

STATE OF MICHIGAN
IN THE SUPREME COURT

GRANT BAUSERMAN, KARL
WILLIAMS, TEDDY BROE, individually
and on behalf of similarly situated persons,

Supreme Court No. 156389

Court of Appeals No. 333181

Plaintiffs-Appellants,

Court of Claims No. 15-202-MM

v

MICHIGAN UNEMPLOYMENT
INSURANCE AGENCY,

Defendant-Appellee.

**MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S
SUPPLEMENTAL BRIEF IN OPPOSITION TO
PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF JURISDICTION

The Michigan Court of Appeals issued its decision on July 18, 2017. In that decision, the Court of Appeals ruled in favor of the Michigan Unemployment Insurance Agency by reversing the Court of Claims and remanding the case to that court for entry of an order granting the Agency's motion for summary disposition. The Court of Appeals held that the Agency was entitled to dismissal of the claim because Plaintiffs failed to file the claim, or a notice of intent to file the claim, within six months of the event giving rise to the claim, as required under MCL 600.6431(3). This Court's jurisdiction to grant leave to appeal rests on MCR 7.305(B).

On April 6, 2018, this Court issued an order scheduling oral argument on Plaintiffs' application for leave to appeal and directing the parties to file supplemental briefing on what constituted the event giving rise to Plaintiffs' due-process claim.

COUNTER-STATEMENT OF QUESTION PRESENTED

1. A plaintiff bringing a due-process claim in the Court of Claims must file the claim or a notice of intent to file the claim within six months of the event giving rise to the claim. That date may be different than the date the plaintiff is financially harmed by the triggering event. Plaintiffs alleged the Agency adjudicated them to have fraudulently obtained unemployment benefits, without first giving them notice or an opportunity to object, and then later collected money from them based on those erroneous adjudications. Did the Court of Appeals correctly conclude that the issuance of the adjudication was the event giving rise to Plaintiffs' due-process claim?

Appellants' answer: No.

Appellee's answer: Yes.

Court of Claims' answer: No.

Court of Appeals' answer: Yes.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article 1, § 17 of Michigan's 1963 Constitution

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

MCL 600.5827

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

MCL 600.6419(1)

(1) Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive. All actions initiated in the court of claims shall be filed in the court of appeals. The state administrative board is vested with discretionary authority upon the advice of the attorney general to hear, consider, determine, and allow any claim against the state in an amount less than \$1,000.00. Any claim so allowed by the state administrative board shall be paid in the same manner as judgments are paid under section 6458 upon certification of the allowed claim by the secretary of the state administrative board to the clerk of the court of claims. Except as otherwise provided in this section, the court has the following power and jurisdiction:

(a) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court.

(b) To hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ that may be pleaded by way of

counterclaim on the part of the state or any of its departments or officers against any claimant who may bring an action in the court of claims. Any claim of the state or any of its departments or officers may be pleaded by way of counterclaim in any action brought against the state or any of its departments or officers.

(c) To appoint and utilize a special master as the court considers necessary.

(d) To hear and determine any action challenging the validity of a notice of transfer described in section 6404(2) or (3).

MCL 600.6431

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

* * *

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

INTRODUCTION

The core allegation of Plaintiffs' claim is that the Unemployment Insurance Agency deprived them of their due-process rights when it concluded they had fraudulently obtained unemployment benefits and assessed penalties against them. They assert the Agency used an automated system to adjudicate these issues and therefore deprived Plaintiffs of the opportunity to contest the Agency's allegations. Because this lack of notice and opportunity to object was therefore the event giving rise to Plaintiffs' claim, they were required to file the claim or notice of intent within six months of the Agency's fraud adjudications. Plaintiffs failed to do so, and they therefore cannot maintain their claim.

