

BAR BRIEFS

Official Publication of the Macomb Bar Association

April 2025



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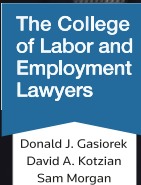


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Spring has Sprung!

By Dana Freers, President of the Macomb Bar Association

Spring has sprung and your Macomb County Bar Association is in full bloom! Our new executive director,



Madeleine Bennage, has settled in and is rocking and rolling. Each Wednesday in February we hosted a different session of the first traveling Bench Bar conference. It was nice to be able to support different local businesses and allow practitioners to focus on one area of law at a time. We had awesome participation from the

bench so thank you to our wonderful Judges! We also hosted a Chili Cook-Off in February at the Macomb Discovery Center in downtown Mt. Clemens. It was so much fun and Carmen DeFranco earned bragging rights. Bill Barnwell graciously hosted a St. Paddy's party for the bar and we had a blast! Thank you Bill! Upcoming is our annual Top Golf event and we have some more fun events in the works.

Young Lawyers are planning a Meet the New Judges evening in April/ May. Jimmy John's field is hosting the MCBA on May 30th so be sure to grab your tickets for a family friendly fun night out. Our annual golf outing will be on Juneteenth at St. Clair Shores Golf Club. Not our usual location but the date seemed more

important so we went with it. Plans are underway for our Annual Meeting. We're considering hosting a luncheon as opposed to an evening event- I'd love to hear from you on which you'd prefer. Lunch or dinner? We announce election results and award winners at the meeting so think about running for our board and/or nominating a colleague for one of our awards. The Macomb County Bar Foundation is hosting Law Day on May 1st and the Women Lawyers are having their annual Cocktails for a Cause on May 15th at Filippas.



Did you know we've been working hard to make our bar office accommodating for you? We have a zoom room ready for your zoom hearings. A conference room available for private meeting space. We have a charging station for your devices and coffee and snacks always ready and available. We've recently upgraded our copy machine to make color copies and print wirelessly.

Your Macomb County Bar Association is here to serve you! What else can we do for you? We'd love to hear from you!





The Price is Right? Application of the “Fee Schedule” to No-Fault Claims

By Melissa Sulla, Dyki, Latra, Braukmuller, Ross, Allen & Russaw

From the Chair:

Hello All! My name is Karen Trickey Pappas. I am a former Macomb County Bar President and current Chair of the Civil Law Committee. I have asked my colleague Melissa Sulla to discuss the law and updates concerning the No-Fault “Fee Schedule”. I asked Melissa to do this instead of doing it myself as she is more educated about this topic than anyone I know and has an ability to explain the fee schedule so I am actually able to understand it!

Melissa and I work together as House Counsel for Progressive at Dyki, Latra, Braukmuller, Ross, Allen & Russaw. Melissa has worked there since 2019. She is a Michigan State University graduate and went to law school at Wayne State University. She has been practicing in Insurance Defense since 2014.

In 2019, the Michigan legislature passed a bill to amend the No-Fault Insurance Act (MCL 500.3101 et seq) creating the most significant changes to the Act since its enactment in 1972. The amendment included changes to the order of priority for Personal Protection Insurance benefits (more commonly referred to as PIP benefits), codification of what constitutes a serious impairment of bodily injury, and allowing Michigan residents to select levels of coverage as opposed to the prior mandatory unlimited benefits. Nothing quite changed the legal landscape (for those litigating PIP claims) as the enactment of the cost containment measures found in MCL 500.3157, often referred to as the “fee schedule”.

Simply stated, MCL 500.3157 limits the amount a healthcare provider will be reimbursed under personal protection insurance for services the provider renders to an injured person following a motor vehicle accident. Sec. 3157 provides a detailed blueprint for reimbursement based on a percentage of the amount payable under Medicare or, if it is a service that Medicare does not provide for an amount payable, a percentage of the amount payable based on what the provider charged for the service on January 1, 2019. In the days and months that followed Sec. 3157 taking effect on July 1, 2021, PIP litigators found themselves engrossed in Medicare research and debates over Medicare rates. Fast forward to 2025, and several issues have found their way to the Court of Appeals to provide further clarification of the parameters of Sec. 3157.

