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JOEL C. BRYANT

WHAT'S INSIDE

Dear Readers,

The last six months have seen an unprecedented number of Litigation Section members express an interest in sharing their knowledge via a published article. I am therefore pleased to be able to share with you this special double issue of *The Litigation Journal*. I hope you enjoy learning about the diverse range of topics addressed. And please keep the submissions coming!

- Joel C. Bryant, Editor in Chief

Letter from the Chair

by: Patrick Cherry

I'm honored to be serving as the chair of the Litigation Section for the 2020-2021 year. Certainly, the last year has created some significant barriers to our group's activities, but we have managed to stay active nonetheless.

In 2018, our Section made a move to focus more on social events for our members. In response, we held an incredible bench-bar mixer at the Detroit Institute for the Arts. The event featured incredible food, drinks, and fellowship between nearly 200 attorneys and 50 members of the judiciary.

Our members loved the DIA event so much that, in September of 2019, we committed to hosting four social events each year; once per quarter. We planned to repeat our DIA mixer, then add an axe throwing night in Ferndale, a wine tasting tour through the Leelanau Peninsula, and close the season with a masquerade ball hosted at the historic Henderson Castle. Unfortunately, we all know how that ended.

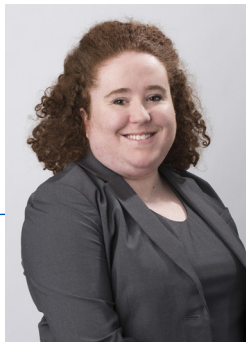
However, rather than throw in the towel, our Section has risen to the challenge by engaging in new opportunities. This year, we have provided support to the Michigan Center for Civic Education, the Young Lawyer's Section, the Criminal Defense Attorneys of Michigan, and the Institute for Continuing Legal Education. Through these opportunities, we bolstered current relationships, rekindled old ones, and created new ones which we earnestly hope continue on into the future.

As we move forward and, hopefully, come out of the restrictions imposed by COVID-19, it is my hope that we will integrate our giving this year into our action packed social vision. To do so, we need you, the members of the Litigation Section, to step up and continue to carry the reigns.

The Section Council is made up of four Officers and twelve at-large members. Each Officer serves for one year and each at-large member serves for three years. Therefore, each year, there are five openings for new Council members. We typically meet once per month. If you are interested in being nominated to serve on the Council, please contact me and I will be happy to steer you in the right direction. Similarly, if you aren't interested in joining the Council, but would like to help by serving on one of our committees (newsletter, legislative, amicus, and events), you can reach out to me.

I look forward to welcoming you to our Council.

The Potential Impact of the *Ford Motor* Case on the Personal Jurisdiction Analysis



By: Rebecca M. Klein

On March 25, 2021, the United States Supreme Court issued an opinion that may have a significant impact on the world of personal jurisdiction over corporate defendants. *Ford Motor Co. v. Montana Eighth Judicial District Court*, examined whether a lawsuit "arises out or relates to" a corporation's in-state conduct, as required to establish limited personal jurisdiction, if the in-state conduct was not a cause of the underlying claim.[1] The Court found that strict "but-for" causation is not required, thus opening the door to a potentially significant change in the traditional jurisdictional analysis.

I. The Facts and Argument of *Ford Motor*

Ford Motor dealt with a products liability suit stemming from a car accident.[2] The accident happened in Montana, where the case was brought, and the victim was a Montana resident.[3] Ford acknowledged that it does "substantial business" in Montana, including "among other things, advertising, selling, and servicing the model of vehicle the suit claims is defective."[4] Ford likewise admitted that it "purposefully availed" itself of the privilege of conducting business there.[5]

Ford contended that personal jurisdiction was improper in Montana because "the particular car involved in the crash was not first sold in the forum State, nor was it designed or manufactured there."[6] It contended that the state court had jurisdiction "only if the company's conduct in the State had given rise to the plaintiff's claims. And that causal link existed . . . only if the company had designed, manufactured, or—most likely—sold in the State the particular vehicle involved in the accident."[7] Although Ford admitted that it had "purposefully avail[ed] itself of the privilege of conducting activities" in Montana, it claimed that "those activities do not sufficiently connect to the suits, even though the resident-plaintiffs allege that Ford cars malfunctioned in the forum State[]."[8] "In Ford's view, the needed link must be causal in nature: Jurisdiction attaches only if the defendant's forum conduct gave rise to the plaintiff's claims."[9]

II. Background Principles of Corporate Personal Jurisdiction

The Court first reviewed the traditional jurisdictional analysis of *International Shoe Co. v. Washington*,[10] and its progeny, and the different analyses for general and specific personal jurisdiction.[11] With general jurisdiction, the court has jurisdiction over any claims brought against a defendant in the forum State.[12] But general jurisdiction only exists in states where "a defendant is essentially at home,"[13] which usually is in the state incorporation and in the state of its principal place of business.[14]

Specific jurisdiction, the Court explained, "covers defendants less intimately connected with a State, but only as to a narrower class of claims."[15] "The contacts needed for this kind of jurisdiction often go by the name 'purposeful availment.'"[16] Specific jurisdiction requires that the defendant "take 'some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State.'"[17] And even if the defendant

"purposefully availed" itself of doing business in the forum State, it may only be sued for claims that "'arise out of or relate to the defendant's contacts' with the forum."[18] This phrase is key to the issues in *Ford Motor*.

III. The Holding of *Ford Motor*

The majority opinion, written by Justice Kagan, rejected Ford's argument that Montana lacked personal jurisdiction. The Court found that "[w]hen a company like Ford serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit."[19]

The Court rejected Ford's argument that "the needed link must be causal in nature: Jurisdiction attaches only if the defendant's forum conduct gave rise to the plaintiff's claims."[20] The Court stated that:

> Ford's causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities. That rule indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction. But not quite so far as Ford wants. None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do.[21]

The Court went on to discuss the "arise out of or relate to" rule.[22] In a potentially significant statement, the Court ruled that "[t]he first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing."[23] The Court went on to caution that its statements "do[] not mean that anything goes . . . the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum."[24] "But again, we have never framed the specific jurisdiction inquiry as always requiring proof causation, *i.e.*, proof that the plaintiff's claim came about because of the defendant's in-state conduct."[25] The Court found that jurisdiction was proper because "Ford had systematically served a market in Montana . . . for the very vehicles that the plaintiffs allege malfunctioned and injured them in th[at] State[]."[26] The Court elaborated:

> the owners of these cars might never have bought them, and so these suits might never have arisen, except for Ford's contacts with [Montana]. Those contacts might turn any resident of Montana . . . into a Ford owner—even when he buys his car from out of state. He may make that purchase because he saw ads for the car in local media. And he may take into account a raft of Ford's in-state activities designed to make driving a Ford convenient there: that Ford dealers stand ready to service the car; that other auto shops have ample supplies of Ford parts; and that Ford fosters an active resale market for its old models.

The Court ultimately rejected Ford's arguments entirely.

IV. Justice Gorsuch's Concurrence in *Ford Motor*

One of the concurrences in *Ford Motor*, written by Justice Gorsuch and joined by Justice Thomas, raised some additional points that may indicate where personal jurisdiction jurisprudence is heading.

Justice Gorsuch first discussed the long-standing standard from *International Shoe*. Justice Gorsuch stated that the "old guardrails" between general and specific jurisdiction "have begun to look a little battered."[27] Justice Gorsuch opined that "[i]f it made sense to speak of a corporation having one or two 'homes' in 1945, it seems almost quaint in 2021 when corporations with global reach often have massive operations spread across multiple States."[28] He stated that "the old *International Shoe* dichotomy [is] looking increasingly uncertain."[29]

Justice Gorsuch next questioned the impact of the majority's opinion on causation. Justice Gorsuch stated that:

> Until now, many lower courts have proceeded on the premise that specific jurisdiction requires two things. First, the defendant must "purposefully avail" itself of the chance to do business in a State. Second, the plaintiff's suit must "arise out of or relate to" the defendant's in-state activities. Typically, courts have read this second phrase as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff's injuries.[30]

Justice Gorsuch continued to question the impact of the majority's holding, stating that the opinion "leaves us far from clear."[31] "[T]he majority says, it is enough if an 'affiliation' or 'relationship' or 'connection' exists with the defendant's forum contacts.[32] Justice Gorsuch opined that "[l]oosed from any causation standard, we are left to guess" what this assortment of words means.[33]

V. The Potential Impact of *Ford Motor*

The impact *Ford Motor* on limited personal jurisdiction analysis may be significant. If the lower courts read *Ford Motor* as saying that the "arise out of or relate to" test does not require any kind of causal link, corporate defendants could potentially be open to jurisdiction in ways they previously have not. Justice Gorsuch's concurrence points this issue out and discusses some of the possible consequences.

Additionally, Justice Gorsuch's explicit questioning of whether *International Shoe* works in 2021 may fortell a reexamination of that seminal cases. Justice Gorsuch is surely correct that the business world functions much different in 2021 than it did in 1945. It is possible that the Court will find that a new standard is necessary, in which case personal jurisdiction analysis may be changed entirely.

VI. How the Lower Courts are Treating *Ford Motor*

Ford Motor came out quite recently, so we have yet to see what its real impact will be. However, it is already being addressed in the lower courts, which may signal what changes it may bring. A few recent examples are illustrative of the effect *Ford Motor* may have:

- One court found that "[h]istorically, courts in the Ninth Circuit exclusively relied on a but for test to determine whether a particular claim arises out of forum-related activities. But the Supreme Court appears to have recently done away with that approach in [*Ford Motor*]. While this does not mean anything goes, courts must give real consideration to claims that 'relate to' the defendant's forum contacts."[34]
- One court found that "[t]he Eleventh Circuit has previously held that a tort arises out of or relates to the defendant's activity in a state only if the activity is a 'but-for' cause of the tort . . . . [T]he Supreme Court did way with this view, explaining that the Court has never framed the specific jurisdiction inquiry as always requiring proof of causation, i.e., proof that the plaintiff's claim came about because of the defendant's in-state conduct. Because the prong is separated by an 'or,' specific jurisdiction may also exist where a claim 'relate[s] to the defendant's contacts with the forum."[35]
- One court rejected the defendant's argument that the plaintiffs "fail to causally connect the [defendants'] forum-related conduct to the [plaintiffs'] specific claims, relying on the 'but for' test outlined by the Ninth Circuit" because "as the Supreme Court just made clear, such a 'causation-only approach' improperly narrows the inquiry . . . . [S]pecific jurisdiction may also exist where a claim 'relates to the defendant's contacts with the forum'"[36]

VII. Conclusion

As time goes on and more lower courts examine the Court's holding in *Ford Motor*, we will see what impact the case has, especially with respect to what link is required in the "arise out of or relate to" portion of the analysis, if causation is not always required. While the Court did state that a but-for causal connection was not always necessary, it also stated that "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do."[37] The meaning of the word "strict" is opaque, and may serve, at least in some courts, to limit the impact of the Court's words on the necessity of a causal relationship. Both plaintiffs' and defense counsel should be aware of *Ford Motor* when bringing or defending personal jurisdiction motions and should be cognizant of how courts in their Circuit are treating the case.

