When I Got Laid Off, I Applied for Unemployment Benefits: Was That a Mistake?

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"Robo-Fraud" Determinations and Related Michigan Unemployment Insurance Agency Issues in Bankruptcy Cases

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I. Introduction[1]

Within approximately the last three years, the Michigan Unemployment Insurance Agency (UIA) has been aggressively pursuing non-dischargeability of debts for overpayment of unemployment compensation benefits that it contends arise are from the fraud of the debtors-claimants.

To make matters worse, the Michigan Employment Security Act (MESA) provides for penalties of up to four times the amount of the overpayment. So, for example, a $6,000 overpayment of benefits could give rise to a debt of $30,000 (overpayment of $6,000 plus $24,000 quadruple penalty) which UIA would almost always assert is non-dischargeable.

What is particularly troubling is the way that these determinations are made and how and when claimants are notified (or not) of the determinations and their rights to challenge them in

[1] The following materials provide background information on the Michigan Unemployment Agency's programs and systems that are at issue for this presentation: (1) "UIA Fact Sheet" prepared by Rep. Sander Levin's office (attached as Exhibit A); (2) transcript of the administrative hearing in *Di Gregorio v. J.C. Concrete, Inc.*, Michigan Administrative Hearing System, Appeal Docket Nos. 15-061404, 15-061394, and 15-061709, February 1, 2016 (the "Di Gregorio Transcript") (attached as Exhibit B); (3) the Claimant Services Audit by the Michigan Auditor General from April 2016 (the "Audit") (select portions of the Audit attached as Exhibit C) (the full Audit can be obtained at http://www.audgen.michigan.gov/finalpdfs/15_16/r641031814.pdf); (4) Letter from Rep. Sander Levin to Gov. Rick Snyder, April 25, 2016 (copy attached as Exhibit D); and (4) the memorandum from H. Luke Shaefer and Steve Gray to Gay Gilbert, Administrator, U.S. Department of Labor, May 19, 2015 (the "Shaefer/Gray Memorandum") (attached as Exhibit E). This writer thanks Jennifer Lord of Pitt McGehee Palmer & Rivers, P.C. for bringing many of these documents to his attention.

In addition, the reader should be aware that there is a class action lawsuit pending in the Michigan Court of Claims styled *Bauserman v. State of Michigan, Unemployment Insurance Agency*, Case No. 15-00202-MM, which challenges the UIA's actions that give rise to many of the fraud determinations being asserted by UIA as non-dischargeable debts and the UIA's collection of those debts. Class counsel in the *Bauserman* case is the firm of Pitt McGehee Palmer & Rivers, P.C.

administrative proceedings. Moreover, UIA can collect these debts not only through garnishment of debtors' Michigan income tax refunds, but also their federal income tax refunds.

II. The MiDAS System

The primary mover of this extraordinary effort has been UIA's implementation of the Michigan Integrated Data Automated System known as the "MiDAS" system. The legal deficiencies in the MiDAS System are the subject of the *Bauserman* class action.[2] In summary, many of the "determinations" that the claimant-debtor committed fraud, and the imposition of a quadruple penalty, are made entirely by the computerized MiDAS system based on various criteria with no human intervention, including nobody considering any evidence or information submitted by the debtor-claimant to explain why no fraud was committed. Frequently, the MiDAS system identifies purported discrepancies between information provided by the claimant (e.g., regarding eligibility for benefits or amounts) and information from other sources (e.g., other employers who report that the claimant was employed during a certain period of time) which discrepancies, UIA contends, indicate that the claimant engaged in fraud.

III. Non-Dischargeability Issues Presented by UIA Fraud Determinations

When a claimant whom UIA has determined fraudulently obtained unemployment compensation benefits files for bankruptcy protection, UIA will likely file an adversary proceeding seeking a ruling that the debt is non-dischargeable under 11 U.S.C. § 523(a)(2). This includes the entire amount of the debt consisting of the overpayment itself plus any penalty portion (up to 4x the overpayment).

UIA may file a motion for summary judgment very early in the proceeding (asserting that no discovery is needed) arguing that the UIA's determination is a final ruling that is entitled to collateral estoppel effect.

A. Collateral estoppel basics

A final judgment entered pre-petition (by a state or federal court and, under certain circumstances as explained below, by an administrative agency) may be given collateral estoppel or issue preclusive effect by the bankruptcy court, thereby preventing the debtor from re-litigating (or litigating in the first instance) any issues that were determined in the prior case or proceeding.

