



THE LITIGATION NEWSLETTER



SPRING 2009



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LETTER FROM THE CHAIR

by: *James C. Partridge*

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Dear Colleagues:

Very few litigators fully utilize their potential when it comes to cross examination. Whether used at deposition or at trial, testimony elicited as a result of effective cross examinations can be crucial to obtaining a favorable result in both civil and criminal litigation. With this in mind, the Litigation Section of the State Bar of Michigan, together with the Institute of Continuing Legal Education (ICLE), is pleased to offer the Killer Cross Examination of Pozner & Dodd.

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As always, the Litigation Section Summer Conference will also provide many networking opportunities and a chance to explore and enjoy one of the most beautiful areas in Michigan; The Garland Resort located in Lewiston, Michigan. This year's attendees will start with a fine cocktail reception Friday evening followed by continental breakfast and educational program Saturday morning. The seminar ends at 3:30 pm to give you time to relax and enjoy the pleasures of Garland, one of Michigan's most beautiful resorts with four championship golf courses and 3500 acres of unspoiled wilderness. Families are welcome.

For a complete conference schedule and registration information for the 2009 Litigation Section Summer Conference, visit www.icle.org or call ICLE at 1-877-229-4350.

We hope to see you at the conference.

Sincerely,

James C. Partridge

THE DEATH OF BOILERPLATE: NEW WRINKLES IN ARBITRATION DEMAND MORE THOUGHT AND BETTER DRAFTING

by: *Daniel D. Quick** and *Richard R. Glaser***

Over the past year there have been several developments which directly affect litigators handling arbitration matters, but which also speak to lawyers who draft the arbitration agreements in the first place. Arbitration is a creature of contract. Once born, it is up to the courts to apply governing law to the creature, and there are lessons to be learned from judges' wrangling with arbitration clauses.

In this two-part series, we will first review two recent developments in arbitration law: (1) the right to third-party pre-hearing discovery and (2) evolving issues involving choice of law provisions, pre-emption and the "manifest disregard of the law" basis for moving to vacate an arbitration award. In part two, we will discuss potential drafting tips both generally and specifically for particular industries which often use arbitration clauses.

DISCOVERY RIGHTS MAY BE LIMITED IN ARBITRATION

In a recent decision that impacts a party's ability to obtain discovery in arbitration arising under the Federal Arbitration Act ("FAA"), the U.S. Court of Appeals for the Second Circuit held in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*,¹ that Section 7 of the FAA does not provide arbitrators with authority to compel pre-hearing document discovery from non-parties to the arbitration proceeding. The Second Circuit's decision resolves an issue that previously had not been addressed by that court.

The Second Circuit's decision is relevant to arbitration proceedings across the country because a clear split

among the U.S. Courts of Appeals means this important issue is likely headed for ultimate consideration by the United States Supreme Court. Like the Second Circuit, in *Hay Group, Inc. v. E.B.S. Acquisition Corp.*,² the Third Circuit previously held that the FAA does not enable arbitrators to issue pre-hearing document subpoenas to third parties. On the other hand, the Eighth Circuit held in *In re Arbitration Between Security Life Ins. Co.*,³ that the FAA does allow arbitrators to compel such pre-hearing document production. The Fourth Circuit has held that an arbitrator may subpoena pre-hearing document discovery from non-parties only upon demonstration of "special need or hardship." *Comsat Corp. v. Nat'l Science Foundation*.⁴

In the Sixth Circuit, the U.S. Court of Appeals has previously held that the FAA empowers arbitrators to issue third party document subpoenas. In *American Federation of Television and Radio Artists, AFL-CIO v. WJBK-TV*,⁵ the court noted that "the FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing." Therefore, "[t]he FAA authorizes an arbitrator to compel production of documents 'which may be deemed material as evidence in the case'," including documents from third parties.⁶

Some courts, including the Second Circuit, have suggested that the Sixth Circuit has yet to explicitly comment on the issue because the decision in *WJBK-TV* involved a suit governed by the Labor Management Relations Act. However, in *WJBK-TV*, the court expressly

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noted that it found “guidance in the FAA’s provisions and in court decisions concerning a district court’s power to enforce subpoenas under the FAA.”⁷ Thus, the Sixth Circuit’s decision was an interpretation of an arbitrator’s ability to subpoena third party documents under the FAA.

A party’s ability to obtain document discovery from third parties not involved with a dispute is often central to understanding and resolving a matter. As many parties are now turning to arbitration to resolve disputes without the expense and time commitment of traditional litigation, and as arbitration becomes an even more regular occurrence in the court system, the probable United States Supreme Court final determination of this significant issue will pave the way for how parties proceed in future arbitrations.

CHOICE OF LAW, PREEMPTION AND MANIFEST DISREGARD OF THE LAW

The U.S. Supreme Court recently invalidated a contract clause that provided for expanded judicial review of an arbitration award. In *Hall Street Associates, LLC v. Mattel, Inc.*⁸, the parties’ arbitration clause provided that the district court could vacate or modify the arbitration award if the arbitrator’s findings of facts were not supported by substantial evidence or if the arbitrator’s conclusions of law were erroneous. The Court held that the exclusive grounds for a court to vacate or modify an arbitration award when enforcement is sought under the review provisions of the FAA are the limited grounds stated in that Act. The Court reasoned that the FAA’s policy favoring arbitration is consistent with limiting judicial review to just the amount “needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” “Any other reading,” held the Court, “opens the door to the full-bore legal and evidentiary appeals that can ‘rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.’” In response to amici proclamations that the Court’s ruling would scare parties away from arbitration, the Court said it did not know whether this was the case, but “whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds.”

The direct ruling in *Hall Street* may force a reconsideration of both contractual arbitration provisions and litigation strategies. Given parties’ inability to contract for a broader judicial review, one option would be for a private review – an arbitration appellate review. Such a contract would provide that

no award is final until reviewed by a separate panel pursuant to a specified standard. Such a tact would take arbitration to an entirely new level, and place more (and deserved) attention on the initial drafting of arbitration provisions (rather than the all-too-common practice of using boilerplate). Of course, the additional cost of an arbitral appellate panel should be considered before including such a provision. In such a model, the alleged virtue of arbitration as cost-effective relative to litigation may be dubious.

Parties that desire more searching appellate review than the FAA provides may, as suggested by the Supreme Court, turn to state law. This may prompt parties to try to stipulate that their agreements to arbitrate and any proceedings to enforce arbitration awards will be interpreted and enforced under state law rather than the FAA.⁹ This, however, raises at least two questions.