ENDNOTES

1. 141 S. Ct. 1017 (2021)
2. The Ford Motor case actually dealt with two state court cases, however the facts in both cases are similar and the analysis is the same for the purposes of this Article. For the sake of simplicity, only one case will be discussed in this Article.
3. *Ford Motor Co.*, 141 S. Ct. at 1022.
4. *Id*.
5. *Id*. at 1026 (internal quotation marks omitted).
6. *Id*.
7. *Id*. at 1023.
8. *Id*. at 1026.
9. *Id*. (internal quotation marks omitted).
10. 326 U.S. 310 (1945).
11. *Ford Motor Co.*, 141 S. Ct. at 1024-25.
12. *Id*.
13. *Id*. (internal quotation marks omitted).
14. *Id*. (citing *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)).
15. *Id*.
16. *Id*. (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985)).
17. *Id*. at 1024-25 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).
18. *Id*. at 1025 (quoting *Bristol-Myers*, 137 S. Ct. at 1780)).
19. *Id*. at 1022.
20. *Id*. (internal quotation marks omitted) (emphasis in the original).
21. *Id*. at 1026 (citation omitted) (emphasis added).
22. *Id*. (emphasis in the original).
23. *Id*. (emphasis added).
24. *Id*.

25. *Id*. (emphasis added).
26. *Id*. at 1028.
27. *Id*. at 1034.
28. *Id*.
29. *Id*. at 1036.
30. *Id*. at 1034.
31. *Id*.
32. *Id*.
33. *Id*. at 1035.
34. *Clarke v. Dutton Harris & Co., PLLC*, No. 2:20-cv-00160-JAD-BNW, 2021 WL 1225881, at *4 (D. Nev. Mar. 31, 2021) (internal quotations and footnotes omitted).
35. *Lewis v. Mercedes-Benz USA, LLC*, No. 19-CIV-81229-RAR, 2021 WL 1216897, at *35 (S.D. Fla. Mar. 30, 2021) (internal quotation marks and citations omitted).
36. *James Lee Constr., Inc. v. Gov't Employees Ins. Co*., No. CV 20-68-M-DWM, 2021 WL 1139876, at *2 (D. Mon. Mar. 25, 2021) (internal quotation marks and citations omitted).
37. *Ford Motor Co*., 141 S. Ct. at 1026 (emphasis added).

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A Concise Guide for the Effective Use of Police Reports for Fact Investigation and Litigation

By: Austin D. Blessing

Police reports, while not always 100% reliable, can be a quick and easy way to ascertain a plethora of basic information about a case in which law enforcement has been involved. That is why if one is not provided to you by the client, it is always a good idea to make requesting a police report one of the first things you do with a new case.[1] This can help you quickly get up to speed on the basics of the case and, since they often contain names and contact information of witnesses, can be a good tool for drafting initial disclosures and witness lists.

Additionally, police reports, while not always admissible under the Rules of Evidence,[2] can still be useful in litigation, such as at depositions or in motions. This includes motions for summary disposition since evidence presented for such a motion need only be admissible in substance, not in form, and officers can usually testify at trial about the substance of the report even if the report is not itself admissible.[3] Although, one must be careful of the hearsay within hearsay problem that can sometimes be an issue with police reports.[4] Furthermore, it should be noted that traffic citations are not generally admissible, but the facts leading up to the citation may be.[5]

Police reports are also a good tool for fact investigation. Much of the information, such as the time[6] and place of the accident, witnesses, road conditions, names and insurance information for involved parties, and the hospitals injured parties were taken to is fairly clear and easy to utilize. However, to fully and effectively utilize police reports, some decoding is necessary.

In Michigan, the standard report you will see for most automobile accidents is a UD-10 form, which is relatively short – it can be as short as two pages, but more complex crashes or those with extra witnesses often require more pages – but full of information.[7] A User Guide for the UD-10 is available online through the Michigan State Police website,[8] but some of the most important information is summarized below.

One of the most useful and simultaneously confusing parts of a police report is the injuries reported section. Usually, unless the injuries are particularly serious, they will not be described in detail. Instead, the UD-10 will simply list an injury code for each involved person. These codes are O (no injury), C (possible injury), B (suspected minor injury), A (suspected serious injury), and K (fatal injury).[9] The User Guide goes on to give a brief description of each type of injury.

Regarding extent of the damage to the vehicles involved, there are five options: 1 (none), 2 (minor damage, which is mostly for cosmetic damage), 3 (functional damage), 4 (disabling damage), and 98 (unknown). These codes are more fully explained in the previously referenced materials, as well as in Traffic Crash Advisory #2.[10] The UD-10 also will tell you whether the driver of a vehicle is also the owner, which can be important for insurance and liability reasons that are well known to insurance lawyers but are beyond the scope of this article.

Additionally, there are codes for multiple other things such as what was a driver was distracted

by,[11] what hazardous action a driver was engaged in, whether and what airbags deployed, the sequence of events, the action prior to the crash, whether and what restraints were used, the road conditions, the weather and light conditions, traffic control devices, and so much more. In fact, there are too many categories of codes, as well as too many specific codes themselves, to list in this short article, but it is highly recommended that you familiarize yourself with them by reviewing the User Guide and referencing it whenever you are reviewing a police report.[12] Additionally, in order to fully understand all of the various codes and terms and how they are used and applied, it is worthwhile to glance over the Instruction Manual, which gives a great amount of detail and guidance about police reports and how they are properly completed.[13]

A final portion of police reports worth mentioning here is the narrative, which is sometimes complicated by abbreviations and jargon – which can hopefully be quickly learned with the aid of Google. The narrative is "a free text area for the officer to provide a brief description as to the events of the traffic crash, and to provide any additional remarks about the crash that need to be noted."[14] The narrative can be an important tool because it gives the basic events of the accident, which are often the basic facts of the whole case. Although, its reliability and accuracy – as well as the reliability and accuracy of other parts of the report – can certainly sometimes be called into question since, in addition to things like typos and clerical errors, it is written by someone who usually only knows about the events of the accident what he/she was told. Therefore, it can be subject to the same biases and flaws that can plague any report. Additionally, the narrative is limited in space so an officer may not be able to include all of the information and will instead often have to choose what to include.[15]

However, that is not to say it is not useful as it is still an official report of the accident. Additionally, oftentimes the basic facts of the accident conveyed by the police report are not even in dispute, so the reliability of the report often will not even be an issue as it will not be challenged. If the facts are at issue, then the police report, when admissible, will be another piece of evidence – along with testimony and other documents – that the trier of fact will have to weigh to decide what took place.

If possible, it is a good idea to verify the facts of the report through client interviews, depositions, and written discovery. This is all the more important if the facts are in dispute, and especially if the case turns on a disputed fact. Also, if necessary, you can attempt to verify things like addresses and dates of birth through information searches and background checks.

In summation, while they may appear confusing at first glance, police reports contain a plethora of information, which, when properly interpreted, can be a highly effective tool to investigate and litigate the facts of a case. Hopefully this short guide has helped shed some light onto the effective use of police reports![16]

ENDNOTES

1. David Goguen, *Auto Accident: How Are Police Reports Used*, Lawyers.com (Oct. 17, 2019), https://www.lawyers.com/legal-info/personal-injury/auto-accidents/auto-accident-how-are-police-reports-used.html. It is also a good idea to seek videos, photos, and other potential evidence from the police department. This can be via a subpoena or a Freedom of Information Act request, both of which have benefits and costs, but a full discussion on this topic is outside the scope of this article.
2. *See* MRE 803(6) & (8); *People v. McDaniel*, 469 Mich. 409, 670 N.W.2d 659 (2003); *Solomon v. Shuell*, 435 Mich. 104, 457 N.W.2d 669 (1990); *Maiden v. Rozwood*, 461 Mich. 109, 597 N.W.2d 817 (1999); *Latits v. Phillips*, 298 Mich. App. 109, 113-114, 826 N.W.2d 190, 193 (2012); *Calderon v. Auto-Owners Ins. Co.*, 2014 Mich. App. LEXIS 791, 2014 WL 1679130 (Apr. 24, 2014).
3. *See Latits v. Phillips*, 298 Mich. App. 109, 113-114, 826 N.W.2d 190, 193 (2012); *Gee v. Kerr Enters., Inc.*, 2014 Mich. App. LEXIS 956, *3-4, 2014 WL 2218723 (May 27, 2014).
4. *See Maiden v. Rozwood*, 461 Mich. 109, 124-125, 597 N.W.2d 817, 825-826 (1999).
5. MCL 257.731; MCR 801(d)(2).
6. Although a word of caution about the time of the accident. Often the time listed is not the precise time of the crash and is instead the time the crash was reported or the time officers arrived on the scene.
7. *UD-10 Traffic Crash Report Instruction Manual*, Michigan State Police (2018), https://www.michigan.gov/documents/msp/UD10_Manual_Plus_Electronic_2014_Revision_441848_7.pdf.
8. *UD-10 Traffic Crash Report User Guide*, Michigan State Police (2018), https://www.michigan.gov/documents/msp/UD-10_Help_Sheet_337147_7.pdf.
9. To clarify a common mistake, the code is the letter "O" and not the number "0."
10. *UD-10 Advisory #2*, Michigan State Police (2018), https://www.michigan.gov/documents/msp/Advisory_2_FINAL_547417_7.pdf. Other Advisories are available at UD-10 Advisories, Michigan State Police, https://www.michigan.gov/msp/0,4643,7-123-72297_24055_35240-231185–,00.html.
11. *UD-10 Advisory* #3, Michigan State Police (2018), https://www.michigan.gov/documents/msp/Advisory_3_560511_7.pdf.
12. *UD-10 Traffic Crash Report User Guide*, Michigan State Police (2018), https://www.michigan.gov/documents/msp/UD-10_Help_Sheet_337147_7.pdf.
13. *UD-10 Traffic Crash Report Instruction Manual*, Michigan State Police (2018), https://www.michigan.gov/documents/msp/UD10_Manual_Plus_Electronic_2014_Revision_441848_7.pdf.
14. *UD-10 Advisory #3*, Michigan State Police (2018), https://www.michigan.gov/documents/msp/Advisory_3_560511_7.pdf.
15. "With electronic crash reporting the narrative cannot exceed 2048 characters, and can include letters, numbers, spaces and punctuation." *UD-10 Advisory #3*, Michigan State Police (2018), https://www.michigan.gov/documents/msp/Advisory_3_560511_7.pdf.
16. If you want to test your knowledge, feel free to take this short quiz. *UD-10 Traffic Crash Report Quiz*, Michigan Department of State Police: Criminal Justice Information Center: Traffic Safety Data Unit (2001), https://www.michigan.gov/documents/UD10Q_18402_7.pdf.

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Does a Parent's Past Really Predict a Child's Financial Future?

By Genevieve E. Delonis

An often underappreciated element of a personal injury lawsuit is the damages. Sure, there is an awareness that the plaintiff has incurred some form of injury, but putting a monetary value on that injury can sometimes be an afterthought once litigation has commenced. When the injured plaintiff is a child, lost earning capacity often comprises a large portion of a damages figure. Traditionally, the figure arrived at by economics experts has focused on intergenerational trends in educational attainment and corresponding incomes. Yet frequently those figures fail to take into account the cost of higher education and more recent trends in the labor market that are demonstrating that the financial burden of a higher education does not necessarily translate to higher net worth when compared to previous generations. Perhaps it is time to take a closer look at current trends rather than past trends in assigning a value to lost earning capacity.

Since non-economic damages are capped in medical malpractice cases in Michigan, the vast majority of the damages will be economic in most such cases, and particularly when a medical malpractice lawsuit involves a child. Not only are there the expected economic damages such as medical expenses but there is also the lost earning capacity, which is a number arrived at by retained economics experts based on past observed trends in the economy in combination with other influencing factors. Lost earning capacity figures take into account the level of educational attainment of the injured child's parents and are based on a belief that the but for the injury, the injured child would have attained at least the same level of education and would have been employed with an income commensurate to that level of education. Though children today may still be attaining at least the same level of education as their parents, the current economic climate is proving that the value of that education in today's society comes at a high financial burden and may not be proportional to earnings in comparison to past generations.

