

THE LITIGATION NEWSLETTER

Summer

2003

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Chair's Letter

STATE BAR OF MICHIGAN LITIGATION SECTION 2002 – 2003 ANNUAL REPORT

Submitted by: *Anne Warren Bagno*
Litigation Section Chairperson

The Litigation Section has once again enjoyed a year filled with successful professional programs, with a newsletter filled with program information and substantive articles and with multiple opportunities to interact with other litigators. The Litigation Section has also maintained its commitment to the improvement of the administration of justice.

The Section's Program Committee, under the capable direction of Tom Cavalier and in conjunction with the Institute for Continuing Legal Education, sponsored three banner programs with nationally recognized luminaries in the Masters in Litigation Series. Targeted at litigators who have reached the advanced level, these seminars focused on both procedural and substantive aspects of litigation. Robert Musante led participants on April 24, 2003 in "How to Take a KILLER Deposition," an animated and dynamic program for sharpening deposition techniques. On May 8, 2003, Dana K. Cole presented "Psychodrama For Litigators," a compelling, hands-on approach to addressing the jury and examining and cross-examining witnesses at trial. Finally, Ed Pappas offered "Ed Pappas on Business Torts: Posturing to Prevail" on June 24, 2003, a stimulating presentation on the now hugely active area of business tort litigation. The collaboration between the Litigation Section and ICLE continues to be extremely successful in presenting high quality programs at an attractive price. With ICLE's Section discount, savings for Litigation Section Members surpass the Section dues of the entire year.

Another exciting collaborative effort is in the works with ICLE. A new program is being planned by Shel Stark, ICLE Education Director, entitled "Litigation Boot Camp – Basic Training for Every Litigator." The Litigation Section Council voted to sponsor and support the program. "Litigation Boot Camp" will provide practical and comprehensive litigation training for new lawyers that promises to provide a sound and memorable beginning to a litigator's career. The program will consist of nine separate sessions from September through May lasting

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two hours each. The curriculum includes client intake and conflicts of interest, pleadings, discovery plans, depositions, motion practice, negotiating settlements and using ADR, expert witnesses, trial preparation, and civility and professionalism.

The Section held its eighth Summer Conference on the last weekend in July. Under the diligent leadership of Susan Keener, the Summer Conference Committee organized numerous activities for Litigation Section members and their families at the JJ Resort. The traditional Saturday morning substantive program, entitled "Winning Your Trial: Techniques for Effective Advocacy," was hosted by Joseph V. Gustafarro and James W. Jeans, Sr. Once again, the social programs and activities were geared to members and their families, including the welcome reception Friday evening, followed by a rodeo. After the educational program on Saturday, participants enjoyed horseback riding and playing golf. The conference concluded with a Family Barbecue Saturday night. The Section once again retained the capable support of Special D Events of Troy, Michigan to handle logistics related to the conference, including advertising, registration, planning and onsite coordination. The Summer Conference Committee was also successful in obtaining sponsorship from a number of entities to help defray the cost of the conference.

The Litigation Section's Rules and Legislative Committee, under the dedicated leadership of Lynn Shecter, analyzed and commented upon numerous proposals circulated by the State Bar of Michigan, the Michigan Supreme Court and the Legislature. The activity of this committee permits our members to have a voice in the ongoing improvement of the practice of law in the State of Michigan.

Another prominent feature of the Litigation Section's activities included the publication of the Litigation Section Newsletter, under the skilled direction of Brad Sysol. Three issues were published this year, which included substantive articles on a number of

litigation topics, as well as program information and reminders.

The Litigation Section also continued its ongoing commitment to improving the administration of justice. For example, it became an official sponsor and contributed \$1,000.00 to the first Michigan Conference on Racial and Ethnic Fairness in the Legal System, which was held in April, 2003 in Detroit. The Litigation Section Council also approved a \$2,000.00 contribution to the Michigan High School Mock Trial Tournament through the Center for Civic Education Through the Law.

Preliminary efforts also were made to form a collaborative relationship between the Litigation Section and the Inns of Court. Chair Anne Bagno and Council Member Steve Wolock approached members of the Inns of Court to explore future programming opportunities and other areas of shared interests.

Thanks to the technological support of Dickinson Wright, PLLC, the Litigation Section Council was able to meet several times over the course of the year by video conference from that firm's offices in Detroit, Lansing and Grand Rapids. The Section's Executive Committee met by conference call one week prior to each Council meeting to discuss pertinent matters and to refine the agenda for the upcoming Council meeting.