Collateral estoppel is "issue preclusion," meaning that a party will not be allowed to re-litigate *issues* that were actually and necessarily determined in the prior proceeding.[3]

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2 At this time, the Bauserman class action is pending in the Michigan Court of Appeals (Docket No. 333181). The trial court denied the State's motion to dismiss the lawsuit. Because the trial court's ruling involved a claim of governmental immunity, the State was able to take an appeal as of right.

[3] By contrast, *res judicata* is "claim preclusion" which bars a second action on the same claim or cause of action including all matters that were raised *or that could have been raised*. In general, *res judicata* does not apply in non-dischargeability proceedings. *Brown v. Felsen*, 442 U.S. 127, 138-139 (1979).

The Supreme Court has ruled that "collateral estoppel principles do indeed apply to discharge exception proceedings pursuant to § 523(a)." *Grogan v. Garner*, 498 U.S. 279, 284 n. 11 (1991).

The Sixth Circuit has explained the standard for issue preclusion/collateral estoppel that the bankruptcy courts must apply:

> In determining whether to accord preclusive effect to a state-court judgment, we begin with the fundamental principle that "judicial proceedings [of any court of any state] shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken. 28 U.S.C. § 1738. The principles of full faith and credit reflected in § 1738 generally require "that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."

In re Bursack, 65 F.3d 51, 53 (6th Cir. 1995) (citing *Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 81 (1984)) (footnote omitted).

So, the issue becomes whether the courts of the rendering state would give the judgment preclusive effect in a subsequent proceeding. If so, then the bankruptcy court must also give it preclusive effect.

B. Michigan law of collateral estoppel

Under Michigan law, collateral estoppel or issue preclusion applies when:

> 1) there is identity of parties across the proceedings;
> 2) there was a valid, final judgment in the first proceeding;
> 3) the same issue was actually litigated and necessarily determined in the first proceeding; and
> 4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.

Dantone v. Dantone (In re Dantone), 477 B.R. 28, 35-36 (6th Cir. B.A.P. 2012) (citations omitted).

C. Collateral estoppel of agency determinations

The Michigan Supreme Court has ruled that collateral estoppel may be applied to determinations of administrative agencies.

> By putting an end to litigation, the preclusion doctrines eliminate costly repetition, conserve judicial resources, and ease fears of prolonged litigation. Whether the determination is made by an agency or court is

> inapposite; the interest in avoiding costly and repetitive litigation, as well as preserving judicial resources, still remains.
>
> * * *
>
> However, because defendant is seeking to preclude relitigation on the basis of an administrative decision, three additional elements must be satisfied. [1] The administrative determination must have been adjudicatory in nature and [2] provide a right to appeal, and [3] the Legislature must have intended to make the decision final absent an appeal.

Nummer v. Dep't of Treasury, 448 Mich. 534, 542 (1995) (emphasis added) (citations omitted).

Michigan courts have explained what it means for an agency's determination to be adjudicatory in nature:

> To determine whether an administrative agency's determination is adjudicatory in nature, courts compare the agency's procedures to court procedures to determine whether they are similar. Quasi-judicial proceedings include procedural characteristics common to courts, such as a right to a hearing, a right to be represented by counsel, the right to submit exhibits, and the authority to subpoena witnesses and require parties to produce documents.

Nat. Res. Def. Council v. Dep't of Envtl. Quality, 300 Mich. App. 79, 86, 832 N.W.2d 288, 293 (2013) (internal citation omitted).

D. Use of collateral estoppel in criminal cases

In certain situations, the UIA may request a local prosecuting attorney to file criminal cases against a claimant. This raises the question of whether the result in the criminal case could be used against the debtor-claimant or the UIA, what is known as "cross-over estoppel," meaning when collateral estoppel "crosses over" the line between a criminal and civil proceeding. Although there appear to be no cases involving the UIA bringing a criminal case where non-dischargeability was alleged, the following cases may provide some insight if UIA did so.

In *Citizens Ins. Co. v. King (In re King)*, 500 B.R. 511 (Bankr. E.D. Mich. 2013), the debtor plead guilty in a criminal case to felonious assault with a dangerous weapon (hitting the victim with his uninsured motor vehicle). Insurer that had paid the victim's personal injury protection benefits obtained default judgment against debtor for $236,721.55.

In debtor's subsequent bankruptcy case, the insurer filed a complaint for non-dischargeability under section 523(a)(6) for "willful and malicious injury" to the victim.

Insurer moved for summary judgment based on "cross-over estoppel." It did not rely on the default judgment because the state court judgment's finding that debtor acted with malice and intent was not necessary to the insurer's claim against the debtor.

