

MCR 2.403
Case Evaluation

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

MCR 2.403 (M)(3) should be amended as proposed by the Civil Procedure and Courts Committee.

- (a) yes
- (b) no

Synopsis

The Civil Procedure and Courts Committee recommends that the current case evaluation court rule be amended to limit its scope regarding automobile no fault benefit cases, to limit its scope to only expenses actually incurred and disputed before the case evaluation hearing due to the ongoing nature of these types of claims. The current rule provides that acceptance of a case evaluation award is deemed to dispose of all claims in an action.

Proposed MCR Amendment

MCR 2.403 (Case Evaluation)

(A)-(L) [Unchanged]

(M)(1)-(2) [Unchanged]

(3) In a case alleging a claim for personal protection insurance benefits under MCL 500.3101, et seq, the award is limited to expenses claimed in the action that were incurred and disputed prior to the case evaluation hearing. The trial court may enter an order further limiting the scope of case evaluation. A judgment or dismissal based on mutual acceptance of the award does not dispose of any claims in the action that seek declaratory relief for future benefits, or for reimbursement of expenses that were incurred and disputed after the case evaluation hearing.

(N)-(O) [Unchanged]

Additional Commentary

MCR 2.403(M)(1) provides in pertinent part that a judgment or dismissal entered upon mutual acceptance of a case evaluation award shall be deemed to dispose of all claims in the action.” This rule has been strictly enforced. See, e.g., Marshall v Franklin Life Ins Co, 2001 WL 733529 (February 20, 2001).

The Civil Procedure and Courts Committee notes that as a result, the current case evaluation rule raises problems in actions for personal protection benefits (commonly known as auto no-fault benefits) under MCL 500.310, et seq. Such cases typically involve claims for a combination of no-fault expenses, some incurred pre-suit, with other expenses incurred throughout the pendency of the lawsuit, as well as claims for declaratory relief for future benefits.

The ongoing nature of these claims and the claims for declaratory relief present specific problems in view of the current rule that requires that all claims within a cause of action be disposed of by the process.

The Committee opines that the most troublesome aspect of the current rule arises in claims for declaratory relief for future benefits because it is unwise for a plaintiff to accept case evaluation when declaratory relief sought, thereby risking the dismissal of the plaintiff’s entire claim and a loss of future benefits.

The Committee states that problems also arise in cases involving ongoing disputes where medical expenses are being incurred at or shortly after the time of the case evaluation hearing. The Committee notes that the time lag between the date of case evaluation hearing and entry of judgment is minimally 29 days and in actual practice much longer, often several months. Expenses incurred during this time cannot be determined in advance, yet would be covered by a judgment on mutual acceptance of an award.

The Committee believes that the proposed new MCR 2.403(M)(3) solves these problems by limiting case evaluation awards in PIP actions to expenses incurred and disputed before the case evaluation hearing, and providing that “[a] judgment or dismissal based on mutual acceptance of the award does not dispose of any claims in the action that seek declaratory relief for future benefits, or for reimbursement of expenses that were incurred and disputed after the case evaluation hearing.” The Committee believes that the new rule also provides the trial court with the ability to further limit the scope of case evaluation where needed.

The Civil Procedure and Courts Committee urges the Representative Assembly to approve the amendment to MCR 2.403(M)(3) and transmit it to the Michigan Supreme Court with a recommendation that the Court adopt the amendment.

**STATE BAR OF MICHIGAN
CIVIL PROCEDURE AND COURTS COMMITTEE**

Proposed Amendment to MCR 2.403 (Case Evaluation)

I. Recommendation to the Representative Assembly

The Civil Procedure and Courts Committee urges the Representative Assembly to approve the following amendment to the MCR 2.403 and transmit it to the Michigan Supreme Court with a recommendation that the Court adopt the amendment.

MCR 2.403 (Case Evaluation)

(A)-(L) [Unchanged]

(M)(1)-(2) [Unchanged]

(3) In a case alleging a claim for personal protection insurance benefits under MCL 500.3101, et seq., the award is limited to expenses claimed in the action that were incurred and disputed prior to the case evaluation hearing. The trial court may enter an order further limiting the scope of case evaluation. A judgment or dismissal based on mutual acceptance of the award does not dispose of any claims in the action that seek declaratory relief for future benefits, or for reimbursement of expenses that were incurred and disputed after the case evaluation hearing.