First is the sticky wicket of FAA preemption. Some federal courts have held that the FAA preempts parties’ choice of law provisions which purport to govern the parties’ contract – precisely one way a party might avoid an FAA standard of review. For example, in *Jacada (Europe), Ltd. v. International Marketing Strategies, Inc.*,¹⁰ the parties’ contract contained a general choice of law provision. The district and circuit court held that the Federal Arbitration Act *per se* preempts the parties’ contractual choice of law provision such that the FAA standard of review, and not the state law standard of review, applies to the review of the award.

Such rulings arise from a bevy of potentially confusing Supreme Court rulings and subsequent lower court decisions.¹¹ Academics have noted that parties and courts have been “confus[ed]” as to the scope of FAA preemption, including whether a contractual choice of law provision should apply to the standard of review of an arbitration award.¹² And as between state and federal courts, the answer turns largely upon where you are: federal courts more freely find FAA preemption while state courts generally find no preemption, although, by the same token, there is widespread “confusion and inconsistency” between different states and even within states.¹³ Likewise, there is “confusion” among lower federal courts resulting in “a morass of inconsistent principles.”¹⁴

Hall Street provides some fodder to those who would argue for limited preemption of the FAA. In describing the FAA, the Court uses the phrase of parties “tak[ing] the FAA shortcut” to confirm, vacate or modify an award. This language suggests choice – the “taking” of a shortcut – and thus also the existence of another

choice, which must be state court adjudication even when the FAA *could* otherwise apply. More directly, the Court stated:

...we do not purport to say that [the exclusive vacatur grounds under the FAA] exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.

However, a deeper and more complex set of issues await past this threshold – exactly what is the standard of review in state courts. *Hall Street* itself cast doubt upon the primary argument raised by appealing parties in federal courts - “manifest disregard of the law.” This phrase, first used in *Wilko v Swan*¹⁵, has subsequently come to have a life of its own as an extra-statutory basis upon which to challenge awards. *Hall Street* does not hold that this is no longer a valid basis, but it comes close, as recognized by the Sixth Circuit, although there is currently a lively debate in the federal courts on the matter.¹⁶

The impact of this ruling in state court jurisprudence is unclear. The Michigan Arbitration Act, MCL 600.5001 et seq (“MAA”), as construed by the courts, includes an avenue, however narrow, to review certain substantive errors made by arbitrators. See *Detroit Auto. Inter-Insurance Exchange v. Gavin*.¹⁷ It has been noted that this standard permits a broader review than under the FAA – an observation which is certainly true should “manifest disregard of the law” be eliminated from FAA review jurisprudence by virtue of *Hall Street*.¹⁸ However, the Michigan standard of review as announced in *Gavin* has not been thoroughly re-reviewed in 27 years. *Gavin* itself consists of a broad review of previous Michigan opinions, many decided under the common law. Arguably, the ‘broader’ review permitted in Michigan emanates from the language in MCR 3.602(J)(2)(c), which permits vacatur if an arbitrator “exceeded his or her powers.” But similar language exists in the FAA (9 USC § 10(a)(4)) and has not been so broadly construed. Will Michigan’s Supreme Court follow *Hall Street* and similarly lessen the standard of review available under the MAA? Certainly such a result is possible.

The potential demise of the “manifest disregard of the law” standard should prompt a re-examination of whether parties truly desire arbitration. Elimination of this loophole, together with the inability of the parties

to contract-around the limited express FAA bases for vacatur, should result in arbitration being much more of a “one and done” process. Parties should give far more thought to whether they really want this sort of finality, free of subsequent review. Perhaps one effect of *Hall Street* will be to erode parties’ affection toward arbitration and breathe new life into the civil judicial system.

ENDNOTES

1. No. 07-cv-1197 (2nd Cir. Nov. 25, 2008).
2. 360 F.3d 404 (3d Cir. 2004).
3. 228 F.3d 865 (8th Cir. 2000).
4. 190 F.3d 269, 278 (4th Cir. 1999).
5. 164 F.3d 1004, 1009 (6th Cir. 1999).
6. *Id.* at 1010.
7. *Id.* at 1009.
8. 128 S.Ct. 1396 (2008).
9. Some courts have already adopted this approach, endorsing provisions under state law that are now impermissible under the FAA. See, e.g., *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586 (2008).
10. 401 F.3d 701 (6th Cir. 2005). The author was counsel for plaintiff-appellant in this matter.
11. The topic is too lengthy to address here, but see, among other cases, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 n.9 (2002); *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002)(Thomas, J. concurring); *Jacada, supra*; *Goff Group Inc. v. Greenwich Ins. Co.*, 231 F.Supp.2d 1147, 1153-55 (M.D. Ala. 2002); Gross, *Over-Preemption Of State Vacatur Law: State Courts And The FAA*, 3 J. AM. ARB. 1 (2004); Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2251-2 (June 2002). See also *Moore v. Omnicare, Inc.*, 2005 WL 1705827 (Idaho 2005) (Idaho standard of review applied to arbitration award over the FAA);

Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 859 A.2d 742 (2004) (same).

12. "An Unnecessary Choice," *supra* n.13.
13. *Gross*, *supra* n.13.
14. "An Unnecessary Choice," *supra*.
15. 346 U.S. 427 (1953).
16. *Martin Marietta Materials, Inc. v. Bank of Oklahoma*, 2008 WL 5272786 (6th Cir. 2008).
17. 416 Mich. 407 (1982).
18. *Jacada*, *supra* at 710.

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MICHIGAN'S NEW DISCOVERY RULES: EARLY INVOLVEMENT CAN REDUCE RISKS AND COSTS OF E-DISCOVERY

by: *B. Jay Yelton III** and *Dari Craven Bargy***

Data compilations, including electronically stored information ("ESI"), have been discoverable under the Michigan Court Rules since they became effective in 1985. So why did the Michigan Supreme Court recently amend its court rules to more explicitly address ESI? Primarily because during the last several years the quantity, complexities and risks associated with ESI have increased exponentially.

Today more than 95% of all information is created electronically and less than 3% of that information will ever be converted to paper.¹ As a consequence, organizations have to manage exponentially more ESI today than just a few years ago. In fact, the average Fortune 1000 company manages approximately 1,000 terabytes of ESI;² that is over 100 billion document pages.³ America's 9,000 midsize companies have seen their data grow from two terabytes to 100 terabytes over the past three years.⁴

Because of this rapid and exponential growth in ESI, many organizations and their attorneys are experiencing difficulties complying with discovery obligations in response to subpoenas and requests for production of documents.⁵ Because these ESI problems initially attained notoriety in federal courts, the United States Supreme Court led the way in evaluating how best to get the ESI problems under control. After a several year process, e-discovery amendments to the Federal Rules of Civil Procedure ("FRCP") became effective on December 1, 2006. The primary goal of the federal e-discovery amendments was to reduce the risks and costs associated with e-discovery. One method of accomplishing this goal was to require the

parties and courts to address e-discovery issues early in the case.