The court ruled that collateral estoppel based on the criminal conviction did not apply because the "same parties" were not involved in both cases and there was no "mutuality of estoppel," *i.e.*, the insurer would not have been bound by a determination in the criminal case that debtor was not responsible.

It is not clear if the UIA would be considered the "same party" as the county prosecuting attorney. If a local prosecuting attorney files criminal charges alleging unemployment insurance benefits fraud, it is likely that it is acting at the behest of the UIA so they probably should be considered to be in privity.

Whether a conviction after trial would be entitled to collateral estoppel effect in a non-dischargeability proceeding would require a careful analysis of the elements of the criminal offense and fraud under 11 U.S.C. § 523(a)(2). An acquittal would not necessarily redound to the benefit of the debtor-claimant in the non-dischargeability proceeding since the prosecutor/UIA has to prove guilt beyond a reasonable doubt but has to prove fraud only by a preponderance of the evidence.

In *Heitmanis v. Rayes (In re Rayes)*, 496 B.R. 449 (Bankr. E.D. Mich. 2013), debtors had pleaded guilty in Michigan state court to "Embezzlement from a Vulnerable Adult" in violation of M.C.L. 750.174a. As part of their sentences, debtors were ordered to pay restitution of $919,356. Debtors then filed Chapter 7.

The victim's guardian filed an adversary proceeding for non-dischargeability and moved for summary judgment under section 523(a)(7) based on the restitution ordered in the criminal case. Section 523(a)(7) excepts a debt from discharge "to the extent that such a debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss other than [certain tax penalties]."

Relying on *Hughes v. Sanders*, 469 F.3d 475 (6th Cir. 2006), the Court denied summary judgment. As interpreted by the *Hughes* court, section 523(a)(7) does not apply if either (a) the penalty is payable to an individual victim, who is not a governmental unit or (b) the penalty is strictly calculated in the sum of the victim's incurred damages. The restitution judgment failed both tests.

Although the probation department (a governmental unit) initially collected the restitution payments, the money was ultimately paid to the victim as the statute required. M.C.L. 780.766(2). The Court found that the involved governmental unit was merely acting as a conduit to the victim. Moreover, the restitution that was ordered was designed to compensate the victim for her damages.

E. Some arguments for avoiding collateral estoppel of UIA fraud determinations

1. Was the UIA's determination of fraud "adjudicatory in nature?"

Michigan Unemployment Insurance Agency v. Green (In re Green), ___ B.R. ___; 2016 WL 4750137 (Bankr. W.D. Mich.) (Boyd, J.) (Opinion Regarding Nondischargeability of Debt for Overpaid Unemployment Benefits, Penalties, and Interest).

In *Green*, in an opinion issued after a trial, Judge Boyd ruled that the UIA was not acting in a "judicial capacity" under *Univ. of Tennessee v. Elliott*, 478 U.S. 788 (1986), or that the procedures it utilized were not "adjudicatory in nature" under Michigan law, including *Storey v. Meijer, Inc.*, 429 N.W.2d 169 (Mich. 1988); and *Roman Cleanser Co. v. Murphy*, 194 N.W.2d 704 (Mich. 1972), explaining in detail the basis for his ruling:

> The examiner who conducted the fact-finding [re: Green's overpayment of benefits] was not identified. There was no hearing. There are no fats in the record to indicate what the examiner's qualifications were. There was is no evidence as to whether he or she considered the Debtor's responses to the inquiries, and if so, how he or she might have weighed the evidence. There is no evidence establishing what standard of proof was used. The examiner did not testify at trial in this court to explain his or her decision-making. There is no evidence suggesting that the Redetermination proceeding possessed any characteristics of being "quasi-judicial." The only part of the process that was even remotely "adjudicatory" was the right to appeal. The Debtor testified that he did not receive the Redetermination and therefore was unable to exercise his appeal rights. Although the credibility of that statement was somewhat diminished by the Debtor's prior position that he had appealed the decision, his testimony raises a question about the adequacy of the notice and opportunity to appeal the Redetermination.
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> Based on these facts, this court finds that the UIA was not "acting in a judicial capacity" and that Debtor was not given a full and fair opportunity to litigate the [UIA's] allegations against him, so as to entitle the factual findings of the prior Redetermination to collateral estoppel effect under Elliott. Likewise, the court concludes that a Michigan state court reviewing the Redetermination would not give preclusive effect to the factual findings made therein, because the procedures utilized by the [UIA] in making those findings were not adjudicatory in nature.

