STATE OF MICHIGAN

COURT OF APPEALS

GM SIGN, INC.,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 11, 2012

No. 301742
Wayne Circuit Court
LC No. 10-000455-CK

Before: GLEICHER, P.J., and M.J. KELLY and BOONSTRA, JJ.

GLEICHER, P.J. (*concurring*).

I fully concur with the lead opinion and write separately only to respond to Judge Boonstra's concurrence.

Judge Boonstra would hold that GM Sign lacks standing to pursue a declaratory judgment. I respectfully disagree with this conclusion. Specific interest in a legal issue combined with sincere and vigorous advocacy confers standing. In this case, both parties demonstrated genuine, adverse interests in whether the Auto-Owners policy afforded coverage and aggressively litigated this question in the trial court. By issuing a coverage declaration the trial court acknowledged that the parties' competing and well-argued interests gave rise to GM Sign's standing to sue. Moreover, Auto-Owners never objected to GM Sign's standing and instead sought a resolution of the coverage question, thereby waiving any objection to the proceedings.

I. STANDING

In *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), the Supreme Court set forth a "limited, prudential" approach to standing grounded in whether a litigant's interest suffices to ''ensure sincere and vigorous advocacy.'" *Id.* at 355, quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). The touchstone for standing is "substantial interest" in an issue. A party possessing an individual and important interest in a controversy has standing to litigate it. *Lansing Schools*, 487 Mich at 359.

Judge Boonstra's opinion asserts that because "there is not currently an 'actual controversy' under MCR 2.605," the circuit court "should not have reached the merits of plaintiff's claims." In *Lansing Schools*, the Supreme Court emphasized that the term "actual controversy" must not be confused with the "case or controversy" requirement applicable to

lawsuits filed in federal court. Rather, "the standing inquiry focuses on whether a litigant 'is a proper party to request adjudication of a particular issue and *not* whether the issue itself is justiciable.'" *Lansing Schools*, 487 Mich at 355, quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (emphasis added). The Supreme Court emphasized in *Lansing Schools* that "[t]here is no support in either the text of the Michigan Constitution or in Michigan jurisprudence . . . for recognizing standing as a constitutional requirement or for adopting the federal standing doctrine." *Lansing Schools*, 487 Mich at 362. Indeed, the *Lansing Schools* majority characterized as an "illogical[] leap[]" that "Michigan law has historically required a case or controversy to invoke the judicial power." *Id.* at 365.

To satisfy MCR 2.605's "actual controversy" requirement, a plaintiff must "plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised." *Lansing Schools*, 487 Mich at 372 n 20 (quotation marks and citations omitted). GM Sign demonstrated "an adverse interest necessitating the sharpening of the issues raised" by pleading that Auto-Owners had defended 400 Freight "under a complete reservation of rights" and contended in the Illinois class action that 400 Freight "is not entitled to defense or indemnity under the Policies for the claims made by G.M. Sign[.]" The "actual controversy" that brought these parties to Michigan is whether the Auto-Owners policy affords coverage for the blast faxes.

[T]he declaratory remedy is an especially appropriate vehicle for resolving insurance coverage disputes." *Allstate*, 442 Mich at 65. The Supreme Court elaborated in *Allstate*:

> The determination that insurance coverage does or does not exist serves a purpose useful to the insurer, the insured, and the injured party. Moreover, in a given context, such a declaration coming before the trial of the underlying tort suit will end the controversy between insurer and insured and will 'afford relief from the uncertainty [and] insecurity' surrounding the coverage question. [*Id.* at 74-75 (citation omitted, alteration in original).]

