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Managing the People's Voice—
The Assertion and Manipulation of the People's Constitutional Right of Initiative

By Graham K. Crabtree

The people of Michigan are a strong-willed bunch who have never been shy about making their wishes known. They feel free to do so because our Constitution assures them that "all political power is inherent in the people" and that "government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. Thus, they understand and expect that government in all of its forms has been created and maintained to serve *their* interests, not those of the government or any of its branches, or of any political party, person or interest group. And if the people are unwilling to allow erosion of those principles, the power that they have reserved for themselves must be respected and preserved.

By their approval of our current Constitution of 1963, the people have sought to ensure a proper balance by distributing the political power among the various branches of state government while specifically reserving certain parts of that power for themselves. Among the rights reserved are those which have come to be known as the rights of initiative and referendum—to propose and adopt amendments of the Constitution by voter initiative; to propose and enact laws by voter initiative; and to approve or reject laws enacted by the Legislature by referendum.

The rights of initiative and referendum were not new in 1963. First established by amendments to the 1908 Constitution in 1913, they were born of popular distrust of the legislative branch and motivated in large part by its repeated failures to pass legislation called for by popular demand.[1] Those sentiments were not limited to Michigan alone. In the early years of the last century, several of the states began to recognize and facilitate the right of the people to propose amendments of their state constitutions by voter initiative petitions. In Michigan, the constitutional convention of 1907 and 1908 featured a lengthy and spirited debate as to whether a people's right of initiative should be recognized. As adopted, the Constitution of

1908 allowed the people to propose Constitutional amendments by voter initiative, subject to the Legislature's right to approve or disapprove submission of the proposed amendments to the voters. Const 1908, art 17, § 2.

In 1913, the Constitution of 1908 was amended to eliminate the Legislature's authority to veto proposed constitutional amendments. Those amendments also added new language to the Legislative Article, which allowed the people to propose and enact statutory laws by voter initiative and to approve or reject laws enacted by the Legislature by referendum. Const 1908, art 5, § 1. In the 1963 Constitution, the provisions reserving and governing the exercise of those rights were transferred from the Legislative Article to Article II, regarding Elections, where they now appear as Article II, § 9. The separately defined right of Michigan's citizens to propose constitutional amendments by voter initiative is now found in Article XII, § 2.

In the last century, the rights of initiative and referendum have been invoked on numerous occasions. A few of the proposed constitutional amendments and initiated laws have been adopted, and a number of legislative enactments have been approved or rejected, but many initiatives have failed for lack of the necessary support at the polls or in the signature gathering process. In most cases, it is an extremely difficult and expensive process to obtain the required number of petition signatures and navigate the challenging road to certification of the proposal for submission to the voters or the Legislature by the Board of State Canvassers.[2]

An individual or group proposing a constitutional amendment must present a petition in proper form signed by a number of properly registered voters equal to at least ten percent of the total number of votes cast for all candidates for Governor in the last gubernatorial election. Petitions for enactment of initiated laws and referendum of legislation must be supported by a number of valid voter signatures equal to at least eight percent of that number for proposed initiated laws and five percent for referendum petitions.

When an initiative petition has been filed with the Secretary of State, the Board of Canvassers conducts a canvass of the supporting signatures to determine whether a sufficient number of valid signatures has been submitted in support. If the Board determines that a referendum petition or a petition proposing a constitutional amendment is in proper form and supported by the required number of valid signatures, it must certify the referendum or proposed amendment for submission to the voters. When the power of referendum has been properly invoked, application and enforcement of the challenged enactment is suspended until it has been approved by a majority of the voters in the next general election.

If the Board of Canvassers finds that a petition for an initiated law meets the requirements for certification, the proposal is submitted to the Legislature for its consideration. The Legislature then has two choices, which must be exercised within 40 session days: it may enact the proposed law as submitted without change, or reject it.[3] If the Legislature does not enact the proposed law without change within the time allowed, the proposal must be submitted to the voters at the next general election, and if approved at the polls, the voter-initiated law cannot be repealed or amended by the Legislature without a supermajority three-fourths vote in both houses.

The sponsor of an initiative must bear in mind that the minimum number of required signatures is never sufficient. Many signatures will be deemed invalid for one reason or another when scrutinized by the Board of Canvassers or parties opposed to the initiative, so it is always essential to have a comfortable margin of extra signatures before an initiative petition is filed with the Secretary of State.