Green, 2016 WL 4750137, *9 (emphasis added).

Michigan Unemployment Insurance Agency v. Nemes (In re Nemes), Adv. Proc. No. 15-02047 (Bankr. E.D. Mich. 2015) (Opperman, J.) (Opinion Regarding Cross-Motions for Summary Judgment) (unpublished – available at www.mieb.uscourts.gov).

In *Nemes*, Judge Opperman followed Judge Shapero's decision in *Michigan Unemployment Insurance Agency v. Turner (In re Turner)*, Adv. Proc. No. 09-5413 (Bankr. E.D. Mich. 2010) (Shapero, J.) (Opinion Regarding Plaintiff's Motion for Summary Judgment)

> "In *Turner*, the Court found that the [UIA's] determination regarding restitution and penalties 'did not involve a hearing for which Turner was given prior notice and an opportunity to appear. It was, in effect, an intra-agency administrative determination; [the debtor's] sole right with regard to which was to appeal it within 30 days . . . of receiving notice." *Nemes*, p. 7.
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> "The Turner Court went on to conclude that, because the debtor was not given a pre-determination notice or opportunity to appear, 'it cannot fairly be said that the [UIA] was acting in a judicial capacity. . . . [The debtor] was never given the opportunity to contest or litigate the factual determination upon which the [determination] was based prior to the same being issued." *Id.*
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> "The only 'notice' she received was a letter informing her that '[i]nformation recently received indicates that you may have intentionally misled [the UIA]' regarding benefit payments, and inviting her to respond to a series of questions by mail." *Id.*, p. 8

If all that has occurred is the claimant was sent a notice (whether via his or her MiWAM account or by some other means) that UIA asserts he or she committed fraud, UIA has not acted in an adjudicatory manner.

If the debtor-claimant actually requests and gets a hearing before an ALJ, however, it may be a closer call depending on the procedures allowed to a claimant.

2. Did the debtor-claimant have a "full and fair opportunity" to litigate the issue in the earlier proceeding?

Insufficient Notice or Findings by UIA

The quality of the notice claimants are given by UIA that it contends the claimants have committed fraud, and that they may be subjected to a finding of fraud (including a quadruple damages penalty), is highly questionable.

First, the notice that the UIA believes the claimant has or may have committed fraud is usually (always?) sent to the claimant's online MiWAM account *usually long after the claimant has ceased receiving benefits and, thus, has no reason to be monitoring the account*. This would seem to violate fundamental principles of Due Process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314; 70 S. Ct. 652; 94 L. Ed. 865 (1950).

"The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.*, 339 U.S. at 315.

If the UIA was "desirous of actually informing" the claimant that it contends the claimant has committed fraud, it would not send notice to an online account that very likely is not being monitored. In *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293; 73 S. Ct. 299; 97 L. Ed. 333 (1953), the Supreme Court held that a creditor that was not provided written notice of the claim-filing deadline, but was provided notice only by publication, could not have its claim barred because it did not receive reasonable notice required by Due Process, citing *Mullane, supra*. Even where the party was aware of the bankruptcy proceedings, it was entitled to notice by mail before its claim would be barred.

Second, even when the UIA employs the U.S. mail to send notices, many of the those mailings are returned because of a bad address (or the claimant has moved). *See* Audit, p. 10 (describing UIA's failure to follow up to notify claimants when mail is returned to UIA). No court would consider service of process to be effective under such circumstances.

Third, where the determination of fraud was made by the MiDAS system's logic, with no review or consideration of the debtor-claimant's evidence or information to explain that he or she did not commit fraud, there is a serious question of the "fullness" and the "fairness" of the opportunity to litigate. *See also* Di Gregorio Transcript (referenced below).

Fourth, the UIA determination that the claimant committed fraud is likely not supported by adequate or possibly any findings. As pointed out by the Administrative Law Judge Goldstein in the *Di Gregorio* case:

> Under Docket 15-061394, the Agency alleges that the Claimant committed intentional fraud. The only statement made by the Agency in support of that conclusion is that the Claimant made a false statement knowing it to be false by failing to properly report his earnings for the period July 14th, 2012, through August 18th, 2012. The Agency fails to identify the false statement. (inaudible) allegation that the Claimant did not properly report his earnings could've been a mistake, therefore that statement in and of itself does not adequately identify what false statement the Claimant made. As a result, the Agency has deprived the Claimant of his due process rights.

Di Gregorio Transcript (Appeal Nos. 15-061404 & 15-061394), p. 5 (emphasis added).