In arguing for the survival of their claim, Plaintiffs misunderstand this Court's jurisprudence on what constitutes the *actionable* harm on which claims are based. That is, Plaintiffs want to focus solely on when the Agency's actions resulted in *financial* harm to them. But this Court has been clear in stating that "financial harm" is not necessarily synonymous with "actionable harm." *Frank v Linker*, 894 NW2d 574, 585 (Mich, 2017). And the United States Supreme Court has held that a person has a viable due-process claim even if their only injury is not having notice of the government's proposed action and an opportunity to be heard. *Carey v Piphus*, 435 US 247, 266 (1978). Yet Plaintiffs continue to assert they had to wait until they suffered financial harm before they could file this claim. But even if that were true, Plaintiffs were still required to file the notice of intent to file the claim within six months of the Agency's fraud adjudications. There is no dispute that they failed to do so. They therefore cannot maintain this claim.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Plaintiffs allege the Agency's fraud-detection and adjudication system violated their due-process rights, resulting in later financial harm.

Plaintiffs allege they were deprived of their property without due process of law. Their stated "property interest" includes unemployment benefits, wages, and tax returns. (Appellants' App'x, p 32a.) As with any procedural-due-process case, and especially in this case where the happening of the event giving rise to the claim is at issue, it is crucial to examine the facts underlying the alleged due-process violation. The relevant portion of each named Plaintiffs' factual scenario is presented below.

Grant Bauserman

Bauserman collected unemployment benefits from September 2013 until early March 2014. (Appellants' App'x, p 17a; App for Leave, p 6.) During a later investigation, the Agency learned that Bauserman received a sizeable payment (\$256,299.16) from his former employer around the time he received unemployment benefits, but that he failed to report it to the Agency. On December 3, 2014, the Agency issued redeterminations finding Bauserman ineligible for benefits, demanding repayment of all improperly received benefits, and assessing a penalty for intentionally misleading or concealing information from the Agency in order to obtain benefits. (Appellee's App'x, pp 024b-035b; App for Leave, p 18.) This is the finding that Bauserman asserts occurred without notice or an opportunity to be heard.

Bauserman did not protest or appeal that redetermination within the time period provided in the redetermination. He later sent letters to the Agency asserting his former employer had mistakenly reported earnings, but he never fully explained what the unreported money was for until March 2015—after the Agency began collection activity on the December 3, 2014 redetermination. (Appellants' App'x, pp 18a-20a.) These collection efforts included intercepting Bauserman's tax refunds. (*Id.* p 21a; App for Leave, pp 6, 18.)

On September 30, 2015, after reviewing the matter by order of an administrative law judge, including a review of the information Bauserman submitted after the December 3, 2014 redetermination became final, the Agency issued new redeterminations concluding that the large bonus payment from Bauserman's former employer did not disqualify him from receiving the benefits at issue. (Appellee's App'x, pp 036b-043b.) The Agency has returned all monies collected from Bauserman.

Karl Williams

Williams collected benefits in May of 2011, while also working full-time and training to be a manager. (Appellants' App'x, pp 22a-23a.) On June 22, 2012, the Agency issued a redetermination finding Williams ineligible for benefits and assessing a penalty for intentionally misleading the Agency to obtain benefits by failing to report his remuneration. (*Id.* p 23a.) Like Bauserman, this is this finding that Williams asserts occurred without him being provided notice and an opportunity to be heard.

He did not protest or appeal that redetermination within the time period provided in the redetermination. The Agency later began collecting on the debt from the June 22, 2012 redetermination, and provided Williams a notice of garnishment on October 29, 2013. (*Id.* p 24a.)

Williams filed a late protest of the June 22, 2012 redetermination, and on July 1, 2014, an ALJ held that Williams failed to establish good cause for his late protest. (Appellants' App'x, p 23a.) Williams took no further appeal.

On February 19, 2015, Williams was notified his federal income tax refund had been intercepted to be applied to the debt he owed to the Agency stemming from the June 22, 2012 redetermination. (Appellants' App'x, p 24a.) The Agency no longer collects money from Williams because he no longer owes it any money.