The Section's financial condition is healthy. The success of the Litigation Section is the direct result of the ongoing commitment and diligent activity of the Litigation Section Council and its Committees. This Section will continue to thrive and provide improved services to its members under the capable leadership of Chairperson-elect Bob June, Secretary Kevin O'Dowd and Treasurer Gordon Gold.

Respectfully submitted,

Anne Warren Bagno, Chairperson
Litigation Section

Financial Statement Schemes – Error or Fraud? *Part III, Overstating Assets*

by: *Susan Henry*
Senior Manager, BDO Seidman, LLP

This article is the third of a four part series that describes the primary categories of financial statement schemes that, once detected, lead to the restatement of a company's financial statements.

Some of the most notorious balance sheet frauds occurred in the 80's and early 90's, and remind us that these frauds are not sustainable and typically end through the demise of the company. For example, the ZZZZ Best Carpet Cleaning fraud involved a company supposedly worth \$200 million that in reality had no assets. Crazy Eddie's, an east coast electronics retailer, overstated inventory by \$80 million. In both of these cases, the parties perpetrating the fraud were convicted and ultimately served time. In the early 90's, the pharmacy-retailer PharMor became the biggest corporate scandal in U.S. history prior to Enron. These companies are examples of financial statement frauds involving overstatement of assets, and illustrate the ultimate demise of companies with financial statements that lack substance.

Now enter the 90's, where corporate America experienced a broad phase of market expansion. The unfortunate part of this growth, however, is the fictitious part demonstrated on some companies' financial statements in the form of earnings manipulation and net worth inflation. The most common fraud/manipulation that occurred during this era involved overstating revenue as the primary scheme, although overstating assets is another commonly reported problem during this period.

We are currently in a correction stage for the financial manipulations of the 90's, where proactive and reactive steps are taking place to correct financial statements and markets. Law enforcement agencies, including the Securities and Exchange Commission ("SEC") and the Corporate Fraud Task Force¹ are stepping up enforcement actions related to allegations of financial statement fraud and other law violations committed by companies and their officers/managers.

New proactive laws, such as Sarbanes-Oxley, have been instituted in what some perceive to be a reactive measure. The corrections seem to be taking place, much to the chagrin of investors. According to a recent General Accounting Office study, market capitalization for 689 companies reporting financial statement restatements decreased by \$100 billion around 1997 – 2002.²

Since the last writing in the Spring 2003 issue of *The Litigation Newsletter*, the Securities and Exchange Commission ("SEC") issued approximately 300 litigation releases in a five month period.³ All of the filings/enforcements relate to allegations of misrepresentations by public companies and their officers/management, and approximately 60 are specifically related to allegations of accounting and auditing infractions that violate the "antifraud, reporting, books-and-records, and internal controls provisions of the federal securities laws".⁴ That is, each company and its management allegedly misrepresented its financial results and/or position by recording transactions and other data to depict other than the real position and/or performance of the company. The enforcements related to the following schemes:

- revenue overstatement – 80%
- asset overstatement – 12%
- expense understatement – 5%
- liability understatement – 3%

The most common scheme, as noted above and as cited by the General Accounting Office, is overstating revenue.⁵ In reality, many cases of financial statement fraud involve one or more combinations of schemes intended to alter the financial position (balance sheet – assets, liabilities and equity) and/or performance (income statement) of a company. In addition, one scheme can affect both the income statement and the balance sheet with the same transaction. Schemes involving overstated revenue, the

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Overstating Assets ...

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intent of which is to present a more robust earnings picture on the income statement, most often involve an overstatement of accounts receivable, portraying a healthier asset position on the balance sheet. The primary motive of a revenue overstatement scheme is to manipulate or manage earnings. Following are examples of companies currently embroiled in litigation with the SEC related to allegations of earnings management/manipulation utilizing revenue/asset overstatements.

