VI. SPECIAL PROBLEMS

A. Exclusivity and Third-Party Actions

In recent years a number of Michigan companies have become alarmed that a linchpin of the workers' compensation system, namely, the immunity of employers against employee suits or third-party actions based upon tort theories, was breaking down. Professor Arthur Larson, the country's acknowledged authority on workers' compensation law, agreed to provide a comparative analysis of Michigan law and the law of the neighboring Great Lakes states on this subject. From Professor Larson's full report, I reproduce those portions in which he describes the problem and sets forth his conclusions:

The exclusiveness of the compensation remedy is a universal and accepted feature of American compensation law. It lies at the heart of the well-known quid pro quo, under which the employer enjoys tort immunity in exchange for accepting absolute liability for all work-connected injuries. The last state to give the employee an option to sue his employer in tort, New Hampshire, abolished that option in 1947. Since then, no frontal assault of any seriousness has been made on the exclusiveness principle in this country.

In recent years, however, selective attacks on exclusiveness have been pressed on a number of fronts. The trend for a time seemed to be toward a breakdown of exclusiveness. Most recently, however, the trend has been not only halted but reversed. One must hasten to add, however, that there has been no let-up in the vigor and variety of attempts to penetrate exclusivity.

If the various features of Michigan compensation law bearing most relevantly on exclusiveness of remedy and third party issues are appraised from the point of view of hospitality toward employers and carriers, the conclusion is that on all counts, with one questionable exception, Michigan law is at least as favorable as that of its neighbors, and that on some counts it is more favorable.

The basic statutory provision is as inclusive as any as to kinds of suits and plaintiffs barred. MCL § 418.131.

As to nonphysical injury, Michigan, unlike Indiana, Ohio, and Pennsylvania, has not yet opened the door to suits based on deceit as a "second injury" independent of the first compensable injury, although it has not rejected that possibility either. It has generated a number of cases on discrimination, humiliation, and emotional distress, but always carefully limiting suit to kinds of injury not covered by the Act. It has produced one case [**Broaddus**, 84 Mich. App. 593 (1978)], which, as it stands, goes further than any case on record in recognizing a tort remedy for harassment in the form of delayed or terminated benefits, so long as the damages are

nonphysical; but the value of the case as precedent is drawn into question by its apparent ignorance of a penalty provisions enacted shortly before the decision. MCL § 418.801(2).

As to retaliation [against employees filing workers' compensation claims], Michigan, in common with Indiana, Minnesota, Ohio, and Wisconsin, recognizes a private cause of action.

The dual-capacity doctrine [e.g., treating a company as products manufacturer rather than employer] has been clearly rejected in Michigan, as it has in all the Great Lakes states dealing with the issue, except Ohio.

On the insurer as a suable third party, Michigan's statute is one of the most comprehensive in its protection of carriers and other agencies making safety inspections.

Coemployees are immune from suit in Michigan. Only Minnesota among the neighboring group permits such suits. Michigan has also produced the most extreme decision to be found anywhere immunizing corporate officers and stockholders.

Michigan, like all other states but Ohio, has held the line on refusing to accept gross negligence or even deliberate violation of safety statutes as "intentional injury," or to accept mere conclusory use of the word "intentional" in pleadings. Ohio accepts both.

Finally, on the third party's action over against the employer, Michigan rejects both contribution and indemnity actions, as do Ohio and Wisconsin. But in Minnesota and Illinois an employer who has paid compensation is still vulnerable to a contribution suit by the third party in proportion to his fault, limited to the amount of compensation in Minnesota, but unlimited in Illinois.

The areas, then, in which Michigan is most conspicuously more protective of employers are: in relation to dual capacity and the stretching of "intentional," Michigan is markedly more favorable to employers than Ohio; and in relation to third party actions over, Michigan is much more favorable to employers than Minnesota or Illinois.

* * *

B. Compromises or "Redemptions"

Under the Michigan "wage loss" theory, one might expect that the standard award would require the payment of weekly benefits during the period of an employee's disability and continuing lack of work. In fact, as shown in Table VI-1, **more than half the total dispositions in contested workers' compensation cases have consisted for many years of compromises or so-called "redemptions," usually in the form of lump-sum settlements.** Typically, a redemption terminates all further employer liability for income maintenance, medical benefits, and vocational rehabilitation. The practical effect is to transform the Michigan wage loss system, in many cases, into a modified impairment rating system.