Precisely the same logic guides my conclusion that GM Sign's declaratory judgment complaint stated an actual controversy. GM Sign filed this action because it possessed a substantial interest in determining whether insurance coverage would be available if it prevailed in the Illinois class-action suit. According to GM Sign, 400 Freight is out of business and therefore unable to independently satisfy any judgment.[1] Given that no coverage exists under the policy, GM Sign perhaps will elect to terminate the class action. Accordingly, GM Sign

[1] The Illinois Secretary of State's website indicates that the corporate status of 400 Freight Services, Inc. has been "revoked." See <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed August 15, 2012). GM Sign named 400 Freight as a defendant in this case; Auto-Owners appeared on its behalf. 400 Freight has not independently sought a judicial determination concerning Auto-Owners' indemnification obligation.

possessed a real and substantial interest in a declaration of coverage that was adverse to Auto-Owners' interpretation of the policy; that interest gave rise to its standing to sue.[2]

Even under the far more rigorous federal case or controversy doctrine, GM Sign would have standing to bring this action. In *Bankers Trust Co v Old Republic Ins Co*, 959 F2d 677 (CA 7, 1992), Judge Richard Posner concluded that a plaintiff situated similarly to GM Sign established an actual case or controversy under federal law, and I find his analysis both persuasive and directly applicable. The *Bankers Trust* plaintiff sought a declaration that if it obtained a judgment in an underlying lawsuit pending in an Oklahoma federal district court, Old Republic (an excess liability insurer for an Oklahoma defendant) would have to pay it. *Id.* at 679-680. The district court dismissed the declaratory action, ruling that unless the underlying suit resolved in Bankers Trust's favor no actual case or controversy would exist. *Id.* at 680. The United States Court of Appeals for the Seventh Circuit reversed the district court, holding that although Bankers Trust might lose the underlying lawsuit, it had stated a case or controversy. *Id.* at 680-681. Judge Posner explained that there was "a real disagreement" between the parties regarding the availability of coverage, not merely an "academic" one, otherwise Bankers Trust would not have initiated the suit. *Id.* "An ironclad rule that the insured's victim can never bring suit against the insurer unless he has a judgment against the insured would be . . . inappropriate." *Id.*

The Seventh Circuit set forth a compelling and highly pertinent hypothetical example highlighting a tort victim's "legally protectable interest" in ascertaining the availability of coverage:

> [S]uppose that the day after the accident in which the victim was injured, and therefore long before he could feasibly bring a tort suit, let alone obtain a judgment, the insurer declared the liability insurance policy void; and suppose the insured had no other assets. Then a tort suit would be worthless unless the insured's victim could obtain a declaration that the policy was valid after all. Must the victim go to the expense of prosecuting to judgment a tort suit that will be completely worthless unless the policy is declared valid? Or does not the victim have sufficient interest in the policy to proceed simultaneously, on both fronts, against insured and insurer, or even against the latter first if less preparation is necessary for that suit? [*Id.* at 682.]

In such a situation, the tort victim's interest in the policy would suffice to satisfy the case or controversy requirements of US Const, art III. *Bankers Trust*, 959 F2d at 682. Ultimately, the

[2] Tellingly, Auto-Owners concedes in its supplemental brief, "If this Plaintiff were seeking a declaration of coverage based on Michigan substantive law, it is probable that Michigan courts would grant standing, even prior to Plaintiff obtaining a judgment in the underlying case." (Emphasis in original).

decision whether to declare the parties' rights under the policy resides within the trial court's equitable discretion. *Id.* [3]

Judge Posner's pragmatic approach to standing starkly contrasts with the standing analysis advanced by Judge Boonstra. In this declaratory judgment action premised on an insurance policy, Judge Boonstra equates contractual insurance proceeds with a "pot of gold at the end of the rainbow" and insists that the mere existence of this "pot of gold" plays no role in determining whether the parties have presented a concrete dispute. But Auto-Owners is not a leprechaun. It has not hidden a cache of money in a mythical location. Rather, Auto-Owners sold a commercial insurance policy to a sophisticated purchaser. Unlike Judge Boonstra, both Auto-Owners and GM Sign understood that the policy was protection against loss, not magic money. Both Auto-Owners and GM Sign recognized that the plain language of the policy would guide their future conduct and therefore sought a legal ruling as to coverage. Had Auto-Owners brought the case instead of GM Sign, it would involve precisely the same "pot of gold," an identical "rainbow," and even Judge Boonstra could not contest standing.