The Amendments to the No Fault Act are Not Retroactive

On August 25, 2022 the Court of Appeals issued a much-anticipated opinion in *Andary v USAA Casualty Insurance Company (2022)*, in which it interpreted the retroactivity of the 2019 amendments to the Michigan No-Fault Act. More specifically, the Court was asked whether the reimbursement limitations for PIP benefits, specifically those found at 3157(7) and (10), could be applied retroactively so as to limit benefits to those that were injured in motor vehicle

accidents occurring prior to the effective date of the amendments. The Court of Appeals ultimately held the legislature did not clearly demonstrate an intent for the amendments to apply retroactively, and therefore the limitations do not apply to pre-amendment accident claims. Moreover, the Court held that allowing a retroactive application of the amendments would substantially impair the no-fault insurance contracts entered into before effective date of the amendments, which would violate the rights of the insureds and the Contract Clause of the Michigan State Constitution.

The Michigan Supreme Court then accepted the matter on appeal, issuing an opinion upholding the Court of Appeals decision on July 31, 2023. Accordingly, the amendments to the No-Fault Act, specifically the reimbursement limitations of 3157(7) and (10), only apply if the motor vehicle accident occurred on or after June 11, 2019. For those accidents occurring prior to June 11, 2019, the pre-amendment limitations of “reasonable and customary” would still apply.

The Amount Payable Under Medicare

On March 21, 2024, the Court of Appeals issued a published opinion in *Central Home Health Care Services, Inc, et al v Progressive Michigan Insurance Company (2024)* further interpreting MCL 500.3157. The Court was asked to decide the narrow issue of whether the applicable limit on a provider’s potential reimbursement for its services under the circumstances were to be limited by MCL 500.3157(2) or MCL 500.3157(7). More specifically, the Court was asked whether subsection (2) can apply to differing payment methodologies, such as the prospective payment system, or if it is limited to charges covered under a fee schedule system. The Court ultimately provided a simple answer to the dispute:

“We therefore hold that for purposes of MCL 500.3157, Subsection (7) does not apply if Medicare covers the treatment or service at issue because coverage under Medicare means that Medicare provides an “amount payable” for the treatment. Under

the factual circumstances here, the fact the Medicare covers the service means that the limitations cap is provided instead by Subsection (2)(a). Subsection (7) only applies if there is no Medicare coverage for the treatment at issue.” *Id* at ___; slip op at 6.

The Court further commented that whether there is an amount payable can include payments based on a straight fee schedule or a prospective payment system. An application for leave to appeal the Court of Appeals decision was filed with the Michigan Supreme Court, but was denied on December 13, 2024 as the Court was not persuaded that the questions presented should be reviewed.

Fee Schedule Applies to Third-Party claims for Excess Allowable Expenses

The Michigan Court of Appeals reviewed applicability of the fee schedule to third-party or bodily injury claims in the recent *Canty v Mason* (2024) decision. Canty was a Medicare recipient and opted out of PIP benefits on his personal auto insurance policy because he maintained “qualified health coverage”. Despite his opt out and coverage through Medicare, it was not used to pay for his accident-related medical expenses. Instead, Canty sought payment of his medical expenses through a negligence action brought against Mason as a result of the subject motor vehicle accident. The Court of Appeals ultimately held that the fee schedule applies to third party claims, and a plaintiff has a duty to mitigate his or her damages.

The matter is currently pending on application with the Michigan Supreme Court.

Medicare Rules and Their Applicability Under MCL 500.3157

A common ongoing dispute in PIP litigation surrounds the use of various Medicare rules in the payment of PIP benefits. Decisions in the trial courts have been inconsistent, creating a desire for legislative or appellate clarification. One case currently pending with the Court of Appeals is the matter of *Favot v Memberselect Insurance Company* (COA No. 368734), which seeks to clarify whether the legislature intended to incorporate Medicare payment methodologies into the Michigan No-Fault Act. More specifically, the Court is being asked to address whether insurers are permitted to utilize the Multiple Procedure Payment Rule (“MPPR”) and geographic adjustments. Oral arguments have not yet been scheduled for this case.