During the last few of years, state courts have been seeing a significant increase in ESI disputes.⁶ As a consequence, many states have been evaluating whether and to what extent they should follow the federal courts' lead in amending their court rules to deal with ESI problems. On December 16, 2008, the Michigan Supreme Court followed the federal courts' lead and approved several amendments to their court rules, which became effective on January 1, 2009. The extent to which these new Michigan discovery rules will reduce the risks and costs of e-discovery will depend, in part, on getting the court's early involvement with e-discovery issues.

GETTING THE COURT'S EARLY INVOLVEMENT WITH E-DISCOVERY ISSUES.

The FRCP require opposing counsel to meet and confer about potential discovery issues (FRCP 26(f)) and then to have a scheduling conference with the judge (FRCP 16). Under the 2006 amendments, opposing counsel are explicitly required to discuss ESI issues at the meet and confer and to consult with the judge at the scheduling conference to discuss any agreements by the parties regarding e-discovery. While some litigants still approach the Rule 26 meet and confer and Rule 16 scheduling conference as a standoff, the amended federal e-discovery rules attempt to force the parties to engage in some meaningful dialog regarding e-discovery and minimize discovery disputes later in the case.

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The Michigan Amendments have similar goals, but require litigants to be more hands-on in seeking the court's involvement. The Michigan Rules do not *require* a meet and confer nor do they *require* a scheduling conference before the judge. In fact, with respect to pre-trial conferences, very little may change under the new Rules unless the parties take a proactive approach. MCR 2.401 continues to allow the parties to request a scheduling conference and also allows the court discretion as to whether to conduct a scheduling conference at its own initiative.

Many state courts do not elect this option and instead, automatically generate standard scheduling orders, or permit the parties to jointly submit a form prepared by the court in lieu of an in-person conference. After surveying a sample of Michigan circuit courts, focusing on the larger Michigan counties, an overwhelming majority do not require an in-person scheduling conference as a matter of routine or compel the parties to meet and confer on any issues prior to the issuance of a case scheduling order.

The Michigan Amendments continue to permit courts to have great freedom in how they conduct pre-trial conferences and issue scheduling orders. The Amendments do *advise* the court to consider "discovery, preservation, and claims of privilege of electronically stored information." MCR 2.401(B)(1)(d). The Amendments also *permit* a court to include provisions concerning the discovery of electronically stored information, agreements concerning privilege, the preservation of electronically stored information and the form of production in the scheduling order itself. MCR 2.401(B)(2)(c). Based on the authors' survey of Michigan circuit courts, only one court (Oakland County) disclosed that it is working on changing its scheduling conference procedure in response to the new Michigan e-discovery rules.

WHEN SHOULD A PARTY ASK FOR THE COURT'S EARLY INVOLVEMENT?

As a general rule, if the stakes are higher, the more important an early scheduling conference will be. Whether you are a David or a Goliath, you should seriously consider asking for the conference if ESI will be important to the case. For example, an individual plaintiff may ask for a conference to ensure that an adequate preservation plan is in place and to put the defendant on unequivocal notice that he or she expects the preservation and production of ESI. On the other hand, a large corporate defendant may ask for a conference in order to narrow the scope of discovery

and preservation and reign in an unreasonable plaintiff who wants to see every document and drive up the costs of litigation. However, before seeking the court's involvement, each litigant should consider the following factors:

Value of the Case. The value of the case is a key factor in determining whether a scheduling conference is needed to discuss the scope of e-discovery. For example, a landlord/tenant or routine collection case does not typically warrant a scheduling conference. However, for business and employment litigation, the costs of e-discovery can quickly cost hundreds of thousands of dollars.

Quantity of Potentially Relevant E-Data. It can cost between \$.25 and \$2.50 to identify, collect, review and produce each page of ESI. Because courts are increasingly willing to approve or require parties to effectively narrow the scope of ESI that needs to be collected and reviewed, getting the court's early involvement is very important when it appears that your case could involve a large quantity of potentially relevant ESI.

Opportunity for Cost Shifting. Whether there will be an opportunity for cost shifting is another important factor in deciding whether to request an early scheduling conference. There may be a greater likelihood for cost shifting if e-discovery parameters are stipulated and the opposing party later attempts to go outside those bounds. In addition, as recent Federal cases reveal, waiting until late in the case to request cost shifting for unilaterally designed e-discovery plan, your request is likely to be rejected.⁷

Significant Privilege Issues. One of the most significant discovery costs for litigants is the vendor and attorney review time spent on searching for privileged documents. The Amendments to the Federal and Michigan Court Rules encourage agreements between the parties which address the disclosure of privileged information. For example, one such agreement, commonly known as a clawback agreement, requires the return of privileged documents inadvertently disclosed. However, litigants should be cautioned that clawback agreements and other means to reduce the risk of inadvertent e-discovery disclosures are relatively new solutions that have not been tested by many courts.⁸

Significant Confidentiality Issues. Whether document productions are likely to contain trade secrets or an individual's personal information is another

factor for seeking early court involvement. The parties need to discuss and agree on the terms of a protective order and get the court's approval of such an order as soon as possible when confidential information is likely to be within the scope of discovery.

Likelihood of E-Discovery Compliance Issues.

While many state cases progress without mention of e-discovery compliance issues, if the opposing party has already indicated he or she intends to make e-discovery an issue in the case, a scheduling conference may be helpful to avoid disproportionate costs. The Amendments under MCR 2.302(B)(6) require courts to consider whether the discovery expense outweighs the benefit. Judges will be more sensitive to the burden e-discovery costs can impose if they are advised what the case is worth versus what the transaction costs of discovery will be.

It is important to note that courts are becoming less tolerable of mistakes in e-discovery cases. *Qualcomm v. Broadcom*, sent a wave of alarm through the legal community after the court imposed \$8,568,633.24 in sanctions against Qualcomm and referred its counsel to the State Bar of California for failing to produce e-mails.⁹ While *Qualcomm* may be the most drastic sanction yet, the definition of mishandling e-discovery may vary from case to case. This is why defining what is meant by proper handling of e-discovery should be established early in the case.

ON WHAT TOPICS IS THE COURT'S EARLY INVOLVEMENT IMPORTANT?