Teddy Broe

Broe collected benefits in 2013. (Appellants' App'x, pp 24a-25a.) After his employer disputed his eligibility, the Agency requested information from Broe, but he did not respond. (*Id.*) Based upon information available to it, the Agency issued redeterminations on July 15, 2014, finding Broe ineligible for benefits and assessing penalties. (*Id.* p 25a.) Broe, like Bauserman and Williams, asserts he was denied notice and an opportunity to be heard before the Agency made this finding.

Broe did not protest or appeal the redeterminations within the time period provided in the redetermination. (*Id.*) In 2015, the Agency sent a notice that Broe owed the Agency over \$8,000.00 in restitution for the improperly paid benefits,

interest, and fraud penalties. (*Id.*) The Agency then collected on that debt by intercepting Broe's state and federal tax refunds in May of 2015. (*Id.* p 26a.)

Broe filed a late appeal of the 2014 redeterminations, but an ALJ denied the late protest on September 24, 2015, because Broe failed to establish good cause for the late appeal. (Appellants' App'x, p 26a.) Broe appealed the ALJ's decision and on October 8, 2015, the matter was returned to the Agency. The Agency reconsidered its previous redeterminations and additional information submitted by Broe, and on November 4, 2015, issued new redeterminations in Broe's favor. (Appellee's App'x, pp 044b-051b.) All intercepted monies have been returned to Broe.

The complaints

On September 9, 2015, Bauserman filed a complaint in the Court of Claims. (Appellee's App'x, pp 001b-023b.) The complaint alleged that the Agency's use of the Michigan Data Automated System (MiDAS) to "detect and adjudicate suspected instances of unemployment benefit fraud . . . deprives UIA claimants of due process and fair and just treatment because it determines guilt without providing notice, without proving guilt and without affording claimants an opportunity to be heard before penalties are imposed." (*Id.* pp 001b-002b.) The "result of the violations of the Michigan Constitution" to Bauserman and the putative class were "economic damages." (*Id.* p 021b.)

After the Agency moved to dismiss based, in part, on Bauserman's failure to comply with the notice requirement of the Court of Claims Act, Bauserman filed an amended complaint on October 19, 2015, adding Williams and Broe as additional

class representatives. (Appellants' App'x, pp 1a-66a.) The allegations and thrust of the amended complaint were nearly identical to the original complaint. But the amended complaint included allegations that the Agency's means of collecting debts owed to it violated the Michigan Employment Security Act, MCL 421.1, *et seq.* (Appellants' App'x, pp 2a-3a and 14a-17a.) The Agency again moved to dismiss the amended complaint.

B. The Court of Claims denies the Agency's dispositive motion, holding that Plaintiffs' claims accrued after the filing of the complaint.

The Court of Claims issued its opinion and order on May 10, 2016, denying the Agency's motion for summary disposition. (Appellants' App'x, p 43a.) The court held, in relevant part, that Bauserman and Broe could not "fully allege the elements" of their constitutional tort claim (false accusation of fraud and wrongly deprived of property) until the Agency issued the redeterminations on September 30, 2015, and November 4, 2015, respectively, which rendered the previous fraud determinations null and void. (*Id.* p 48a.) Thus, the court concluded, the filing of the amended complaint on October 19, 2015, was done within six months of the redetermination dates, and Plaintiffs therefore complied with the requirements of MCL 600.6431. (*Id.* p 49a.)

- C. The Court of Appeals reverses the Court of Claims and holds that a due-process claim accrues when a plaintiff is denied notice and an opportunity to be heard, not when a plaintiff ultimately suffers the economic consequences of the denial of due process.**

The Court of Appeals held that the Court of Claims' conclusion on when Plaintiffs' claims accrued was incorrect and warranted reversal. *Bauserman v Unemployment Ins Agency*, unpublished opinion per curium of the Court of Appeals, issued July 18, 2017 (Docket No. 333181) (Appellants' App'x, p 61a.) Instead, the Court of Appeals concluded that since the nature of Plaintiffs' claim was a violation of the Due Process Clause of the Michigan Constitution, and because the fundamental requirement of due process is reasonable notice of proceedings and a meaningful opportunity to object and be heard, the wrong on which Plaintiffs' claim was therefore based was the Agency's adjudication they fraudulently obtained unemployment benefits without giving Plaintiffs notice and a chance to be heard. (Appellants' App'x, pp 61a-62a (citations and quotations omitted).)