Be aware that the ALJ's decision in Di Gregorio was reversed by the Michigan Compensation Appellate Commission which ruled that the ALJ exceeded his authority. *See Di Gregorio v. J.C. Concrete, Inc.*, Michigan Compensation Appellate Commission, Appeal Docket No. 16-000012-248399 (copy attached as Exhibit F). Nonetheless, the flaws identified by the ALJ can still be raised by a claimant in an appropriate case.

Fifth, the determination of fraud may have been made in violation of MESA. It appears that the UIA may be routinely seeking restitution for overpayment of benefits contrary to the statute of limitations in MESA:

> This case involves a Claimant appeal to a November 4, 2015, Redetermination denying reconsideration under Section 32 (a) of the Act, and this Denial of Reconsideration is related to a September 1, 2015, Notice of Redetermination holding the Claimant partially ineligible for benefits under Sections 27 (c) and 48 of the Act. The period of alleged overpayments occurred between April 3rd, 2010, and July 3rd, 2010. The Agency is seeking restitution under Section 62 (a) of the Act. Under Section 62 (a) of the Act the Agency has three years from the date of an alleged overpayment to institute an action seeking repayment of benefits. Beyond that three-year statute of limitation, the Agency lacks jurisdiction to institute an action seeking repayment of benefits. Because the Agency's Redetermination was not issued until September 1, 2015, it lacked jurisdiction to seek repayment of benefits in this case, considering that the alleged overpayments occurred back in 2010. Because the Agency lacked jurisdiction under Section 62 (a) , it's [sic] decisions in this matter will be summarily reversed, and that includes the Denial of Reconsideration.

Di Gregorio Transcript (Appeal No. 15-061709), p. 6 (emphasis added).

Some deficiencies/criticisms identified in the Audit and the Shaefer/Gray Memorandum

The Audit contains certain findings that highlight several of the above deficiencies:

- "UIA needs to improve its efforts to obtain and/or consider supporting information and provide claimants with the facts and rationale for claims identified as including potentially false or misleading information (intentional misrepresentation)." Audit, p. 10.

- "Between October 1, 2013 and March 31, 2015, UIA issued 60,324 (re)determinations finding intentional misrepresentation on 47,350 claims." *Id.*

- The Auditor General reviewed 60 of these 60,324 redeterminations and found that "UIA could have improved its efforts to contact 22 claimants who did not respond to UIA's original request for information related to 46 (76.7%) (re)determinations. Also, UIA did not inform claimants that, absent new information provided by another source, failure to respond to the requests for information would result in a finding of intentional misrepresentation. . . . UIA assessed the 22 claimants statutorily required penalties totaling $184,795." *Id*.

- "Although UIA's attempts to obtain claimant information met State and ET Handbook 301, 5th Edition, requirements, additional attempts to contact these claimants would have better ensured that the claimants were provided adequate due process prior to finding intentional misrepresentation." *Id.*

- "b. UIA did not obtain and/or consider sufficient information to support some adjudications made for claimants who responded to UIA's requests for information related to issues of intentional misrepresentation.

  UIA asked claimants only two questions on the requests for information:

  (1) Did the claimants intentionally provide false information to obtain benefits that they were not entitled to receive? (A "yes" or "no" answer was required.)

  (2) Why did the claimants think they were entitled to benefits?

  UIA determined intentional misrepresentation existed when claimants either answered "yes" to the first question, where a "yes" appears to be an admission, or answered "no" to the first question but checked the box for 1 of 3 of the 7 non-"other" responses to the second question. Although some of these responses appeared to provide sufficient proof of intentional misrepresentation, others did not. For example, responding "no" to the first question and that one needs the money in response to UIA's second question may not, in itself adequately support an intentional misrepresentation (re)determination." *Id.*, p. 11 (emphasis added).

- "c. UIA did not include the reasons for, or facts that led to, the written (re)determinations of intentional misrepresentation, when UIA contacted the claimant, as required by [state and federal law.] Instead, the (re)determinations only stated that the claimants' actions indicated that the claimants intentionally misled and/or concealed information to obtain benefits that the claimants were not entitled to receive." *Id.*

- Interestingly, UIA responded to these last criticisms/findings as follows: "*The UIA agrees that (re)determinations should include the facts, supporting information, and the reason(s) on which the (re)determination is based. In 2015, the UIA began a review of its intentional misrepresentation (re)determinations processes. As a result, intentional misrepresentation matters are investigated, reviewed, and determined by staff to ensure the inclusion of relevant facts, reason(s), and conclusions within these redeterminations. . . .*" *Id.*, p. 12.