(N)-(O) [Unchanged]

II. Reasons Supporting the Proposal

MCR 2.403(M)(1) provides in relevant part that a judgment or dismissal entered upon mutual acceptance of a case evaluation award “shall be deemed to dispose of all claims in the action.” This rule has been strictly enforced. See, e.g., Marshall v. Franklin Life Ins. Co., 2001 WL 733529 (February 20, 2001).

As a result, the current case evaluation rule raises problems in actions for Personal Protection Benefits (commonly known as auto No-Fault Benefits) under MCL 500.3101, et.seq. Such cases typically involve claims for a combination of No-Fault expenses, some incurred pre-

suit, other expenses incurred throughout the pendency of the suit, as well as claims for declaratory relief for future benefits. The ongoing nature of these claims and the claims for declaratory relief give rise to specific problems in light of the current rule which requires that all claims within a cause of action be disposed of by the process.

The most troublesome problem arises in cases where claims for declaratory relief for future benefits are involved. In CAM Construction v Lake Edgewood Condominium Assn, 465 Mich 549 (2002), the court held that all claims in an action are disposed of by mutual acceptance of a case evaluation award. The court stated:

“The language of MCR 2.403(M)(1) could not be more clear that accepting a case evaluation means that *all claims* in the *action*, even those summarily dismissed. Thus, allowing bifurcation of the claims within such actions, as plaintiff suggests, would be directly contrary to the language of the rule.” Emphasis in the original.

As a result of the above language, it is unwise, if not impossible for a plaintiff to accept case evaluation when declaratory relief is sought. To do otherwise could result in dismissal of plaintiffs’ entire claim and a loss of future benefits. Alternatively, Plaintiffs are requesting (and case evaluators are cooperating in issuing) non-unanimous awards. Both of these practices defeat the purpose of case evaluation and render the process meaningless, as the desired purpose of case evaluation is to resolve matters.

Problems also occur in cases involving ongoing disputes where medical expenses are being incurred at or shortly after the time of the case evaluation hearing. The time lag between the date of case evaluation hearing and entry of judgment is minimally 29 days and in actual practice much longer, often several months. Expenses incurred during this time cannot be determined in advance, yet would be covered by a judgment on mutual acceptance of an award. Once again, Plaintiffs are forced to reject case evaluation as a matter of routine, which

unnecessarily subjects their clients to sanctions and further defeats the purpose of case evaluation.

Proposed new MCR 2.403(M)(3) solves these problems by limiting case evaluation awards in PIP actions to expenses incurred and disputed prior to the case evaluation hearing, and providing that “[a] judgment or dismissal based on mutual acceptance of the award does not dispose of any claims in the action that seek declaratory relief for future benefits, or for reimbursement of expenses that were incurred and disputed after the case evaluation hearing.” It also provides the trial court with the ability to further limit the scope of case evaluation where needed.

III. Fiscal Impact

No fiscal impact is anticipated.

IV. Staffing Impact

No staffing impact is anticipated.

V. Prior Assembly Action

The Assembly has not taken any prior action on this subject.

Respectfully submitted by:

Ronald S. Longhofer

Chair, Civil Procedure and Courts Committee

November 12, 2004

MCR 3.602
Arbitration

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

MCR 3.602 should be amended as proposed by the Civil Procedure and Courts Committee.

- (a) yes
- (b) no

Synopsis

The Civil Procedure and Courts Committee recommends that the current arbitration court rule be amended to provide three procedural revisions: to substitute “motion” or “complaint” for “applicant” (an undefined term within the court rules or the Arbitration Act), clarify post-arbitration actions and set timing deadlines consistent with the Federal Arbitration Act.

Proposed MCR Amendment

MCR 3.602 (Arbitration)

(A) Application of Rule [Unchanged]

(B) Proceedings to Compel or to Stay Arbitration.

~~(1) In a pending action an application to the court for an order under this rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. An initial application for an order under this rule, other than in a pending action, must be made by filing a complaint as in other civil actions.~~

(1) A request for an order to compel or to stay arbitration under this Rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. If there is not already a pending action between the necessary parties, the party seeking the requested relief must first file a complaint as in other civil actions.

(2) On ~~application~~ motion of a party showing an agreement to arbitrate that conforms to the arbitration statute, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement and the arbitration statute. If the opposing party denies the existence of an agreement to arbitrate, the court shall

summarily determine the issues and may order arbitration or deny the ~~application~~ motion.

(3) On ~~application~~ motion, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. If there is a substantial and good faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration.

(4) ~~An application~~ A motion to compel arbitration may not be denied on the ground that the claim sought to be arbitrated lacks merit or is not filed in good faith, or because fault or grounds for the claim have not been shown.