TABLE VI-1

REDEMPTIONS AS PERCENTAGE OF DISPOSITIONS

	1968	1972	1975	1978	1981	1984*
Total Dispositions ("Decisions" & Redemptions)	16,305	25,848	24,807	32,018	41,801	30,797
Redemptions Granted	9,119	15,186	14,708	19,964	26,657	16,752
Redemptions as % of Dispositions	55.9%	58.8%	59.3%	62.4%	63.8%	54.4%

*Projection based on actual data for first 9 months of 1984.

Office of Strategy
10/31/84

There is much to be said against redemptions as a matter of principle. The seriously injured worker may be bedazzled by a settlement offer for the seemingly munificent sum of $50,000 or more, which might enable the realization of a life-long dream to open a small business. The risk, of course, is that a year later the business will be bankrupt, the funds exhausted, and the worker and his family on welfare. On the other hand, the possibility of securing a small redemption in the $1,000-$2,000 range, which an employer may be willing to pay simply to avoid the cost of litigation, may be a lure to the filing of dubious or unmeritorious claims. Some persons are also troubled by the arrangement whereby attorneys' fees are paid from the accrued amount of an award or a lump-sum settlement, which could lead to a potential conflict of interest in a lawyer's counseling a claimant-client on

the advisability of accepting a redemption. For such reasons, a number of jurisdictions prohibit redemptions, and an amendment adopted in 1981 would have forbidden them in Michigan, effective January 1, 1984. Before the ban went into effect, however, it was repealed, and Public Act 151 of 1983 established a new and stricter system for Bureau approval of proposed redemptions. MCL §§ 418.835-836.

Despite their various deficiencies, redemptions are likely to be favored in many cases by every party directly involved. For the employer it means converting an uncertain liability of indefinite duration into a fixed and final obligation. For the employee and his or her attorney, it can mean a substantial amount of cash on the spot. To many the certainty of that immediate recovery may well outweigh the prospects of much more (but possibly nothing) after a long wait. Moreover, one cannot dismiss the notion that a sizable check in hand provides a sort of psychological "balm" to the injured worker aggrieved by the damage done him by "the system." And of course there is a disquieting element of paternalism in telling disabled employees that they cannot settle their claims even if they wish to. Finally, and not insignificantly, the administrative burdens of the beleaguered Bureau are considerably eased through the pressure valve of redemptions.

The National Commission on State Workmen's Compensation Law was obviously troubled by the competing arguments concerning compromises or redemptions, and came up with the following recommendations (**Report** at 110):

> R6.17. We recommend that the workmen's compensation agency permit compromise and release agreements only rarely and only after a conference or hearing before the workmen's compensation agency and approval by the agency.
>
> R6.17. We recommend that the agency be particularly reluctant to permit compromise and release agreements which terminate medical and rehabilitation benefits.

Given the enormous backlog of cases which now confronts the Michigan workers' compensation system (to be discussed more fully in the next section), I conclude, somewhat reluctantly, that **it is unfeasible at this time to consider further stringent restrictions on, or the outright prohibition of, the practice of redemptions.** I am also encouraged by my experience sitting in on redemption hearings for one day in Detroit. Even allowing for some differences in approach that might have been caused by the presence of an outsider, I was impressed by the conscientiousness of the ALJs (administrative law judges) in examining proposed agreements and in explaining their consequences to the claimants. I was further impressed by the efforts that were made to promote so-called "structured" settlements, in which the claimant would receive a lump sum up front but then be guaranteed a series of periodic payments over time. The past year has also seen a modest but promising decline of 15 percent in the rate of redemptions. This whole area has enough potential for abuse, however, that it calls for continuing

surveillance.

C. Retirees

For many years the most hotly discussed topic concerning the Michigan workers' compensation system was the so-called "retiree problem." It was almost unique to this State. Its legal underpinning was the notion developed by the Workers' Compensation Appeal Board, with some support from the judiciary (cf. Evans v. United States Rubber Co., 379 Mich. 457 (1967)), that a retired worker, even one who had voluntarily retired and gone on a company-funded pension, could still be suffering from a loss of wage earning capacity. If the retiree could demonstrate that he or she had incurred a disability caused by pre-retirement job activity or working environment (a bad back from 30 years on the assembly line or a dust disease from 30 years in a foundry), the retiree was entitled to workers' compensation. It should be emphasized that in many of these cases the disability was undoubtedly genuine, at least in the physical impairment sense, and such an employee would unquestionably be eligible for medical benefits. The fighting issue was whether he was also entitled to recover for wage loss. Theoretically, of course, wage loss was not impossible, since a number of retirees, especially in inflationary times, might well have planned on some extra earnings from parttime employment. Nonetheless, for a "Big Three" automobile manufacturer (the most common target of this practice), it was plainly provoking, not to mention costly, to see workers take early retirement and walk out of a plant one day and then proceed to file their workers' compensation claims the next.