Lost earning capacity is defined as the complete loss or reduction of one's ability to earn money in the future due to an injury whereas loss of income/earnings refers to past earnings that have already been lost because of the injury. In actions involving children, the focus is usually exclusively on lost earning capacity, which is recoverable by the child and is to be used for the child's benefit during his/her lifetime. As set forth in Michigan Civil Jury Instruction 50.07:

> In actions for damages arising out of an injury to an unemancipated minor, the loss of earning capacity during the child's minority is recoverable by the parents. *Vink v House*, 336 Mich 292; 57 NW2d 887 (1953); *Gumienny v Hess*, 285 Mich 411; 280 NW 809 (1938); *Mulder v Achterhof*, 258 Mich 190; 242 NW 215 (1932). The child's recovery, therefore, is limited to the loss of his earning capacity after he or she reaches the age of eighteen (the age of majority, as provided by 1971 PA 79, MCL 722.52 et seq), unless the parents waive their rights. See *Gumienny*, 285 Mich at 414–415; 280 NW at 810.

The amount attributed to lost earning capacity is then included within the general damages settlement amount or award and distributed to the child's personal representative or estate as a lump sum to be used for the benefit of the child during his or her lifetime. This is in contrast to traditional employment where income is earned for work done, not as a lump sum in advance. In catastrophic injury cases where life expectancy is reduced, the child frequently dies before the settlement or award money can be completely expended with the remaining funds being distributed to the next of kin.

Generally, when calculating the loss of future earnings from age 18 to retirement, economics experts will look to the parents' highest level of education as it is generally accepted, and there is established research indicating that parents' educational attainment is a predictor regarding a child's educational and occupational outcomes.[1] Using various resources such as the Bureau of Labor Statistics, which tracks nationwide trends in earnings based on level of education, the economist then puts forth an expected lost earnings amount based on those various levels of potential educational attainment. Putting it extremely simply, the economist will look at the average earnings of a high school graduate, for example, in the current year and multiply that amount by the minor's work life expectancy (a calculation that takes into account periods away from the work force) taking inflation, pay raises, and other factors into consideration to reach a projected value that represents the minor's lost earning capacity for that particular level of educational attainment.

In order to calculate these figures, economics experts must rely on the scientific method utilizing the information available to them at the time, which, necessarily, is based on past observations. What these calculations may therefore fail to take into consideration is the current trends in the economy, such as the rising cost of higher education and associated debt and the decrease in absolute income mobility. There has been no shortage of media coverage on the financial struggles of millennials, those born between 1980 and 1994. It is not surprising, then, that at the end of 2019 it was determined that millennials owned only 3% of America's wealth compared to baby boomers who owned about 21% at the same age.[2] This "generational wealth gap" increase is an effect of rising living costs, increasing student loan debt, and the ongoing fallout of the recession.[3]

What millennials are showing us is that the financial burden of an education is not always commiserate with the value of that education in the workforce. So when an economics expert calculates lost future earnings based on an assumption that the minor would have obtained a four-year college degree if not for injury, should it be argued that the cost of that education should be taken into consideration? If, in the eyes of the law, a minor is considered emancipated at age 18, the costs associated with education beyond that age should not be the responsibility of the parent. Therefore, could it not be argued that the calculation of lost earning capacity should take into account the financial burden of that education and be reduced accordingly? Specifically, according to the National Center for Education Statistics, for the 2017-2018 academic year, annual current dollar prices for undergraduate tuition, fees, room, and board were estimated to be $17,797 at public institutions, $46,014 at private nonprofit institutions, and $26,261 at private for-profit institutions.[4] That means that today, a four-year college education could cost anywhere from $72,000 to $184,000, which will only increase exponentially into the future as these injured children reach college age. This is a significant amount of money, which it could be argued, is the minor's responsibility alone thereby necessitating the utilization of federal and private student loans, which would have to be repaid with interest, yet another cost that could be deducted from the lost earning capacity.

Could projections of lost earning capacity also somehow take into consideration the fact that since 1940 the fraction of children who earn more than their parents has fallen from approximately 90% for children born in 1940 to 50% for children born in the 1980s? "Absolute income mobility has fallen across the entire income distribution, with the largest declines for families in the middle class... Absolute mobility fell in all 50 states, although the rate of decline varied, with the largest declines concentrated in states in the industrial Midwest, such as Michigan and Illinois."[5] This trend is separate and apart from the average earnings based on level of education alone, but could there be some argument made based upon this trend that perhaps the future rate of income increase is going to continue to decline, as observed by the World Economic Forum?[6]

Economic damages are specific damages designed to compensate an injured party for actual, measurable losses so it is important that those calculations be as accurate as possible, which can be challenging when trying to predict the future based on the past. Therefore, it is paramount to retain economics experts who are aware of the current and emerging trends in the economy and can extrapolate that data to calculate lost earning capacity figures that are as accurate as possible.

When determining a lost earning capacity figure for a child, the figure arrived at by economics experts focuses on intergenerational trends in educational attainment and corresponding incomes. Though it may be true that a parent's educational attainment is a predictor of a child's educational attainment, current trends in the amount of financial burden undertaken to obtain that education and declining rates of income increase, should, perhaps, also be considered when arriving at a lost earning capacity figure.

ENDNOTES

1. *See* Eric F. Dubow, Paul Boxer, and L. Rowell Huesmann *Long-term Effects of Parents' Education on Children's Educational and Occupational Success: Mediation by Family Interactions, Child Aggression, and Teenage Aspirations*, 55 MERRILL PALMER QUARTERLY 224 (2009) (citations omitted), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2853053/pdf/nihms140890.pdf.
2. Hillary Hoffower, *Millennials only hold 3% of total US wealth, and that's a shockingly small sliver of what baby boomers had at their age*, BUSINESS INSIDER (Dec. 5, 2019), available at https://www.businessinsider.com/millennials-less-wealth-net-worth-compared-to-boomers-2019-12.
3. *Id.*
4. *See* U.S. Department of Education, National Center for Education Statistics (2019); Digest of Education Statistics, 2018 (NCES 2020-009), Chapter 3.
5. *See* Raj Chetty, et al., *The Fading American Dream: Trends In Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (April 28, 2017), available at https://science.sciencemag.org/content/356/6336/398.full.
6. *See* Marcus Lu, *Is the American Dream Over? Here's What the Data Says*, WORLD ECONOMIC FORUM (September 2, 2020), available at https://www.weforum.org/agenda/2020/09/social-mobility-upwards-decline-usa-us-america-economics/.

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Marketable Record Title Act Litigation – It's Coming!

By Brandon J. Evans

Google "Michigan Marketable Record Title Act" and you no doubt will find a flurry of articles talking about how a recent amendment to the Michigan Marketable Record Title Act, MCL 565.101 *et seq* (the "MRTA"), is going to cause people to lose their real property rights if they don't act fast to preserve their interests. This article is going to tell you why your clients who fail to record that notice may still be okay even with the recent amendment to the MRTA and with the proposed amendment to the MRTA.

This is not to say the amendment should be ignored or taken lightly. However, as litigators, it is good to have options because mistakes, even legislative mistakes, happen. The thesis of this article is that while there are, arguably, two competing ways to interpret the MRTA, it was amended with only one of those interpretations in mind (the "Jones Interpretation"), and the other interpretation (the "ML Interpretation") may often produce a completely different result. This article will explain why the ML Interpretation shows more respect for the law as written in 1945, the Land Title Standards, and generations of real estate lawyers that came before us.

The MRTA was amended on December 28, 2018, and that amendment took effect 90 days thereafter on March 29, 2019 (the "Jones Amendment"). The Jones Amendment gave people two years to file notices under the MRTA or face the possibility of losing their interests in real property.1 That is, it gave people until March 29, 2021 to file their notice. Because of fear that this was not enough time, on December 29, 2020 the MRTA was amended again extending the date that by which such notices must be filed to March 29, 2024.[2]

The hardest part of writing this article is doing justice to the view of the MRTA that must be held by those that advocated for the Jones Amendment and its extension – what I am calling the Jones Interpretation – because it is so different from what I learned from prior generations of mining lawyers. To better understand the Jones view, we look at the Bill Analysis prepared by the Senate Fiscal Agency that lists the "Rationale" for the Jones Amendment as follows:

> Some people have raised concerns about a Michigan law that provides for marketable record title, which generally refers to an ownership interest in land that can be transferred to a new owner without the likelihood that another person will claim an interest in the property. Like similar laws of many other states, Michigan's statute limits the number of years during which someone may assert a claim, such as a lien, or a land use restriction. This in turn limits the period of time for which recorded instruments must be examined, sometimes called the look-back period. Subject to exceptions, if action is not taken to assert an interest during the specified time frame, the interest is extinguished by law. Michigan's marketable title statute was enacted by Public Act 200 of 1945 and most recently amended in 1997. Under the Act, a person possesses a marketable record title to an interest in land if he or she has an unbroken chain of title to the interest for 40 years or, as provided by the

1997 amendments, 20 years for mineral interests. In other words, a document creating that person's interest has been recorded within the 40- or 20-year period, and nothing that would conflict with or deny the person's interest (or "purport to divest" the interest) has been recorded within that period. Subject to exceptions, the Act extinguishes a claim that may affect the person's interest if the claim depends on an event or transaction preceding the 40- or 20-year period unless, within that period, a notice of claim has been recorded.

Despite these provisions, there are times when an extensive investigation or litigation is necessary to determine whether there are limitations on a title or whether old restrictions remain valid. It has been suggested that this is due to a lack of clarity in the Act regarding what must be specified in a claim to preserve an interest. Evidently, it is common for deeds or purchase agreements to contain generic statements such as "subject to anything of record" or "subject to existing use restrictions, if any", which may or may not preserve title restrictions. Reportedly, land title companies are reluctant to issue title insurance in these situations, which can impede development.

To address these issues, some have recommended that the Act should require a person who wants to preserve an interest in property to refer specifically to the document that created it, when conveying title to the property, and require a person who wants to claim an interest to include particular information in the notice that must be recorded.[3]

Essentially, to summarize their position, I imagine the Jones Interpretation of the MRTA after the Jones Amendment goes something like the following:

The MRTA indicates that if you examine the records at the register of deeds back in time for 40 years (for surface interests), then in that examination period you should find all of the instruments that affect the property or a specific reference to them. The Jones Amendment made sure that general references on deeds that essentially said, "subject to everything of record" did not operate to extend that period back further in time than the 40 years **except as to minerals**. The Jones Amendment also made it harder to file a Notice of Claim under the Act by requiring greater specificity in such a notice **except as to mineral interests**.

Those exceptions for mineral interests are not by accident. I am a real estate lawyer in the Upper Peninsula of Michigan with an emphasis on mineral title examination for hard rock minerals. I learned how to examine mineral title from attorney Ronald E. Greenlee, who has been examining mineral title since he left Clark Klein, k/n/a Clark Hill, in the late 1970s to join the firm known locally as "the mine's lawyers". Through him, and the lawyers before him, I am the beneficiary of a 100-year history examining mineral title, before and after the passage of the MRTA in 1945. I raise this history because, while the MRTA is extremely important to mining lawyers, general real estate practitioners probably have very little use for the Act, if any.[4]

The only way to explain the interpretation of the MRTA that I was taught – what I am calling the ML Interpretation (ML for Mining Lawyer) – is to go over very basic concepts of the MRTA for illustration purposes. I apologize in advance for going over the basics, but in them is the key to understanding the differences between these interpretations. Dealing with competing views of the MRTA is not new to mining lawyers. It seems to some of us that many lawyers conflate the MRTA with the Dormant Minerals Act (the "DMA"), which works in a completely different manner.