The process of approval is also complicated in many cases by political opposition when the subject matter is controversial or the Legislature has resisted popular demands for passage of the desired legislation or approval of the proposed constitutional amendment.[4] When the subject matter of an initiative proposal is controversial, it has generally been presented as a voter initiative because the Legislature has been unwilling to consider the proposed legislation or constitutional amendment, and interested parties will frequently go to great lengths to prevent the submission of the proposal to the voters. Those who pursue expensive legal action to keep an initiative off the ballot will usually explain that they have been motivated by a desire to protect the system from abuse, while the initiative sponsors and those without strong opinions will say that the opposition has instead been motivated by fear that the proposal will be approved if the voters are allowed to have their say.

The statutory timetables for submission and approval of initiative petitions for the ballot are tight, and thus, the litigation of legal challenges to keep them off the ballot is often fast-paced and intense. This provides a wild ride for counsel on both sides, which may bring them before the Board of Canvassers, the Court of Appeals, and the Supreme Court within a matter of days or weeks in the summer before a general election. In August and early September of election years, the bypass application and motion for immediate consideration are frequently used tools. Our appellate courts are cognizant of the necessity for fast action in election cases and will move quickly to accommodate that need.[5]

Legal challenges to the submission of voter-initiated proposals typically assert claims that the proposal addresses a subject matter beyond the scope of a constitutionally permissible initiative, that the form of the petition did not satisfy applicable constitutional or statutory requirements, or that

the sponsor has failed to submit the required number of valid signatures in support. The Board of Canvassers may determine the sufficiency of supporting petition signatures and the technical sufficiency of petition form, but it has no authority to decide legal questions, which must therefore be addressed to the courts. Legal questions concerning the sufficiency of the petition, the propriety of submitting it to the voters for approval, and enforcement of the Board of Canvassers' legal duty to certify or reject the proposal have generally been raised by way of an original complaint for mandamus filed in the Court of Appeals, with further review in the Supreme Court. Constitutional challenges to the substance of a proposal are not ripe for review until the proposal has been approved by the voters.

Legal challenges to proposed constitutional amendments have frequently featured claims that the proposal cannot be submitted to the voters because the petition circulated for signatures failed to list and republish all of the provisions of the current constitution that would be abrogated by the proposal if adopted, as required by MCL 168.482(3). The decisions of our Supreme Court interpreting this "republication requirement" have held that an existing constitutional provision is deemed to be altered or abrogated if the proposed amendment would add to, delete from, or change the existing wording of the provision, or render it wholly inoperative. There is no abrogation if the existing provision will remain operative, even though there may be a need thereafter to construe that provision in conjunction with the amending provisions. *Ferency v Secretary of State*, 409 Mich 569, 596–597 (1980); *School District of the City of Pontiac v City of Pontiac,* 262 Mich 338, 344 (1933). In *Protect Our Jobs v Board of State Canvassers,* 492 Mich 763 (2012), the Supreme Court reaffirmed the standards previously established in *City of Pontiac* and *Ferency,* but provided some additional clarification, instructing that an abrogation may be found when a discrete portion of an existing provision, including, in some cases, a single phrase or word, would be rendered "wholly inoperative" and the conflicting provisions cannot be harmonized. 492 Mich at 783–784.

It has also become a common practice in recent years to challenge the submission of some proposed constitutional amendments on grounds that the proposed amendment is too extensive or complex to be considered an amendment that may be proposed and submitted for voter approval pursuant to Article XII, § 2—that it is, instead, a "general revision" of the Constitution, which can only be proposed by a constitutional convention convened pursuant to Article XII, § 3. This claim was raised and addressed by the Court of Appeals in *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273 (2008), *result affirmed,* 482 Mich 960 (2008), which held that the staggeringly diverse and voluminous Reform Michigan Government Now! ("RMGN") proposal of 2008 could not be included on the ballot as a voter- initiated proposal because it would have amounted to a general revision of the Constitution.[6]

In finding an impermissible attempt at a general revision in that case, the Court opined that, for purposes of Article XII, §§ 2 and 3, there is a legally significant distinction between a general revision and an amendment that depends upon both the quantitative and the qualitative nature of the proposed changes. The Court explained that, in evaluating those criteria, "the determination depends on, not only the number of proposed changes or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government." 280 Mich App 304–305. The Court was careful to emphasize, however, that its decision was *not* intended "to prevent the citizens from voting on a proposal simply because that proposal is allegedly too complex or confusing." *Id.* at 276.[7]