Scheduling conferences can be used as a means to settle a number of issues. While a party may move to amend the scheduling order later in the case, the judge cannot fault the non-movant for complying with the terms of an existing court order. This is why litigants must be prepared for the conference well in advance. Before conferring with opposing counsel or the judge, it is important to have done some solid ground work, including the thoughtful consideration of the following factors:

Relevant Custodians. Know the identities of potentially relevant document custodians (for both sides if possible). Consider sending discovery requests contemporaneously with the complaint or answer to identify relevant persons with knowledge. If this is not possible, simply agree on a number of custodians.

Relevant Data Sources & Sampling. For each relevant custodian, learn where emails and other

potentially relevant ESI are stored including laptops, shared drives, smart-phones, Blackberries, portable drives, network servers, home computers, and back-up tapes. Also evaluate whether sampling data sources can help narrow the scope of discovery before discovery data is harvested.

Relevant Date Range. Parties should also try to agree during the conference that only documents generated during plaintiff's course of employment or during the statute of limitations period may be relevant. Date restrictions can substantially reduce the cost of production.

Relevant Search Terms. The use of search terms is another important way to focus on important ESI. However, before parties agree to a list of search terms, it is important to be clear about how search terms will be applied. For example, will the search terms be applied against both the text and metadata of documents? In addition, parties should consider whether to test search terms against a sample to confirm the terms are returning relevant data without too many false positives.

Data Deduplication. Several studies indicate that the exact same data is often located in 10 or more locations within an organization.¹⁰ In most cases it is unnecessary that 10 copies of the same data be collected and produced. In cases where there is likely to be a high level of duplicative relevant data, the parties should discuss and agree on protocols for reducing duplicative data within or across relevant custodians.

Use of an E-Discovery Vendor. Determine whether you want each party to employ an independent forensic vendor to collect data or whether the party's own information technology personnel have the tools and experience to conduct the collection. Using internal resources may save significant time and money, but only if they are up to the task. Considerations also include whether the parties trust each other to collect internally or whether either party suspects the other of tampering or abuse.

Production Format. The parties should be prepared to discuss and hopefully agree upon the image style (single or multi-page TIFF, PDF, etc.), whether text files and load files are to be provided and if so, for what review format (Summation, Concordance, etc.). The parties should also be prepared to agree upon what metadata will be provided, whether documents should be logically unitized and if the documents will be coded with any objective field codes. This will largely depend on which review platform each party

chooses. Agreeing to a production format is important to minimize the cost of re-doing productions which can be substantial.

Privilege and Confidentiality Concerns.

Pre-discovery negotiation provides an opportunity to limit costs associated with a privilege and confidentiality review by coming to an understanding with the opposing party on a procedure for identifying and logging privileged documents. Depending on the potential risk involved, a party may choose to forego a page-by-page attorney review altogether in favor of technology-assisted review or other alternatives. For example, the parties may agree to flag documents with certain privilege key words (e.g., names or email addresses of attorneys) and reserve them to be reviewed only if necessary after the rest of the document production is complete. Alternatively, decide whether a clawback agreement may be helpful.

In any scenario, the parties should also discuss and agree on the format, level of detail, and schedule for production of privilege logs. Greater level of detail provides more bases for challenging the opposing party's privilege claims, but also creates greater burden and expense for the parties.

Scope of Data Preservation. Be prepared to propose what documents and data types to preserve. If the defendant stores a large amount of electronic data on inaccessible sources, it may wish to seek agreement from the opposing party and/or the court that certain data need not be preserved.

Accessibility of ESI. Rule 2.302(B) was amended to place an additional limitation on the scope of discovery. Rule 2.302(B)(6) now provides that a party need not produce ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost (however, the duty to preserve that ESI will likely still be applicable). Whether data is "readily accessible" will largely depend upon how your data is stored and where it is located. These factors ultimately translate into the costs of accessing and producing ESI. While the issue of whether data is readily accessible will typically arise in the context of a motion to compel or motion for protective order, knowing your client's data systems may allow you to utilize the court early on to further limit the scope of discovery and consider shifting the costs of e-discovery to the requesting party.¹¹

CONCLUSION

Litigants should give careful consideration to the extent to which ESI will play a role in each case and assess

whether to obtain the court's early involvement before discovery disputes arise. Success in an ESI case is most often accomplished long before issues arise during discovery. In every case, know the potentially relevant data sources, calculate the costs involved with collection and review and formulate a reasonable discovery plan early. Michigan's amended discovery rules can be of great benefit to those who take a proactive approach.

ENDNOTES

1. "All of the recent studies show that somewhere between 93 and 97 percent of all information is now created electronically. It is commonly accepted that less (some would say *much* less) than 3 percent of that information will ever be converted to paper." Sharon D. Nelson, Bruce A. Olson & John W. Simek, *The Electronic Evidence and Discovery Handbook, Forms, Checklists and Guidelines* (ABA 2006).
2. Lucas Mearian, *A Zettabyte by 2010: Corporate Data Grows Fiftyfold in Three Years*, Computer World, March 6, 2007.
3. The 100 billion document pages is a rough estimate because converting terabytes or gigabytes of ESI into number of document pages can vary widely depending on the type of ESI. For example, it is estimated that one gigabyte of ESI converts into 17,552 pages of PowerPoint files, 64,782 pages of Word files, or 165,791 pages of excel files. See <http://web.monroec.edu/ETSTechNEWS/pagespergigabyte>.
4. Lucas Mearian, *A Zettabyte by 2010: Corporate Data Grows Fiftyfold in Three Years*, Computer World, March 6, 2007.
5. *United States v. Phillip Morris USA, Inc.*, 327 F.Supp.2d 21 (D.D.C., 2004) (inappropriate deletion of ESI: \$2,750,000 in sanctions and evidence preclusion); *Zubulake v. UBS Warburg, L.L.C.*, 220 F.R.D. 212 (S.D.N.Y. 2003) (inadequate preservation and production of ESI: adverse inference jury instruction, assessed \$232,500 in costs and eventual \$29 million judgment including \$20 million in punitive damages); *Danis v. USN Communications, Inc., et al.*, No. 98 C 7482, 2000 WL 1694325 (N.D. Ill. Oct. 23, 2000) (inadequate ESI preservation and collection procedures: adverse inference jury instruction, \$10,000 fine against

