



FROM THE LAW OFFICES OF GARAN LUCOW MILLER, P.C.

LAW FAX

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COURT OF APPEALS DISCUSSES DEFAULT AND FACTORS TO BE CONSIDERED IN SETTING ASIDE DEFAULT

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In the case of *Shawl v Spence Brothers, Inc.*, decided on August 19, 2008 by the Michigan Court of Appeals, the Court revisited the recurring issue of what circumstances justify setting aside a default when a Complaint is not answered while an insurance company is investigating the circumstances of the claim.

James Shawl was injured in a construction accident in Saginaw County in June 2003. Spence Brothers, Inc., one of several defendants, was the general contractor on the project. When it was served, Spence Brothers forwarded the Complaint to its liability insurer, Amerisure. In investigating the Complaint, including analyzing coverage issues, Amerisure determined that it would need more time to retain counsel and answer the Complaint.

In early July 2006, a claims representative contacted Shawl's attorney and requested a 30 day extension. The attorney agreed and requested that the extension be documented. The claims representative wrote a letter confirming the 30 day extension, and she was careful enough to note the new date to answer the Complaint – August 8, 2006.

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No Answer was filed by August 8. A default against Spence Brothers was entered by the Clerk of the Court on August 16.

A motion to set aside the default was made but was denied by the trial court.

The Court of Appeals discussed the "good cause" standard under MCR 2.603(D)(1). The Court noted that good cause can be shown by one of the following:

- “1. A substantial defect or irregularity in the proceedings on which the default was based;
2. A reasonable excuse for failure to comply;
3. Some other reason showing that manifest injustice would result from permitting the default to stand.”

Although it addressed all three standards, the Court's primary discussion involved the "reasonable excuse" component. The Court concluded that the insurance carrier had been negligent in failing to ensure that an answer to the complaint was filed timely, and that the documentation established that its claim representative was aware of the August 8 deadline. The insurance company had offered no reasonable excuse to explain its failure to respond, the Court concluded. The issue that the Court had to address, however, was whether this negligence could be imputed to Spence Brothers, its insured.

In addressing this question, the Court found that there were conflicting opinions among panels of the Court of Appeals, all of which preceded November 1990, the date of adoption of the current rule requiring that panels follow the rule of law established by prior published decisions of the Court of Appeals.

In the first of these cases, *Walters v Arenac Circuit Judge*, 377 Mich 37, 138 NW2d 751 (1966), the Michigan Supreme Court had held that the negligence of the insurance company cannot be imputed to its insured in determining whether a reasonable excuse for failing to answer the complaint had been shown. The Supreme Court declined to extend the ruling of previous cases which had held that the error of a party's attorney is imputed to his client for this purpose.

The *Shawl* Court noted, however, that *Walters* was not binding as precedent because no single opinion had commanded a majority of the justices on the case.

After consideration of five different cases that had followed *Walters*, the *Shawl* Court noted that there remained a lack of definitive case law on the issue of whether the negligence of an insurance company or another intermediary may be imputed to the insured and thereby preclude a finding of good cause or reasonable excuse for failing to answer. Although it found that *Walters* was non-binding, it was persuaded by the logic of the decision, and agreed with its conclusion that the negligence of the insurer should not prejudice the defendant which itself was not negligent.

“A defendant who diligently turns over a case to an ultimately negligent insurer should not be denied his or her day in court. The defendant is not ‘obligated to call daily to see whether the insurer did what it had contracted and accepted a premium to do.’”

We have noted in previous issues of this publication that the courts in Michigan have not given defendants much leeway in setting aside defaults for failure to answer a complaint on time. This decision will provide some welcome relief in certain factual scenarios.

Section E of the decision, entitled "Totality of the Circumstances", provides the Court's "guidance for future cases" on these issues. The Court introduced this section by noting:

"We believe that it would be helpful to the trial courts if we provided additional factors for them to use in their evaluations of 'good cause' and 'meritorious defense' under MCR 2.603(D)(1). We emphasize that trial courts should base the final result on the totality of the circumstances."

The Court then identified the following lists of factors to be considered by trial courts in analyzing both of these elements:

"In determining whether a party has shown good cause, the trial courts should consider the following factors:

- 1) Whether the party completely failed to respond or simply missed the deadline to file;
- 2) If the party simply missed the deadline to file, how long after the deadline the filing occurred;
- 3) The duration between entry of the default judgment and the filing of the motion to set aside;
- 4) Whether there was defective process or notice;
- 5) The circumstances behind the failure to file or file timely;
- 6) Whether the failure was knowing or intentional;
- 7) The size of the judgment and the amount of costs due under MCR 2.603(D)(4);
- 8) Whether the default judgment results in an ongoing liability (as with paternity or child support); and
- 9) If an insurer is involved, whether internal policies of the company were followed.

In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit shows evidence that:

- 1) The plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
- 2) A ground for summary disposition exists under MCR 2.116(D)(2), (3), (5), (6), (7) or (8); or
- 3) The plaintiff's claim rests on evidence that is inadmissible.

Neither of these lists is intended to be exhaustive or exclusive. Additionally, as with the factors provided in other contexts, the trial courts should consider only relevant factors, and it is within the trial court's discretion to determine how much weight any single factor should receive."