(C) Action Involving Issues Subject to Arbitration; Stay. Subject to MCR 3.310(E), an action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or ~~an application~~ a motion for such an order has been made under this rule. If the issue subject to arbitration is severable, the stay may be limited to that issue. If ~~an application~~ a motion for an order compelling arbitration is made in the action or proceeding in which the issue is raised, an order for arbitration must include a stay.

(D)-(I) [Unchanged]

(J) Vacating Award.

(1) A request for an order to vacate an arbitration award under this Rule must be by motion. If there is not already a pending action between the necessary parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

~~(1)~~ (2) On ~~application~~ motion of a party, the court shall vacate an award if:

- (a) the award was procured by corruption, fraud, or other undue means;
- (b) there was evident partiality by an arbitrator, appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;
- (c) the arbitrator exceeded his or her powers; or
- (d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

~~(2)~~ (3) ~~An application~~ A motion to vacate an award must be ~~made~~ filed within 21-90 days after ~~delivery of a copy of the award to the applicant~~ the date of the award, except that if it is predicated on corruption, fraud, or other undue means, it must be ~~made~~ filed within 21 days after the grounds are known or should have been known.

~~(3)~~ (4) In vacating the award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement, or, if there is no such provision, by the court. If the award is vacated on grounds stated in subrule (J)(1)(c) or (d), the court may order a rehearing before the arbitrator who made the award. The

time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

~~(4)~~ (5) If the ~~application~~ motion to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award.

(K) Modification or Correction of Award.

(1) A request for an order to modify or correct an arbitration award under this Rule must be by motion. If there is not already a pending action between the necessary parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to correct or modify an arbitration award must be filed no later than 21 days after the date of the arbitration award.

~~(4)~~ (2) On ~~application made~~ motion of a party filed within ~~21~~ 90 days after ~~delivery of a copy of the date~~ of the award ~~to the applicant~~, the court shall modify or correct the award if:

(a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;

(b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or

(c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

~~(2)~~ (3) If the ~~application~~ motion is granted, the court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected. Otherwise, the court shall confirm the award as made.

~~(3)~~ (4) ~~An application~~ A motion to modify or correct an award may be joined in the alternative with ~~an application~~ a motion to vacate the award.

(L)-(N) [Unchanged]

Additional Commentary

The proposed amendment contains two material revisions. Both relate to procedure only, not the substantive grounds upon which an award can be vacated or confirmed or the issue of enforcing arbitration agreements.

First, the current version of the Rule uses the word “application” to describe a type of proceeding in the circuit court. “Application” is not a defined term within the Michigan Court Rules or in the Arbitration Act, MCL 600.5025. The proposed changes eliminate the term “application,” and substitute the word “motion” or “complaint,” depending on whether there is already a pending action.

Second, the current version of the Rule does not provide clear guidance on how to bring a post-arbitration action (to either confirm or vacate) under two possible procedural scenarios: (1) where an action was already filed and remains open with the court (perhaps

a lawsuit to compel arbitration was filed and the case was left open pending conclusion of the arbitration), and (2) where there is not an open case with the court when the time comes to either confirm or vacate the award. In the former scenario, the proposed revision replaces “application” with “motion.” In the latter scenario, the proposed revision clarifies that a complaint must first be filed, and then also a motion (consistent with the spirit of the existing text of MCR 3.602(B)(1), which is also clarified). The amendment also sets timing deadlines consistent with the time frame allowed under the Federal Arbitration Act. Synchronizing the state and federal time periods aids the uniformity of the law and practice and can be important if an action is removed to federal court and to avoid potential arguments about preemption.

The Civil Procedure and Courts Committee urges the Representative Assembly to approve the amendment to MCR 3.602 and transmit it to the Michigan Supreme Court with a recommendation that the Court adopt the amendment.

**STATE BAR OF MICHIGAN
CIVIL PROCEDURE AND COURTS COMMITTEE**

Proposed Amendment to MCR 3.602 (Arbitration)

I. Recommendation to the Representative Assembly

The Civil Procedure and Courts Committee urges the Representative Assembly to approve the following amendment to the Michigan Court Rules and transmit it to the Michigan Supreme Court with a recommendation that the Court adopt the amendment.

MCR 3.602 (Arbitration)

(A) [Unchanged]

(B) Proceedings to Compel or to Stay Arbitration.