UIA's acknowledgement that, starting in 2015 it "began a review of its intentional misrepresentation (re)determination processes" seems to be a tacit admission that these previous processes were deficient.

The Shaefer/Gray Memorandum also identifies a number of deficiencies/problems with the UIA's practices including:

- "because many adjudications occur months after a claimant has stopped claiming benefits, former claimants who changed addresses do not learn of the determination within the 30-day appeal window," Shaefer/Gray Memorandum (Exhibit E), p. 2

- Noting that the Michigan Unemployment Insurance Project "frequently sees partial benefits cases where [UIA] automatically brings fraud charges against claimants who made good-faith efforts to accurately report wages." *Id.*

- When it sends a questionnaire to a claimant suspected of committing fraud, UIA "does not explain in any detail the nature of the problem in the questionnaire itself or in the ensuring fraud determination letter. (Not until the appeals hearing, do claimants learn of the details of [UIA's] accusations.)" *Id.*, pp. 2-3.

- When claimants do not receive the questionnaires or determination letters, they "do not find out about the charges until UIA is about to garnish their wages and tax refunds or levy on their bank accounts." *Id.*, p. 3.

The deficiencies identified in the Audit and the Shaefer/Gray Memorandum should help support arguments for avoiding the application of collateral estoppel to the UIA's administration determinations of fraud.

3. Was the UIA's determination effectively a "true default judgment?"

In *Vogel v. Kalita (In re Kalita)*, 202 B.R. 889 (Bankr. W.D. Mich. 1996), the Court considered whether a so-called "true default judgment" would be given collateral estoppel effect by Michigan courts. A "true default judgment" has been defined as a "judgment [that] was entered solely because [the defendant] failed to file an answer or take *any* steps to defend herself in the state court action." *Kalita*, 202 B.R. 899 (emphasis added).

The Court ruled that such a judgment would not be given collateral estoppel effect because nothing was "actually litigated" in such a case.

Since the principles of collateral estoppel apply whether the determination was made by a court or an agency, *Nummer, supra*, it should follow that the "true default judgment" rule of *Kalita* should apply to administrative determinations.

In the case where the claimant ignores the UIA's notice or assertion that the claimant has or may have committed fraud, or where the claimant is never aware that the UIA has sent such a notice, it would seem to follow that such a determination is the equivalent of a "true default judgment" and would not be entitled to collateral estoppel effect by the bankruptcy court.

Some default judgments *are* given collateral estoppel effect. If the claimant participates in the administrative proceedings and a default judgment is later entered, such may not be considered a "true default judgment" within the meaning of *Kalita* and may be given collateral estoppel effect. The degree of participation needed to give a default judgment collateral estoppel effect is not entirely clear. However, a party will not be allowed to participate in the case or proceeding and then fail or refuse to do so and argue that the resulting default judgment is not entitled to collateral estoppel effect. *See, e.g., Kasishke v. Frank (In re Frank)*, Adv. Proc. No. 09-80245 (Dales, J.) (default judgment entered as a discovery sanction is entitled to collateral estoppel effect).

Varied treatment of true default judgments in the Eastern District of Michigan: while it is believed that all the bankruptcy judges in the Western District follow the *Kalita* rule regarding "true default judgments," there is a split among the bankruptcy judges in the Eastern District. A sampling of the cases reflecting this split:

> *Cresap v. Waldorf (In re Waldorf)*, 206 B.R. 858, 867 n. 3 (Bankr. E.D. Mich. 1997) (Rhodes, J.) (true default judgments are given collateral estoppel effect, disagreeing with *Kalita*).
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> *Micco Construction Co. v. Brunett (In re Brunett)*, 394 B.R. 425 (Bankr. E.D. Mich. 2008) (Rhodes, J.) (continuing to disagree with *Kalita*, predicting that Michigan Supreme Court would rule that true default judgments are entitled to collateral estoppel effect).
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> *Building Communications, Inc. v. Rahaim (In re Rahaim)*, 324 B.R. 29 (Bankr. E.D. Mich. 2005) (McIvor, J.) (true default judgment will not be given collateral estoppel effect, following *Kalita*; arguably *dicta* because court ruled that it was not a true default judgment).
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> *Williams v. Noblit (In re Noblit)*, 327 B.R. 307 (Bankr. E.D. Mich. 2005) (Shapero, J.) (holding that true default judgments are entitled to collateral estoppel effect, agreeing with *Cresap* which disagreed with *Kalita*). *But see Montgomery v. Kurtz (In re Kurtz)*, 170 B.R. 596 (Bankr. E.D. Mich. 1994) (Shapero, J.) (state court default judgment was not entitled to collateral estoppel effect).
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> *Universal Underwriters Group v. Allen (In re Allen)*, 243 B.R. 683 (Bankr. E.D. Mich. 1999) (Perlman, J.) (following *Kalita*).
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> *Phillips v. Weissert (In re Phillips)*, 434 B.R. 475, 486 (6th Cir. B.A.P. 2010) (following *Kalita*) (opinion by McIvor, J.)
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> *McCallum v. Pixley (In re Pixley)*, 456 B.R. 770, 778 (Bankr. E.D. Mich. 2011) (Tucker, J.) (declining to follow majority opinion in *Phillips*, instead adopting view of concurring opinion of Rhodes, J).

