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From the Editors

by Karen Libertiny Ludden

This edition of Commercial Law Reporter addresses:

- **What happens when one covered and one excluded loss occur concurrently in Michigan?**
- Our new **practical advice column**: "What you need to know about..." **litigating a water loss claim**.
- Commercial law update: **personal agency licensure, investment damages, and Shareholder Oppression statute**.
- Breaking news: **No coverage on jewelers block policy** where claimant misrepresented previous claims history; **no cause of action for electrical fire on leased premises**.

Michigan unique in excluding coverage for concurrent covered/excluded perils.

by: C. David Miller

The majority of states have adopted a proximate cause standard for determining whether a loss is covered by insurance when there are both covered and excluded causes of that loss. Still other states provide that if any

cause is covered, so is the loss. Michigan is the only state which differs.

As recently confirmed by Federal Judge Cleland in the Eastern District of Michigan, this state has adopted the default position that when a covered peril and an excluded peril combine to cause a loss, the entire loss is excluded, regardless of the amount of contribution by each peril, timing of contribution or order in which the perils combine to cause the loss.



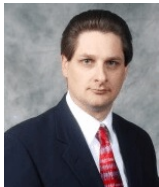
In *TMW Enterprises, et al v. Federal Insurance Company*, where construction defects (an excluded peril) allowed water to permeate a building and produce rust on structural steel, Judge Cleland granted summary judgment in favor of the insurer. Plaintiff sought coverage for tearing down the defective walls to remediate the steel. The Court held that Michigan's default rule applies unless the parties agree to opt out of the rule by contract. The contract did not provide an opt-out and therefore Michigan's default rule applied.



Citing *Iroquois on the Beach, Inc. v. General Star Indemnity Company*, 550 F.3d 585, 588 (6th Cir. 2008), Judge Cleland ruled, "[t]he default rule under Michigan law is that a loss is *not* covered when it is concurrently caused by the combination of a covered cause and an excluded cause... In Michigan...sequencing is irrelevant – it is the

existence of two or more concurrent causes that controls, not the order or magnitude of their effect."

Insurers and insureds in Michigan need to be aware that Michigan law on concurrent causation stands alone from other jurisdictions in always denying coverage where the parties have not contractually opted out of the default rule on causation, where a covered cause and excluded cause combine to cause a loss.



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**What you need to know about...
litigating a water loss claim.**
by: Mark Shreve

Water loss" is the phrase commonly used for damage to commercial property exposed to water, but in order to know if there is insurance coverage for such a claim, one must always ask, how did the water get there? The next crucial question is, what does the insurance policy actually say about coverage for water loss? And finally, what does the law in your state say about coverage, particularly when there might be multiple causes of that loss? The larger the loss, the more important it becomes to thoroughly evaluate these cases at the outset to determine whether litigation of these often complex and costly cases would be successful.



nce water generally contributes to a ss in connection with some other event, valuating the cause and origin of the ater loss is crucial to litigating any ater loss case. The first step is to thus to retain a reputable expert to determine the cause and origin of the water loss. The technical expert should be well-versed in the applicable standards. For example, if your case involves water that leaked within a building's walls, the American Society for Testing and Materials (ASTM) has issued standard E-2128-11A, entitled, "Evaluating Water Leakage of Building Walls."

Next, if it is determined that there are concurrent causes of a water loss, a careful review of the policy for language addressing which of those causes are covered is crucial. Where the policy does not contain any such language, state law generally prescribes how concurrent causation is handled. Your jurisdiction's default rule on concurrent causation will determine whether the "water damage" is excluded from coverage.

While the complexities of these types of cases are well-known, a careful initial analysis can help you decide whether a claim is valid. This can save a lot of money and frustration in the long run.

Mr. Shreve is an attorney in the Troy office who handles complex commercial loss cases. You can contact him at 641-7600 / (800) 875-7600, or mshreve@garanlucow.com.