(1) ~~A request for an order to compel or to stay arbitration under this Rule~~ ~~In a pending action an application to the court for an order under this rule~~ must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. ~~An initial application for an order under this rule, other than in~~ ~~If there is not already~~ a pending action, between the necessary parties, the party seeking the requested relief must ~~be made by~~ first filing a complaint as in other civil actions.

(2) On ~~application~~ motion of a party showing an agreement to arbitrate that conforms to the arbitration statute, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement and the arbitration statute. If the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the ~~application~~ motion.

(3) On ~~application~~ motion, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. If there is a substantial and good-faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration.

(4) ~~An application~~ motion to compel arbitration may not be denied on the ground that the claim sought to be arbitrated lacks merit or is not filed in good faith, or because fault or grounds for the claim have not been shown.

(C) Action Involving Issues Subject to Arbitration; Stay. Subject to MCR 3.310(E), an action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or ~~an application~~ motion for such an order has been made under this rule. If the issue subject to arbitration is severable, the stay may be limited to that issue. If ~~an application~~ motion for an

order compelling arbitration is made in the action or proceeding in which the issue is raised, an order for arbitration must include a stay.

(D)-(I) [Unchanged]

(J) Vacating Award.

(1) A request for an order to vacate an arbitration award under this Rule must be by motion. If there is not already a pending action between the necessary parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to vacate an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(2) On ~~application~~-motion of a party, the court shall vacate an award if:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was evident partiality by an arbitrator, appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;

(c) the arbitrator exceeded his or her powers; or

(d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(~~32~~) An ~~application~~-motion to vacate an award must be ~~made~~-filed within ~~90~~21 days after ~~delivery of a copy of the~~ date of the award ~~to the applicant~~, except that if it is predicated on corruption, fraud, or other undue means, it must be ~~made~~-filed within 21 days after the grounds are known or should have been known.

(~~43~~) In vacating the award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement, or, if there is no such provision, by the court. If the award is vacated on grounds stated in subrule (J)(1)(c) or (d), the court may order a rehearing before the arbitrator who made the award. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(~~45~~) If the ~~application~~-motion to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award.

(K) Modification or Correction of Award.

(1) A request for an order to modify or correct an arbitration award under this Rule must be by motion. If there is not already a pending action between the necessary parties, the party seeking the requested relief must first file a complaint as in other civil actions. A complaint to correct or modify an arbitration award must be filed no later than 21 days after the date of the arbitration award.

(2) On ~~application motion of a party made filed~~ within ~~90~~21 days after ~~delivery of a copy of the date of~~ the award ~~to the applicant~~, the court shall modify or correct the award if:

(a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;

(b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or

(c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If the ~~application motion~~ is granted, the court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected. Otherwise, the court shall confirm the award as made.

(3) ~~An application motion~~ to modify or correct an award may be joined in the alternative with ~~an application motion~~ to vacate the award.

(L)-(N) [Unchanged]

II. Reasons Supporting the Proposal

The proposed amendment of MCR 3.602, addressing court actions related to arbitration, contains two material revisions. Both relate to procedure only, not the substantive grounds upon which an award can be vacated or confirmed or the issue of enforcing arbitration agreements.

1. The current version of the Rule uses the word “application” to describe a type of proceeding in the circuit court. “Application” is not a defined term within the Michigan Court Rules or in the Arbitration Act, MCL 600.5025. The proposed changes eliminate the term “application,” and substitute the word “motion” or “complaint,” depending on whether there is already a pending action.

2. The current version of the Rule does not provide clear guidance on how to bring a post-arbitration action (to either confirm or vacate) under two possible procedural scenarios: (1) where an action has already filed and remains open with the Court (perhaps a lawsuit to compel arbitration was filed and the case was left open pending conclusion of the arbitration), and (2) where there is not an open case with the Court when the time comes to either confirm or vacate the award. In the former scenario, the proposed revision replaces “application” with “motion.” In the latter scenario, the proposed revision clarifies that a complaint must first be filed, and then also a motion (consistent with the spirit of the existing text of MCR 3.602(B)(1), which is also clarified).

The amendment also sets timing deadlines consistent with the time frame allowed under the Federal Arbitration Act. Synchronizing the state and federal time periods aids the uniformity of the law and practice and can be important if an action is removed to federal court and to avoid potential arguments about pre-emption.

III. Fiscal Impact

No fiscal impact is anticipated.

IV. Staffing Impact

No staffing impact is anticipated.

V. Prior Assembly Action

The Assembly has not taken any prior action on this subject.

Respectfully submitted by:

Ronald S. Longhofer

Chair, Civil Procedure and Courts Committee

November 12, 2004