The court expressly rejected Plaintiffs' argument that their claim did not accrue until they suffered economic harm. (Appellants' App'x, pp 61a-62a.) Citing this Court's decision in *Frank v Linkner*, 894 NW2d 574 (Mich, 2017), the court noted there is a difference between the occurrence of a wrong on which a claim is based and the resulting monetary damages or financial injury from the harm. (*Id.*, citing *Frank*, 894 NW2d at 584-586 (internal quotations and citations omitted).) The court concluded that Plaintiffs here, like those in *Frank*, "erroneously focus on the potential consequence of a due process violation, the taking of their property,

rather than the hallmark of a due process claim, the right to notice and an opportunity to be heard.” (*Id.* p 63a.)

Thus, because each Plaintiff failed to file a notice of intent to file their claim, or the claim itself, within six months of the happening of the event giving rise to their claim—the issuance of their fraud adjudications—the Court of Appeals concluded Plaintiffs failed to comply with MCL 600.6431(3). (Appellants’ App’x, pp 62a-63a.) The court remanded the matter to the Court of Claims to grant the Agency’s motion for summary disposition. (*Id.* p 63a.)

STANDARD OF REVIEW

The question before this Court is whether Plaintiffs’ claims are barred because they failed to pursue the claims in accordance with MCL 600.6431. Analysis of that question requires this Court to interpret MCL 600.6431, which it does *de novo*. *McCahan v Brennan*, 492 Mich 730, 736 (2012).

ARGUMENT

I. The event giving rise to Plaintiffs' due-process claim occurred when the Agency allegedly denied them notice and an opportunity to object to the determination that they fraudulently obtained unemployment benefits.

A. This Court has held that the actionable harm giving rise to a claim may be distinct from the realization of financial damages resulting from the actionable harm.

In *Frank v Linkner*, this Court held that a claim can accrue before a plaintiff suffers actual economic or financial harm. 894 NW2d at 585. The *Frank* plaintiffs were former employees of a company who also had ownership units in the company. *Id.* at 578. The founder of the company told the plaintiffs that their ownership units would not be diluted or subordinated to other ownership units. *Id.* But several years later the company executed an amended operating agreement that did subordinate plaintiffs' ownership units. *Id.* And three-and-a-half years after that, the company was sold and the plaintiffs received no distribution of the proceeds from that sale. *Id.*

The plaintiffs brought a statutory claim for LLC member oppression, and in analyzing when that claim accrued, this Court said it had to "determine the date on which plaintiffs first incurred the harms they assert" and that "harms" are "the actionable harms alleged in a plaintiff's cause of action." *Frank*, 894 NW2d at 584. The Court then held that the actionable harm in an LLC member oppression claim is the substantial interference with a member's interests as a member. *Id.* at 585 (quotation and citation omitted). The *Frank* plaintiffs argued that their claim did not accrue until they had an actual financial injury after the sale of the company's

assets. *Id.* This Court rejected that argument and held that the plaintiffs had “conflate[d] monetary damages with ‘harm.’” *Id.* The “harm” in a member oppression case is a substantial interference with a member’s interests as a member, and therefore that harm may occur before the member suffers economic injury. *Id.* at 585-586. The Court also noted that a claim’s accrual date does not reset or allow for a new cause of action if “additional damages result[] from the same harm.” *Id.* at 586.

