

EXAMINERS' ANALYSIS OF QUESTION NO. 9

Under Michigan law, "[i]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8 (2008) quoting *Kernen v Homestead Dev Co*, 232 Mich App 503, 509 (1998) quoting *Jeffrey v Clinton Twp*, 195 Mich App 260. In determining whether to grant a preliminary injunction, the court must consider four factors: "whether (1) the moving party made the required demonstration of irreparable harm, (2) the harm to the applicant absent such an injunction outweighs the harm it would cause to the adverse party, (3) the moving party showed that it is likely to prevail on the merits, and (4) there will be harm to the public interest if an injunction is issued." *Detroit Fire Fighters Assn, IAFF Local 344 v City of Detroit*, 482 Mich 18, 34 (2008).

"The object of a preliminary injunction is to preserve the status quo, so that upon the final hearing the rights of the parties may be determined without injury to either." *Bratton v Detroit Automobile Inter-Insurance Exchange*, 120 Mich App 73, 79 (1982). "The status quo which will be preserved by a preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy." *Id.*

Applying the preliminary injunction factors, the court should deny Peggy's motion. The focus of the analysis should be on factors (1) and (2), as the Michigan Supreme Court has held that "[a] particularized showing of irreparable harm" is "an indispensable requirement to obtain a preliminary injunction." *City of Pontiac*, 482 Mich at 9 (quotation omitted). Without such a showing, a plaintiff's likelihood of success on the merits is irrelevant. *Id.* at 13 n 21. To establish irreparable injury, a plaintiff must demonstrate "a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Thermatool Corp v Borzym*, 227 Mich App 366, 377 (1998).

Here, Peggy cannot show irreparable harm because she has an adequate legal remedy. Peggy's argument that she "will be

impoverished and unable to continue her lawsuit" will not be successful because if Peggy prevails in her lawsuit, the no-fault act provides not only for recovery of unpaid benefits, but penalty interest and attorney fees. See *Bratton*, 120 Mich App at 81. Moreover, any claimed harm to Peggy is outweighed by the potential of irreparable harm to D-Lux and disruption of the status quo. D-Lux stopped paying benefits only after receiving a medical evaluation indicating that Peggy can return to work. If D-Lux is required to pay benefits and is successful in defending against Peggy's lawsuit, there is a real risk that it would be unable to recover those benefits from Peggy. That would distort the status quo that existed before Peggy filed her lawsuit.

As for factors (3) and (4), they are either neutral or favor D-Lux. Regarding factor (3), there is no indication from the facts that Peggy is likely to prevail on her claim for benefits. At the very least, there is a factual dispute concerning whether Peggy is actually disabled. Regarding factor (4), issuance of an injunction would arguably be against the public interest because the no-fault act affords a remedy for an insurer's failure to pay benefits - including penalty interest and attorney fees - and does not provide for payment of benefits while an insured's action is pending. The court should refrain from ordering relief that goes beyond the statutory scheme. *Bratton*, 120 Mich App at 81.

While not necessary to achieve a perfect score, some credit may be given for also recognizing that it is inappropriate to grant a preliminary injunction "if it will grant one of the parties all the relief requested prior to a hearing on the merits." *Id.* at 79.