I have much more experience with hard rock mineral interests than I do with oil and gas interests. However, as I understand, and for our purposes, some key features of the Dormant Mineral Act are:

- Basically, an owner of oil and gas interest has

to sell, lease, mortgage, transfer, drill or file a notice every 20 years to preserve their interest in oil and gas.

- Otherwise, their interest is: (1) "deemed abandoned"[5]; and (2) "vests as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership."[6]

In simplistic unprecise terms, we refer to this possible "abandonment" under the DMA as a "reversionary feature." If an owner of a severed oil and gas interest fails to file their notice, then their interest in oil and gas reverts to the surface owner. Thus, by statute, the "surface" is a dominate estate. Another statute, the 1968 Act To Limit Possibilities Of Reverter And Rights Of Entry, MCL 554.61 *et seq*, operates in a similar fashion. The 1968 Act provides that possibilities of reverter and rights of entry are unenforceable if not exercised within 30 years unless a preservation notice is recorded within a certain time period.[7]

The MRTA has no reversionary, abandonment, or unenforceability feature per se. The MRTA applies to "any interest in land".[8] The only distinction the Act makes as to the interests being examined is "... 20 years for mineral interests and 40 years for other interests..."[9] The words "abandon" and "unenforceable" are not in the MRTA.[10] Similarly, the word "reversion" is only used in one of the exceptions to the MRTA.[11] The simplest way for me to illustrate that there is no reversionary or abandonment feature is with a hypothetical questions: If I own Blackacre and there is nothing of record showing that I own Blackacre for 60 years, does the MRTA extinguish my ownership interest in Blackacre? If I had asked that question with regard to the mineral estate, you may have had a different reaction. However, I think that stems from general familiarity with the Dormant Minerals Act.

The MRTA does not have a "reversionary" or "abandonment" feature because it applies equally to the surface estate as it does to the mineral estate and other interests in land not explicitly excluded by the provisions of the Act. Where would the surface interest possibly revert? The text and mechanics of the statute work the same for "mineral interests" and "other interests." Since we know the surface interest does not revert anywhere, we also know the mineral interest does not simply revert somewhere.

This is why mining companies and other large landowners in the Upper Peninsula of Michigan often file their MRTA Notices for their mineral interests and their surface interests alike. Technically speaking, under the MRTA, you should be filing a notice with respect to your house because it is an interest in land. Why don't people file such a notice? Because taxes, title insurance, and possession virtually guarantee that you will not have a MRTA problem, which is to say they virtually ensure there will not be competing claims to your house to resolve with the provisions of MRTA, so preservation notices are, practically speaking, unnecessary.

There is a dearth of caselaw on Michigan's Marketable Record Title Act. It seems widely regarded that the Michigan Land Title Standards are where you should begin your analysis for MRTA questions.[12] Looking at MRTA problems in the Land Title Standards shows a lot of sample problems about ownership of "Blackacre".[13] While "who owns Blackacre" comes up in my real estate practice, it is a pretty infrequent question with respect to surface interests for three reasons that I can identify:

- Taxes – Usually someone has been paying real property taxes, so true ownership disputes are identified early well before the applicable of the 40-year period for surface interests under the MRTA would decide the matter.
- Title Insurance – Most transactions involve title insurance, which generally forces title problems to be resolved early. I have been a title examiner for two different law firm owned title companies. One of my partners often complains to me. "You don't take any risk. You find the risk and then force it to be corrected."

That is not exactly true, but I see his point. As a title examiner, for surface estate interests, while I use the MRTA process, I basically make sure there is no identifiable risk in the record and force any issues I find in the record to be corrected. Any issue where I am relying on the MRTA to resolve a competing claim would have to be so old that I see virtually no risk before I insure over that risk.

- Hostile Possession – Most surface interests are affected by actual possession of the property at issue, and the MRTA is not determinative where the land is in the hostile possession of another.[14]

These are also three of the reasons why mining lawyers are uniquely qualified to talk about MRTA issues. For hard rock mineral interests, analyzing "Who Owns Blackacre" is extremely important because:

- Taxes – Non-producing severed hard rock mineral estates are currently not taxable. When they were taxable, almost no one taxed them because, by statute, they were assigned a nominal value. In other words, taxes are generally not that helpful in determining who owns a certain mineral estate.
- Title Insurance – The standard exceptions on a title insurance policy exclude mineral interests from the scope of coverage, so title companies are not generally identifying conflicting mineral interests. In other words, title insurance is also generally not that helpful in determining who owns a certain mineral estate. In the Upper Peninsula, almost no one insures mineral interests. Instead, mining companies and others rely on title opinions based primarily on the Michigan Marketable Record Title Act.
- Hostile Possession – Unless there is active mining it would be hard for hostile possession to prevent a MRTA analysis with respect to a mineral estate. [15]

The Jones Interpretation very clearly views the MRTA like the DMA where interests revert to the surface owner if not preserved; whereas I am telling you that the better view of the MRTA is that the MRTA was designed to resolve competing claims to Blackacre or interests in Blackacre, and it is only where there is a competition that the failure to file a MRTA Notice can cause someone to lose their interest in real property. In other words, if John Doe claims to own Blackacre and Jane Doe also claims to own Blackacre, then the MRTA might be able to help you resolve which of the two competing claims wins. Similarly, if John Doe claims to own Blackacre free from encumbrances and Jane Doe claims to own an encumbrance on Blackacre, then the MRTA might be able to help you resolve which of the two competing claims wins.

Michigan Land Title Standard 1.1 provides, "The Marketable Record Title Act Remedies Title Defects Within its Scope." An old building and use restriction is not a title defect simply because it is old. Two people claiming to own the same interest in real estate is a title defect.

There must be more than one title claim for the MRTA to extinguish a claim. That is different than under the DMA. There, if a notice does not get filed by a certain date then, all of a sudden, the surface estate owner owns the oil and gas even though prior to that date the surface estate owner had no claim to the oil and gas. That cannot happen under the MRTA because there is no statutory direction as to where the interest would go. If the surface estate owner doesn't file their MRTA Notice would the surface estate revert to the owner of the mineral estate? Of course not.

The rationale for the Jones Amendment seems to indicate the lookback periods under the MRTA are 20- and 40-year periods exactly. Comment A to Land Title Standard 1.1 recognizes that lookback periods are "at least 40 years" and "at least 20 years for mineral interests".[16] Periods under the DMA can be 20 years exactly because if there is nothing of record for 20 years (and no possessory drilling) you can determine who owns the oil and gas interest – the surface owner. Under the MRTA, you don't know how long a period is until

you look at the chain of title because a claim must start somewhere. There is no winner in the absence of an instrument.

To illustrate the full implications of that statement: Imagine John Doe owns Blackacre in 2021, there was a warranty deed of Blackacre every 10 years between 1951 and 2021, and every deed in his chain said, "subject to building and use restrictions of record." Further, imagine that there is a building and use restriction from 1951 and that interest has never been preserved by a notice under the Act. The MRTA does not extinguish the building and use restriction because none of the warranty deeds to Blackacre are in conflict with the building and use restriction. They all explicitly state they are subject to "subject to building and use restrictions of record." The key is competition because without it there is no title defect for the MRTA to remedy.

If none of the warranty deeds in our hypothetical had mentioned building and use restrictions of record, then John Doe's interest in Blackacre would be free of the building and use restriction from 1951 under the MRTA. This is because the warranty deeds themselves, in as much as they do not recognize the prior building and use restriction from 1951, would be a title defect the Act was designed to remedy. Said warranty deeds would imply or explicitly state that there was no building and use restrictions, and in our hypothetical that would have been incorrect. In other words, those deeds would have been in competition with the building and use restriction. To win a MRTA competition, you need to have some sort of competing claim.

That is different than under the DMA where John Doe can fully recognize that he owns the surface and that Jane Doe owns the oil and gas, and then next day, simply because of Jane Doe's failure to lease, mortgage, transfer or file a claiming notice (and in the absence of drilling), John Doe owns the fee. Under the MRTA the surface owner needs to have an independent claim to the same property or the same property right before the failure of someone else to file a notice will cause the surface owner's claim to that property or property right to prevail. This is because the MRTA applies to "any interest in land" and the MRTA does not indicate "any interest in land" is categorically superior to any other interest in land.

HB 6332 seeks to further amend the MRTA making the notice requirements even more stringent and adding new exceptions. Said bill, like the Jones Amendment, appears to be premised on the idea that the MRTA can eliminate someone's property rights simply by the failure to file a notice, which will likely lead to litigation. By this article, I am here to say, there is a counter position where there are no competing claims to the interest allegedly lost. The failure to file a notice does not, by itself, extinguish an interest in real property under the Act.[17]

ENDNOTES

1. *See* MCL 565.101.
2. Public Act No. 294 of 2020.
3. Senate Fiscal Agency Bill Analysis, S.B. 671 (as passed by the Senate), Date Completed April 3, 2018.
4. Ask yourself and your real estate colleagues, have you ever really used the MRTA to determine who owns Blackacre? There was a time where many real estate lawyers probably at least had a general familiarity with the MRTA because they rendered title opinions. However, title insurance has probably taken away most of that work for lawyers. I firmly believe real estate lawyers would better understand real estate law if they were still regularly examining title, but I understand that costs drove that work elsewhere. In March 2021, I listened to a presentation on the MRTA, the Jones Amendment, the extension, and the new proposed amendment. The speaker referred to the MRTA as the "Dormant

MRTA". My immediate curmudgeon tendencies wanted to shout, "it is only viewed as 'dormant' by those that don't have to actually use the MRTA!" I resisted and listened quietly because I knew that with time my somewhat emotional reaction would cool, and I would consider that the issues he faces in his practice are just different than mine. For these reasons and the reasons mentioned above, I believe hard rock mining lawyers are in a unique position to comment on the Marketable Record Title Act. They often must determine who owns a mineral estate using the provisions of the MRTA, and someone else will literally build a mine based on their opinion.

5. MCL 554.291(1).
6. MCL 554.291(2).
7. MCL 554.63 & MCL 554.65.
8. MCL 565.101.
9. MCL 565.101.
10. MCL 565.101 et seq.
11. MCL 565.104(a) references "reversioner."
12. There are seven Land Title Standards regarding the Marketable Record Title Act – 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, and 1.7.
13. There are no problems in Land Title Standards 1.1 and 1.2. Land Title Standards 1.3 has six problems concerning whether there is an unbroken chain to Blackacre. Land Title Standard 1.4 has seven problems explaining how one purports to divest another's interest in Blackacre. Land Title Standard 1.5 has six problems explaining the effect of hostile possession of Blackacre on an MRTA analysis. Land Title Standard 1.6 has two problems explaining the effect of the MRTA on prior interests in Blackacre. Land Title Standard 1.7 has three problems regarding conflicting claims to Blackacre.
14. *See* MCL 565.101 ("[A] person is not considered to have a marketable record title by reason of this act if the land in which the interest exists is in the hostile possession of another."); *see also*, Land Title Standard 1.5.
15. Additionally, the Dormant Mineral Act only applies to oil and gas, so it is not helpful when examining title to hard rock minerals. Moreover, individuals and companies will "reserve" and then claim a mineral estate that they do not own more frequently than they would claim surface interests that they do not own. People are less troubled making a reservation of the mineral estate that they may not own because if you reserve something that you do not own, then the reservation just acts like an exception from the conveyance. Almost no one buying real estate in the Upper Peninsula expects to receive the minerals anyway. Reserving something does not explicitly indicate that you own the thing you are reserving, so you are not necessarily slandering someone else's title when you "reserve" something you do not own. It is exceedingly expensive to figure out if you own a mineral estate, so individuals and companies often make the calculation to reserve a mineral estate in case they own it when they are not sure if they own the mineral estate. Moreover, if there is an old reservation of the minerals in your title chain that would now be in your favor through conveyances thereafter, then you might make the similar calculation and file a MRTA Notice claiming to own the mineral estate based on said old reservation. Examining mineral title can be fun!
16. The actual text references in the MRTA are "not less than" 20 years and the Act uses the same "not less than" to modify the 40-year period for other interests. MCL 565.102.
17. This article does not fully examine the MRTA and explain every facet of this statute. For additional information see An Action to Quiet Mineral Title, the Marketable Record Title Act, and Other Thoughts from an Upper Peninsula Title Examiner, State Bar of Michigan's Real Property Law Section's 2020 Winter Conference: https://www.youtube.com/playlist?list=PLjxOTw6HpF01mrb1t5Voam9wbZ2wmr5xM.