Michigan case law firmly supports that GM Sign has standing to seek a declaration concerning 400 Freight's coverage. In declaratory judgment actions brought under MCR 2.605, Michigan's standing doctrine embodies a "'broad, flexible'" approach intended to "'mak[e] the courts more accessible to the people.'" *Allstate*, 442 Mich at 65, quoting *Detroit Base Coalition for the Human Rights of the Handicapped v DSS*, 431 Mich 172, 191; 428 NW2d 335 (1988). The drafters of the predecessor to MCR 2.605 "recognized the usefulness of the action for declaratory judgment and intended to provide for the broadest type of declaratory judgment procedure." *Allstate*, 442 Mich at 65 n 8 (quotation marks and citation omitted). "Where a party was seeking declaratory relief, the Court repeatedly held that meeting the requirements of the court rule governing declaratory actions was sufficient to establish standing." *Lansing Schools*,

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[3] Other courts have also found standing to sue under the circumstances presented in this case. For example, in *Christian v Sizemore*, 181 W Va 628, 632; 383 SE2d 810 (1989), the West Virginia Supreme Court interpreted that state's declaratory judgment statute to permit an injured plaintiff to file a declaratory judgment action against the tortfeasor's insurance company, finding "there is an actual controversy between the insurance carrier and the injured plaintiff because of the very real possibility that the plaintiff will look to the insurer for payment." The court elaborated:

> Declaratory judgment . . . provides a prompt means of resolving policy coverage disputes so that the parties may know in advance of the personal injury trial whether coverage exists. This facilitates the possibility of settlements and avoids potential future litigation as to whether the insurer was acting improperly in denying coverage. Moreover, . . . the use of declaratory judgments protects the plaintiff from an insured who has no independent assets and is not concerned about insurance coverage. [*Id.*]

As discussed in greater detail *infra*, the Illinois Court of Appeals agrees with this approach.

487 Mich at 357. Standing to bring a declaratory judgment action exists when "a litigant has a special injury or right, *or substantial interest*, that will be detrimentally affected in a manner different from the citizenry at large[.]" *Id.* at 372 (emphasis added). "MCR 2.605 does not limit or expand the subject-matter jurisdiction of the courts, but instead incorporates the doctrines of standing, ripeness, and mootness." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

> *[B]y granting declaratory relief in order to guide or direct future conduct, courts are not precluded from reaching issues before actual injuries or losses have occurred.* The essential requirement of an "actual controversy" under the rule is that the plaintiff pleads and proves facts that demonstrate an "'adverse interest necessitating the sharpening of the issues raised.'" [*Id.* (emphasis added) (citations omitted).]

The *Allstate* Court upheld the use of a declaratory remedy under circumstances analogous to this case. *Allstate* arose from an automobile accident involving William Keillor's decedent, the driver of a car struck by a drunk driver. Keillor sued Daniel Hayes, who had allegedly supplied alcohol to the intoxicated driver. Hayes tendered his defense to Allstate, his homeowner's insurer, which agreed to defend Hayes under a reservation of rights. *Allstate*, 442 Mich at 58. Allstate then filed a declaratory judgment action against Hayes, Keillor and others, asserting that coverage was precluded by the policy's criminal/intentional acts and automobile exclusions. *Id.* Keillor filed a counterclaim against Allstate, independently requesting a declaration of coverage. *Id.* at 59. Hayes failed to respond to Allstate's complaint or Keillor's counterclaim, and the court granted a default judgment in favor of Keillor and Allstate. *Id.*