Company	Amount ⁶	Period	Note
Xerox Corporation	\$3 billion	Five years	7
HealthSouth	\$1.4 billion	Four years	8
Peregrine Systems, Inc.	\$509 million	Three years	9
Symbol Technologies	\$254 million	Two years	10
Gemstar-TV Guide International, Inc.	\$223 million	Three years	11
Qwest	\$144 million	Two years	12
Thomas & Betts	\$114 million	Five years	13
Dynegy Inc.	\$79 million	One year	14
Kmart	\$42 million	One year	15
Sabratek Corp.	\$31 million	Two years	16
Anicom	\$10 million	One year	17
Candies	\$9 million	One year	18
Interspeed, Inc.	\$9 million	One year	19
Just for Feet	\$8 million	One year	20
Nesco	\$2 million	One year	21

The motives for asset schemes, versus revenue schemes, often relate to compliance with reporting requirements imposed by outside interests or in anticipation of a merger/acquisition transaction. The focus by outside interests in these cases is the company's financial position rather than earnings. The perpetrator of an asset overstatement scheme intends to inflate the value of the assets on the balance sheet to indicate a higher value of the assets and/or company.

Motivations to manipulate assets on the balance sheet include:

- Complying with debt covenants
- Maintaining agency ratings (e.g., insurance companies)
- Complying with regulatory requirements (e.g., minimum asset requirements for banks as dictated by federal law)

- Raising debt or equity capital where assets are the primary measurement of future earnings potential
- Obtaining exaggerated sales price upon divestiture of assets

Types of Asset Schemes

The American Institute of Certified Public Accountants (“AICPA”) categorizes financial statement frauds into three categories:²²

- Earnings manipulation
- Earnings management
- Balance sheet manipulation

The AICPA further identifies the most common kinds of balance sheet fraud:²³

- Overstatement of assets
- Understatement of allowances for receivables
- Overstatement of the value of inventories by not writing down the value of obsolete goods
- Overstatement of property values and creation of fictitious assets

Overstatement of Assets

Example 1

In 2000 and 2001, American Tissue allegedly overstated accounts receivable through bogus “bill and hold” sales. American Tissues’ scheme induced its lenders to continue to extend commercial credit when the company was no longer credit worthy. In conjunction with other schemes, American Tissue reported a net profit of \$24.5 million when in reality it experienced a loss of \$3.6 million. During this period, American Tissue raised \$160 million through security sales.²⁴

Affect on Financial Statements: overstate assets and revenue

Example 2

In 1999, Freedom Surf purportedly exchanged company stock and notes payable for equipment that

was overvalued and not in the company’s possession to boost the equity of the company.²⁵

Affect on Financial Statements: overstate assets, liabilities and equity

Example 3

In addition to other asset schemes between 1995 and 1999, Hexagon Consolidated Companies of America, Inc. (“HCCA”) allegedly reported \$200 million worth of ore and \$70 million of mining claims without appropriate appraisals and other evidence required by generally accepted accounting principles. The ore was in reality “tailings” from a previous mining operation, and the mining claims were related to a property abandoned after WWII. The company raised at least \$4.2 million through stock sales during this period.²⁶

Affect on Accounts: overstate assets and equity

Example 4

The Credit Store, Inc. adjusted its balance sheet downward by \$4.1 million for the fiscal year ended 2001 due to an error in the calculation of fair market value of two credit card securitizations.²⁷

Affect on Financial Statements: overstate assets, equity

About the Author

Susan Henry is a Senior Manager in BDO Seidman, LLP’s Litigation Consulting Services practice in the Midwest. Susan is the practice leader for the investigations group in the Midwest, and is resident in the Chicago office. Susan’s experience ranges from forensic accounting, fraud investigations and fraud susceptibility reviews to a variety of litigation consulting services including expert testimony.

Endnotes

1. Created by the federal government in July 2002 and includes federal and state agencies such as the FBI, United States attorneys, and other law enforcement agencies involved in the investigation of white collar crime
2. United States General Accounting Office, Report to the Chairman, Committee on Banking, Housing and Urban Affairs, U.S. Senate, *Financial Statement Restatements: Trends, Market Impacts, Regulatory Responses, and Remaining Challenges*, October 2002, page 25