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The Antidote for Court Congestion Caused by the Pandemic

By Stephen A. Hilger

It is no secret that the pandemic has created havoc for court systems in Michigan and other states which has led to backlogs and congestion. This is a problem which was obviously not created by any of the courts and while they have done an excellent job managing the crisis, creative solutions are necessary to expeditiously move civil court dockets through the system, particularly where some courts are reporting that civil jury cases will not take place for some time to come. The old adage that justice delayed is justice denied certainly holds true. It is therefore time to consider how to work together to solve this problem where mediation may simply not be enough. Outlined below are three options to timely resolve disputes and avoid the long wait for a fact finder in the traditional litigation setting:

Customized Arbitration as a solution

Litigants and their attorneys should take a fresh look at arbitration. Even if the parties' contract does not contain an arbitration clause, the parties can always later agree to use arbitration as their dispute resolution mechanism. As arbitration is purely a creature of contract and consent, the parties have complete control over the arbitration parameters and the arbitration process. This allows for substantial flexibility in structuring a resolution process that meets the parties' needs, limited only by the creativity of the parties in crafting that process.

For example:

First, the parties can determine their own rules. Often parties simply adopt the Rules of the American Arbitration Association or modify those rules to suit their purposes. Parties can make arbitration simulate a full-blown trial or streamline the approach and the rules when it makes sense to do so.

Second, the parties can decide who administers the arbitration proceeding. The parties can select the American Arbitration Association, or any other group that administers arbitrations, or even manage it privately.

Third, the parties can determine the process by which they will select a mutually agreeable arbitrator who has the knowledge, skill and background appropriate to their dispute.

Fourth, the parties can control the scheduling and location of the hearing, and manage how soon the case can be heard, where the case is heard, how quickly the results will be issued, and whether there would be any court involvement relating to equitable claims.

Fifth, the parties can decide whether dispositive motions will be heard and if so, whether the Michigan Court Rule standards apply. Typically, under the rules of the American Arbitration Association, dispositive motions are permitted but the standards are not clear. That may be one of the reasons why certain parties avoid arbitration. You can modify all of that in your arbitration agreement.

Sixth, the parties can control the level and extent of discovery, one of the most expensive parts of any litigation process. Parties can decide wheth-

er any discovery will be permitted and if so, the number and limit of interrogatories, the extent of document production, electronic document protocols, whether all documents will be produced in native format, the number and length of permitted depositions, and a whole host of other issues to avoid costly disputes once the proceedings
begin.

Seventh, the parties can decide the specifics of how the hearing will be conducted. Parties can make arbitration simulate a full-blown trial or streamline the approach when it makes sense to do so. One technique to rein in unnecessarily lengthy witness examination is the use of a "chess clock" whereby parties are allotted a specific amount of time for their direct examination and cross examination. This technique forces the parties to focus on the key issues of a case and moves the proceeding along. Parties can also establish the order and method of proof, such as whether affidavits will be permitted in lieu of live testimony.

Eighth, the parties can decide which evidentiary rules, if any, they want to govern the proceeding. In a typical arbitration, there are no rules of evidence, or the rules of evidence are very loosely applied. To avoid evidentiary objections concerning hearsay and document foundation, the parties can stipulate that state or federal rules of evidence apply, or conversely, only certain rules apply.

Finally, to preserve the opportunity for interim mediation or a final settlement conference as typically afforded in a court-litigated matter, the parties can include a mediation requirement in their arbitration agreement. The AAA has such a process built into its standard rules.

Utilization of Special Masters

If parties cannot agree to arbitrate or otherwise prefer to continue with traditional litigation, parties should consider using a Special Master to expedite the proceeding. In Michigan, the State's Constitution prohibits courts from ordering a referral of a case to a Special Master. However, nothing prevents the parties, on their own accord, from agreeing to the appointment. In fact, Special Masters are commonly used in resolving discovery disputes.

Special Masters can be especially helpful in accelerating adjudications by acting as a magistrate in terms of hearing the case, preparing proposed findings of fact and conclusions of l aw, and submitting a Special Master Report to the court for consideration in a manner similar to the federal system. The court would then have the opportunity to accept and adopt the findings of fact and conclusions of law, or not.

In addition, as in arbitration, since the appointment of a Special Master is purely by consent, the parties can select the individual who will fill that role. This can be an attorney with particular expertise in the area which is the subject of the litigation. And, the beauty of utilizing a Special Master, unlike arbitration, is that the parties fully preserve their appellate rights.

Modified Case Evaluation

Finally, as nearly all litigated cases are required to submit to a case evaluation process, the parties should consider using that existing process in more meaningful ways to drive resolution. For instance, the parties can agree to select a "Blue-ribbon Panel" of case evaluators, appointing attorneys who are knowledgeable about the particular area of law. Parties can voluntarily agree to select case evaluators who would be in the best possible position to provide a competent case evaluation award. Further, the parties can stipulate to modify the case evaluation presentation process to afford more time to each party to present an in-depth explanation of their positions. Parties may be more receptive to considering and accepting a case evaluation award issued by a panel they have selected using a process that more fully considers the merits of the parties' positions.

There is also often a missed opportunity with the case evaluation process. Case evaluation can also be combined with mediation. For example, parties can agree that the case evaluation award be entered and sealed in an envelope and delivered to the ADR clerk. After that envelope is delivered, but before it is opened and distributed to the parties, those same case evaluators could participate, either all or in part, as mediators to try to facilitate a resolution before the case evaluation award is published to the parties.

All of these options are likely to move your case forward despite the current court congestion associated with the pandemic. While neither the lawyers, the litigants, nor the court have any control over the chaos created by the pandemic, we all do have control over how we move forward. Arbitration, however structured, should certainly be given a fresh look. Lawyers and litigants should also consider the Special Master process to expedite proceedings and preserve appellate rights. Finally, parties can get more inventive with the traditional case evaluation process to ensure a meaningful outcome that might propel early resolution. These are just some of the options, and the universe of options is only limited by the creativity of the parties.

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Give Me Back My Stuff! Mere Retention Of Property Does Not Violate The Bankruptcy Code!

by: Vonica F. Sallan and Anthony J. Kochis

In *City of Chicago v. Fulton*, the Supreme Court held that mere retention of property does not violate the automatic stay imposed by § 362(a)(3) of the Bankruptcy Code.[1] You may be thinking: "I am a litigator, this article does not apply to me. I now intend to stop reading this article." Not so fast.

Consider the following hypothetical situation that you likely may have seen before: your client and BrokeCo decide to do business with one another. As a protective measure, your client takes a security interest in some of BrokeCo's assets. Inevitably, a lawsuit arises because BrokeCo fails to pay your client's invoices. Your client obtains possession of the personal property in which BrokeCo granted a security interest. BrokeCo immediately responds with a bankruptcy filing and demands return of the property under § 362(a)(3) of the Bankruptcy Code.

Is your client required to return the personal property to BrokeCo? Is your client violating the bankruptcy automatic stay if it does not? While *Fulton* resolved a circuit split holding that mere retention of property does not violate the automatic stay, there are still plenty of unanswered questions about this hypothetical - but all too real - situation.

Upon the filing of a bankruptcy petition, the Bankruptcy Code imposes an automatic stay that freezes the assets held in the bankruptcy estate.[2] In turn, this freeze restrains creditors from racing to confiscate the debtor's property. The purpose of the automatic stay is to serve "the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others."[3]

To further achieve this end, the Bankruptcy Code contains multiple provisions that prohibit dissipation or allow return of property to the bankruptcy estate.[4] At issue in *Fulton* was the portion of § 362 that imposes the automatic stay on "any act . . . to *exercise control* over property of the estate[.]"[5] Prior to this decision, courts throughout the country struggled to clearly decipher which actions violated § 362(a)(3). Ultimately, the federal circuit courts diverged quite bluntly in their holdings.[6]

The Supreme Court resolved this split in *Fulton*. There, the City of Chicago repossessed and impounded individuals' vehicles for failure to pay certain fines.[7] After filing for bankruptcy, the debtors requested that the City return their vehicles.[8] The City refused.[9] The debtors brought suit, arguing that the City's retention of their vehicles violated the automatic stay imposed by § 362(a)(3) of the Bankruptcy Code.[10] Ultimately, the Seventh Circuit sided with the debtors, holding that the City exercised control over the debtors' property when it refused to return their vehicles, thereby violating § 362(a)(3).[11] The Supreme Court reversed in favor of the City.[12] Considering the full text and the history of the Bankruptcy Code, the Court held that a violation of the automatic stay under § 362(a)(3) requires *affirmative* action "that would disturb the

status quo of estate property as of the time when the bankruptcy petition was filed," and that retention alone is not an affirmative action.[13]

At the outset, the Court grounded its decision in two statutory bases. The first was the plain language of § 362(a)(3). The words used in that provision – "stay," "act," and "exercise control" – the Court reasoned, can be read to prohibit only *affirmative* acts.[14] This is because the definition of "act" itself requires that something be done or performed.[15] Likewise, to "exercise control," one must "put into practice or carry out in action."[16] And to "stay" something "suspend[s] judicial alteration of the status quo."[17] Read together, these words mean that *passive* retention of pre-bankruptcy property is not an act to exercise control, and thus cannot violate § 362(a)(3).[18]

Second, reading § 362(a)(3) to prohibit retention of a debtor's property would render another provision of the Bankruptcy Code – § 542 – superfluous.[19] Section 542(a), dubbed the turnover provision, directs an entity in possession, custody, or control of a debtor's property to deliver that property to the trustee, subject to limited exceptions.[20] So, reading § 362(a)(3) to impose a blanket turnover obligation renders § 542, and consideration of its exceptions, purposeless.[21] Instead, a full reading of the Code indicates that "§ 362(a)(3) prohibits collection efforts outside the bankruptcy proceeding that would change the status quo, while § 542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of the debtor or trustee."[22]

The Court discussed the relationship between the automatic stay of § 362(a)(3) and the turnover provisions of § 542 at considerable length. Keep in mind that debtors primarily rush to file bankruptcy to effectuate the automatic stay and thwart eager creditors from picking apart their estate. For this reason, the automatic stay is an incredibly debtor-friendly device. Section 542, on the other hand, is not a product of the automatic stay at all. Rather, it is a provision that empowers a debtor to claw back property into the estate. Accordingly, from the debtor's perspective, a major fault of § 542 is its sluggish administration.[23] Bankruptcy is urgent. A debtor desires to mitigate any additional depletion to his or her estate. And claiming a violation of the automatic stay to either maintain or recoup property is one of the surest and quickest ways to do so. For this reason, the Supreme Court's foreclosure of one of those opportunities is a significant development. But this is not the entire account of the Court's decision. Rather, the Supreme Court hinted at, but declined to opine on, several other avenues that *would* require turnover of debtors' retained property.

