

**Michigan Senate Insurance Committee Hearings**  
**May 22, 2012 at 2:30 pm**  
**Room 100 Farnum Building,**  
**123 W. Allegan Street, Lansing MI 48933**

**SB 1118. Statute of limitations on wrongful death cases; prejudgment interest;  
Time for filing Affidavit of Meritorious Defense**

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SB 1118 proposes three significant changes. These will be addressed in the order they appear in the proposed bill:

1. Sec. 2912e proposes to change the date on which the affidavit of meritorious defense must be filed. Currently, it must be filed within 91 days of the affidavit of merit being filed. The proposed change requires it to be filed within 91 days of the affidavit of merit being served. This change is reasonable.
2. Sec. 5852 identifies when a lawsuit must be filed when there is a death. In order to file a lawsuit, a probate estate must be open. Currently, you have two years to file suit after an estate has been opened. In 1996, when the Notice of Intent (NOI) legislation passed, the law was that an NOI had to be filed within two years of opening a probate estate. The Michigan Supreme Court later ruled that the lawsuit had to be filed within two years – so the NOI had to be filed 6 months earlier.<sup>1</sup> Effectively, now, the claimant has only 18 months from opening an estate to filing the Notice of Intent – rather than the two years allowed for every other type of death case.

It is also important to know that many times, a grieving family goes to Court to change the title of a car, or a small bank account, after a family member dies. A small estate is opened for that purpose, and then immediately closed. This type of estate doesn't require hearings and filings, like a regular probate estate.

- a. The proposed change requires filing the suit within two years of first opening the estate. The effect would be that an unsuspecting, grieving family who try to dispose of a small asset through a small estate, would be

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<sup>1</sup> *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004)

starting the clock ticking and many families would find their claims time barred.

- b. When considering the 18 months time allowed to file the first document (NOI), you should know:
  - i. Autopsies can take six months for completion;
  - ii. Applying to reopen a small estate as a regular probate estate, and having a hearing on this issue, can take two months or more;
  - iii. Obtaining medical records can take 1-2 months, or more, after the estate has been re-opened;
  - iv. After the records are obtained, they must be reviewed to determine whether there is a case, and if there may be, then the specialty of each potential defendant must be identified and expert opinion obtained before drafting the NOI. This is a 2-4 month process, and usually longer.
- c. The proposed legislation requires the grieving family to go hire an attorney immediately. It does not allow any time for the grieving process and for families to heal. The proposed change would, effectively, bar anyone from making a claim who doesn't do so immediately. Most cases, where a small estate has been opened, would be barred.
- d. 30% of the medical expenses in this country today are for people during the last six months of their life.<sup>2</sup> This expense is recouped and returned to the health insurer/government when there is a lawsuit. If lawsuits are barred due to this unreasonably shortened time constraint, those payments could not be recouped.

NOTE: The first bill above is not objectionable because it sets a reasonable time requirement; the second proposes an unreasonable timeframe.

3. Sect. 6013 addresses the calculation of interest for a money judgment. Currently, if a party obtains a money judgment, and is also awarded reimbursement for costs and attorney fees, then interest is owed from the time the complaint is filed on the judgment, costs and attorney fees. The proposed change bars recovery of interest on costs and attorney fees – but only in medical malpractice cases.
  - a. Obviously, the current legislation is fine—or there would be a proposal to change the entire process for making the interest calculation. This proposal is just giving doctors a special advantage that no other person, business, or party to a lawsuit enjoys. Why?? Victims should not lose rights just because a doctor hurt them in a health care facility.
  - b. The only articulated reason for this bill is that it benefits lawyers, which is untrue. The statute specifically says that the interest on attorney fees goes to the victim – not the attorney.

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<sup>2</sup> Citation omitted due to the large number of sources, most of which use this number, or it is in the mid-range for the number. Some sources use a slightly lower number (upper 20's) and range as high as 80%. (Although the source of the 80% number, which is widely discussed, was not found.)

- c. The statute currently allows the defendant to stop the accrual of all interest – by making a bona fide settlement offer.<sup>3</sup> The current statute encourages parties to evaluate cases early and try to resolve them. If this is done, interest won't accrue on any part of the judgment. The proposed change discourages early evaluation of cases and encourages lengthy, drawn out lawsuits of cases that could, and should, settle early.

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<sup>3</sup> A bona fide offer is defined by the statute, essentially, as one that is within 10% of the verdict.