The Court determined that the substantial interference with the *Frank* plaintiffs’ interests as member occurred in 2009 when the operating agreement was amended to allow for the subordination of the plaintiffs’ membership units. *Frank*, 894 NW2d at 586. That is the time where plaintiffs could have first sought relief under the applicable statute. *Id.*

The Court rejected the plaintiffs’ argument that their claim did not accrue until the company’s assets were sold because that sale was the last in a series of actions that interfered with their membership rights. *Frank*, 894 NW2d at 587. In rejecting the “last in a series of events” argument, the Court concluded that distribution of the sale’s proceeds was done “in *conformity* with the Operating Agreement and would not have breached plaintiffs’ interests as members *absent* the prior subordination of their shares.” *Frank*, 894 NW2d at 587 (emphasis in original).

More recently, in *Henry v Dow Chemical Co*, 905 NW2d 601 (Mich, 2018), this Court again held that the relevant focus is on when the wrong on which a claim is based occurred; not on when the plaintiff ultimately suffers damage. *Id.* at 601.

The takeaway from *Frank* and *Henry*, and the cases cited therein, is that the event giving rise to a cause of action is not necessarily the date on which a plaintiff suffers economic or financial harm. Determining what that event or actionable harm is requires a court to look at the nature and essence of the claim being asserted. The nature and essence of Plaintiffs' claim is the denial of notice of the Agency's fraud findings and an opportunity to object. The financial harm that resulted from the denial of that right is not the event that gave rise to the claim.

Indeed, in addition to the principle from *Frank* and *Henry* that a claim accrues once there is any *actionable* harm (not just a *financial* harm), the specific language of MCL 600.6431 suggests that the event giving rise to the cause of action is something that occurs *before* a claim fully accrues. The Legislature used the term "accrued" in MCL 600.6431(1) as the trigger for when the claim or written notice must be filed, but the Legislature used different words—the event "giving rise to the cause of action"—in MCL 600.6431(3) to specify the time that triggers the notice requirement for certain types of claims.

It is a basic principle of statutory construction that "[w]hen the Legislature uses different words, the words are generally intended to connote different meanings." *United States Fid & Guar Co v Michigan Catastrophic Claims Ass'n*, 484 Mich 1, 14 (2009). Here, the different words suggest different meanings: while the term "accrued" means a claim that has fully arisen, the phrase "giving rise to the cause of action" uses language showing that the cause of action has not yet fully arisen. See Garner, *A Dictionary of Modern Legal Usage* (2d ed), p 16 ("Arise may

refer to the onset of the underlying wrong (e.g., exposure to asbestos), whereas *accrue* may refer to the ripeness of the claim (e.g., contraction of asbestosis or discovery of the disease).”). In other words, even if we were to set aside *Frank* and *Henry* and assume as true that Plaintiffs’ claim had not *accrued* until they suffered a financial harm, the events *giving rise* to their due-process claims occurred when the fraud determinations were made, as those allegedly automated decisions were the events that started into motion Plaintiffs’ due-process causes of action.

Either way, when pursuing a claim alleging the denial of due process the actionable harm is the government’s alleged failure to adequately notify a person of proposed action and give them an opportunity to object to it. The actionable harm in a due process claim is not, as Plaintiffs assert, the later or ultimate deprivation of a plaintiff’s property interest.

B. The actionable harm in a denial of due-process claim occurs prior to the actual deprivation of property.

In *Carey v Piphus*, 435 US 247 (1978), the Supreme Court held that the ability to maintain a procedural-due-process claim was not dependent on the plaintiff suffering other actual damages. The case involved the separate suspensions of two students for 20 days, which the students alleged were imposed without due process in violation of the Fourteenth Amendment. *Carey*, 435 US at 248-250. The students filed complaints seeking declaratory and injunctive relief, and actual and punitive damages. *Id.* at 250-251. The issue before the Court was whether a plaintiff bringing a procedural-due-process claim had to prove they were

actually injured by the denial of due process before they could recover substantial actual damages. *Id.* at 253. In describing the nature of due-process rights, the Court held that they are “meant to protect persons not from the deprivation [of a person’s possessions, or liberty, or life], but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey*, 435 US at 259. The nature of these rights comes from “the risk of error inherent in the truth-finding process” *Id.* (quoting *Matthews v Eldridge*, 424 US 319, 344 (1976)). And due-process rights aim to minimize that risk “by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests.” *Id.* at 259-260 (citation omitted).