Commercial Law Update
by Gregory A. Light

PERSONAL AGENCY LICENSURE MANDATORY FOR ENFORCEMENT OF MANAGEMENT CONTRACT



Where Plaintiff entered into a management contract to provide Defendant with advice, counsel, and guidance in the development of his career in the entertainment and entertainment-related industries, Plaintiff qualified as a personal agency pursuant to MCL 339.1003(1) which states "A person shall not open, operate, or maintain a personal agency in this State without first obtaining the appropriate license from the department..." Since Plaintiff was not licensed under that statute, the management agreement was unenforceable and Plaintiff was further barred from claiming unjust enrichment because there was an express contract in place. *Hudson v Mathers*, 2009 WL 735857 (March 19, 2009).

INVESTMENT DAMAGES MUST BE SHOWN
THROUGH SPECIFIC FACTS



In 1989, Plaintiff purchased a 1/12 share in a land development and lake front lot for \$221,000. The lot was sold in 1997 for \$250,000 and Plaintiff sued in 2005 alleging, in part, that Defendant's breach of the agreement resulted in the loss of investment profit to Plaintiff. An independent accounting found no improprieties and no damages to Plaintiff because he sold the lot for profit.

Despite Plaintiff's assertions and an affidavit from an expert, the trial court found no question of material fact and granted summary disposition. The Court of Appeals affirmed on the grounds that Plaintiff provided no specific facts. An affidavit submitted by a purported expert on the part of Plaintiff was conclusionary in nature and not specifically sufficient to create a genuine issue of material fact regarding damages. *O'Leary Family LLC v Dekroub*, 2009 WL 529876(March 3, 2009)

TERMINATION OF EMPLOYMENT ACTION NOT
ACTIONABLE UNDER SHAREHOLDER
OPPRESSION STATUTE BEFORE MARCH 2006
AMENDMENT, BUT OTHER REMEDIES AVAILABLE

Where husband and wife incorporated a business but then divorced, the husband's subsequent termination of wife as an employee was not actionable under the shareholder oppression statute, MCL 450.1489, as termination was prior to March 2006 amendment. That amendment added termination as a cause of action under the statute. The Court of Appeals did find, however, that there was sufficient evidence to maintain claims for breach of contract and tortious interference with the contract where factual disputes existed as to whether Plaintiff had a just-cause employment contract and whether the business benefitted from her termination. *Zuehlke v Impact Auto and Collision, Inc.*, 2009 WL 839496(March 31, 2009)



Mr. Light is an attorney in the Lansing office who handles commercial litigation involving contracts. You can contact him at (517) 327-0300 / (888) 910-0300, or glight@garanlucow.com.

Breaking News

NO COVERAGE ON JEWELERS BLOCK
POLICY WHERE INSURED MISREPRESENTED
PREVIOUS CLAIMS HISTORY

Last week, Judge Redford of the Kent County Circuit Court granted summary disposition to Lloyds of London in a jewelers block case, dismissing a claim for over \$100,000 because the insured had made a material representation regarding his previous claims history. Tom Herman successfully obtained this result for Lloyds.



Mr. Herman is an attorney in the Grand Rapids office who handles insurance coverage claims. You can reach him at (616) 742-5500/(800) 494-6312, or therman@garanlucow.com

NO CAUSE OF ACTION ON WRONGFUL
DEATH CASE ON LEASED PREMISES ARISING
OUT OF AN ELECTRICAL FIRE

A jury trial before Judge Andrews of the Oakland County Circuit Court resulted in a no cause of action in a wrongful death case on a leased premises arising out of a fire. Robert Obringer of the Troy office obtained this favorable result on behalf of the Defendant property owners.

Mr. Obringer is an attorney in the Troy office who handles trials involving commercial and residential leases. You can contact him at (248) 641-7600/(800) 875-7600, or robbringer@garanlucow.com.



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