In 2018, the Voters Not Politicians Ballot Committee ("VNP") proposed a constitutional amendment to create a new 13-member "Independent Citizens Redistricting Commission for State Legislative and Congressional Districts," which was presented to the voters as Proposal 18-2 and adopted by their 61% vote in favor in the November general election. Legal challenges were initiated in April by an opposing ballot question committee—Citizens Protecting Michigan's Constitution ("CPMC")—requesting that the proposed amendment be rejected and excluded from the ballot based upon the two familiar issues previously discussed: a claim that the petition had failed to list and republish four existing constitutional provisions that would allegedly be abrogated by the proposed amendment if adopted, and a claim that the proposed amendment was sufficiently complex and broad-reaching to constitute a "general revision" of the Constitution, which could not be submitted to the voters for approval pursuant to Article XII, § 2.

On June 7th, the Court of Appeals issued a published Opinion and Order that rejected all of CPMC's legal challenges to VNP's proposal and denied its request for a writ of mandamus. The Court also granted the relief requested in VNP's cross-claim for mandamus, directing the Secretary of State and Board of Canvassers "to take all necessary measures to place the proposal on the November 2018 general election ballot" and giving its Order immediate effect. *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561 (2018). CPMC filed an application for leave to appeal to the Supreme Court, together with a separate motion to stay enforcement of the Court of Appeals Judgment on VNP's cross-claim, which the Supreme Court denied on June 14th. On July 6th, the Supreme Court granted leave to ap-

peal, directing the parties to address the "revision or amendment" question, and scheduled the case for presentation of oral arguments on July 18th. The decision of the Court of Appeals was subsequently affirmed by the Supreme Court in an Opinion issued on July 31st. *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42 (2018).

The appellate decisions in VNP's case did not add anything of substance to the legal principles applied to reject CPMC's abrogation claims. Because those claims were found to be unsubstantiated, neither court found it necessary to address VNP's alternative argument that the purely statutory republication requirement for initiative petitions was unconstitutional in light of the abundant case law holding that, although the Legislature may enact supplementary legislation to facilitate the implementation of a self-executing constitutional right reserved to the people, it may not impose additional requirements that curtail or unduly burden the free exercise of that guaranteed right.[8]

In rejecting CPMC's claim that the proposed amendment could not be presented to the voters because it would amount to a "general revision" of the Constitution, the Supreme Court provided clarification of the standard to be applied in reviewing such claims in the future. The Court recognized that there is a legally significant difference between proposing a new Constitution, which can only be accomplished by a constitutional convention convened under Article XII, § 3, and proposing an amendment, which may be done by voter initiative under Article XII, § 2. With that distinction in mind, the Court held that changes that would significantly alter or abolish the form or structure of government in a way that is tantamount to creating a new Constitution cannot be proposed by voter initiative. *Citizens Protecting Michigan's Constitution, supra,* 503 Mich at 75–82. And finding that VNP's proposed amendment did not rise to that level of weight or complexity, the Court concluded that it could properly be submitted for voter approval.

The Supreme Court's favorable decision did not bring the matter to an end for VNP's legal team. The Board of Canvassers had certified VNP's proposal for submission on the ballot in compliance with the Court of Appeals Judgment on June 20th, but no further action was taken with respect to its consideration and approval of the constitutionally required 100-word statement of purpose for the ballot until late August, when the statutory deadline for approval of ballot language was rapidly approaching.[9] On August 21st, having received no assurance that the Board of Canvassers would complete its remaining statutory duties in a timely manner sufficient to allow any further review that might have been required, VNP sought expedited enforcement of the Court of Appeals Judgment by means of a new complaint requesting issuance of a second writ of mandamus directing the Board of Canvassers to promptly approve the 100-word statement of purpose and assign the appropriate numerical designation for VNP's proposal. On August 23rd, the Court of Appeals issued the requested writ of mandamus, directing the Board to complete the performance of its remaining statutory duties by August 31st. (Court of Appeals Docket No. 345133). The Board complied, completing its performance of those duties as directed on August 30th.