In short, the Due Process Clause protects persons from injury to their right to a process: to the right to be notified of potential government action and the right to have the opportunity to object to it. Thus, as the Court held in *Carey*, a person can have a viable procedural-due-process claim even if the underlying government action was in fact justified, and even if the person had no other injury aside from the denial of due process. *Carey*, 435 US at 266.

Plaintiffs assert that the Due Process Clause says that an individual cannot be deprived of “property, without due process of law,” and not that a person cannot be “deprived of notice and an opportunity to be heard.” (Corrected Suppl Br, p 7.) They also state that “the deprivation of notice and a hearing is an administrative *step* in furtherance of a deprivation of property without due process.” (*Id.* p 15 (emphasis added).) While the language of the Due Process Clause speaks for itself, the Supreme Court has held that the “root requirement” of the Due Process Clause

is reasonable notice and an opportunity to be heard before deprivation of a significant property interest. *Cleveland Bd of Ed v Loudermill*, 470 US 532, 542 (1985) (citations omitted). This Court has similarly referred to notice and the opportunity to object as “[a] fundamental requirement of due process.” *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509 (2008). Thus, the Due Process Clause prohibits depriving a person of notice and an opportunity to be heard, and the denial of notice and a hearing is the essence of a due process claim since that is the process that the U.S. and Michigan Constitutions provide for.

In sum, *Frank* says to look for the actionable harm when analyzing the event giving rise to the claim. The U.S. Supreme Court has held that the actionable harm in a denial of due process case is the lack of notice and an opportunity to be heard; regardless of whether the plaintiff suffered actual financial harm. *Carey*, 435 US at 266. The Constitution gives individuals the right to process. Thus, a due-process claim is born out of the deprivation of that process. The fact that a plaintiff may later suffer additional damage—like financial damage—does not change that conclusion. *Frank*, 894 NW2d at 586.

C. Plaintiffs’ amended complaint makes clear that their claim is one for denial of due process, and not simply a claim for property deprivation.

It is clear upon reading Plaintiffs’ amended complaint that their claim is that the Agency’s automated detection, determination, and penalization for fraud violated their due-process rights. Their argument about collection practices or

seizures is that they violate the Michigan Employment Security Act (MES Act), MCL 421.1, *et seq.*

Right at the start of the amended complaint Plaintiffs said that the Agency’s use of “an automated decision-making system to detect and adjudicate suspected instances of unemployment benefit fraud” “deprive[d] UIA claimants of due process” because this system “determine[d] guilt without providing notice” and “without affording claimants an opportunity to be heard before penalties are imposed.” (Appellants’ App’x, p 2a.) For the allegations regarding the Agency’s collection practices—what Plaintiffs now refer to as the actual deprivation of their property—the Plaintiffs asserted those practices violated the MES Act, not the Due Process Clause of the Michigan Constitution. (*Id.* pp 2a-4a.) In their “general allegations,” Plaintiffs asserted the Agency had to provide due process to those *accused* of fraud. (*Id.* pp 6a-8a.) Plaintiffs went on to say that due process must be afforded to a claimant regardless of whether the Agency ultimately concludes that they committed fraud. (*Id.* p 8a.) Thus, taking Plaintiffs’ claim at face value, if a claimant is even accused of fraud without due process, their rights have been violated upon the happening of the accusation.