In 1973 the Big Three (General Motors, Ford, and Chrysler) paid out $51 million in wage loss benefits, of which $24 million, or 47 percent, went to retirees. For Michigan employers as a whole, out of a total of $191 million in wage loss benefits, $45 million, or 24 percent, went to retirees. With such a large part of the compensation dollar going to persons who were no longer part of the active work force, it was inevitable that reforms would be demanded. Public Act 357 of 1980 added MCL § 418.373, which provides that an employee receiving an employer-funded nondisability pension is presumed not to have a loss of earning capacity. This presumption may be rebutted only by evidence "that the employee is unable, because of a work related disability, to perform work suitable to the employee's qualifications, including training or experience." This is a very stiff requirement, both because the rebuttal is phrased in terms of **disability** rather than continuing participation in the labor market, and because the definition of disability for this purpose is about as drastic as the Social Security definition of disability. As one experienced practitioner puts it: "Presumably, this means the retiree must prove disability from **all** work for which he or she is qualified." (Emphasis in the original.) E. Welch, **Worker's Compensation in Michigan** § 8.10, p. 87. It should be noted, however, that MCL § 418.373(2) makes the new definition of disability applicable only to wage loss benefits, and thus does not limit a retired employee's right to medical benefits. In addition to the presumption against loss of earning capacity, Public Act 203 of 1981 imposed

still another restriction upon a retiree's former capacity to recover workers' compensation benefits as well as pension benefits. Under MCL § 418.354, a new scheme for coordination of benefits is created. Essentially, in the case of periodic compensation for total disability or partial disability, or for compensation under a redemption arrangement, there will be a deduction from the amounts due under workers' compensation to take account of employer contributions to benefits being received under old age Social Security, a self-insurance plan, a wage continuation plan, a disability insurance policy, or a pension or retirement plan. The effect, of course, was a sharp reduction in the attractiveness of workers' compensation benefits to retired workers.

The diminished appeal of workers' compensation to retirees is dramatically reflected in the following tables showing the decline in filings by employees and former employees of the Big Three in the last few years:

TABLE VI-2

CHRYSLER: CONTESTED CASE CLAIMS FILED BY RETIREES

HOURLY EMPLOYEES

	Number of Contested Case Claims Received by Chrysler	Number of Claims Filed By Retirees	% of Claims Filed by Retirees
1978	3,715	1,762	47.4%
1979	3,047	1,242	40.8%
1980	3,970	1,174	29.6%
1981	5,587	1,668	29.9%
1982	3,052	1,238	40.6%
1983	2,582	816	31.6%
1984	1,217*	NA	NA

* Projection based on actual data for first 10 months of 1984.

TABLE VI-3

FORD: CONTESTED CASE CLAIMS FILED BY RETIREES

	Number of Contested Cased Closed by Ford	Number of Cases Filed by Retirees	% of Cases Filed by Retirees
1978	4,749	1,720	36.2%
1979	5,207	1,660	31.9%
1980	4,775	1,574	33.0%
1981	4,786	1,691	35.3%
1982	3,955	1,336	33.8%
1983	3,854	1,291	33.5%

TABLE VI-4

GENERAL MOTORS: CONTESTED CASE CLAIMS FILED BY RETIREES

	Number of Contested Cased Closed by GM	Number of Cases Filed by Retirees	% of Cases Filed by Retirees
1978	3,777	1,961	51.9%
1979	4,199	1,964	47.7%
1980	4,652	1,853	39.8%
1981	4,717	2,024	42.9%
1982	4,302	1,715	39.9%
1983	3,465	1,136	32.8%
1984*	3,337	839	25.1%

*Projected from actual data for first 10 months of 1984.

If the retiree problem cannot be said to be "solved," the above data on case filings and closings indicate that the combined effect of the presumption against lost earnings and the coordination of benefits requirement, both of which provisions went into effect only in 1982, have had a striking impact in reducing the incidence of the phenomenon. Retiree claims will never fall to zero. There will always be cases when a retiree is entitled to medical benefits or when he or she is prevented from any feasible kind of post-retirement parttime employment by a total disability under the new, strict definition. But in my judgment, no further legislation regarding retirees is called for at this time.