So, what can sponsors of voter initiatives expect going forward? In light of the clarification provided by the Supreme Court in *Citizens Protecting Michigan's Constitution, supra,* it seems unlikely that there will be many new challenges based upon a claim that a proposed amendment would constitute a general revision of the Constitution. Opponents of voter-initiated proposals to amend the Constitution will probably continue to present challenges based upon claims that the petition did not identify and republish other existing provisions that would be abrogated by adoption of the amendment, and this seems especially likely in light of the Supreme Court's clarification, in *Protect Our Jobs,* that an abrogation may be found when a discrete portion of the existing provision, including, in some cases, a single phrase or word, would be rendered "wholly inoperative" and the conflicting provisions cannot be harmonized. 492 Mich at 783–784.

To avoid invalidation of their initiatives after the necessary signatures have been collected at great expense, sponsors of proposed constitutional amendments should carefully study the Supreme Court's decisions defining abrogation and take great care in preparing their petitions to identify any existing constitutional provisions that could conceivably be found to be in danger of abrogation by the proposed amendment. And if a claim of abrogation is raised in opposition despite the sponsor's best efforts to avoid it, it may be fruitful to renew the constitutional challenge to the purely statutory republication requirement that was raised but not addressed in relation to VNP's proposal.

When the subject matter is controversial, sponsors of any kind of voter initiative can expect that opponents will scrutinize the petition signatures if the number collected is close to the minimum number required, to see if a sufficient number can be disqualified to prevent certification by the Board of Canvassers. They can also expect that technical defects in petition format will be seized upon as a suggested basis for the Board to deny certification. Sponsors of voter initiatives can generally avoid pitfalls based upon noncompliance with technical petition form requirements by thoroughly reviewing the statutory requirements, carefully preparing the petition, and securing an approval of the petition form by the Bureau of Elections prior to circulation. And again, if a legal challenge is made based upon an alleged failure to comply with a

technical statutory requirement, it may be beneficial to argue that the technical statutory requirement cannot be constitutionally applied to curtail or unduly burden the free exercise of the people's constitutionally reserved right of initiative.

It should be noted, however, that in *Stand up for Democracy v Secretary of State,* 492 Mich 588 (2012) the Supreme Court considered whether a referendum petition filed pursuant to Article II, § 9, should be excluded from the ballot based upon a technical objection that the heading of the petition had not been printed in 14-point type, as MCL 168.482(2) requires. Although the Court ultimately concluded that the referendum should be certified for the ballot because compliance with the type-size requirement was established, a majority of the Justices also opined that substantial compliance with that requirement could not be considered sufficient in light of the statute's mandatory direction that 14-point type "shall" be used for the purpose specified. In support of that pronouncement, those Justices disavowed the doctrine of substantial compliance often applied by prior appellate decisions in adjudicating challenges based upon alleged failure to comply with statutory petition requirements, and specifically disapproved the prior decision of the Court of Appeals in *Charter Township of Bloomfield v Oakland County* Clerk, 253 Mich App 1 (2002), which had been cited by the lower courts as authority for rejection of the technical objection raised in opposition to the proposal at issue.

It may be suggested in future cases that the Court should retreat from its application of a strict compliance rule in light of the abundant case law holding that free exercise of the people's constitutional right of initiative and referendum cannot be curtailed or unduly burdened by statutory requirements. But until such time as the Court may choose to modify the rule of strict compliance endorsed in *Stand up for Democracy,* it may suffice to argue that a justification for the rule may have been found in the language of Article II, *§* 9 providing that the power of referendum "must be invoked in the manner prescribed by law" and that its application should therefore be limited to review of referendum petitions.

Finally, sponsors of voter initiatives can continue to expect that they will encounter politically motivated resistance to approval of a reasonably worded 100-word summary for the ballot, and that in cases where the proposal in question is politically-charged, the Board of Canvassers may delay the performance of its statutory duties and possibly become deadlocked, requiring judicial intervention.

Regrettably, the free exercise of the people's right of initiative has also been threatened, and in some cases thwarted entirely, by legislative action. Article II, *§* 9 provides, with respect to the right of referendum, that, "[t]he power of referendum does not extend to acts making appropriations for state institutions or to meet deficiencies in state funds…" This language has often been relied upon by the political party in control to insulate legislation from challenge by referendum by the simple expedient of adding a small appropriation to a Bill proposing substantive changes—a practice which our Supreme Court has declined to disapprove.[10] Use of this popular ploy requires the participation of the Governor however, and thus, it appears that it may fall into misuse, for a time at least.