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3. See www.sec.gov/litigation/litreleases.shtml from February 20, 2003 to August 13, 2003.
4. From SEC Litigation release No. 18044 / March 20, 2003 related to the enforcement against HealthSouth's CEO Richard Scrushy, paragraph 4
5. October 2002 GAO report, page 19
6. Amounts are cited in SEC litigation releases and represent alleged amounts
7. SEC Litigation Release No. 18174 / June 5, 2003
8. SEC Litigation Release No. 18044 / March 20, 2003
9. SEC Litigation Release No. 18205 / June 30, 2003
10. SEC Litigation Release No. 18194 / June 19, 2003
11. SEC Litigation Release No. 18199 / June 20, 2003
12. SEC Litigation Release No. 17996 / February 25, 2003
13. SEC Litigation Release No. 18058 / April 1, 2003
14. SEC Litigation Release No. 18188 / June 12, 2003
15. SEC Litigation Release No. 18000 / February 26, 2003
16. SEC Litigation Release No. 18142 / May 16, 2003
17. SEC Litigation Release No. 18037 / March 17, 2003
18. SEC Litigation Release No. 18120 / April 30, 2003
19. SEC Litigation Release No. 18180 / June 6, 2003
20. SEC Litigation Release No. 18139 / May 15, 2003
21. SEC Litigation Release No. 18125 / May 7, 2003
22. *The CPA's Handbook of Fraud and Commercial Crime Prevention*, Copyright @ 2000, 2001, 2002, 2003, AICPA, "Financial Statement Fraud", p. 5
23. *Id.*
24. SEC Litigation Release No. 18022 / March 10, 2003
25. SEC Litigation Release No. 18263 / July 30, 2003
26. SEC Civil Action No. 03C-1507
27. Financial News article *The Credit Store, Inc. to Make Financial Statement Adjustments*, Wednesday, February 13, 2002

The COA Rules that an Attorney has an Ethical Obligation to Return Inadvertently Disclosed Documents

by: **Andy Portinga**

In many large civil cases, parties exchange thousands, and sometimes hundreds of thousands, of documents. Careful attorneys always review each document being produced in order to ensure that no attorney-client or work-product privileged documents are turned over to their adversaries. Despite such precautions, privileged documents are occasionally produced.

When an inadvertent disclosure of privileged documents occurs, what are the ethical obligations of the attorney who receives the documents? Can the lawyer read the documents? Must she return them?

Must she inform opposing counsel of the fact that he produced a privileged document?

According to a recent unpublished decision of the Michigan Court of Appeals, a lawyer has an ethical obligation to both refrain from reviewing inadvertently produced, privileged documents and to notify opposing counsel of their production. *Holland v Gordy Company et al.*, unpublished opinion per curiam of the Court of Appeals, decided April 29, 2003 (Docket No. 231183). In *Holland*, Plaintiff's counsel went to the office of Defendant's counsel to review 13 boxes of documents. The thirteenth box contained the

litigation files of Defendant, and these files contained privileged materials. Plaintiff's counsel reviewed all thirteen boxes and requested copies of everything that had been made available to him. Defendant did provide copies of everything requested, including the privileged materials.

Two of the documents that were contained in the thirteenth box were of particular interest to Plaintiff's counsel. These were internal memoranda prepared by Defendant's counsel. While still in the office of Defendant's counsel, Plaintiff's counsel asked the Defendant's legal assistant who was supervising the document production to make copies of these two documents. The legal assistant dutifully complied.

Later, when Defendant's counsel learned that its litigation files had been inadvertently disclosed, Defendant moved for both a return of the documents and disqualification of Plaintiff's counsel. The trial court denied the motion to disqualify but held that Plaintiff's counsel had engaged in ethical misconduct by reviewing "confidential" information. On appeal, the Court of Appeals agreed that disqualification was not required. The Court also agreed that the actions of Plaintiff's counsel constituted ethical misconduct.

Despite the fact that Defendant's counsel had made all thirteen boxes available, that Defendant's counsel had copied and delivered all thirteen boxes, and that Defendant's legal assistant had made copies of two of the "hottest" documents for Plaintiff, the Court of Appeals concluded that Plaintiff's counsel committed an ethical violation by reviewing, requesting, and receiving documents that the lawyer should have known were inadvertently disclosed. The Court of Appeals held that Plaintiff's counsel should have refrained from reviewing the documents, notified Defendant's counsel of their error, and abided opposing counsel's instructions until the issue was addressed by the trial court.

In reaching the conclusion that it was ethical misconduct for Plaintiff's counsel to review inadvertently produced documents, the Court of Appeals did not cite to any portion of the Michigan Rules of Professional Conduct. Currently, no provision of the MRPC explicitly addresses a lawyer's obligation

regarding inadvertently produced documents. In 2002, the ABA added such a rule to the Model Rules of Professional Conduct, on which Michigan's rules are based. Model Rule 4.4(b) now requires an attorney to notify opposing counsel of an inadvertent production. Model Rule 4.4(b) leaves open the question of whether an attorney can ethically review a document that was inadvertently produced. No state, including Michigan, has adopted Model Rule 4.4(b), however.