Allstate then sought summary disposition of Keillor's declaratory judgment claim, which the circuit court granted. This Court affirmed the circuit court, concluding that Keillor lacked standing to obtain declaratory judgment concerning the policy terms because he was not a third-party beneficiary of the contract. *Id.* at 60-61. The Supreme Court reversed, holding that "once Allstate began its action for declaratory judgment and alleged that an actual controversy existed between itself and its insured and Keillor, the trial court could declare the rights and responsibilities of all interested parties before it." *Id.* at 61. The Supreme Court specifically addressed the language of MCR 2.605, which permits declaratory judgment "in a case of actual controversy" within the court's jurisdiction. The Court found the existence of an actual controversy for the simple reason that Keillor's "position is in conflict with that of [Allstate] and will be foreclosed by a determination of rights contrary to his position." *Id.* at 68. The Court found the interest to be "sufficiently concrete to assure effective advocacy," a prerequisite to standing. *Id.* Interest in the subject matter, the Court continued, "is subsumed within the declaratory judgment rule that expressly allows the declaration of rights of an 'interested party.'" *Id.* at 69.

Judge Boonstra's opinion notes that in *Allstate*, the Supreme Court declined to reach the precise issue presented here: "whether an injured party has a 'vested' interest from the time of the injury, which would permit the institution by the injured party of an action for declaratory

relief." *Id.* at 62-63.[4] Judge Boonstra posits that GM Sign lacks standing under *Allstate* because it is not a real party in interest to or a third-party beneficiary of the contract between Auto-Owners and 400 Freight, and has no "vested interest" in their contract. However, the Supreme Court specifically stated in *Allstate*:

> The nature of the procedural remedy is to declare interests not yet vested. Thus, the fact that the injured party is not a third-party beneficiary of the insurance contract is not determinative of his 'standing' to continue the action for a declaration of his rights as a conceded real party in interest. [*Allstate*, 442 Mich at 63.]

Both standing and the real-party-in-interest doctrine "are used to designate a plaintiff who possesses a sufficient interest in the action to entitle him to be heard on the merits." 6A Federal Practice and Procedure (2d ed), § 1542. In *Allstate*, 442 Mich at 63, Keillor became a "real party in interest" when Allstate commenced its declaratory judgment action and alleged an actual controversy between itself and Keillor. Keillor's real interest in the policy existed before trial on the merits of his negligence case. This Court specifically recognized a tort plaintiff's entitlement to declaratory judgment under similar circumstances in *Cloud v Vance*, 97 Mich App 446, 451-452; 296 NW2d 68 (1980): "In this case, plaintiff had an independent interest in the insurance policy from the time of the accident, contingent upon his recovery against the defendant."

Lansing Schools instructs that a litigant's standing is determined simply by asking whether its "interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.'" *Lansing Schools*, 487 Mich at 355, quoting *Detroit Fire Fighters*, 449 Mich at 355. A litigant with a meaningful interest in an issue, backed by effective advocacy, qualifies as a real party in interest possessed of standing to seek a declaratory judgment. Thus, *Lansing Schools* resolves the question left unanswered in *Allstate.* An injured party possessing a genuine interest in determining whether insurance coverage exists has standing to seek a judicial declaration of coverage.

Here, GM Sign's interest is particularly meaningful. 400 Freight has apparently closed its doors and has no incentive to challenge Auto-Owners' position that a policy exclusion bars coverage. Thus, 400 Freight has nothing to lose by allowing GM Sign's case to proceed to judgment.

Obviously, had 400 Freight brought this declaratory judgment action in the place of GM Sign, it would have had standing. And in that circumstance, GM Sign would have been a real party in interest under *Allstate.* GM Sign has precisely the same interest in this litigation. Pursuant to *Lansing Schools* and *Allstate*, this interest suffices to establish standing. The circuit

[4] Notably, the Supreme Court footnoted this statement with an explicit acknowledgment that in *Reagor v Travelers Ins Co*, 92 Ill App 3d 99; 415 NE2d 512 (1980), "the court held for public policy reasons that members of the public in general are beneficiaries of a liability insurance policy[.]" *Allstate*, 442 Mich at 63 n 7. I discuss *Reagor, infra.*

court correctly recognized the importance of construing the policy and its exercise of discretion should not be disturbed.[5]

II. WAIVER

Challenges to standing are waived if not timely raised. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 528; 695 NW2d 508 (2004); MCR 2.116(C)(5); MCR 2.116(D)(2). Auto-Owners did not challenge GM Sign's standing to bring this action in the trial court or in its initial brief on appeal. Auto-Owners defended this case solely on the merits until this Court *sua sponte* raised the issue of standing during oral argument.