- CEO and \$1.5 million in discovery motion fees); *In re Fannie Mae Securities Litigation*, 552 F.3d 814 (D.C. Cir. 2009) (contempt citation for failure to comply with ESI discovery obligations).
6. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.*, No. SC07-1251, 2007 WL 4336316 (Fla. Dec. 12, 2007)(jury instruction given regarding defendant's willful destruction of emails leading to \$1.58 billion award to plaintiff in case overturned on unrelated grounds); *Ingolia v. Barnes & Noble College Booksellers, Inc.*, 2008 WL 458504 (N.Y. App. Div. Feb. 19, 2008)(court ordering dismissal of plaintiff's action due to plaintiff's intentional spoliation of files on home computer); *State ex. rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, No. 2007-1694, 2008 WL 5157733 (Ohio Dec. 9, 2008)(court ordering defendant to restore deleted emails at its own cost where emails were deleted in violation of defendant's document retention schedule); *State ex rel. Gehl v. Connors*, No. 2006AP2455, 2007 WL 3024436 (Wis. Ct. App. Oct. 18, 2007) (affirming denial of petition requesting emails from 150 backup tapes and more than 30 employee hard drives where request encompassed virtually every email passed between county employees encompassing virtually all county zoning matter during two-year period); see e.g. *Martinez v. General Motors*, Docket Nos. 266112, 267218, 2007 WL 1429632 (Mich. Ct. App. May 15, 2007) (motion for sanctions for spoliation of ESI);
 7. *Cason-Merenda v. Detroit Med. Ctr.*, Civil Action No. 06-15601, 2008 WL 2714239 (E.D. Mich. July 7, 2008).
 8. Michael Kozubek, *Protecting Privilege - New Rule 502 mitigates the risk of inadvertent e-discovery disclosures*, Inside Counsel, February 2009.
 9. *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B (BLM), 2008 WL 66932 (S.D. Cal. Jan 7, 2008).
 10. GarnerGroup RAS Services, R-12-6295 publication, 20 February, 2001.
 11. *CBT Flint Partners, LLC v. Return Path, Inc.*, Civil Action File No. 1:07-CV-1822-TWT, 2008 U.S. Dist. LEXIS 84189 (N.D. Ga. Aug. 7, 2008) (court ordered production of 500,000 pages on condition that requesting party pay \$300,000 for the costs of the privilege review); *Thielen v. Buougiorno USA, Inc.*, Case No. 1:06-CV-16, 2007 U.S. Dist. LEXIS 8998 (W.D. Mich. Feb. 8, 2007) (finding good cause for the inspection of plaintiff's home computer under court-imposed conditions, including allocation of all forensic examination costs to requesting party).

ACCRUAL OF LATENT DISEASE CLAIMS UNDER *TRENTADUE V BUCKLER LAWN SPRINKLER CO.*

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EXECUTIVE SUMMARY

The Supreme Court's decision in *Trentadue* that the statute of limitations had run when harm to Plaintiff's decedent took place, and not when Plaintiff discovered the possible cause of action, has implications for the application of the statute of limitations defense in cases involving latent injuries, although the specific facts of the case make its application in other cases less than clear. In toxic tort cases, a threshold question is what constitutes "harm" to plaintiffs, and when does "harm" occur. The *Trentadue* decision does not address these questions, at least in the context of latent injury claims.

It is possible that claims based on breach of an implied warranty of quality or fitness might be treated differently, because of a separate statutory provision for discovery, but since negligence underlies every claim of breach of warranty of quality, *Trentadue's* rejection of a discovery principle may yet be applied.

In time there may develop some clarity in the law pertaining to latent injury cases and the accrual of claims. *Trentadue* changes existing law but does not provide much in the way of such clarity. Trial and error through the course of extended motion practice lies ahead.

For decades, Michigan courts applied the so-called common-law "discovery rule" to determine the date of accrual of tort claims, including latent disease-based product liability claims.¹ Under this rule, plaintiff's cause of action accrued, and the limitations period commenced to run, when the plaintiff discovered, or through the exercise of reasonable diligence

should have discovered, the possible cause of action associated with the injuries sustained.²

This has changed with the Michigan Supreme Court's recent decision in *Trentadue v Buckler Automatic Lawn Sprinkler Co.*³ Although *Trentadue* did not arise in a product liability context, the court declared that there is no legal basis for interpreting the accrual of claims under a discovery rule. In fact, the *Trentadue* decision expressly overrules those precedents by which the 'discovery rule' became part of Michigan's common law.⁴ The court held that the language of Michigan's accrual statute, MCL 600.5827, requires that accrual will be determined by the date when plaintiff was "harmed."⁵

A brief summary of the factual context and procedural history of the *Trentadue* matter follows, followed by an analysis of certain practical problems that attend its application outside the context of 'typical' bodily injury cases. The purpose of this article is to analyze the impact of this decision on latent-disease product liability cases governed by Michigan law.

TRENTADUE V BUCKLER AUTOMATIC LAWN SPRINKLER CO

Trentadue arose from the rape and murder of a woman at her leased residence on an estate in 1986. The crime was unsolved until 2002, at which time DNA evidence established the identity of the person who committed the rape and murder, an employee of a sprinkler contractor working on the estate. In that same year the victim's representative filed suit against the alleged killer, his employer (the contractor), the owner of the estate and others, with claims sounding in negligence.

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The defendants, with the exception of the alleged killer, moved for summary disposition arguing that the action was barred by the three-year statute of limitations applicable to wrongful death claims. The trial court granted the motion on the statute of limitations and denied as to other motions unrelated to this analysis. The Michigan Court of Appeals reversed the ruling on the limitations period, holding that the common law discovery rule tolled the accrual of the cause.

The Michigan Supreme Court granted leave and then rejected the lower courts' reliance on the "discovery rule." The court rejected the argument that the claims of the estate did not accrue until the identity of the killer was discovered. In so ruling, the court relied in particular on the language of two statutes. One is MCL 600.5805(10), which states: "The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." The other is MCL 600.5827, which states:

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections **the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.** (Emphasis added).

The court quickly pointed out that the meaning of these words in MCL 600.5827 had been interpreted in earlier decisions to mean that "[t]he wrong is done **when the plaintiff is harmed** rather than when the defendant acted" (emphasis added).⁶

Although the *Trentadue* court acknowledged that it had applied the discovery rule in prior decisions, including a pharmaceutical products liability action involving claims of latent disease, *Moll v Abbott Laboratories*,⁷ a DES case in which it was alleged that a mother's ingestion of diethyl stilbesterol caused injuries to her daughter in utero, resulting in the daughter's cancer which manifested decades after birth. Despite this precedent, the *Trentadue* court declared that the Michigan legislature had specifically exercised its power to establish tolling based on discovery under particular circumstances (e.g., medical malpractice claims and claims of fraudulent concealment), but had not provided for a general discovery rule that tolls or delays the time of accrual in other matters. As such, the court concluded that "courts may not employ an extra-

statutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827."