The Court of Appeals based its opinion on a federal case, *Resolution Trust Corp v First of America Bank*, 868 F Supp 217 (WD Mich 1994), which in turn relied on ABA Formal Opinion 92-368. In Opinion 92-368, the ABA stated that a lawyer who receives materials that are clearly not intended for the lawyer should refrain from examining the materials and should notify opposing counsel of the inadvertent disclosure. ABA opinions, however, do not have the effect of law. While ABA opinions are binding on members of the ABA, it is not clear how a state court is authorized to enforce the rules of a private, voluntary association such as the ABA.

Additionally, the continuing validity of ABA Opinion 92-368 is questionable. In adopting new Model Rule 4.4(b) the ABA did not incorporate all of the requirements of ABA Opinion 92-368. Namely, Model Rule 4.4(b) does not require an attorney to refrain from reviewing inadvertently disclosed documents; it only requires an attorney to notify opposing counsel of the inadvertent production. The Reporter's Explanation of Changes for Model Rule 4.4(b) notes that ABA Opinion 92-368 had been criticized because no portion of the existing Model Rules required an attorney to either refrain from examining inadvertently produced documents or to notify opposing counsel of an inadvertent production.

It is also interesting to compare the Michigan Court of Appeals' treatment of this issue with that of other states. In *Elkton Care Center v Quality Care Management*, 805 A2d 1177 (Md App 2002), the Maryland Court of Appeals addressed a situation very similar to *Holland*. Like *Holland*, *Elkton* concerned an attorney who reviewed a box of documents produced by opposing counsel. One of the documents

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Ethical Obligation ...

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produced was clearly marked “ATTORNEY/CLIENT PRIVILEGE ATTORNEY WORK PRODUCT PREPARED IN ANTICIPATION OF LITIGATION.” The attorney tabbed this document, along with several other documents, and requested a copy of the tabbed documents. Opposing counsel dutifully complied.

The result reached by the Maryland Court of Appeals in *Elkton*, however, is much different from that reached by the Michigan Court of Appeals in *Holland*. The Maryland Court of Appeals did not hold that the attorney had engaged in ethical misconduct by reviewing, tabbing, and receiving a clearly privileged document. Rather, the Maryland Court of Appeals pointed its finger at the attorney who produced the document. The Maryland Court noted that the attorney that produced the document had not taken adequate precautions to prevent an inadvertent disclosure and that on two occasions (when the box of documents was first produced and when the tabbed documents were copied) the producing attorney could have prevented the inadvertent disclosure.

The Maryland Court of Appeals did not accuse either the producing attorney or the receiving attorney of ethical misconduct. Rather, it merely addressed the evidentiary issue of whether the inadvertent disclosure waived the privilege. Interestingly, one could argue that when there is an inadvertent disclosure, the attorney that produces the documents – not the attorney that receives them – has engaged in ethical misconduct. While there is currently no part of the Michigan Rules of Professional Conduct or the ABA Model Rules that prevents an attorney from reviewing inadvertently

disclosed documents, MRPC 1.6 does require an attorney to maintain client confidences. Specifically, MRPC 1.6(d) requires an attorney to take reasonable care to prevent an associate, employee, or others from disclosing a client confidence. If, for example, an attorney or her paralegal copies and produces privileged documents at the request of opposing counsel, the attorney has arguably violated MRPC 1.6.

Because it is currently unpublished, *Holland* is not precedential. Nevertheless, *Holland* is a very important decision. If its reasoning is adopted in subsequent opinions, *Holland* will mark a significant shift in an attorney’s ethical duties regarding inadvertently disclosed documents. *Holland* takes what had been primarily an evidentiary issue and converts it into an ethical one. Previously, when a document was inadvertently disclosed, the issue was whether the disclosure waived the privilege. See e.g. *See Leibel v General Motors*, 250 Mich App 229 (2002). Under *Holland*, this issue becomes secondary. Instead, the attorney who receives documents that appear to be privileged must take care not to commit any ethical violations. Even if opposing counsel copied the document and produced it, *Holland* places an ethical duty on the receiving lawyer to refrain from reviewing the document and to notify opposing counsel of his error.