In her first State of the State Address, Governor Whitmer pledged that she would veto any legislation designed to thwart the people's constitutional right to challenge legislation by referendum. The first test of her resolve came shortly thereafter with the presentation of Enrolled House Bill 4286 (Johnson – R), which proposed a substantive amendment of the Wrongful Imprisonment Compensation Act but also provided for an appropriation of $10,000,000 from the General Fund to the Wrongful Imprisonment Compensation Fund. When House Bill 4286 was presented to Governor Whitmer for her approval, she fulfilled her pledge by vetoing the appropriation, although supportive of the proposed funding, to preserve the people's reserved right to challenge the legislation by referendum. In doing so, she sent a clear message that appropriations should not be made outside of general or supplemental appropriation Bills so that all may know that the practice of doing so in order to defeat the people's constitutional right of referendum will not be tolerated on her watch.

A much more egregious abuse of the people's right of initiative was seen in the fall of last year, when the Legislature was presented with two properly supported and certified proposals for enactment of initiated laws—one calling for the creation of a new act requiring increases in the minimum wage and the other calling for the creation of a new act establishing new procedures and requirements related to the accumulation and payment of sick time benefits. Those proposals were promptly taken up and passed by both houses of the Legislature without change on September 5th, and were subsequently assigned Public Act numbers 337 and 338. Comments made in the press and the legislative proceedings clearly suggested, however, that these proposed initiated laws were taken up by the controlling majority party and enacted without change as part of a preconceived plan to prevent their submission to the voters in order to avoid the requirement of a three-fourths vote for repeal or amendment of an initiated law approved by the voters, and to then amend the new acts to the liking of its members by a simple majority vote after the election in the lame duck session – a plan referred to at the time and in subsequent discussions as "adopt and amend."

As predicted, 2018 PA 337 and 2018 PA 338 were promptly amended after the November election by Bills

introduced on November 8th, two days after the general election. Those Bills, each of which proposed substantial substantive changes, were passed by simple majority party-line votes on November 28th and December 4th, and upon filing with the Secretary of State, were assigned 2018 PA Nos. 368 and 369. There was a firestorm of protest against the majority party's use of this "adopt and amend" procedure to deny the people their constitutionally guaranteed right to vote for approval of the laws that *they* had proposed, and to have the proposed laws endowed with the durability conferred by the three-fourths vote requirement for subsequent repeal or amendment if approved at the polls. That protest has prompted both houses of the Legislature to request an Advisory Opinion as to the constitutionality of the amendatory legislation pursuant to Article III, § 8. The Supreme Court has requested and received briefs addressing both sides of the issue and will hear oral arguments on the Legislature's request on July 17, 2019.

Two other efforts were made during last fall's lame duck session to erode the people's right of initiative. The approval of Proposal 18-2 by 61% of the voters in the November general election prompted the introduction of Senate Bill 1254 (Pavlov – R), proposing the enactment of inconsistent "implementing legislation." That legislation was quickly passed by the Senate on December 5th but was later abandoned in the face of fierce opposition.

House Bill 6595 (Lower – R), introduced and approved with remarkable speed in the lame duck session, has now become 2018 PA 608. Given immediate effect upon its signing on December 28th, it poses a new and substantial potential for erosion of the people's right of initiative by virtue of its new provisions requiring sponsors of initiative petitions to sort and categorize supporting signatures by congressional districts, and its additional restrictive requirement, found nowhere within the governing constitutional language, that no more than 15 percent of the required signatures may be supplied by residents of any single congressional district.

The 15 percent limit imposed by 2018 PA 608 is of questionable constitutional validity by virtue of its potential for curtailment of the people's constitutionally guaranteed right to propose desired changes by voter initiative. Attorney General Nessel has issued an Opinion expressing her findings that portions of 2018 PA 608, including the 15 percent signature limit, are unconstitutional. The constitutionality of Act 608 has also been challenged in an action for declaratory judgment filed in the Court of Claims by the League of Women Voters and other interested groups, and it is probable that the court's ruling in that case will be subject to further review in the Court of Appeals and the Supreme Court.

There have been widely held and vigorously expressed opinions that there were considerable abuses of the legislative power in last year's lame duck session, which can and should be remedied by new voter-initiated proposals for enactment of initiated laws and adoption of constitutional amendments designed to prevent similar abuses in the future. Next year's general election, which already promises to be very interesting, may be made even more so by opportunities to vote for approval or disapproval of those proposals.