In the context of the facts before it, the court ruled that the wrong was done when the decedent was raped and murdered in 1986. Plaintiff's claims accrued at the time of the decedent's death, even though Plaintiff did not discover, and likely could not have discovered the identity of the killer until DNA technology made this possible some 10 years or more after the 3 year limitations period had expired.

APPLICATION OF TRENTADUE TO LATENT INJURY CLAIMS

The *Trentadue* court's proscription of the common-law "discovery rule" was broad, although the decision arose from circumstances involving a patent, not latent, injury. Many questioned whether the court intended its ruling to apply in cases of latent disease or injury, although there were reasons to believe that the court intended just such a result. The question has been addressed at least once, as of this writing, by the Michigan Court of Appeals in a recent, unpublished decision, *Bearup v General Motors Corp.*⁸ Plaintiffs in *Bearup* brought a product liability action against a manufacturer and seller of metalworking fluids, alleging that defendant failed to warn of adverse health effects allegedly caused by inhalation of mist from the fluids. According to plaintiffs, their injuries included, but were not limited to, reduced and impaired breathing capacity, respiratory problems, reduced oxygen diffusion capacities, loss of lung function, chemical sensitivity and hypersensitivity, reduced blood oxygen levels, and interstitial lung disease, some of which injuries were "latent" in nature.

Defendant moved for summary disposition based in part on the statute of limitations, arguing that plaintiff's claims were barred by application of the "discovery rule."⁹ The manufacturer also moved for summary disposition based on the "sophisticated user" doctrine, based on General Motors' status as a bulk purchaser of their metalworking fluid products. The trial court granted summary disposition to defendant on both grounds.

Analyzing the trial court's grant of summary disposition based on application of the "discovery rule," the Michigan Court of Appeals noted that the Supreme Court's decision in *Trentadue* "completely eliminated" the common-law discovery doctrine in Michigan, and that, after *Trentadue*, the discovery rule only applies if the legislature specifically provides for same. The

Bearup court also acknowledged that the Supreme Court specifically stated that prospective-only application of its decision in *Trentadue* is inappropriate, and ruled that the trial court erred in applying the discovery doctrine in analyzing the timeliness of plaintiffs' claims and in granting summary disposition on statute of limitations grounds. Nevertheless, the Court of Appeals declined to address the accrual issue further, stating that additional discussion was unnecessary in that summary disposition was properly granted based on application of the "sophisticated user" doctrine.¹⁰

WHEN DOES HARM OCCUR?

Unfortunately, the *Trentadue* court's decision provides scant practical guidance as to the appropriate means of analyzing accrual in the context of latent disease or injury-based tort claims, absent application of a "discovery rule." In most injury cases, the point at which the plaintiff is "harmed" is readily discernable. In cases of latent injury, which are common to many toxic exposure actions, the precise moment at which plaintiff is harmed is a mystery, even to science. Indeed, the very meaning of "harm" becomes complicated in latent injury matters.

Consider a typical case, in which the plaintiff's injury occurs simultaneously with the symptoms of that injury, or within a relatively short time before the development of those symptoms. In a latent disease case the injury may start with discrete, microscopic changes at a cellular level before the existence of disease or injury could manifest clinically, and before any symptoms would be noticed by even the most sensitive individual. Thus, there could be a significant gap in time (perhaps years, or decades) between the changes that constitute the initial stages of "injury" and the manifestations of harm to the plaintiff, such as symptoms, pain, etc.

HARM' VS THE MANIFESTATION OF 'HARM'

It is at this point of the accrual analysis where guidance from *Trentadue* is lacking. Is there "harm" to the plaintiff when the first cellular changes constituting "injury" take place, even though they have yet to manifest in the form of symptoms of which the plaintiff could be aware? Alternatively, is it more practical to treat "harm" as something that is at least clinically discernable, if not symptomatic?

In its 2005 decision in *Henry v Dow Chemical Co*,¹¹ the Michigan Supreme Court noted, in rejecting a medical monitoring claim, that "mere exposure to a

toxic substance and the increased risk of future harm" does not constitute an "injury" for tort purposes. Rather, the court concluded, it is a "present physical injury," not fear of an injury in the future, that gives rise to a cause of action under a negligence theory. Interestingly, the *Henry* court stated in a footnote that, in rejecting claims for medical monitoring, persons exposed to toxic substances would not necessarily experience statute of limitations problems if physical harm only later became manifest, given the existence of the "discovery rule."

The legislature, when it enacted MCL 600.5827, set forth a purely objective standard of accrual, one that triggers the running of the three-year statute of limitations on a single event: "at the time the wrong upon which the claim is based was done regardless of the time when damage results." The Supreme Court in *Trentadue* declared that some judicial gloss on this statute is acceptable, citing its *Boyle* decision, in which "the time the wrong was done" became "the time when 'harm' came to the plaintiff," while stating that judicial gloss in the form of the discovery rule (from its decision in *Johnson v Caldwell*, *supra*) is unacceptable. What then constitutes "harm," or when does "harm" occur?

"MANIFEST" INJURY

Trentadue is bereft of guidance as to the determination of accrual in a latent injury context. The predominant majority of sister jurisdictions apply a variation of the "discovery rule" in such matters, but there is limited case law from a few jurisdictions which may provide some reasonable direction. One such case is *Griffin v Unocal Corp*,¹² where the Supreme Court of Alabama addressed the issue of accrual and "manifest present injury" in the context of toxic tort cases in which there was no applicable statutory discovery rule.¹³ The *Griffin* court adopted the following meaning of "accrued":

The proper construction of the term "accrued" in § 6-2-30(a) in the context of toxic-substance exposure cases should honor the rule that a cause of action accrues only when there has occurred a manifest, present injury. I understand "manifest" in this context to mean an injury manifested by observable signs or symptoms or the existence of which is medically identifiable. "Manifest" in this sense does not mean that the injured person must be personally aware of the injury or must know its cause or origin. All that is required is that there be in fact a physical injury manifested, even if the injured person is ignorant of it

for some period after its development. This approach is mandated by the rule . . . that “plaintiff’s ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, [does not] postpone the running of the statute [of limitations] until the tort or injury is discovered.” An oft-declared companion rule is that “this Court will not apply the discovery rule unless it is specifically prescribed by the Legislature.”

