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Clerk Of the Supreme Court  
P.O. Box 30052  
Lansing, Michigan 30052

**RE: ADM Files 2005-05 and 2006-20**

My comment relates to the alternative proposals ("Alternative A" and "Alternative B") for amending MCR 2.403(M)(1) regarding the effect of accepting case evaluation. In short, I suggest that the adoption of Alternative B would aggravate the problem that created the initiative to amend the rule.

The problem is that many of the bench and bar believe that the holdings of some unreported cases that interpret the rule create the danger that mutual acceptance of case evaluation will cut off the right to future potential benefits in circumstances where future benefits should clearly not be precluded. The last sentence of the subrule says:

"The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date is entered." (Emphasis supplied.)

Does this sentence say anything that wouldn't be true if it hadn't been written? Not really.. It speaks of the effect of a judgment that is entered pursuant to mutual acceptance of case evaluation. But doesn't a judgment *always* dispose of all claims in an action, past and future? Yes, it does, under the familiar principle of *res judicata*, which says that a judgment concludes all claims in an action that were litigated, or which could have been litigated. But the problem at hand is something more than that. It is the fact, or at least the legitimate apprehension, that the rule has been construed to eliminate future rights which *could not* have been litigated in the prior action.

What are cases where future rights cannot be litigated? To describe them generically, I would say that they are cases where the future rights can't be litigated because they haven't yet matured. Or, to use a more legalistic term, because they have not yet "accrued."

What are examples of such cases? First, let's suppose that a songwriter has a contract with a publisher to receive royalties for each piece of sheet music sold over a period of 15 years, the royalties to be paid semi-annually. Let's also suppose that the songwriter brings suit for royalties after the first two years on the claim that the songwriter has been paid for fewer than the actual number of sales. Suppose, furthermore, that the parties mutually accept a case evaluation in the action. Does that acceptance, or the judgment entered pursuant thereto, forever preclude the songwriter from ever again bringing a suit for a shortage in any year after that the first two? It doesn't seem right. At the time of the lawsuit, no one could know how many pieces of sheet music would be sold in the future. The principle of *res judicata*, certainly, does not preclude claims that are impossible to litigate.

Let's try another example. Suppose that an automobile purchaser has a disability insurance policy which provides that the insurance company will make the monthly automobile payments during such times that the insured is disabled from working. Suppose also that the insured brings suit during the first year that payments are due, on the claim that he is disabled, followed by a mutually accepted case evaluation that awards payments owing during the period at issue in the action. By accepting that award, is the insurance company precluded from later claiming that the insured has recovered from his disability? By the same token, is the insured precluded from later claiming that additional payments are owing because he is still disabled? It doesn't seem possible.

But that appears to be precisely what occurred in the unreported case of *Marshall v Franklin Life Insurance Company* (CA No. 217742, 2-20-01). The plaintiff had an insurance policy that covered her monthly automobile payments while she was disabled. She filed an action and recovered a judgment by acceptance of case evaluation ("mediation" then), for the payments owing to that time. Later she filed another action for payments accruing after the first suit. The *Marshall* court sustained the trial court's grant of summary disposition on the basis of *res judicata*, and also on the rule language that says that "The judgment or dismissal shall be deemed to dispose of all claims in the action...." A similar result occurred in *Weinger v Paul Revere Life Insurance Co*, (CA No. 241691, 11-18-03), another case where acceptance of a case evaluation award was held to preclude recovery for disability benefits in the future.

As for the royalties example, a similar result occurred in *Fritz v Delfield Company*, (CA No.238630, 6-3-03). In that case the plaintiff accepted an award rendered by case evaluation, but was denied royalties for periods thereafter in a second suit, on the basis that the plaintiff *could have asked* for future damages in the first suit. In both the *Weinger* and *Fritz* cases the courts cited *CAM Construction v Lake Edgewood Condominium Ass'n*, 465 Mich 549 (2002) as part of the rationale for holding that the acceptance of case evaluation precluded a later claim for future benefits.