About the Author

Andy Portinga is an attorney at Miller, Johnson, Snell & Cumiskey PLC in Grand Rapids, Michigan, where he practices commercial litigation. He serves on the Michigan State Bar Board of Commissioners and is the commissioner-liaison to the Litigation Section.

⇒ ⇒ ⇒ LITIGATION POINTERS ⇒ ⇒ ⇒

Litigation Pointers is a regular feature column of one or more articles contributed by Michigan lawyers, judges, and scholars. To submit articles or suggest topics, please contact the Litigation Section's Publications Committee Chair.

The “Borrowing Statute”: Is Your Opponent’s Case Already Untimely?

by: *John Mucha, III*
Dawda, Mann, Mulcahy & Sadler, PLC

When I have asked fellow attorneys if they have ever heard of the Michigan “borrowing statute”, I have usually received a blank, slack-jawed look coupled with the response “what’s that?” My reply is that the borrowing statute is a potentially valuable procedural tool that should not be overlooked in any case involving out of state claims or events. Far from being new, the borrowing statute is, nonetheless, often not on litigators’ radar screens. Its name further adds to its wallflower existence, because it has nothing to do with banks, lending or “borrowing” in the financial sense.

MCL 600.5861, provides that when a *non-Michigan resident*¹ brings suit in Michigan upon any cause of action that has accrued outside of the state, that plaintiff’s claim is subject to the statute of limitations of both Michigan **and** the jurisdiction in which the cause of action accrued. In such case, the **shorter** period of limitation governs the case. The statute further provides that when a *Michigan resident* brings suit in Michigan for a claim that accrued outside of the state, the limitations period for the Michigan resident’s claim will be determined by the *Michigan* statute of limitations. The text of MCL 600.5861 states, in relevant part:

An action based upon a cause of action accruing without this state shall not be commenced after the expiration of the statute of limitations of either this state or the place without this state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of this state the statute of limitations of this state shall apply.

The Michigan borrowing statute has been held to be a statute of limitations rather than a choice of law statute, and is viewed as procedural, not substantive. *Pryber v Marriott Corp.*, 98 Mich App 50; 296 NW2d 597 (1980). Accordingly, the statute of limitations must be raised as an affirmative defense in order for the borrowing statute to apply. MCR 2.111(F)(3).

In its simplest form, the borrowing statute is easy to understand. For example, if a non-Michigan resident is injured outside of Michigan, then brings a claim in Michigan (as he or she might elect to do if the defendant is subject to personal jurisdiction in Michigan), the court will simply compare the foreign jurisdiction’s statute of limitations for the claim with the Michigan statute of limitations for the same or comparable claim, and apply the shorter of the two. *Hover v Chrysler Corp.*, 209 Mich App 314; 530 NW2d 96 (1995); *Bechtol v Mayes*, 198 Mich App 691; 499 NW2d 439 (1993). The essential purpose of the borrowing statute is to prevent out-of-state plaintiffs from forum shopping for a jurisdiction with a longer limitations period than that of their own state. *Hall v General Motors Corp.*, *supra*.²

For Michigan residents whose cause of action accrued in another state, the borrowing statute on its face states that the Michigan statute of limitations for that cause of action will automatically govern, presumably regardless of whether the Michigan limitations period is longer or shorter than the limitations period of the state in which the cause of action arose. While this aspect of the statute has been held to revive

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a cause of action that would have been otherwise time barred under the limitations period of the foreign state, but which was still timely under the Michigan statute of limitations, the opposite situation (in which the application of the Michigan limitations period strips a Michigan resident of a claim that would otherwise still be timely under the foreign state’s limitations statute) has yet to be squarely addressed. *See Pryber v Marriott Corp., supra; Smith v Elliard*, 110 Mich App 25; 312 NW2d 161 (1981). Presumably it would operate in such a limiting fashion, if the language is applied as facially written, despite the intention of the 1978 amendments to the borrowing statute to alleviate certain harsh effects of the predecessor statute upon Michigan residents. *Id.*

Differences from state to state in rules governing the accrual of claims frequently complicate the application of the borrowing statute. For example, when does a claim “accrue” for purposes of the statute if the Michigan rules for claim accrual differ from the rules for claim accrual in the state in which the cause of action arose? In such instance, case law holds that the limitations period for each respective state is determined by the rules of that state, rather than by a uniform accrual methodology. *Makarow v Volkswagen of America, Inc.*, 157 Mich App 401; 403 NW2d 563 (1987). Therefore, if a tolling provision applicable in Michigan differs from a tolling provision applicable in the foreign state, or if one state has adopted a discovery rule approach to claim accrual and the other has not, a single cause of action may be deemed to have accrued at two different times under the rules of the respective states. The net result is that for claims brought by non-Michigan residents, dates of accrual must first be carefully determined before the resulting limitations periods can be compared and applied under the Michigan borrowing statute.

