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Court of Appeals May Invoke Rarely-Used Conflict Procedure to Reevaluate the Application of *Res Judicata* to Successive PIP and UM suits

By: Drew W. Broaddus **February 24, 2016**

SECREST WARDLE NOTES

An ordinary panel of the Michigan Court of Appeals has no authority to overrule published Court of Appeals decisions issued after November 1, 1990, no matter how strongly the subsequent panel disagrees with the prior decision. MCR 7.215(C)(1) & (J)(1). That is why the *Garrett* panel described itself as "bound by" the decision in" *Adam*. *Garrett*, __ Mich App __; slip op at 7.

Although the panel unanimously requested a conflict panel, this does not mean that one will necessarily be convened. Within 28 days of the *Garrett* decision, the Chief Judge of the Court of Appeals must poll all 28 judges "to determine whether the particular question is both outcome determinative and warrants convening a special panel to rehear the case for the purpose of resolving the conflict…." MCR 7.215(J)(3)(a). So if there is not sufficient support at that stage, no conflict panel will be convened. Also, per MCR 7.215(J)(3)(a), the procedure terminates if the Michigan Supreme Court grants leave to appeal "in the controlling case."

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In *Adam v State Farm*, __ Mich App __; __ NW2d__ (2015) (Docket No. 319778), the Court of Appeals held that *res judicata*, or claim preclusion, did not apply where the plaintiff filed a PIP case, settled that case and voluntarily dismissed it, and then filed an uninsured motorist ("UM") claim against the same carrier, relative to the same accident. The *Adam* panel based its decision on the notion that a UM claim took longer to investigate and required more factual development than a PIP claim. *Id.* at __; slip op at 4. The panel also noted that a UM claim is subject to a longer statute of limitations than a PIP claim. *Id.* "[W]hile an injured person will likely have all the facts necessary to make a meaningful decision to pursue a PIP claim within a relatively short time after an accident, the same cannot be said for the injured person's ability to pursue a claim for" UM benefits, as the UM claim will require proof of both fault and a threshold injury. *Id.* at __; slip op at 8.

The decision was in tension with the broad transactional approach to *res judicata* adopted by the Michigan Supreme Court in *Adair v State*, 470 Mich 105; 680 NW2d 386 (2004). Under this approach, *res judicata* bars not only claims already litigated, but also every claim arising from the same transaction that the parties,

"exercising reasonable diligence, could have raised but did not." *Id.* at 121. This has been referred to as the "transactional test" to distinguish it from the narrower "same evidence test." *Id.* at 123-125. Under *Adair*, although the question of whether the same evidence is necessary to support claims "may have some relevance," the "determinative question is whether the claims in the instant case arose as part of the same transaction as did [the plaintiff's] claims in" the original action. *Id.* at 125. Under this test, "a claim is viewed in 'factual terms' and considered coterminous with the transaction, regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff." *Id.* at 124. "[T]he assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief." *Id.* "Whether a factual grouping constitutes a transaction … is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit…." *Id.*

If you have trouble seeing how a single claimant's injuries from one motor vehicle accident does not constitute a single "transaction," you are not alone. This week, in *Garrett v Washington & State Farm*, __ Mich App __; __ NW2d__ (2016) (Docket No. 323705); slip op at 1-2, a panel of the Court of Appeals criticized *Adam* as "wrongly decided," and declared a conflict pursuant to MCR 7.215(J)(2). In *Garrett*, the plaintiff had previously filed a PIP suit against State Farm based upon a January 4, 2013, motor vehicle accident. That suit was resolved through a mutual case evaluation acceptance and dismissed with prejudice. Almost immediately thereafter the plaintiff filed a new suit based upon the same accident against the allegedly at-fault driver, and also named State Farm in a count seeking UM benefits. The trial court dismissed State Farm from the second suit based on r*es judicata*. The *Garrett* panel reluctantly reversed, noting that – although all three judges disagreed with *Adam* – *Adam* was factually controlling and the panel was bound to follow it. *Id*. at __; slip op at 3,6. The panel further noted that but for *Adam*, it would have held that the plaintiff's second suit violated the compulsory joinder rule, MCR 2.203(A). *Garrett*, __ Mich App at __; slip op at 8.

The *Garrett* panel took note of conflicting unpublished Court of Appeals decisions on this point prior to *Adam*, and noted that if it were writing on a clean slate it would have found *res judicata* applicable, and affirmed the dismissal, as follows (*Garrett*, __ Mich App __; slip op at 5-7):

> …The two claims in this case arise from a single group of operative facts. The PIP and UM claims stem from the same automobile accident and involve all of the same parties. Furthermore, the claim for PIP benefits and the claim for UM benefits are related in time, space, origin, and motivation, and the combination of the two claims form a convenient trial unit since they involve the same parties, the same automobile accident, and the same body of law. … Accordingly, we would conclude that the two claims constitute the same transaction if we were not bound to follow *Adam*….
>
> In addition, we are not persuaded that there are significant differences in the timing and motivation for asserting the claims that would prohibit the application of *res judicata*. Plaintiff filed the UM benefits case approximately two months after settling the PIP benefits case and approximately two weeks before the final order was entered in the PIP benefits case. … The fact that plaintiff filed the UM benefits case approximately two

months after settling the PIP benefits case indicates that plaintiff could have sought to amend the complaint in the original action to include a claim for UM benefits before accepting the case evaluation award if he had exercised reasonable diligence. … The timing of the two cases also undercuts plaintiff's argument that he did not have all of the information necessary to bring a UM claim at the time of the original action ….

We are also unpersuaded by plaintiff's argument that the two claims differed in terms of the form of relief granted. …[Per] *Adair*, the same transaction test applies "regardless of the … variant forms of relief flowing from the substantive theories." … [T]he fact that the PIP benefits claim and the UM benefits claim involved different forms of relief did not affect the analysis with regard to whether the two claims constituted the same transaction…. Plaintiff [argues] that he could not have known that he was entitled to UM benefits at the time he filed the original action and would not have been able to obtain the requisite proof to sustain a UM benefits case. Plaintiff essentially argues that the doctrine of *res judicata* does not apply since the two claims involved different evidence. However, the "same evidence" test was rejected [in *Adair*] in favor of the "same transaction" test….

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