I suggest that the reliance on *CAM Construction* was misplaced. The *Cam* case did not involve future rights of any kind. The plaintiff in *Cam* claimed damages for breach of two separate contracts, and the trial court granted summary disposition on the second of the claims. The action then went to case evaluation on the first contract, and after a mutual acceptance the plaintiff sought to go to trial on the second contract, asserting that it had reserved that claim. In affirming the refusal to allow the plaintiff to proceed, the Supreme Court said that MCR

2.403(M)(1) means what it says in declaring that mutual acceptance of case evaluation disposes of all claims in the case.

There was nothing novel in the *CAM* decision. It was a routine matter of enforcing *res judicata* as well as the court rule, which, as indicated above, amounts to the same thing. But the truism that a judgment disposes of all claims in the case does not dispose of the problem at hand, which is to find a way to articulate the rule in a manner that won't be construed to eliminate future rights before they come to fruition

The problem became particularly acute when the cited cases generated an apprehension among the trial bar that acceptance of case evaluation in a suit for personal injury protection benefits under the no-fault statute might cut off the right for future benefits which would otherwise exist for a lifetime. The apprehension persisted even after the decision in *Allard v State Farm insurance Co.*, 271 Mich App 394 (2006), which specifically held that mutual acceptance of a case evaluation award does not preclude a claim for benefits that accrue thereafter. Many practitioners, it seems, were not confident that the Michigan Supreme Court would uphold the *Allard* decision. That apprehension was misplaced, I will say, and particularly because the Supreme Court had earlier said essentially the same thing as *Allard* in *Proudfoot v State Farm Mutual Insurance Co.*, 469 Mich 476 (2003), in which case the court held that the insurance company could not be liable for future home modification expenses because they had not yet been incurred.

Whether justified or not, the apprehension persisted, generating the practice of consistently rejecting case evaluation awards in PIP cases, and requesting non-unanimous awards in those cases so that they could be rejected without fear of incurring sanctions. It was from this scenario that the initiative arose from several sources to amend the court rule to make it explicit that mutual acceptance of a case evaluation award does not cut off the right to future benefits in all cases.

The Supreme Court's Dispute Resolution Rules Committee approved the language contained in Alternative A as a solution:

(1) if all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 20 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and the interest to the date it is entered. The judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing, including cases involving rights to personal protection insurance benefits under MCL 500.3101 et seq.

The intent of that proposal was to protect not only PIP cases, but also the other kinds of contract situations discussed above, where future rights cannot have accrued at the time of the original litigation. But the Supreme Court's published order includes Alternative B as well, which says instead,

The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and the interest to the date it is entered, except for cases involving rights to personal protection benefits under MCL 500.3101 et seq. for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of that case evaluation hearing.

This version saves future rights for PIP cases only. The e-mail to the committee that accompanied the published order discloses that Alternative B was included on the supposition that Alternative A would leave open the possibility for litigating future damages in every other kind of case. But that is not so. The phrase, "claims that have not accrued" was premeditatedly selected to identify the kind of instances described above, where future rights have not matured. The phrase was regarded as not including conventional claims for tort or breach of contract, in which cases the claims for future damages are deemed to have accrued at the time of the injury or breach, and which must be awarded, if at all, in a single action to the extent that they are "reasonably certain" to be suffered in the future. The kind of future damages sought to be preserved in Alternative A, on the other hand, are those where the conditions for their existence haven't yet arrived, and which are therefore described as not yet "accrued."

The irony of Alternative B is that it would afford protection for future claims in PIP cases, where it is at least arguably unnecessary because of decided case law; while at the same time it would appear to reinforce the "problem" decisions that foreclose future benefits before they ever become possible to litigate.

For the above reasons, I recommend that Alternative A of the proposed amendment be adopted.

Sincerely,

William J. Giovan