Judge Boonstra's opinion asserts that "standing impacts subject matter jurisdiction" and therefore "it is properly this Court's first inquiry." To the contrary, *Lansing Schools*, 487 Mich at 355, instructs that standing is *not* jurisdictional; it is a question of "discretion and not of law." Because Michigan's standing doctrine lacks constitutional roots, a challenge to standing constitutes a garden-variety legal defense that may be waived if not raised. Given that the Supreme Court has held that standing is merely a "prudential" doctrine, I believe that the usual "raise or waive" rule applies.[6]

Nor do I agree that GM Sign lacks standing to pursue a declaratory judgment because its claim might be "premature." Whether an action is ripe presents a question related to its timing. Standing, which concerns whether the proper person has brought the action, is an entirely separate concept. "Whereas ripeness is concerned with when an action may be brought, standing focuses on who may bring a ripe action." *Pic-A-State PA, Inc v Reno*, 76 F3d 1294, 1298 n 1 (CA 3, 1996). Justice Antonin Scalia has summarized the standing inquiry as follows: "In more pedestrian terms, [standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'" Scalia, *The doctrine of*

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[5] Foreshadowing *Lansing Schools*, the Supreme Court in *Allstate*, 442 Mich at 61, observed that the power to issue a declaratory judgment in that case:

> was not destroyed by virtue of the default judgment entered against the insured. Although the court might have refused to declare the rights of the remaining parties, leaving Keillor to pursue the underlying tort action and, if successful, a garnishment action against Allstate, it was within its discretion to allow the action to continue and declare the rights of the parties remaining before it.

[6] As noted by our Supreme Court in *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (quotation marks and citations omitted):

> Michigan generally follows the 'raise or waive' rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a "failure to timely raise an issue waives review of that issue on appeal."

standing as an essential element of the separation of powers, 17 Suffolk U L Rev 881, 882 (1983). Auto-Owners never challenged whether GM Sign possessed the requisite stake to obtain a judicial interpretation of the insurance policy terms. Instead, Auto-Owners contended, "until judgment against the insured is entered, the coverage issue is not ripe for adjudication and the declaratory action must be dismissed." But this argument conflates standing and ripeness, and ignores that declaratory judgments in insurance coverage cases are often sought and issued before trial on the merits. And as pointed out in *UAW*, 295 Mich App at 495, MCR 2.605 subsumes any ripeness concerns.

Furthermore, other than announcing that the controversy is not "ripe," Auto-Owners has failed to articulate any justification for adjourning a coverage determination until after judgment is rendered in the class action. "[R]ipeness turns on 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'" *Pacific Gas & Electric Co v State Energy Resources Conservation & Dev Comm*, 461 US 190, 201; 103 S Ct 1713; 75 L Ed 2d 752 (1983), quoting *Abbott Laboratories v Gardner*, 387 US 136, 149; 87 S Ct 1507; 18 L Ed 2d 681 (1967). It serves no purpose to wait until judgment of the class action to resolve the coverage controversy. The insurance contract will remain unchanged. In the meantime, resources may well be squandered in an effort to obtain a valueless judgment.[7]

III. CHOICE OF LAW

Judge Boonstra's opinion sets forth a choice of law analysis premised on the distinction between substance and procedure, concludes that standing is "procedural," and holds that Michigan law controls whether GM Sign has standing to bring this action. I believe it unnecessary to reach this issue because no true conflict of law exists; under both Michigan and Illinois law GM Sign has standing to seek a coverage declaration. Furthermore, I respectfully disagree with Judge Boonstra's choice of law methodology, as our Supreme Court has rejected the efficacy of substance/procedure distinctions.