The application of the fee schedule remains but one of the persistent challenges in post-reform PIP litigation. As these nuanced issues are brought before the courts, we can almost certainly expect more appeals and opinions in an effort to provide clarity to the uncertainty. If there is one certainty in the current uncertain atmosphere, it is that the litigators handling these matters have demonstrated a remarkable ability to adapt to the ever-changing landscape.

Thank you to Melissa for this article. I greatly appreciate it! Again, please contact me with any interest in the Civil Committee!

– Karen Trickey Pappas

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Requesting Deviations from the Macomb County Prosecutor's Office Plea Policy

By Jonathan Mycek, Macomb County Prosecutor's Office
Assistant Prosecuting Attorney



The Macomb County Prosecutor's Office (MCPO) recognizes each case is unique and, sometimes, a standard plea agreement may not fit the circumstances of a particular client. When that happens, requesting a deviation from the MCPO's Plea Policy might offer an alternative route to a resolution. Fortunately, the process for requesting a deviation has never been easier.

Start a deviation request by navigating to the MCPO website: <https://www.macombgov.org/departments/prosecutors-office>. Next, scroll to the "Quick Links" near the bottom and click on "Request Deviation." Look at the "Deviation Request Protocol" page that appears and complete the Deviation Request Form PDF.

Remember, gun and intoxicated or drug-impaired driving case deviations require counsel to provide specialized expert assessments. Look to the "Deviation Request Protocol" page to see what must be included in the request.

Submit the finished request at least seven days before the next court date. Counsels are reminded to submit a completed request sooner if it's lengthy, complex, or if its thought the review will take longer than normal.

Finally, when the Deviation Request Form is completed and any required supporting documents are provided, save it all as a PDF, and email the file to deviations@macombgov.org. When it's received, the APA assigned will let you know where you stand.

Key Notes for a Successful Submission:

- **Incomplete Forms Will Be Rejected:** Be sure to fill out all applicable fields and include any required documents,

particularly for cases involving OWI or OUID charges, which require a substance abuse evaluation and proof of therapy.

- **No Contact with Senior Prosecutors:** Once the deviation request has been submitted, it is important to understand that contacting the Prosecuting Attorney, Chief Deputy Prosecutor, or anyone above the assigned APA regarding the request is strictly prohibited. Requests made outside of the proper channels will be returned without consideration.

Requesting a plea policy deviation has never been easier. By following these steps, reviewing the MCPO's website, and submitting the request on time, defense counsels can provide the flexible advocacy a unique client needs while simultaneously ensuring the MCPO has everything it needs to make a just decision.

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Weed Man Runnin' Dirty

By Timothy P. Flynn and
Frank L. Briguglio, Clarkston Legal



Michigan has been in the process of slowly decriminalizing and eventually legalizing marijuana for decades. The first city to decriminalize marijuana was Ann Arbor back in 1972. Between 2012 and 2018, major cities like Detroit, Kalamazoo, and Grand Rapids all joined the decriminalization band wagon.

Marijuana was legalized for medicinal purposes across Michigan by citizen-enacted legislation in 2008, followed by the legalization of recreational marijuana in 2018, also by citizen-enacted legislation. As you can imagine, the prosecution of marijuana possession and distribution crimes has likewise evolved.

One result from such progressive legislation is that weed dealers across the state have differing views of what is legal. Similarly, county prosecutors across the state are unsure whether they can or should prosecute the weed man and if so, under which statute and with what charges?

The Michigan Court of Appeals has issued a steady stream of published opinions ever since this sea-change in the law. This post examines two recent cases that seem quite similar in their facts, but ended up very differently for the convicted weed dealers. Truly, a tale of two counties.

A Conflict in the Marijuana Laws.

Here in Michigan, the production, distribution and use of marijuana is governed by two statutes: article 7 of the Public Health Code [for medical marijuana] and the Michigan Regulation and Taxation of Marihuana Act [the recreational marijuana act]. Violations for manufacturing marijuana under the health code trigger felony charges; violations of the recreational use act for the same conduct result in a misdemeanor.