D. Insurance and the Accident Fund

I am not an actuary or an expert on the arcane world of insurance. Partly for these reasons, partly because insurance issues were being pursued so vigorously elsewhere in the Administration during the period of this project, and partly because there were so many other matters to investigate,

I did not regard the structures and procedures for insuring workers' compensation in Michigan as a major topic for inquiry. Nonetheless, a few matters were brought to my attention that deserve at least to be flagged.

A Michigan employer has three options for fulfilling its obligation to provide workers' compensation protection. It may obtain coverage through a private insurance carrier, or through the State Accident Fund, or through a Bureau-approved method of self-insurance, either individual or group. Each method presents its own separate set of issues.

1. **Private insurance.** From time to time various persons have looked longingly toward the seemingly high benefits and low costs of our neighbor to the south, Ohio, and have proposed establishing a state monopoly like Ohio's over the insurance of workers' compensation, thus eliminating coverage by private carriers. Perhaps the most intensive study into the possible transmutation of a competitive state fund into an exclusive state fund has been performed by Professor John F. Burton, Jr. of Cornell. He focused on a particular jurisdiction, Pennsylvania, where such a proposal was extant, and on Ohio, which was an obvious reference point for Pennsylvania because the states are contiguous and have similar benefit levels, with Ohio having the largest exclusive state fund. J. Burton with A. Krueger, **Interstate Variations in the Employers' Costs of Workers' Compensation, with Particular Reference to Ohio and Pennsylvania** (1984). Burton concluded (**id.** at 100-01):

> The difference in costs between the two jurisdictions is relatively small, particularly in comparison to the general magnitude of interstate differences in the employers' costs of workers' compensation. This finding should give pause to anyone who would argue that a change in the insurance arrangements in either of these states will lead to a significant reduction in the costs of workers' compensation. The similarity in costs in Ohio and Pennsylvania, and the considerable differences among other jurisdictions appear to be much more influenced by factors such as relative levels of benefits than by the particular form of insurance arrangement used to provide these benefits.

History is entitled to some deference in assessing schemes to restructure a multimillion dollar industry. For many years private carriers have accounted for more than half of all the workers' compensation benefits provided in this State. Proponents of fundamental change should bear the burden of persuasion. As the Burton-Hunt studies discussed in Part III of this report indicate, the insurance industry in Michigan has demonstrated a remarkable capacity in the last three years to adjust to new mandates and ultimately to open competition. **Much more evidence is needed than currently exists to justify basic structural changes in insurance arrangements.**

Representatives of small business have expressed concern that single-person employers often encounter great difficulty in obtaining workers' compensation coverage, which may be necessary in order for them to

bid on government contracts. Others find themselves caught between the standard insurance classifications, and thus unable to qualify. These and similar technical problems should be resolved.

2. **Accident Fund.** The proper role and function of the State Accident Fund have long been a matter of debate. Some would like to see it serve as a comparative cost yardstick in the manner of the original Tennessee Valley Authority; others believe that its unique responsibility is to be the insurer of last resort; and still others feel that the Accident Fund has become indistinguishable from private carriers (or is it group self-insureds?), and thus has lost its very reason for being. In any event, the Accident Fund looms less large in Michigan than competitive state funds elsewhere. Its share of the premium market has shrunk in recent years from 6-7 percent to only about 3-4 percent. Almost everyone close to the Fund, even if disagreeing about its exact role, seems in accord that a more aggressive sales policy is in order.

3. **Self-Insurers.** Traditionally about 40 percent of all Michigan workers' compensation benefits are handled through self-insurance. This is a far higher proportion than in most other jurisdictions, probably resulting from the prominence of the Big Three in this State. With the approval of the Bureau Director, an employer may be either a self-insurer or a member of a group of self-insurers. There are currently about 600 individual self-insured employers in this State, and about three dozen self-insured groups. (Altogether, there are about 225,000 employers subject to the Worker's Disability Compensation Act, and about 250 insurance companies authorized to write workers' compensation in the State.)