4. Are there questions of fact that preclude summary judgment and require a full trial before the bankruptcy judge?

In addition to the UIA arguing that it is entitled to summary judgment based on collateral estoppel, it will likely also argue that the debtor-claimant's actions in applying for benefits and providing information (that UIA contends were false) establish that the debtor-claimant committed fraud and the UIA is entitled to summary judgment.

Many of the above criticisms/deficiencies should also be used to argue that questions of fact exist which preclude summary judgment for UIA. Fraud determinations are inherently subjective as they involve the question of a debtor's intent.

> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably[2] relied on the false representation; and (4) its reliance was the proximate cause of loss.

In re Rembert, 141 F.3d 277, 280–81 (6th Cir. 1998).

"Whether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard, *see Field v. Mans,* 516 U.S. 59, 70-72, 116 S.Ct. 437, 444, 133 L.Ed.2d 351 (1995)." *Id.*, 141 F.3d at 281. "Fraudulent intent requires an actual intent to mislead, which is more than mere negligence . . . . A 'dumb but honest' [debtor] does not satisfy this test." *Palmacci v. Umpierrez*, 121 F.3d 781, 788 (1st Cir. 1997).

In response to UIA's motion for summary judgment alleging no genuine issue of material fact exists, the debtor/defendant should submit a declaration explaining his or her lack of fraudulent intent to respond directly to whatever representations or conduct UIA relies on in support of its motion (in addition to arguing the deficiencies in UIA's determination procedures). Recall the familiar rule that a party may not merely rely on his or her pleadings to establish that a genuine issue of material fact exists to avoid summary judgment. "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) (emphasis added).

5. *Bauserman* class action lawsuit

A class action lawsuit is pending in the Michigan Court of Claims, *Bauserman v. State of Michigan, Unemployment Insurance Agency*, Case No. 15-00202-MM. The plaintiff class counsel is the law firm of Pitt McGehee Palmer & Rivers, P.C. which has set up a website for the class action: www.uiafraudclass.com. This website should be consulted for developments in the lawsuit that might affect claimants who file for bankruptcy protection.

The *Bauserman* class action lawsuit challenges the UIA's practices and policies for finding that claimants committed fraud and owe restitution and penalties and seeks both to recover money that UIA has taken to satisfy these fraud determinations and declaratory relief. If successful, that lawsuit could nullify many of the fraud determinations by the UIA. At least one adversary proceeding has been put on hold pending the outcome of the *Bauserman* case. *See Michigan Unemployment Insurance Agency v. Eunice Tillman*, Adv. Proc. No. 15-05113 (Dkt. Nos. 30 & 31) (Bankr. E.D. Mich.) (Shefferly, J.) This may be an approach that allows debtors to gain the benefit of the class action lawsuit to, in effect, defend the adversary proceeding without incurring significant attorney fees themselves, at least initially.

IV. *In re Green* – Opinion After Trial

On July 29, 2016, Judge James W. Boyd of the Western District issued his opinion after trial in the case of *Michigan Unemployment Insurance Agency v. Barrid Green, Jr.*, ___ B.R. ___; 2016 WL 4750317 (Bankr. W.D. Mich.). Ultimately, Judge Boyd held that the entire debt Mr. Green owed to the UIA for overpayments – consisting of restitution of $7,984.00 and penalties of $31,416.00 (and interest) – was non-dischargeable under 11 U.S.C. § 523(a)(2) and 11 U.S.C. § 523(a)(7). While the result was bad for this particular debtor, the case is helpful in certain respects and useful because it appears to be the first full trial issued after UIA began its recent concerted efforts including through the MiDAS System.

It is strongly recommended that the reader review the *Green* opinion in detail. Following is just a short summary of the case.