We operate within our proper sphere when we undertake to determine the construction that should be ascribed to the legislatively prescribed term “accrued” in § 6-2-30(a); we would operate outside that sphere were we to attempt to add to the text of § 6-2-30(a) so as to superimpose some sort of discovery feature. Thus, I reject the notion that our prior and present requirement of a “manifest,” present injury means that the injury must be obvious to and known by the injured party. That would simply represent the creation of a type of discovery rule. I reaffirm that creation of a discovery rule lies within the province of the legislature, which is equipped to weigh the competing public-policy arguments and to fashion variations of discovery principles tailored to the particular nature of each affected cause of action. . . .

Thus, as used in the phrase “manifest, present injury,” the word “manifest” designates a condition that has evidenced itself sufficiently that its existence is objectively evident and apparent, even if only to the diagnostic skills of a physician.

An injury manifests itself “when it has become evidenced in some significant fashion, whether or not the patient/plaintiff actually becomes aware of the injury.”¹⁴

The reasoning adopted by the Alabama Supreme Court in *Griffin* is arguably in accord with the decisions of the Michigan Supreme Court in both *Trentadue* and *Henry*. Moreover, the requirement of a “present physical injury” does not operate to bar a cause of action before it accrues. Further, under MCL 600.5827, a definitive diagnosis is not required before a claim is properly deemed to have accrued.¹⁵ Defense counsel can reasonably anticipate that the trial courts will require, consistent with *Henry*, a “present physical injury” to trigger the accrual of an latent injury claim.

The constellation of facts which may give rise to a viable statute of limitations defense under *Trentadue* is not readily subject to prognostication, and counsel’s analysis will necessarily have to be made on a case-by-case basis.

THE “DISCOVERY RULE” AND IMPLIED WARRANTY CLAIMS

As noted by the Michigan Court of Appeals in *Bearup v General Motors Corp*, after *Trentadue*, the discovery rule applies only if the legislature specifically provides for it. There is no statutory accrual provision among the statutes cited in MCL 600.5827 (specifically, MCL 600.5829 through 600.5838) that is applicable to ordinary negligence or gross negligence-based product liability claims, e.g., negligent failure to warn. Therefore, the rule of accrual espoused in *Trentadue* (in essence, a claim accrues when there is harm, irrespective of a claimant’s discovery of the harm or its cause) would apply to such claims. However, among the referenced statutes is MCL 600.5833, governing accrual of breach of warranty of quality or fitness claims. This statute does indeed include a discovery rule applicable to such claims. Specifically, the statute provides:

In actions for damages based on breach of a warranty of quality or fitness the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered.

Consequently, if the ordinary negligence and gross negligence claims were deemed untimely under a *Trentadue*-governed accrual analysis, a discovery rule analysis would, at first blush, still be required with respect to implied warranty claims, if pleaded. However, in many instances, the continued viability of a “discovery rule” analysis pursuant to MCL 600.5833 will not necessarily preclude a successful defense on statute of limitations grounds in cases involving allegations of design defect and failure to warn.

It is well-settled that “[t]he distinction between the elements of negligence and breach of implied warranty is that, in the former, plaintiff must prove that the product defect was caused by the manufacturer’s negligence, whereas under the warranty theory, plaintiff need only establish that the defect was attributable to the manufacturer, regardless of the amount of care utilized by the manufacturer.”¹⁶ However, the Michigan Supreme Court, while recognizing the continued separate existence of the two theories in certain

contexts, has held “that in a products liability action against a manufacturer, based upon defective design, the jury need only be instructed on a single unified theory of negligent design.”¹⁷ Moreover, when liability in a product liability context turns on the adequacy of a warning, the issue is again one of reasonable care, regardless of whether the theory pled is negligence or implied warranty.¹⁸

Since reasonable care underlies both theories, if a plaintiff has pleaded theories sounding in both negligence and breach of implied warranty based on allegations of defective design or failure to warn or reasonable care or reasonable safety, and assuming that a particular claim is not also otherwise readily disposed of under a “discovery rule” analysis, an appropriate motion for summary disposition as to the negligence claims may also seek to dispose of the breach of implied warranty claims pursuant to *Smith, Prentis* and their progeny.¹⁹

LATENT INJURY CASES FOLLOWING TRENTADUE: PRACTICAL CONSIDERATIONS

The possibility of motion practice on the statute of limitations has become stronger in latent injury cases as a consequence of the *Trentadue* decision. The difficulty is not “sniffing out” the possibility for a statute motion. The difficulty is figuring out how to interpret the evidence to make the argument for accrual.

Take, for example, a toxic exposure case in which plaintiff’s work around a toxic substance is alleged to have caused a lung condition which results in shortness of breath as the first of many signs and symptoms associated with the disease related to this toxin. Suppose further that the disease has what is known as a “latency” period, which means that the exposure-related condition does not manifest clinically or symptomatically for a period of 15 or 20 years after the onset of exposure.

Suppose also, in this hypothetical, we obtain medical records during discovery that reveal a comment made by plaintiff to a treating physician that his shortness of breath started “about two years ago.” If that statement was recorded on a date that fell three years before filing, it would be reasonable to assume that symptoms manifested 5 years before the commencement of suit. Complicating things, however, is the fact that there may have been little or no clinical correlation between these complaints and the hallmarks of the disease that plaintiff claims he developed from exposure.

Assume further, in this scenario, that the undiagnosed symptoms did not become part of an exposure-related

diagnosis until later, say one year before the filing of suit. Did the “harm” take place when the symptoms started, or did it manifest when the condition was diagnosed with the support of clinical data that had not been detected, or at least not generated, before that time? *Trentadue* sheds no light on the meaning of the word “harm” in these respects.

Taken to its logical extreme, it would seem that *Trentadue* compels us to consider “accrual” to refer to the earliest manifestation of harm, even if plaintiff was unaware of it, and even if physicians found no evidence of harm in any clinical sense at that time. For example, if every inhalation of the hypothetical toxin is an insult or injury to the lung, did the cause accrue with the onset of exposure, before the first symptom? This seems a ridiculous conclusion, and difficult to reconcile with the above-referenced ruling in *Henry v Dow Chemical Co*, even if it is a logical extension of the *Trentadue* court’s reasoning.

So is it better to consider accrual to be understood as the court in Alabama articulated it? If the “harm” occurs and the cause accrues when “manifested by observable signs or symptoms,” then does the plaintiff’s shortness of breath trigger the running of the period of limitations? It may be so, for we recall that even the Alabama court in *Griffin* held that “manifest harm” does not mean that the injured person must be personally aware of the injury or its cause. “All that is required is that there be in fact a physical injury manifested, even if the injured person is ignorant of it for some period after its development.”