First, in response to the City's position that its retention was an omission, not action, the Court noted that in some circumstances, omissions *can* qualify as actions.[24] The Court acknowledged that to exercise control over something means "more than merely having that power."[25] The Court remarked, however, that it did not "definitively rule out the alternative interpretation adopted by the court below and advocated by [the debtors]."[26] What appears to be a brief aside in the opinion is actually quite a significant declaration. The Court did not parse out the nuances of omissions qualifying as acts. But, with this remark, the Court refused to concede that § 362(a)(3) would *never* impose a turnover obligation of retained property. Through this statement, the Court created just enough ambiguity for litigators to probe.

Second, the Court acknowledged, but did not evaluate, the bankruptcy court's holding that the City's actions also violated §§ 362(a)(4) and (a)(6) of the Bankruptcy Code.[27] Section 362(a)(4) applies the automatic stay to "any act to create, perfect, or enforce any lien against property of the estate."[28] Section 362(a)(6) applies the automatic stay to "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ."[29] Justice Gorsuch picked up on this nuance at oral arguments, questioning whether Section 362(a)(6) would require return of debtors' vehicles even if § 362(a)(3) did not.[30] Ultimately, the Court did not

address the validity of these arguments, leaving these provisions exposed to future debate.

And that is exactly what the Seventh Circuit examined on remand. The Seventh Circuit refused the City's request to "summarily reverse the bankruptcy courts' decisions" that the City's actions also violated §§ 362(a)(4) and (a)(6).[31] Instead, the court stressed that the Supreme Court issued a narrow holding limited to § 362(a)(3), and left subsections (a)(4) and (a)(6) open for consideration.[32] Accordingly, the Seventh Circuit remanded the decision to the bankruptcy court for further analysis of these provisions.[33]

Finally, while the Supreme Court analyzed the relationship between § 362(a)(3) and § 542 at some length, the Court did not decide whether § 542 would require the City to return debtors' vehicles.[34] But, as Justice Sotomayor aptly pointed out in her concurrence, the City's actions may very well violate *any* of these provisions of the Bankruptcy Code.[35]

Fulton initially looks like a win for your client in the hypothetical case involving BrokeCo. The Court's holding resolves a hotly litigated bankruptcy issue. However, the Court's opinion is arguably narrow and contains roadmaps steering litigators onto several other paths to achieve turnover of retained property. We can anticipate that lawyers (and BrokeCo's counsel) will test the bounds of these avenues to obtain return of personal property. After all, the purpose of the Bankruptcy Code is to grant a fresh start to debtors.[36] One way to ensure rehabilitation of the debtors is to allow them to retain possession of their property during the administration of their case. Depriving debtors of their property has the potential to perpetuate financial distress and frustrate debtors' ability to repay creditors – a result that challenges the principal purpose of the Bankruptcy Code.[37]

ENDNOTES

1. *Chicago of Chicago v. Fulton*, 141 S. Ct. 585, 592 (2021).
2. 11 U.S.C. § 362(a).
3. *Fulton*, 141 S. Ct. at 589.
4. *See generally* 11 U.S.C. § 362; 11 U.S.C. §§ 541-550.
5. *Fulton*, 141 S. Ct. at 589; 11 U.S.C. § 362(a)(3) (emphasis added).
6. *California Empl. Dev. Dep't v. Taxel (In re Del Mission)*, 98 F.3d 1147, 1151 (9th Cir. 1996) (holding that "the knowing retention of estate property violates the automatic stay of § 362(a)(3)."); *In re Denby-Peterson*, 941 F.3d 115, 119 (3rd Cir. 2019) (holding that "a secured creditor does not have an affirmative obligation under the automatic stay to return a debtor's collateral to the bankruptcy estate immediately upon notice of the debtor's bankruptcy because failure to return the collateral received pre-petition does not constitute an act . . . to exercise control over property of the estate.") (internal quotations and citations omitted)).
7. *Fulton*, 141 S. Ct. at 589.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*. (citing *In re Fulton*, 926 F.3d 916, 924-25 (7th Cir. 2019)).

12. *Id*.
13. *Id*. at 590.
14. *Id*.
15. *Id*. (citing Black's Law Dictionary 30 (11th ed. 2019); Webster's New International Dictionary 25 (2d ed. 1934)).
16. *Id*. (citing Webster's Third New International Dictionary 795 (1993); Webster's New International Dictionary, at 892)).
17. *Id*. (citing *Nken v. Holder*, 556 U.S. 418, 429 (2009) (brackets in original; internal quotation marks omitted)).
18. *Id*; Id. at 592 (Sotomayor, J., concurring).
19. *Id*. at 591.
20. 11 U.S.C. § 542(a).
21. *Fulton*, 141 S. Ct. at 591.
22. *Id*.
23. *Id*. at 594 (Sotomayor, J., concurring).
24. *Id*. at 590 (citing *Thompson v. General Motors Acceptance Corp*., 566 F.3d 699, 702 (7th Cir. 2009) (quoting Merriam-Webster's Collegiate Dictionary 272 (11th ed. 2003)).
25. *Id*.
26. *Id*.
27. *Id*. at 595 n.2.
28. 11 U.S.C. § 362(a)(4).
29. 11 U.S.C. § 362(a)(6).
30. Transcript of Oral Argument at 40-43, *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021) (No. 19-357).
31. *In re Fulton*, Nos. 18-2527, 18-2793, 18-2835, 18-3023, 2021 U.S. App. LEXIS 10322, at *6 (7th Cir. April 12, 2021) (order remanding applicable cases to the bankruptcy court for further proceedings.).
32. *Id*. at *7.
33. *Id*.
34. *Fulton*, 141 S. Ct. at 592.
35. *Id*. (Sotomayor, J., concurring).
36. *Id*. at 593 (Sotomayor, J., concurring) (citing *Marrama v. Citizens Bank of Mass*., 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991)).
37. *Id*.

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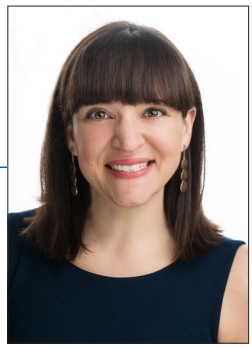

ICLE's Litigation Toolbox

By: Rebekah Page-Gourley, Staff Lawyer Senior, Institute of Continuing Legal Education (ICLE)

Hands-On Support for Virtual Litigation

Just a few years ago, Michigan litigators were preparing to implement the 2020 Michigan Court Rules on civil discovery into their practice. Little did we know that much more significant procedural challenges were just around the corner. Court closings, social distancing requirements, and safety protocols implemented during the COVID-19 pandemic have overhauled the way lawyers interact with clients and litigate their cases. And while some things may return to normal once the pandemic is behind us, many lawyers agree that at least some of the changes are here to stay.

The increased use of two-way audio-visual technology like Zoom to conduct remote client meetings, hearings, depositions, mediations, and more is probably the most transformational aspect of litigation practice post-COVID-19. Given the speed with which lawyers were forced to adapt to virtual litigation, generalized best practices emerged quickly. For example, judges and lawyers agree that it is critical to treat any remote proceeding with the same level of respect and decorum one would show in person (and not to appear as a cat). In addition to these basic guidelines, each individual type of remote proceeding involves special considerations.

ICLE has worked with our contributors to develop specialized tools and resources addressing the variety of virtual litigation challenges. The resources range from demonstrations of virtual depositions and mediations and written tips from experienced litigators to audio interviews with judges who handle virtual hearings every day. If you listen to the audio interview, Advice on Zoom Hearings from Two Judges, you'll learn that judges hate it when attorneys don't change their Zoom username to their full name or the case number they're on; when the Zoom screen just says iPhone, it can be very confusing. And if you check out the Top Tips in Ten Minutes, "Conducting Effective Zoom Mediations in Family Law Cases," you'll learn how to use Zoom breakout rooms to caucus with attorneys and clients separately: "Beware of automatic assignment of the breakout rooms. If you use the automatic option rather than assigning your breakout rooms manually, Zoom will randomly assign people to a room. You could end up with husband and wife alone in a room and the attorneys in another!"

If you are an ICLE Premium Partner, the resources below are just a sampling of the guidance you'll find in your Partnership.

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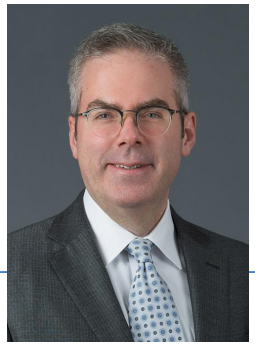
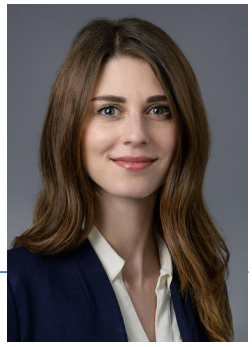
- Blog, "Three Judges' Advice for Appearing via Zoom"

To find out more about our litigation resources, or to suggest ideas for new content, contact me at rebekahp@icle.org.

The Internal Affairs Doctrine: The Unsettled Issue of Choice of Law in Shareholder Litigation Involving a Foreign Corporation





By: Daniel D. Quick and Priscilla Ghita

I. Introduction

A minority shareholder of a corporation[1] organized under the laws of another state sues the majority shareholder in Michigan for breach of fiduciary duty and shareholder oppression. Which state's law governs the dispute?

The internal affairs doctrine is a choice of law principle which provides that "in disputes involving a corporation and its relationships with its shareholders, directors, officers, or agents, the law to be applied is the law of the state of incorporation."[2] Thus, the substantive law of the state where a corporation was formed should govern any dispute related to the corporation's internal affairs. The purpose of the doctrine is to ensure that only one state has the authority to regulate a corporation's internal affairs so that a corporation is not faced with conflicting demands.[3] Examples of what courts have deemed "internal affairs" include disputes concerning issuance of corporate shares, shareholder voting rights, shareholder meetings, and dividends.[4]

No Michigan Supreme Court or published Court of Appeals opinion has squarely addressed this choice of law doctrine. This article discusses two relevant issues that may be encountered. The first issue is whether the internal affairs doctrine is recognized such that the substantive law of the state of incorporation would govern resolution of the shareholder litigation in Michigan. Second, in applying the internal affairs doctrine, there is the question of whether the pre-suit demand requirement in shareholder derivative actions is substantive in nature such that the doctrine would require application of the foreign state's laws and not Michigan law.

II. The Internal Affairs Doctrine in Michigan

The majority of states recognize the internal affairs doctrine.[5] The internal affairs doctrine has at times been discussed by Michigan courts and federal courts sitting in Michigan. In *Daystar Seller Financial, LLC v Hundley*, the Court of Appeals noted that the internal affairs doctrine is "a choice-of-law principle."[6] But the issue in that case did not involve a shareholder dispute but rather an argument that the Michigan court had no subject-matter jurisdiction over a foreign corporation. That issue was originally addressed in *Wojtczak v American United Life Insurance Company*, where the Michigan Supreme Court held that a Michigan court could decline jurisdiction over the internal affairs of a foreign corporation.[7] But the Supreme Court did not opine on what law controls a dispute concerning a foreign corporation in a Michigan court.