Plaintiffs also alleged the Agency’s automated system that detected possible fraud and determined whether a claimant committed fraud, violated due-process rights because it did not provide meaningful notice or an opportunity to be heard. (Appellants’ App’x, p 10a.) In other words, Plaintiffs asserted that the Agency’s system did not provide sufficient notice, allow for an actual examination of a claim,

or allow a claimant to prevent evidence. (*Id.* pp 10a-11a.) The Agency allegedly determined the culpability of people’s conduct and imposed penalties without any due process. (*Id.* p 13a.) And the Agency’s way of detecting possible fraud, determining whether fraud occurred, and assessing penalties for fraud violated the standards required by the Due Process Clause of Michigan’s Constitution. (*Id.*) Plaintiffs also asserted they were “deprived of due process” through the Agency’s flawed fraud detection, determination, and penalty assessment process, and that they “suffered an injury in the form of a deprivation of due process.” (*Id.* p 29a.)

Plaintiffs also alleged that “clearly established principles of due process” required the Agency to provide notice and an opportunity to challenge the charges of fraud levied against them. (Appellants’ App’x, p 33a.) Thus, that process was due to Plaintiffs before the Agency issued its fraud determinations and assessed penalties. And therefore, the issuance of the determinations was the event that gave rise to the due process claim.

Plaintiffs now attempt to characterize this case as simply a “challenge [to] the deprivation of their property.” (Corrected Suppl Br, p 1.) But if that were truly the case, one would expect to see a count in the amended complaint for conversion, or theft, or for violating some law prohibiting the taking of one’s property. But by bringing it under article 1, section 17 of Michigan’s 1963 Constitution, Plaintiffs clearly are challenging the alleged denial of their right to due process. By now tying in the Agency’s collection on its previously issued determinations, Plaintiffs are “conflat[ing] monetary damages with ‘harm’.” *Frank*, 894 NW2d at 585. They are

also asking the Court to ignore the clear language of their amended complaint wherein they acknowledged that the Agency's collections were the *result* of the fraud adjudication and penalty assessment.

Indeed, Plaintiffs acknowledged that the "economic damages" in the form of the tax intercepts were "caused by [the Agency's] deprivations of property without due process." (Appellants' App'x, p 34a.) Plaintiffs also acknowledged that collecting benefit overpayments and fraud penalties is part of "[t]he process for determining fraud." (*Id.* p 8.) Thus, the "economic damages" are separate from the deprivation of due process. Just as the "distribution of the proceeds of the sale was done in *conformity* with the Operating Agreement" in *Frank*, the interception of Plaintiffs' tax refunds was done in *conformity* with the issuance of the fraud determinations. 894 NW2d at 587 (emphasis in original). And just as the actionable harm in *Frank* was the subordination of the plaintiffs' shares through the amendment to the operating agreement, the actionable harm for Plaintiffs' due-process claim was the issuance of the fraud determinations.

D. Plaintiffs failed to file their claim or notice of intent to file the claim within six months of the event giving rise to the claim.

Like other plaintiffs bringing an action against the State, Plaintiffs here were required to file their due-process claim, or notice of intent to file it, within six months of the event giving rise to the claim. MCL 600.6431(1), (3). The Plaintiffs' actionable harm occurred when the Agency determined them to have committed fraud and assessed them penalties. These adjudications (and accompanying lists of

overpayments) explained to Plaintiffs what the Agency concluded, how much money the Agency determined they owed (including restitution and fraud penalties), and how the Agency could collection that money.

The question then becomes whether they filed their due-process claim within six months of the date of those adjudications. For Bauserman, that date was December 3, 2014, but he did not file his claim until September 2015 (about nine months later); for Williams, that date was June 22, 2012, but he did not file until October 2015 (over three years later); and for Broe, that date was July 15, 2014, but he did not file until October 2015 (about 15 months later). (App for Leave, p 18; Appellants' App'x, pp 23a, 25a.) Given that they filed after the six-month notice requirement in MCL 600.6431(3), the Court of Appeals correctly held that Plaintiffs failure to timely bring the claim was fatal to the maintenance of their claim.