Ever since the decision in *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999), after entry of a default for failure to answer the complaint on a timely basis, getting it set aside by the court has been problematic. This decision will give defendants some additional arguments to make when the problem is attributed to the insurer rather than to the defendant or his attorney.

RECOMMENDATIONS

It is customary for insurance claim representatives to request an extension of time to answer the complaint from the attorney for the plaintiff, and to confirm that extension in written form. It also seems to be common to request an extension of approximately one month. It may be preferable to ask for an extension of approximately two months, given the fact that things never move along as quickly as one hopes that they would at the outset.

It is also a good idea to confirm in the letter, as the claim representative in this case did, the date on which the answer is due.

We would recommend one additional step, and that is that the insurer should notify defense counsel of the lawsuit, forward a copy of the complaint, and advise defense counsel of the date of the extension as agreed. Often, the insurer will instruct counsel not to take any additional steps at that point, in light of the need to investigate either facts or legal issues before determining whether to proceed. Getting counsel involved, however, will permit the attorney to remind the claims representative of the impending due date as it approaches. In many cases, it would be determined that the answer should be filed, in order to avoid the entry of a default, even if the insurer's investigation is not yet complete.

Lastly, as we have recommended previously, the insurer should request that counsel confirm receipt of the items sent, to avoid the risk of misdelivery or failed delivery, whether by mail, fax, or email.

COURT OF APPEALS FINDS INSURERS' PERMISSIVE USE EXCLUSION TO BE AMBIGUOUS

While most no fault policies state that an insurer will not provide coverage for an insured's unauthorized use of a motor vehicle, not all policies use identical language. Some policies preclude coverage where there is no authorization from the vehicle's owner. Others only state that coverage will be excluded for "using a vehicle without permission to do so". Whether this language is sufficient to deny coverage where an insured receives authorization from someone other than the owner was the issue in the recent decision of *Farm Bureau v Duncan, et al.*, unpublished opinion per curiam of the Court of Appeals, issued August 14, 2008 (Docket No. 277531 & 277662).

In *Duncan*, Farm Bureau's insured, James Duncan, was driving a rental vehicle when he suffered a heart attack. Duncan lost control of the vehicle and was involved in an automobile accident. He was traveling back from a trip to Alabama with the renter of the vehicle, Larry Cochrane. Mr. Cochrane had become too ill to drive and expressly permitted Duncan to drive the vehicle. Unbeknownst to Mr. Duncan, National Car Rental's rental agreement specifically prohibited anyone other than the renter from driving the vehicle. Based upon this exclusion in the rental agreement, along with Farm Bureau's policy exclusion for use of a vehicle "without permission to do so", Farm Bureau denied liability coverage.

The trial court, relying upon a 2006 unpublished Court of Appeals decision, *Allstate v McDonald*, granted Farm Bureau's motion for summary disposition. The difference between the *McDonald* case and the facts of *Duncan* is that Allstate's policy specifically states that coverage is excluded where an insured does not receive permission from the vehicle's owner. Farm Bureau's policy utilized broader language, not specifically limited to permission from the owner, but rather permission in general. While Mr. Duncan did not receive permission from National Car Rental, the owner of the vehicle, he did receive permission from Mr. Cochrane, the renter.

The Court of Appeals was then left to decide whether the permission given by Mr. Cochrane was sufficient to rebut Farm Bureau's exclusion. Farm Bureau argued that the policy language still required permission from the vehicle's owner, while Mr. Duncan argued that the permission received from Cochrane was adequate. Because Farm Bureau's policy did not provide a definition for the term "permission", the Court relied upon the dictionary definition. Because the normal, everyday use of "permission" only means "formal consent" or "authorization to do something", the Court of Appeals held that the permission that Duncan received from Cochrane was sufficient.

This decision was further based on the fact that courts construe contractual ambiguities against the drafter of the contract and, more specifically in the case of insurance policies, in favor of coverage.

****LAST CALL****

TROY BREAKFAST SEMINAR – WEBCAST

The Firm's annual No Fault Seminar will be held at the Troy Marriott on September 18, 2008. There are many important issues which will be discussed at this seminar, including a presentation by Sharon Filas, CPA, regarding the *Ross* decision from the Michigan Supreme Court. The Supreme Court's recent decision in *Cooper v ACIA*, which opens the door to claims of fraud, will be discussed in depth, inclusive of suggestions on claim handling to avoid litigation. We will also present a review of cases pending in the Supreme Court which will significantly impact no fault claims handling, including *USF&G v MCCA*, *Benefiel v Auto Owners*, *Scott v State Farm* and *Budget Rent-A-Car v City of Detroit*.

We will have a "full house" for this seminar and we ask that if you have registered and cannot now attend, that you please advise Beth Bezenah to remove you from the registration to allow someone else to participate. Reservations will be taken until Wednesday, September 10, 2008. Please contact Beth Bezenah to reserve your seat at bbezenah@garanlucow.com.

In addition, the Firm will be offering the seminar via Webcast. If you wish to access the Webcast presentation, please email Beth Bezenah at bbezenah@garanlucow.com and, in your email, please advise how many people will be attending Webcast so we can prepare and send you materials in advance. Due of the limited number of log-ins available, we are forced to restrict the Webcast to clients only and we would ask that if you are registered and now unable to attend via Webcast, to please advise Ms. Bezenah.