Not only are the penalties in the laws different for essentially the same conduct, prosecutors have learned to tailor their charges, depending on which statute they want to use in order to shut down the local rogue weed man. Generally, statutes that cover the same subject matter, i.e. marijuana, are considered

to be in *pari materia*, and must be read together as one law.

As marijuana has gained favor as an acceptable “substance of choice”, local law enforcement and county prosecutors have experienced diminishing returns from high-profile weed dealer prosecutions. For the most part, anyone running a grow operation, legal or not, was just not making it onto the local sheriff’s radar.



Recent conflicting published decisions of the Michigan Court of Appeals, however, may change the sheriff’s outlook. The problem for Michigan’s jurisprudence is: how can two similar marijuana violations wind up with such vastly differing punishments.

Conflicting Panels of the Michigan Court of Appeals.

Among the recent published decisions flowing from our intermediate appellate court arises a tale of two counties: Berrien and Tuscola. Law in Michigan and most states arises through statutes and the common law. Common law is a collection of published appellate decisions that interpret statutes as they apply to people in a rich variety of circumstances.

When interpreting legislation, there are long-settled rules that judges and lawyers follow especially when two statutes covering the same subject matter contain seemingly conflicting provisions. First, in resolving a statutory conflict, judges apply the more specific statute over the more general statute. Second, the more recently enacted statute has precedence over an older statute.

Conflicting appellate panels sometimes result from conflicts in statutory terminology. This recently happened here in Michigan when two separate panels of the Michigan Court of Appeals, faced with similar criminal conduct, came to completely different results. These criminal defendants, both weed dealers running dirty, were charged under two conflicting provisions of our marijuana laws.

One Dealer Was Busted With Over 1000 Marijuana Plants

In *People v Kejbou*, ___ Mich App ___ (2023) (Docket No. 361377), the at-issue weed dealer allegedly maintained an

extensive unlicensed grow operation in Tuscola County. His multi-building compound was secured with an extensive security camera network and a pack of guard dogs.

Someone (probably one of his licensed competitors) tipped off the Tuscola County Sheriff. A subsequent search yielded hydroponic equipment, chemicals, fertilizer, and 1156 individual marijuana plants. And oh yes, there was also a loaded 12-gauge shotgun in one of the bedrooms.

The county prosecutor charged Kejbou with manufacturing 200 or more marijuana plants without a license along with a felony firearm count for good measure. Defense counsel moved to quash the felony charges based on the recreational marijuana act's limitation of punishment to a civil infraction or a misdemeanor. The motion was granted and the case was dismissed.

Although the prosecutor appealed, the dismissal was affirmed in a published opinion of the Court of Appeals. The three-judge panel held that the recreational marijuana statute was both more specific and came later in time than the medical marijuana provisions contained in the health code. The *Kejbou* panel, quoting the recreational marijuana statute, stated that a violator may be punished only as provided in this section and is not subject to any other form of punishment or disqualification, unless the person consents to another disposition authorized by law.

Focusing on the marijuana decriminalization process, and declaring that it was faced with a matter of first impression, the *Kejbou* Court concluded that the recreational marijuana statute was enacted to prevent felony convictions for unlicensed grow operations.

Judge Robert Redford concurred in the *Kejbou* opinion focusing on a determination of the intent of the electorate given that the law came from a voter based initiative rather than the Legislature. In doing so, Judge Redford quoted the exact language of the ballot proposal from 2018. One of the purposes of the recreational statute recognized in the concurrence was to remove the weed industry from the "illicit market and control by criminal enterprises."

Judge Redford recognized that the weed man in *Kejbou* was runnin' dirty.

He concluded his opinion by commenting: "[P]erhaps the Legislature should consider amending the MRTMA so that when an individual engages in the unregulated commercial manufacture of hundreds of marijuana plants, they could be subject to more severe penalties than allowed in [the recreational marijuana act]." *Id.*

Even prior to *Kejbou*, local law enforcement was beginning to sand-down relative to enforcement against the weed dealer. This decision stands; the unlicensed dealer with over 1000 plants received a misdemeanor.