Yet Plaintiffs continue to assert they could not have brought this claim unless or until the Agency collected money from them; that the actionable harm was the taking of their money. In so asserting, Plaintiffs seek to sidestep *Carey's* identification of the actionable harm in a due-process claim by stating that "notice and opportunity to be heard are elements" of a due-process claim, but are "insufficient in and of themselves, to constitute the 'actionable harm' of a deprivation of property." (Corrected Suppl Br, p 8.) If this were in fact accurate you would have expected *Carey* to say so, but it says the opposite. *Carey*, 435 US at 266 (holding that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury"). And Plaintiffs indeed concede they could

have brought this claim once the Agency issued the fraud redeterminations at issue. (Corrected Suppl Br, p 8.) And while they say they had to wait until their property was seized in order to recover more damages (*Id.* p 16), this assertion ignores *Frank*. 894 NW2d at 586 (“Additional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action.”).

Plaintiffs also discuss this Court’s recent decision in *Millar v Construction Code Authority*, No. 154437 (Mar. 29, 2018), and assert that it is applicable to the issue before the Court in this case. But *Millar*’s import is limited to analyzing cases brought under the Whistleblower Protection Act, MCL 15.361, *et seq.* In *Millar*, this Court concluded that the plaintiff did not have an actionable claim under the WPA, until an allegedly discriminatory action violating the WPA occurred. *Millar*, slip op, pp 6-7. But here, Plaintiffs concede that they had an actionable due-process claim when the Agency issued the fraud determinations. (Corrected Suppl Br, p 8.)

Plaintiffs also cite *Herr v United States Forest Service*, 803 F3d 809 (CA 6, 2015), which they assert supports their argument that a claim does not accrue until the plaintiff is “actually aggrieved.” (Corrected Suppl Br, pp 12-13.) In *Herr*, the plaintiffs purchased lakefront property in 2010 and then challenged a 2007 order of the U.S. Forest Service, arguing the order infringed on their right to operate a motorboat on the lake. *Herr*, 803 F3d at 813, 818. The Sixth Circuit held that the plaintiffs’ claim accrued in 2010 (as opposed to 2007 when the Forest Service issued the order) because that was the first time the plaintiffs became aggrieved by the government’s action. *Id.* at 819. *Herr*’s relevance is limited by the fact that the

court was analyzing a specific federal statute that is not applicable to this case. But even if a party's ability to file an action arises out of the first time they are aggrieved by the government's action, Plaintiffs here *were* aggrieved by the Agency's issuance of the fraud redeterminations. Just look at the amended complaint. As outlined earlier, Plaintiffs repeatedly asserted the Agency violated their due-process rights by detecting suspected fraud, determining guilt on the suspected fraud, and assessing penalties, all without affording them notice of these facts or an opportunity to object to them.

Even if Plaintiffs' assertion is true—that they could not have filed the actual claim for additional damages until the Agency collected on the fraud determinations—Plaintiffs do not address their failure to file a notice of intent to file the claim within six months of the fraud determinations. The Court of Claims Act did not require Plaintiffs to file the claim itself within six months of the Agency's issuance of the redeterminations. They only had to file a notice of intent to bring the claim. MCL 600.6431(3). From there they would have had three years to file the claim itself seeking the additional damages resulting from the Agency's collections. MCL 600.6452(1). They did not do so and are therefore unable to maintain their claim.

CONCLUSION AND RELIEF REQUESTED

A plaintiff cannot maintain a claim against the State unless it satisfies the requirements of MCL 600.6431. Because Plaintiffs' claim is one alleging a violation of their due-process rights, they were required to file their claim, or notice of intent to file it, within six months of allegedly being denied notice and an opportunity to be heard about whether they fraudulently obtained unemployment benefits. They failed to do so.

The Court of Appeals therefore correctly determined that Plaintiffs failed to meet the notice requirement in the Court of Claims Act, and that they could not maintain their claim. Thus, this Court should deny Plaintiffs' application for leave.

Respectfully submitted,

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