DISCOVERY TACTICS

Discovery in cases of occupational exposure must include subpoenas to secure the Worker’s Compensation files generated at or near the last date of employment, if there are such files. Often the “Basic Report of Injury” contains characterizations made by plaintiff’s worker’s comp attorney about the nature of harm and its alleged relationship to the job. For example, Plaintiff may have signed a Basic Report that identifies his or her injuries as “lungs, heart” and more, occurring as a result of “exposure to dust, fumes and toxins in the workplace.”

This information, if prepared and filed by plaintiff outside the limitations period, may serve as evidence of “harm” of the sort envisioned by the *Trentadue* court. Admittedly, this sounds much like evidence of plaintiff’s “discovery” of injury. Still, we should consider such evidence as relevant under *Trentadue*, but viewed a bit

differently than under the old common-law “discovery rule.”

If, as in the hypothetical “Basic Report of Injury,” the plaintiff signed a statement declaring that he suffered injuries to the lungs as a result of dust and fumes in the workplace, this can be treated as an admission that plaintiff had discovered his work-related injuries at least as of that point. Although *Trentadue* tells us that plaintiff’s discovery of the injury and its potential relationship to the job is not relevant under the statute, this declaration by plaintiff provides circumstantial evidence that there was an injury, that there was “harm,” and that the cause had accrued at least as of the time plaintiff filed the “Basic Report” and probably somewhat earlier. This fact, even without the discovery rule, is legally and logically relevant to the statute analysis under *Trentadue*.

Said differently, if the “harm” analysis of *Trentadue* focuses upon the manifestation of clinical signs and/or symptoms, it must be relevant that at least as of the date he signed the “Basic Report” the plaintiff was experiencing symptoms that may have constituted an injury. Thus, even without a “Basic Report of Injury” to work with, questions of the plaintiff at deposition as to when he first noticed his symptoms or discovered a potential cause for the symptom would seem clearly relevant.

ANALYZING MEDICAL RECORDS

Gathering medical records from treating physicians is common practice in injury cases, but the manner in which we analyze them under *Trentadue* will be arguably different. Instead of looking for the first diagnosis of the disease over which suit is brought, we may now be looking for even earlier records of clinical signs and symptoms of that disease. Remember, it is not necessary to establish that plaintiff or his physicians knew that the condition was actionable, only that there was “harm,” at which point plaintiff’s obligation to exercise due diligence is triggered and the limitations period starts to run.

It is difficult to believe that even the tiniest clinical finding consistent with the injury or disease ultimately complained of will suffice to trigger the statutory period to running, particularly since such findings are most often non-specific, not “agent-specific” of a particular disease, much less a particular cause. However, some constellation of clinical signs, reported symptoms and other data may suffice to convince a court that accrual took place, under a *Trentadue* analysis, even before

plaintiff and his doctors knew of the ultimate diagnosis and its relationship to defendant’s product.²⁰

CONCLUSION

In time there may develop some clarity in the law pertaining to latent injury cases and the accrual of claims. *Trentadue* changes existing law but does not provide much in the way of such clarity. Trial and error through the course of extended motion practice lies ahead.

ENDNOTES

1. *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963); *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993).
2. *Moll*, at 29
3. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007).
4. *Id* at 393.
5. “The wrong is done when the plaintiff is harmed rather than when the defendant acted.” *Id* at 388 (citing *Boyle v General Motors Corp*, 468 Mich 226, 231-232, n5; 661 NW2d 557 (2003)).
6. *Id*.
7. *Moll v Abbott Laboratories*, 444 Mich 1, 506 NW2d 816 (1993).
8. *Bearup v General Motors Corp*, 2008 WL 4684098 (Mich App).
9. Specifically, the defendant metalworking fluids manufacturer contended that plaintiffs either discovered or should have discovered an injury and a causal connection between the injury and the defendant more than three years before they filed their cause of action. Plaintiffs, in turn, argued that symptoms alone were not sufficient to put them on notice of their injuries or the cause of their injuries, and that their cause of action did not accrue until they received medical diagnoses.
10. In a footnote, the *Bearup* Court also stated: “In light of *Trentadue*, we would urge the Legislature to enact statutory discovery rules for product liability actions involving latent injuries and other cases in which a plaintiff suffers a latent injury or is otherwise unable to discover the existence of a

cause of action." *Bearup v General Motors Corp*, 2008 WL 4684098 (Mich App) at 7, fn. 8. On September 26, 2007 a Senate Bill was introduced (SB No. 817) and referred to the Committee on Judiciary, with its sponsors seeking to amend MCL 600.5827 to read as follows: "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 or, in cases not covered by sections 5829 to 5838, when the plaintiff discovers or through the exercise of reasonable diligence should have discovered the elements of the cause of action, including the identity of the defendant." The bill sponsors sought to have the amended statute apply to actions arising before the date of enactment as well. No further action on the bill has taken place as of this writing.

11. *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005).
12. *Griffin v Unocal Corp*, 990 So2d 291 (2008); see also *Wade v Danek Medical Inc*, 182 F3d 281 (CA 4 1999) (applying Virginia law and acknowledging that, under same and except where a statutory exception applies, the limitations period begins running at the time of initial injury, not at the time of diagnosis or discovery).
13. In *Griffin*, the court adopted the reasoning of the dissent of one of its justices in a prior case as its opinion in the *Griffin* matter. The portion of

Griffin quoted herein is from the text of the dissent so adopted, attached to the *Griffin* opinion as an appendix.

14. *Griffin v Unocal Corp*, 990 So2d at 310-311, citing *Travis v Ziter*, 681 So2d 1348, 1354 (Ala 1996) and *Marriage & Family Center v Superior Court* (1991) 228 CalApp3d 1647, 1654 [279 CalRptr 475].
15. A definitive diagnosis was not a prerequisite to accrual even under the "discovery rule." See, e.g. *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 246; 492 NW2d 512(1992)
16. *Smith v ER Squibb & Sons Inc*, 405 Mich 79, 89; 273 NW2d 476 (1979).
17. *Prentis v Yale Manufacturing Co*, 421 Mich 670, 695; 365 NW2d 176 (1984).
18. *Smith v ER Squibb & Sons Inc*, 405 Mich 79, 90; 273 NW2d 476 (1979).
19. See also *Glavin v Baker Material Handling Corp*, 144 Mich App 147, 373 NW2d 272 (1985).
20. *Hohendorf v Meagher*, 188 Mich App 400, 470 NW2d 418 (1991); *Stinnett v Tool Chemical Co Inc*, 161 Mich App 467, 411 NW2d 740 (1987).

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