Another Dealer Was Busted With 20 Pounds of Weed in Her House

People v Kathleen Soto, ___ Mich App ___ (2023) (Docket No. 370138) arose from the southwest corner of the state in Niles, Michigan. A drug mule, while trucking 85 pounds

of marijuana toward Soto's residence in Niles, was intercepted by the Illinois State Police. The mule cooperated with the police and completed the delivery as planned.

Of course, this led to a search of Ms. Soto's residence which allegedly yielded 20 pounds of weed, in addition to the 85 pounds trucked in by the mule and delivered to the residence. Unlike *Kejbou*, Kathleen Soto was charged with two felonies: possession with intent to deliver and maintaining a drug house.

Citing *Kejbou*, Ms. Soto's lawyer argued that the recreational marijuana act proscribed a felony charge, regardless of how massive the quantity of weed found in her bedroom. This time, however, Judge Robert Redford wrote for the majority opinion in *Soto*, and upheld the trial court's denial of Soto's motion to dismiss her felony charges. What gives? Why the change of heart Judge Redford?

Well, for one thing, the Berrien County prosecutor elected to charge Soto with possession with intent to deliver under the Public Health Code rather than unlicensed manufacturing under the recreational marijuana act as in the *Kejbou* case from Tuscola County. This specific charge allowed Judge Redford to focus on the precise penalty language contained in the recreational statute as it pertains to possession.

The statutory scheme of the recreational marijuana act addresses misdemeanor penalties for possession of specific -minor- amounts of marijuana. Amounts greater than twice the legal limit, however, are not included within the misdemeanor scope of punishment; that much weed was intentionally omitted from the statute's punishment scheme. For this type of punishment, one must switch over to the felony penalty provisions of the Public Health Code's marijuana section.

Accordingly, Judge Redford concluded that while the recreational marijuana act does not address punishment for possessing more than twice the legal limit of marijuana, Article 7 of the Public Health Code does. And that punishment is a felony with up to 15-years in prison and over \$1,000,000 in potential fines.

Reconciling Two Similar Cases

Mr. Kejbou dodged a major bullet and now has a misdemeanor conviction, while Kathleen Soto took it on the chin with a felony and a possible prison sentence. So much for the recreational marijuana act decriminalizing marijuana and controlling outcomes as being the more specific and more recent statute; tell that to Ms. Soto.

The Tuscola County Prosecutor's application for leave to appeal to the Michigan Supreme Court was denied in the *Kejbou* case. Kathleen Soto has filed her application for leave to the MSC which was joined last month by an amicus brief from the Criminal Defense Attorneys of Michigan. One of the legal arguments will be that it should not be up to the prosecutor to decide which statute to bring against a weed man runnin' dirty.

Given the highly disparate outcomes in two very similar cases, we expect the Michigan Supreme Court to grant leave in *Soto*. We will continue to monitor the case and report on the final outcome.

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Navigating the Complexities of Windows Licensing: A Guide to Staying Within Legal Boundaries

By Cheyenne Harden, CEO, Cyber Protect, LLC



As Windows 10 approaches its end of support on October 14, 2025, a critical juncture looms for law firms. This definitive cutoff will end Microsoft's commitments to security updates and technical support for the operating system, potentially heightening the risk of security vulnerabilities for those who have not yet transitioned to Windows 11. The urgency of this transition is intensified by the increasing sophistication of cyber threats, which can exploit outdated systems to compromise data integrity and business operations. For firms, particularly those operating older hardware that isn't compatible with Windows 11, this poses not only a technological hurdle but also a significant financial challenge. The countdown to October 2025 demands strategic decisions to ensure security, compliance, and operational continuity.

Deciphering the intricacies of software licensing can pose significant challenges, particularly with the ubiquitous Windows and Office suites. These products are frequently the target of promising discounts, but it's crucial to remember that not all that glitters is gold. Here, we delve into the essentials of Windows 11 licensing, highlighting the dangers of piracy and guiding you toward legitimate use.