At the outset, I question the need for any choice of law discourse. As discussed in part I of this opinion, I believe GM Sign has standing to sue under Michigan law. Because Illinois law also affords GM Sign standing to determine whether coverage exists, no true conflict of law exists. In *Skidmore v Throgmorton*, 323 Ill App 3d 417, 421-422; 751 NE2d 637 (2001), the Illinois Court of Appeals summarized pertinent Illinois law as follows:

> In a declaratory judgment setting, the injured party is a necessary party to the suit because he or she has a substantial right in the insurance policy's viability. . . . The injured party's relationship with the liability insurer has been further characterized as that of a beneficiary. . . . [Citations omitted].

[7] Auto-Owners' current ability to bring a declaratory judgment action against 400 Freight, even before judgment in the class action, illustrates the baseless nature of Auto-Owners' "ripeness" challenge.

According to *Skidmore*, Illinois case law "stand[s] for the proposition that even though an injured party is not a party to the insurance contract, he or she will always be allowed to file a declaratory judgment action in order to determine the liable party's coverage pursuant to that insurance contract." *Id.*

In Illinois as in Michigan, tort claimants are "necessary parties" in a declaratory judgment action between an insured tortfeasor and an insurer. *Zurich Ins Co v Baxter Int'l, Inc*, 173 Ill2d 235, 245; 670 NE2d 664 (1996). In Illinois, the injured party's rights under a tortfeasor's insurance policy vest at the time of the accident, and the tort claimant is the real party in interest to the contract. *Reagor v Travelers Ins Co*, 92 Ill App 3d 99, 103; 415 NE2d 512 (1981). In *Reagor*, the Illinois Court of Appeals held that a "sufficient legal relationship" existed between the plaintiffs and the defendant insurance company "to enable plaintiffs to litigate the question of coverage under the policy." *Id.* Thus, under Illinois law GM Sign has standing to seek a coverage declaration.

If a true conflict existed, I would hold that Illinois law governs the question of standing. Judge Boonstra instead selects Michigan law, finding that "[a] declaratory judgment is a *procedural remedy*," and that "[m]atters relating purely to the remedy requested are governed by the laws of the state where the action is instituted." However, our Supreme Court forcefully criticized the procedural/substantive choice of law methodology in *Olmstead v Anderson*, 428 Mich 1, 9; 400 NW2d 292 (1987), a wrongful death case arising from a Wisconsin accident caused by a Michigan driver. In *Olmstead*, the Supreme Court characterized the "procedural characterization" as a "manipulative technique" employed as an "escape device[]" to "evade" application of the lex loci doctrine. *Id.* at 8-9. The *Olmstead* Court abolished the lex loci doctrine and directed that in tort cases, Michigan courts should generally apply Michigan law unless "reason requires that foreign law supersede the law of this state." *Id.* at 24. The Court found that Wisconsin had no interest in having its law applied, and therefore concluded that the presumption favoring Michigan as the forum state was not overcome. *Id.* at 29-30. Thus, there was no need to separately analyze Michigan's interests in the litigation; Michigan law applied.

Chrysler Corp v Skyline Indus Servs, Inc, 448 Mich 113; 528 NW2d 698 (1995), afforded the Supreme Court an opportunity to address choice of law considerations in a contract case. The Court observed that "[t]he predominant view in Michigan has been that a contract is to be construed according to the law of the place where the contract was entered into." *Id.* at 122. The national trend, however, counseled adoption of "the Restatement approach emphasizing the law of the place having the most significant relationship with the matter in dispute." *Id.* The Supreme Court cited favorably the following description of the appropriate inquiry:

> [A]lthough affording less certainty and predictability than rigid rules traditionally followed by the courts, [the Restatement approach] has merit in giving to the place having the most interest in the problem paramount control over the legal issues, thus allowing the forum to apply the policy of jurisdiction most intimately concerned with the outcome of the litigation, and in enabling the court, not only to reflect the relative interests of the several jurisdictions involved, but also to give effect to the probable intention of the parties and consideration to the best practical result. [*Id.*, quoting 16 Am Jur 2d, Conflict of Laws, § 83, p 141].