About the Author

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Endnotes

1 *See e.g., Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42, 62-63 (2018); *Woodland v Citizens Lobby,* 423 Mich 188, 218 (1985); *Ferency v Secretary of State*, 409 Mich 569, 591-592 (1980); and *Hamilton v Secretary of State,* 227 Mich 111, 129-130 (1924).

2 The Board of Canvassers is an administrative body established pursuant to Const 1963, art 2, § 7. It consists of four members, no more than two of whom can be members of any single political party, and thus, it is generally comprised of two Republican members and two Democratic members. All action of the Board requires the concurrence of at least one member from each major political party. MCL 168.22d(2) Thus, it is not uncommon for the Board to become deadlocked and unable to act when considering certification of politically-charged proposals.

3 The Legislature may reject a proposed initiated law by votes taken in legislative proceedings or by simply taking no action. The Legislature can also reject a proposed initiated law by approving an alternative proposal to put on the ballot with the voter-initiated proposal. An alternative proposed by the Legislature will become law if it is approved by a greater number of votes than those cast in favor of the voter-initiated proposal. If the Legislature approves the initiated law without change, the enacted law may be challenged by referendum petition.

4 Const 1963, art 12, § 1 allows the Legislature to propose constitutional amendments by a supermajority vote of two-thirds of the members elected and serving in each house. When so approved, a proposed constitutional amendment will take effect if approved by the voters in the next general election.

5 Appeals from all cases involving election issues are given priority under MCR 7.213(C)(4).

6 The RMGN proposal was much broader in scope than any proposal submitted previously. Unlike most proposed amendments, which address a single subject and purpose, the RMGN proposal addressed several distinct and unrelated subjects, proposing modification of 24 existing sections and the addition of 4 new sections in 4 different articles of the Constitution.

7 Upon further review of the RMGN proposal, the Supreme Court affirmed the result reached by the Court of Appeals without endorsing the legal rationale for its holding, based upon its own sensible determination that it would be impossible to summarize the purpose of the proposal in 100 words, as Article XII, § 2 requires. *Citizens Protecting Michigan's Constitution v Secretary of State,* 482 Mich 960-964; 755 NW2d 157 (2008).

8 *See, e.g., Ferency v Secretary of State, supra,* 409 Mich at 589-593; *Wolverine Golf Club v Secretary of State,* 384 Mich 461, 466 (1971); and *Hamilton v Secretary of State,* 227 Mich 111, 129-130 (1924).

9 Article XII, § 2 requires that a ballot including a proposal for amendment of the Constitution contain "a statement of the purpose of the proposed amendment, expressed in not more than 100 words, exclusive of caption" and provides that the summary "shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment." MCL 168.32(2) requires that the 100-word summary of purpose be prepared by the Director of Elections in accordance with the standards set forth in Article XII, § 2, with the approval of the Board of Canvassers.

10 *See*, *Michigan United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359 (2001)

Is it Time to Consider Expanding (or at Least Clarifying) the Scope Of Material Courts may Consider on a Motion for Summary Disposition Under MCR 2.116(C)(8) Vis-À-Vis the Federal Approach?

By Mark J. Magyar

For many attorneys, motions for summary disposition are a routine part of the legal practice. It's no secret that defendants desire to cut a case as short as possible, whereas skilled plaintiffs' attorneys are adept at alleging the minimum facts necessary to state a claim and obtain full discovery. An issue arising often in Michigan litigation, particularly where the operative complaint provides very little information, is the material a court may consider on dispositive motions testing the pleadings.

Under Michigan Court Rule ("MCR") 2.116(C)(8), summary disposition is appropriate when the "opposing party has failed to state a claim on which relief can be granted." The federal counterpart, Federal Rule of Civil Procedure ("Rule") 12(b)(6), similarly provides that a motion to dismiss is properly granted when there is a "failure to state a claim upon which relief can be granted." But although these sound like the same tests, in practice, this is where the similarity between the federal and state motions end. Most notably, federal courts may consider a broader range of "documents" when considering a motion to dismiss, whereas Michigan courts consider only a limited set of "written instruments" on motions for summary disposition under MCR 2.116(C)(8).

Thus, this article addresses the key differences between the federal approach and the Michigan approach as to what information a court may consider in deciding a pleadings-based motion, and the areas that remain uncertain in this regard in Michigan. This issue affects appellate attorneys at the most basic, standard of review level, and implicates their ability to shape the law in this area through appellate decisions. I conclude that Michigan should broaden the scope of material