The Allure of Discounted Licenses

Advertisements showcasing Windows or Office at substantially lower prices than their retail counterparts are not uncommon. Many of these offers peddle educational licenses acquired illicitly from academic institutions. While it might seem like a win because the product keys function, this does not equate to legitimate or legal use.

The core concern here is the misleading sense of validity these situations foster. Activation alone does not guarantee a license's legitimacy. Microsoft's validation process is designed to confirm the authenticity of the key, but not necessarily its proper usage or rightful ownership.

Choosing Between Windows Home and Professional Editions

Purchasing a new PC often means it comes with Windows Home pre-installed — a version suitable for many users. However, Windows Professional presents additional features that are beneficial for businesses and power users, such as enhanced update management and BitLocker encryption. Upgrading is straightforward through an online purchase, but caution is advised, as the market is rife with offers of questionable authenticity.

The Grey Zones of Microsoft Licensing

Microsoft's licensing system has historically included ambiguities, leading to confusion and misuse. Professional IT administrators have noted that some enterprise services rely on an honor principle, allowing for discrepancies in actual license usage.

On the consumer front, productivity suites like Office Home

and Student, intended solely for non-commercial use, have been adopted by small businesses, further blurring the lines of compliance. Microsoft's shift towards subscription models aims to tighten control over licensing, yet challenges persist, especially in educational contexts.

The Evolution of Piracy Enforcement

The narrative of software piracy and its enforcement by entities like the Business Software Alliance (BSA) has markedly shifted. Previously, aggressive measures were implemented to ensure compliance, with significant fines levied (Up to \$150,000 per infringement) for misuse. Today, the spotlight on these enforcement actions has dimmed. Whether due to improved compliance or altered strategies remains a point for reflection.

The Technical Repercussions of Piracy

Historical instances have shown that piracy can lead to significant technical issues. For example, a Windows security update once led to system crashes due to a conflict with unauthorized modifications aimed at bypassing licensing verifications. Such incidents underscore the unforeseen dangers of piracy.

Modern Windows Activation Mechanisms

Today, Windows activation is sophisticated, linking your license to your device through a unique identifier tied to your computer's motherboard. While the system accommodates minor hardware modifications, significant changes like motherboard replacements may trigger piracy flags, underscoring the need for legitimate licensing practices.

Navigating Licensing Pitfalls

When contemplating software licenses, asking whether an offer's pricing reflects a legitimate deal is imperative. Suspicion should be your guide in evaluating deals that appear exceptionally favorable.

Embracing Legitimacy for Future-Proofing

As Windows 10 nears its support conclusion, users may seek cost-effective upgrade paths. Yet, the true path to security and legal certainty lies in making informed, legitimate choices. Illegitimate software not only risks legal repercussions but also exposes users to security threats and operational instability.

Conclusion

Approaching software licensing with a clear understanding and a keen eye for legitimate sources is not merely a legal requirement but a cornerstone of digital security and reliability. As we navigate our increasingly digital lives, prioritizing proper licensing is not just wise—it is essential. In the realm of Windows 11 licensing, adhering to legitimate channels, understanding your needs, and making informed choices will ensure your digital world remains secure and compliant.



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WLAM Macomb was proud to participate in the 2025 Affinity Bar Charity Challenge!

WLAM Macomb's selected charity was "I Support the Girls," a nonprofit that supports women impacted by homelessness, domestic violence, and human trafficking.

Thank you Macomb County Circuit Judge Julie Gatti for joining us!



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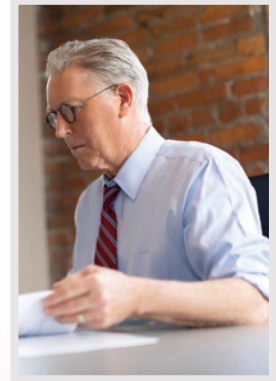
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July 19, 2024 | 9:00am

Amway Grand Plaza | 187 Monroe Ave. NW, Grand Rapids

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AT 8:30 AM