A Self-Insurers' Security Fund has been established to pay benefits to disabled workers when a self-insured employer becomes insolvent. MCL §§ 418.501, 502, and 537. Grave doubts have been raised about the capacity of the Fund to meet its statutory obligations in the event of the insolvency of a major company or public utility. At one time those might have been dismissed as merely speculative fears, but unfortunately recent years lend them much more credence. **The Bureau should be directed to study the adequacy of the Self-Insurers' Security Fund and to report its findings to the Legislature.**

E. Legal Representation and Attorneys' Fees

Labor organizations have urged that union agents be allowed to represent claimants in workers' compensation proceedings before the ALJs. That is an understandable proposal, and I sympathize with the effort to reduce the formality and expense of the entire compensation process. There appear to be serious legal and practical difficulties, however, in implementing this suggestion. Workers' compensation practice has become highly complex and technical, and the formal representation of claimants in trial hearings before ALJs is quite possibly the "practice of law." It could therefore be subject to the exclusive regulation of the Supreme Court of Michigan under

the State Constitution. See, **e.g.**, 3 A. Larson, **Workmen's Compensation Law** § 83.15; 3 **Michigan Law and Practice**, Attorneys & Counselors § 3 (West 1979); 5 **Callaghan's Michigan Civil Jurisprudence**, Constitutional Law § 73 (1980). Guidance on this question may be provided by consolidated cases involving representation before the Michigan Employment Security Commission, which are now pending in the State Supreme Court. **E.g.**, State Bar of Michigan v. Galloway, No. 71983.

In point of fact, the specialized expertise needed to handle workers' compensation cases effectively is beyond the ken of most practicing lawyers. In introducing a text designed to enlighten his less knowledgeable colleagues, one recognized specialist remarked: "Most worker's compensation litigation is handled by a very small number of attorneys, who are sometimes accused of having a 'club' or operating a 'closed bar.'" E. Welch, **Worker's Compensation in Michigan** xi (1984). Having struggled to educate myself in the intricacies of the subject, I do not find the demand for expertise exaggerated or artificial. Nonetheless, a number of states permit lay representation, including California, Connecticut, New York, Oregon, Texas, Washington, and Wisconsin.

At any rate, it would be highly desirable to emphasize to claimants at the earlier, more informal processing stages, handled by the Bureau's consultants (often in a mediating role) that legal representation is not always necessary for a favorable result. Regrettably, many workers retain a lawyer who files a formal application for a hearing before the employer is even notified of the injury or claim.

Most claimants' attorneys in workers' compensation cases operate on a contingent fee basis. If the claimant loses, the lawyer gets nothing. If the claimant wins, the lawyer is paid in accordance with a schedule of maximum attorney fees prescribed by the Bureau Director in Rule 14 of the Bureau's Administrative Rules. In practice the maximum is usually the fee. For example, if a case is tried and goes to a final Bureau order, the lawyer is entitled to charge 30 percent of the balance of the accrued compensation, after deducting his expenses. If a case is redeemed before trial, the lawyer may get 15 percent of the first $25,000 of the settlement and 10 percent of the balance. If the case is tried to completion but then redeemed before a final Bureau order, the lawyer is entitled to 20 percent. Vagaries are introduced into the system because there are certain types of hearings for which the lawyer gets nothing, and others (for example, an employer's petition to stop ongoing payments on the ground the employee is no longer disabled) for which the attorney is theoretically entitled to a recovery, but where there will be no funds from which to obtain it. The career claimant's attorney must simply hope that these gains and losses balance out over time. **I lack sufficient facts to make a considered judgment about the adequacy (or otherwise) of the current maximum fee schedule for plaintiffs' lawyers, but do not feel it is inappropriate to leave the matter in the hands of the Bureau's professionals.** I note, however, that (1) the existing schedule on its face seems generally in line with the differently calculated schedules of

other states, and (2) the Bureau should be expressly authorized to limit the length of time for which benefit accrual will be the basis of setting attorneys' fees. The latter step would eliminate any appearance of a temptation to lawyers to delay the proceedings so as to increase the amount accrued at the time of an award.

One statutory inconsistency has emerged as a result of the 1981 amendments. MCL § 418.858 indicates that the maximum should be based on the benefit amount "after coordination," while § 418.354(16) states flatly that fees are to be based on the "uncoordinated" benefit amount. This discrepancy should be rectified. Theoretically, it might be contended that only the coordinated benefits result in a net gain for the worker, and thus only they should be the basis of attorneys' fees. Generally, I think this is correct, but the establishment of entitlement to workers' compensation may also have substantial tax implications for the employee and may ensure long-term benefits in the event of a continuing disability. The Bureau should be authorized to take these factors into account in drawing up its schedule of attorneys' fees. At the same time the Bureau should not automatically award maximum fees in every given case.