The Michigan Business Corporation Act ("MBCA") provides that it "applies to every domestic corporation and to every foreign corporation which is authorized to or does transact business in this state *except as otherwise provided in this act* or by other law." MCL 450.1121 (emphasis added). The MBCA does "otherwise provide" in MCL 450.2002(2): "This act does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to trans-

act business in this state." Other than *Daystar Seller Financial*, no modern Michigan appellate court has addressed the meaning of the statute.

Federal courts applying Michigan law have conclusively ruled on the issue, however. In *Henkel of Am, Inc v Bell*, the Sixth Circuit Court of Appeals held that Delaware law governed a dispute between a company and its executive in a breach of fiduciary duty claim pending in Michigan, citing MCL 450.2002(2) and other federal district court opinions.[8]

III. The Internal Affairs Doctrine as applied in Trerice

Most cases involving "internal affairs" of corporations are litigated in Michigan's business courts. Business court opinions are collected and posted in order to assist with uniform application of the law.[9] One of those business court opinions has squarely addressed this issue. In *Trerice v Trerice*,[10] the plaintiff was one of two shareholders of a closely-held corporation operating in Macomb County but incorporated under the laws of Florida. (Disclosure: Mr. Quick was counsel to the defendant in *Trerice*. The litigation is no longer pending and the analysis presented here is the authors' own.) The plaintiff brought suit against the other shareholder, claiming the following violations under Michigan law: shareholder oppression; breach of common law fiduciary duty; and derivative breach of fiduciary duty. *Id*. The defendant moved for summary disposition under MCR 2.116(C)(8) because the plaintiff purported to state claims under the MBCA rather than under applicable Florida law, also arguing that the breach of fiduciary duty claim should be dismissed because under Florida law such a claim can only be raised derivatively. *Id*. The defendant also argued that the count for derivative breach of fiduciary duty should be dismissed because the plaintiff had failed to make a demand upon the corporation prior to filing suit, as required under Florida corporate law.

The trial court denied defendant's motion for summary disposition, declining to apply the internal affairs doctrine. *Id*. at 3–8. The court reasoned that "the Michigan courts have not clearly adopted the internal affairs doctrine as a choice-of-law principle." *Id*. at 3. The court stated that the only published Michigan opinion analyzing the doctrine is the Michigan Supreme Court's decision in *Wojtczak*. The court reasoned that the *Wojtczak* opinion approached the internal affairs doctrine only in terms of jurisdiction. The *Trerice* court then pointed to subsequent decisions by Michigan courts and the federal courts sitting in Michigan that interpreted *Wojtczak*, reasoning that they had relied upon *Wojtczak* to recognize the internal affairs doctrine as simply a rule of venue or jurisdiction.[11]

Additionally, the *Trerice* court found that, by its own terms, the MBCA "applies to every domestic corporation and to every foreign corporation which is authorized to or does transact business in this state except as otherwise provided in this act or by other law." *Id*. at 5 (quoting MCL 450.1121 (internal quotation marks omitted)). Based on this language, the court reasoned that it could not disregard the plain language of the MBCA, and that the Michigan legislature could have adopted the internal affairs doctrine in the statute but had declined to do so. *Id*. at 5. For these reasons, the court concluded that it had not found "any controlling authority requiring or even permitting the application of the internal affairs doctrine as traditionally understood" to the case before it. *Id*.

The trial court's decision in *Trerice* was, in our opinion, wrongly decided. Not only is the decision at odds with the national trend of recognizing the internal affairs doctrine, but, more importantly, the decision is also at odds with Michigan law. To begin, the MBCA expressly adopts the internal affairs doctrine. The 2008 adoption of MCL 450.2002(2) was not viewed as constituting a change in Michigan law.[12] The *Trerice* court completely overlooked this provision, analyzing only MCL 450.1121—which contains the qualifying "except as otherwise provided in this act or by other law." MCL 450.1121.

Second, the *Trerice* court misinterpreted *Wojtczak* to mean that the internal affairs doctrine is purely jurisdictional in Michigan. Although the *Wojtczak* court did in fact use the internal affairs doctrine to determine whether the court can decline jurisdiction entirely, this is not the extent of the internal affairs doctrine in Michigan. Indeed, the very decisions the *Trerice* court cited as support actually clarify that the *Wojtczak* decision only focused on one aspect of the internal affairs doctrine—that of discretionary jurisdiction—and not on the fundamental purpose of the doctrine as a choice-of-law rule.[13] Moreover, as stated above, Michigan has since codified the internal affairs doctrine.

IV. The Internal Affairs Doctrine and Antecedent Demand for Derivative Claims

The internal affairs doctrine applies only to the *substantive* law of the state of incorporation.[14] Are state law provisions that govern when, whether and under what circumstances antecedent demand for a derivative claim is required substantive or procedural?

In *Morris v Bales*, a conflict of laws arose between Michigan law, which required a 90-day waiting period between making a demand and filing a derivative suit, and Ohio law, which did not have any waiting period for filing a complaint following demand.[15] The Michigan Court of Appeals first found that Ohio law applied to the dispute pursuant to the choice-of-law provisions in the entity's operating agreement.[16] The Michigan Court of Appeals then stated: "Even when foreign law applies pursuant to a valid contact, however, Michigan law governs procedure. Thus, Michigan law governs whether plaintiff complied with the procedural requirements for filing a derivative shareholder claim."[17] The court went on to hold that the plaintiff failed to comply with the 90-day waiting period after making a demand, as required under Michigan law.[18] The court relied solely on a Michigan Supreme Court case, *Rubin v Gallagher.*[19] But Rubin concerned a contractual choice-of-law provision (stating that Michigan laws on procedure would govern in enforcing the substantive contract rights at issue concerning the sale of pianos) rather than the internal affairs doctrine.

The opposite result, at least on the principal legal concept, was reached in *Karmanos v Bedi*.[20] In *Karmanos*, the question arose as to whether Michigan law required that plaintiffs in shareholder derivative disputes were required to *always* make a demand prior to bringing suit, as MCL 450.1493a provided, or whether demand was excused if plaintiff could prove demand would have been futile, as MCR 3.502(A) suggested.[21] The court reiterated the rule that where court rules conflict with a statute, the statute trumps on substantive issues.[22] Applying this rule, the court characterized the demand requirement as "a matter of substantive law controlled by the language of the statute."[23] In a footnote, the court further elaborated that "[t]he statute determines *who* may sue (substantive law), not *how* one must sue (procedural)."[24] The court also relied upon the federal district court's reasoning in *Virginia M Damon Trust v North Country Financial Corporation*.[25] There, the court concluded that the substantive law of the state of incorporation, and not Federal Rule of Procedure 23.1 concerning demand futility, determines whether failure to make a demand is excused. Accordingly, the *Virginia M Damon* court applied Michigan's substantive law requiring universal demand to the shareholder dispute concerning a Michigan corporation.[26]

Michigan courts should construe the demand requirement as a matter of substantive law for purposes of the internal affairs doctrine. This is the majority approach[27] and is the position in Delaware[28], a jurisdiction oft looked to by Michigan courts on corporate law matters.[29] Indeed, the United States Supreme Court in *Kamen v Kemper Financial Services, Inc* stated that "the function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of '*substance*,' not 'procedure.'"[30]

Accordingly, Michigan courts should construe as substantive the demand requirement in shareholder derivative actions involving foreign corporations, thereby applying the law of the foreign state pursuant to the internal affairs doctrine.

V. Conclusion

Michigan law is unsettled as to whether the laws of a foreign corporation should govern shareholder litigation pending in Michigan and whether the demand requirement in such suits is substantive for purposes of the doctrine. Michigan should join the ranks of other jurisdictions that have clearly adopted the internal affairs doctrine and that have recognized the demand requirement as substantive.

ENDNOTES

1. For simplicity, the article references shareholders and corporations, but the same logic should apply to limited liability companies. As Michigan courts have noted, they are akin to corporations. See, e.g., *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 21; 812 NW2d 793, 797 (2011); *Duray Dev, LLC v Perrin*, 288 Mich App 143, 154–59; 792 NW2d 749, 756–59 (2010).
2. Black's Law Dictionary, Internal-Affairs Doctrine (11th ed 2019).
3. 9 Fletcher Cyc. Corp., Choice of law for corporate issues and the internal affairs doctrine, § 4223.50.
4. *Id*.; Restatement (Second) of Conflict of Laws § 302, comment a.
5. 9 Fletcher Cyc. Corp., Choice of law for corporate issues and the internal affairs doctrine, § 4223.50; see *Boomer Dev, LLC v Nat'l Ass'n of Home Builders of United States*, 258 F Supp 3d 1, 8–9 (DDC, 2017) (noting that, "like most other states," the District of Columbia has adopted the doctrine).
6. 326 Mich App 31, n4; 931 NW2d 15 (2018).
7. 293 Mich 449; 292 NW 364 (1940).
8. 825 Fed Appx 243, 253 (CA 6, 2020). Notably, one case the court cited was *Atlas Techs., LLC v Levine*, 268 F Supp 3d 950, 960 (ED Mich, 2017), which reached the same result concerning a limited liability company, citing MCL 450.5001.
9. See MCL 600.8033(3)(c) ("The purpose of a business court is to…[e]nhance the accuracy, consistency, and predictability of decisions in business and commercial cases.")
10. Unpublished opinion of the Sixteenth Judicial Circuit Court, issued March 8, 2019 (Case No. 2018-4695-CB), available at https://courts.michigan.gov/opinions_orders/businesscourtssearch/BusinessCourtDocuments/C16-2018-4695-CB%20(Mar%208,%202019).pdf.
11. Citing *Daystar*, 326 Mich App; *Lapides v Doner*, 248 F Supp 883 (ED Mich, 1965); *Stewart v Geostar*, 617 F Supp 2d 532 (ED Mich, 2007).

12. See Justin G. Klimko, *New Amendments to the Michigan Business Corporations Act*, Mich Bus LJ, Spring 2009 at 14.
13. See *Daystar*, 326 Mich App at 31 (explaining that *Wojtczak's* statement that Michigan courts do not assume jurisdiction exists is not a jurisdictional bar, and that the doctrine's choice-of-law considerations should guide a trial court's discretion in whether to decline jurisdiction); *Lapides*, 248 F Supp at 886–87 (interpreting the *Wojtczak* decision as the Court recognizing it had jurisdiction to hear the case but declining jurisdiction on grounds of forum *non conveniens*); Stewart, 617 F Supp at 538 (describing *Wojtczak* as capturing "a slightly different concept" of the doctrine that concerns discretionary jurisdiction, but concluding that the doctrine is fundamentally a choice-of-law rule).
14. See *Se Texas Inns, Inc v Prime Hosp Corp*, 462 F3d 666, 673 (CA 6, 2006).
15. Unpublished opinion of the Court of Appeals, issued November 28, 2017 (Docket No. 334493), 2017 WL 5759787, *2.
16. *Id*.
17. *Id*. (internal citation omitted).
18. *Id*. at *2–*3.
19. See 294 Mich 124; 292 NW 584 (1940).
20. Unpublished opinion of the Court of Appeals, issued November 29, 2018 (Docket No. 336577), 2018 WL 6252038.
21. *Id*. at *4–*5.
22. *Id*. at *5.
23. *Id*.
24. *Id*. at *5 n 2 (emphasis in original).
25. 325 F Supp 2d 817 (WD Mich, 2004).
26. *Virginia M Damon Tr*, 325 F Supp at 821.
27. See, e.g., *Hicks ex rel Union Pac Corp v Lewis*, 148 SW3d 80, 85 (Tenn Ct App, 2003); *In re Huron Consulting Group, Inc Sholder Derivative Litig*, 971 NE2d 1067, 1076 (Ill App Ct, 2012); *Stallworth v AmSouth Bank of Alabama*, 709 So 2d 458, 463 (Ala, 1997); *Richelson v Yost*, 738 F Supp 2d 589, 596 (ED Pa, 2010).
28. See, e.g., *Draper v Paul N Gardner Defined Plan Tr.*, 625 A2d 859, 865 n9 (Del, 1993); *Rales v Blasband*, 634 A2d 927, 932 (Del, 1993).
29. *Glancy v Taubman Centers, Inc*, 373 F3d 656, 674 n 16 (CA 6, 2004) ("In the absence of clear Michigan law on matters of corporate law, Michigan courts often refer to Delaware law.") (internal citations omitted).
30. 500 US 90, 95–97 (1991) (emphasis added).