Given that the Michigan borrowing statute only applies to claims that have accrued outside of the state, but are being litigated in Michigan, it is also important to carefully examine the issue of *where* the cause of action has accrued. In many situations, such as

personal injury accidents, the answer is usually obvious (i.e. generally the place where the accident or breach of duty occurred). *Barnes v International Business Machines Corp.*, 212 Mich App 223; 537 NW2d 265 (1995); *Karpinsky v Saint John Hospital-Macomb Center Corp.*, 238 Mich App 539; 606 NW2d 45 (1999). *See also Gross v General Motors Corp.*, 448 Mich 147; 528 NW2d 707 (1995). In other instances the place of accrual may be less obvious and more difficult to discern, such as in contract settings, where the contractual obligations of parties are sometimes entered into and performed out of state. *See generally, Kerry Steel, Inc. v Paragon Industries, Inc.*, 106 F3d 147 (6th Cir. 1997)(examining the place where claims arose in the context of a jurisdictional dispute). Careful analysis may be required in such circumstances. Obviously, if the cause of action is deemed to have accrued in Michigan, the borrowing statute will not apply.

As can be gleaned from the above discussion, the borrowing statute can be used as a tool on both offense and defense. Defensively, it can be used to bar claims brought by an opponent when one of the respective states has a limitations period that has already expired. Offensively, for Michigan residents, it has the potential to extend the time to bring a claim if the Michigan limitations period has not expired, even though the limitations period of the other state has run. In light of the above, the following litigation pointers should be noted:

1. Look carefully at *where* the causes of action at issue in your case accrued.
2. If any of the claims appear to have accrued outside of Michigan, look carefully at *when* the causes of action at issue in your case accrued.
3. Examine carefully all tolling and similar statutory provisions (of both Michigan and the state of accrual) that may affect the limitations period.

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Eight Keys to the Art of Persuasion

Hon. Mark A. Drummond,
Associate Judge, 8th Circuit of Illinois

Tuesday, March 23, 2004 • 9:00 a.m. – 5:00 p.m.

CLE Units: 6.0 Seminar #: 04CP-5646 Level: Advanced/Expert

Mark Drummond details the psychological, social and emotional aspects of effective courtroom persuasion. By incorporating his recommendations into your trial presentation, you will be able to deliver your message simply, with sharp organization, and with a precise effect, making you a more effective advocate.

For more information, call ICLE toll free (877) 229-4350.

Enrollment is limited.

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Both Masters in Litigation seminars will be held at the

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Litigation Pointers / The “Borrowing Statute” ...

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4. If you are defending, always consider bringing a dispositive motion against your opponent based upon the borrowing statute.
5. If you are in the position of plaintiff, don't overlook the extent to which the borrowing statute may enable your client, if a Michigan resident, to maintain otherwise stale claims from the state in which the cause of action arose.
6. Consider as early as possible the potential limiting effect of the borrowing statute on your claim, and don't automatically assume that you have plenty of time to commence your case.
7. When in doubt about whether the borrowing statute may create a statute of limitations

defense, preserve your ability to make that argument by asserting it as an affirmative defense in your first responsive pleading.

Endnotes

1. Generally, a plaintiff's residency is determined as of the date of the injury, not as of the date of the filing of a lawsuit; such that “where a plaintiff is not a resident of Michigan at the time an injury occurs, but becomes a Michigan resident before filing a lawsuit in Michigan, the plaintiff's residency at the time of injury controls.” *Hall v General Motors Corp.*, 229 Mich App 580, 592; 582 NW2d 866 (1998).
2. Whether the borrowing statute should be applied to statutes of repose to achieve this same purpose is not yet finally decided. *See Hall v General Motors Corp.*, *supra*. However, at least one circuit court has ruled that statutes of repose are subject to the borrowing statute. *Arteaga v Ohio Industries, Inc.*, Wayne County Circuit Court Case No. 99-913988-NP, January 10, 2001 (Neilson, J.).

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