In *Chrysler Corp*, 448 Mich at 124, the Supreme Court adopted Restatement Conflict of Laws (Second) , §§ 187-188, explaining that "their emphasis on examining the relevant contracts and policies of the interested states[] provide a sound basis for moving beyond formalism to an approach more in line with modern-day contracting realities." The Supreme Court declined to completely abandon "the law of the place of contracting" as the basis for conflict decision-making. *Chrysler Corp*, 448 Mich at 124 n 28. Rather, the Supreme Court explained that application of a simple and inflexible rule "may prove to be unworkable under certain factual situations, such as those presented [in that case], which demand a more extensive review of the relative interests of the parties and the interested states." *Id.* Notably, the contracting parties in *Chrysler Corp* entered into their contract in Michigan and their agreement included a Michigan choice of law provision. *Id.* at 117-118.

This declaratory judgment action involves the interpretation of an Illinois insurance policy that was purchased by an Illinois corporation and was intended to be performed in Illinois. The policy governs coverage for the Illinois class action lawsuit that spawned this case. Absent a contractual choice of law provision and in the presence of a contract formed in Illinois that may or may not afford coverage in an Illinois lawsuit, I would hold that the law of the place of the contract controls. In my view, Michigan simply has no interest in the outcome of whether or not coverage exists, or in the future of the class action. Even were I to apply an interests-based analysis, I would reach the same conclusion.

Restatement Conflict of Laws, 2d, § 188(2) suggests consideration of the following factors when weighing states' interests in having their law applied:

> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicil [sic], residence, nationality, place of incorporation and place of business of the parties.

All of these factors, other than (e), weigh heavily in favor of the application of Illinois law. Factor (e) is essentially neutral, as one party (GM Sign) is incorporated in Illinois, and Auto-Owners does business there. Interest analysis therefore points to Illinois law.

Two additional Restatement provisions buttress my conclusion that Illinois law applies to the standing issue. Restatement Conflict of Laws, 2d, § 122 relates to "judicial administration, such as the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs." *Id.* at cmt a. It provides: "A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." In explaining the intent of this section, the drafters of the Second Restatement disparaged the "substance-procedure dichotomy," proposing instead that courts "face directly the question whether the forum's rule should be applied." *Id.* at § 122, cmt b. In my view, the mechanical rules governing this lawsuit must be distinguished

from the right to bring the action in the first place. Under the Restatement, Michigan's Court Rules dictate how this lawsuit must be litigated, but the rights of the parties must be determined through evaluation of their interests.

Moreover, Restatement Conflicts of Laws, 2d, § 125 cmt a, specifically addresses the conflict of law question at the heart of this case: "the local law of the forum will *not* be applied to determine whether a direct action can be maintained against an insurance company without the need of first obtaining a judgment against the insured." (Emphasis added.) This recommendation reflects the drafters' recognition that the interests of each state should be weighed when deciding which law controls whether a litigant has the right to seek declaratory relief.

IV. SUMMARY

I believe that GM Sign has standing to pursue this declaratory judgment action under both Michigan and Illinois law. My conclusion rests on the fact that GM Sign and Auto-Owners have genuine and adverse interests in a coverage determination, and advanced them effectively in the trial court. Given that the trial court elected to rule on the issues presented, I discern no logical or legal basis for this Court to withhold appellate review. Accordingly, I believe that the lead opinion properly reached the merits of this case.

/s/ Elizabeth L. Gleicher