Daniel D. Quick is a member of Dickinson Wright PLLC and a recognized trial lawyer whose broad commercial litigation experience includes all aspects of shareholder and family business disputes, UCC and automotive industry litigation, trade secret and non-compete litigation, domestic and international arbitration, and intellectual property cases. Priscilla Ghita is an associate in Dickinson Wright PLLC's litigation group.

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Negotiation & Risk Assessment Techniques That Work

By David C. Sarnacki

*"Flounder, you can't spend your whole life worrying about your mistakes! You f***ed up. You trusted us!"*

—Otter in *Animal House* (1978)

Not exactly what we want to say to a client, but there are ways to increase our skills and avoid such a situation. The ABA has two excellent resources to help us negotiate for our clients and to help our clients make better decisions with our advice.

How much would you pay someone to summarize over 100 chapters of scholarly articles on negotiations into 360 pages? That is the value that Andrea Kupfer Schneider and Chris Honeyman deliver as editors of **Negotiation Essentials for Lawyers**.

Negotiation Essentials for Lawyers is a handbook for action, responding to our pleas, "just tell me what to do in this situation!" The editors culled 53 articles from a much larger resource, the three-volume Negotiator's Desk Reference. Selection was based on the principles and strategies that matter most to attorneys. The editors then established a common framework for summarizing all the chapters they selected for Negotiation Essentials for Lawyers. The goal was to make the principles and strategies "as fast and easy as possible for very time-constrained legal practitioners to apply." The rigor of the structure creates high-yield benefits for us all.

With a focus on the practical, the editors required this framework: (a) a brief introduction, (b) why this concept might change your thinking, (c) action plan – what you can do differently tomorrow, (d) modifiers, caveats and no-go areas – when this advice just won't apply, and (e) a closing section.

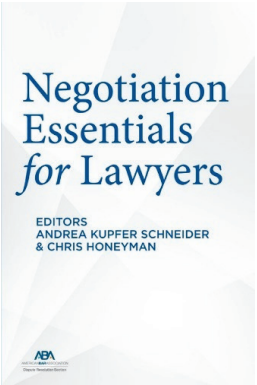
Negotiation Essentials for Lawyers approaches its subject matter from all different angles while maintaining a practical perspective favoring techniques and strategies ripe for immediate application. An example is found in the chapter Your Story and Mine.

"Each party to a conflict will see that conflict differently." People experiencing the same events absorb information differently and categorize it in favor of how each person sees the world. In light of this reality, "we can always tell a third story – the way a mediator or disinterested observer might describe the conflict." Using a different frame moves the focus from *who is right to why do we see things differently and what can we do to manage those differences*. We also can "listen well: inquire, paraphrase, and acknowledge." Genuine curiosity facilitates reframing the conflict into a third story and improving the likelihood of success.

The 53 chapters are divided into sections. First, there is an introduction for learning from your negotiations. Second, All About You covers individual negotiating styles and strategies. Third, Making Your Case addresses taking care of your own needs. Fourth, Strategies of Communication addresses the multiple written, nonverbal, and verbal communications we use every day, including

listening. Fifth, Working with Them focuses on relationships between the negotiators. Sixth, special situations involving mental illness, cultural differences and other complexities are addressed. Seventh, Context and Other Constraints from more unusual situations are covered. Eighth, Working with Your Client addresses psychology, informed consent, authority to settle and interpreters. Ninth, Groups and Third Parties covers organizational factors, including mediators and coaches. And finally, tenth, Getting It Done centers around closing the deal with discussions of ambiguity, deadlock, activism, enduring agreements, and pre-dispute and pre-escalation techniques.

Schneider is a professor of law at Marquette University Law School, where she serves as the director of its nationally ranked dispute resolution program. She is the recipient of the ABA's Section of Dispute Resolution award for outstanding scholarly work for 2017. Honeyman is managing partner of Convenor Conflict Management, a Washington, D.C. consulting firm. He is coeditor of the Negotiator's Desk Reference and six other books.



Andrea Kupfer Schneider and Chris Honeyman (editors), Negotiation Essentials for Lawyers (American Bar Association 2019). $99.95.

Litigation Interest and Risk Assessment helps us help our clients. Litigation is inherently uncertain, and both attorneys and clients have difficulty accurately predicting outcomes. Using the tools presented in this book facilitates better communication and better litigation decisions.

"The main premise of this book is that lawyers and mediators should help parties make decisions in litigation by combining an assessment of likely core outcomes with a careful consideration of how their interests are likely to be affected if they (continue to) engage in litigation." The focus is on the client's goals, concerns, hopes, and fears, as well as how they see themselves and what their principles are. In addition, quality analysis requires consideration of both the direct litigation expenses and the nonfinancial costs associated with the court process.

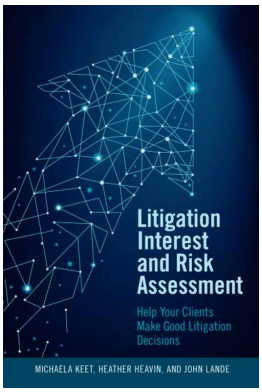
"[P]arties generally make better decisions when they carefully consider their interests and the risks of proceeding in litigation and other dispute resolution procedures." While better decisions do not guarantee outcomes, they do promote a stronger sense of control, confidence procedural fairness.

Litigation Interest and Risk Assessment begins with why people make errors in outcome predictions and our ethical duties to promote informed choices. The book addresses each element of assessment analyses, from both the perspective of individuals and of organizations. The book presents a simple framework for assessing interests and risks, and additional tools such as decision trees, analytics, and data mining. The book concludes with advice on working with clients, negotiating with use of assessment tools, and mediating effectively with these tools.

The appendix includes an additional eight sections providing practical advice for client interviews, mathematical estimation, decision trees, and checklists. All in all, the book spans 240 pages.

All three authors have substantial experience as mediators. Michaela Keet and Heather Heavin are professors at the University of Saskatchewan's College of Law. They were awarded a fellowship by the Canadian Institute for the Administration of Justice, leading to research and publication on litigation risk assessment. John Lande is professor emeritus at the University of Missouri School of Law and its former

dispute resolution director. He is also the author of Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money.



Michaela Keet, Heather Heavin and John Lande, Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions (American Bar Association 2020). $79.95.

David C. Sarnacki practices family law, mediation and collaborative divorce in Grand Rapids, Michigan. He is a past Chairperson of three State Bar Sections: Family Law, Litigation, and Law Practice Management Section. He is listed in Best Lawyers in America.

Review of Visual Refresher Course on Courtroom Persuasion

by: Alexander J. Thibodeau

Following his own advice, David Sarnacki's new book *Visual Refresher Course on Courtroom Persuasion* does not mince words. It is unapologetically "visual" in the sense that the vast majority of its pages are dedicated to large-format charts, diagrams, and breakdowns which skillfully navigate the connections between various aspects of courtroom persuasion. Its label as a "refresher course" is also profoundly accurate. This book is not a guide to courtroom decorum and may be a step beyond what the wholly uninitiated new attorney may need. Instead, Sarnacki takes an approach to persuasion that will help practitioners hone and refine their advocacy skills or reimagine their cases through the lens of the fact-finder, both in theory and in practice. This book doesn't teach its reader what to say, but rather how to say it and why.

Admittedly, most of the ideas Sarnacki offers are not revolutionary. Most of the concepts are simple and familiar, ideas like: guiding your listener on a memorable journey, keeping things simple, and sticking to a theme. Nearly any first year legal writing course will cover these basics. Any diagram in this book could be found scribbled on a law school blackboard mid-lecture. The real benefit of this compilation is the way these themes are interwoven to create the journey on which Sarnacki wants to lead us.

Sarnacki is a master at application. What sets his book apart is the packaging of those principles into bite-sized chunks, then applying those nuggets into familiar contexts. The resulting perspective paints a clear picture of why certain persuasive techniques work and provides a diagram approach to help readers implement those techniques well in support of their own arguments. While short lists and quick take-aways set the stage, application to landmark cases like *Brown v Board of Education* and *Loving v Virginia* adds context to the advice and creative perspective to otherwise abstract concepts. Similarly, Sarnacki uses Dr. Martin Luther King, Jr.'s "I Have a Dream" speech and Harper Lee's *To Kill a Mockingbird* to illustrate his points throughout. Most of us know that Dr. King's speech and Lee's book are compelling, but Sarnacki shows us why they work so well. His approach parses out those abstract aspects of application and generalizes them into something which is transferrable and practical.

Sarnacki's writing is refreshingly conversational, despite its inherently academic content. Despite discussing the importance of narrative, the book spends surprisingly little time on build-up, background, or theme. It gets straight to the point and provides its reader with a pleasantly digestible menu of concise information in a manner that requires just the right amount of intellectual calisthenics to make its point stick. Sarnacki does not do all of the work for his reader and the experience is made better for it. Concepts are offered with little explanation and subtly allow the reader to make his or her own connections, without patronizing verbiage or ego-driven monologue. While immensely consumable, the charts do very little hand-holding. Although relatively linear, after the first read-through, this book need not be

consumed consecutively—my second reading was anything but. Sarnacki creates a guide for understanding persuasion abstractly and crafts exercises to encourage perspective shifting throughout. Litigators with this book will likely want to get their index tabs ready, as many of the diagrams and charts will become daily reference guides.

While the diagrams provide the basic outline for persuasion, or the *how*, much of the practical value comes from the exercise of considering the *who* and *why*. Accordingly, whether a prospective reader best retains information by memorizing concepts or understanding context, this book provides ample opportunity for resonation.

Most attorneys appreciate that the formula for effective persuasion is rarely obvious or straightforward—but Sarnacki's reductive approach makes it feel like it ought to be and allows practical application to feel similarly intuitive. Instead of providing rules, it asks questions which force the reader to analyze and challenge his or her arguments. It removes the idiomatic blinders and highlights the power of simplicity in the simplest of terms. The book also graciously contains worksheets to allow readers to organize their own arguments while applying the concepts conveyed.

Despite the reliance on charts and graphs, Sarnacki's voice shines through in a manner that quickly becomes likeable and familiar. The journey is subtle and nuanced. What initially feels like a bit of a hodge podge of unrelated diagrams comes together beautifully which allows the reader to anticipate conclusions moments before they are affirmed.

Sarnacki's latest does not reinvent courtroom persuasion. It does, however, rethink how we approach becoming effective practitioners of persuasion. It provides a formula of questions to effectively organize and challenge your argument, instead of pretending to know all of the answers. For the young lawyer or the seasoned veteran, there is great value to this refresher course and may become a staple in any courtroom arsenal.

Alexander Thibodeau is a 3rd year Associate in Foster Swift Collins & Smith, PC's Grand Rapids office. He represents a number of businesses, individuals, and insurance companies in a wide range of litigation matters. He also practices in the municipal sector, advising local governments on utility franchise and regulatory issues. He currently serves as President of the Young Lawyers Section of the Grand Rapids Bar Association.

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