A. Background

Debtor Barrid Green first applied for unemployment benefits on January 19, 2010, listing the City of Grand Rapids as his most recent employer. Initially, UIA found that he was disqualified because he was terminated for misconduct. After the UIA issued a redetermination which again found him disqualified, debtor appealed to an administrative law judge who held that he was not disqualified and awarded him benefits.

After a claimant establishes initial eligibility for unemployment benefits, a claim is required to certify continuing entitlement by calling or logging into the Michigan Automated Responses Voice Interactive Network ("MARVIN") every week. There is also a handbook given to all unemployment claimants which includes an explanation for how to use of the MARVIN system.

Green received unemployment benefits for 102 weeks. During this time, he provided weekly certifications through the MARVIN system that he was not working when, in fact, he was working part-time for the City of Grand Rapids. At trial, Green admitted that he failed to disclose his employment with the City and the wages he received when he certified his eligibility for benefits via MARVIN. He argued that he did not disclose his employment based on instructions given to him by a UIA representative. Ultimately, the court did not credit his explanation because he could not identify the UIA representative and in his response to the UIA's request for information when it suspected he had improperly obtained benefits, he never mentioned this alleged conversation.

It was approximately two years from Green's first application for benefits before the UIA made a ruling that he had been overpaid unemployment benefits. The UIA alleged, and Judge Boyd found, that Green's debt for restitution in the amount of $7,984.00 and penalties in the amount of $31,416.00 were non-dischargeable under 11 U.S.C. § 523(a)(2) and (a)(7), respectively.

B. Collateral estoppel discussion

As noted above, Judge Boyd rejected the UIA's argument that its determination and redetermination that the debtor Green had committed fraud were entitled to collateral estoppel effect. The court ruled that the UIA was not acting in a "judicial capacity" or that its determination was not "adjudicatory in nature." The court analyzed collateral estoppel of agency decisions under both Michigan and federal standards, coming to the same conclusion that the UIA did not satisfy this element.

It would be premature to say that the UIA will never be able to apply collateral estoppel to its internal fraud determinations, but the detailed and thoughtful analysis in *Green* strongly suggests it would be difficult for the UIA to prevail on that argument.

C. UIA's theories

UIA sought a determination that Green's debt was non-dischargeable under two separate theories: (1) the debt for restitution for the overpayment that it contended was fraudulently obtained under 11 U.S.C. § 523(a)(2) and (2) the debt for the quadruple penalties was non-dischargeable under 11 U.S.C. § 523(a)(7).

The Court rejected UIA's attempt to argue that the quadruple penalties were non-dischargeable under 11 U.S.C. § 523(a)(2) based on the *Cohen v. de la Cruz*, 523 U.S. (1998), but that was based on the UIA first making this argument in its proposed findings of fact and conclusions of law filed just before trial where the UIA had not pleaded this theory in its complaint. *Green, supra,* at *12, n. 10. The Court also noted the split between the *Andrews* and *Kozlowski* cases regarding treatment of penalties under 11 U.S.C. § 523(a)(7) in Chapter 13 cases, but declined to weigh in since *Green* was a Chapter 7 case.

It is believed that UIA will argue that all amounts owed by a debtor-claimant, whether restitution or penalties, are non-dischargeable for fraud under 11 U.S.C. § 523(a)(2) and *Cohen, supra*.

D. UIA procedures explained

The *Green* case is useful for purposes of providing an overview of the UIA's procedures and terminology. It explains the meaning of a "determination" and "redetermination," how claimants apply and, on a weekly basis certify their continuing eligibility, for unemployment benefits through use of the MARVIN system, and how UIA investigates cases of potential fraud.

E. Some lessons learned from *Green*

Are the penalties necessarily non-dischargeable if the overpayment is found to be non-dischargeable?

Judge Boyd noted that "[n]either party has addressed whether, in light of the Redetermination's lack of preclusive effect, this court is required to reevaluate the imposition of

the statutory penalties or whether it has authority to do so. . . . Other than thorough implicit arguments regarding his lack of fraudulent intent, the Debtor did not directly challenge the prior assessment of the penalties or their amount. . . . This proceeding does not require the court to consider the questions that might arise if this court's independent factual findings were inconsistent with imposition of the penalties (for example, if this court found no intentional fraud). The ability of this court to revisit the assessment of penalties under such circumstances, and whether such determination should be made in this court or in another court of competent jurisdiction, are questions for another day." *Id*., *12, n.11 (emphasis added).

If the UIA's finding that a debtor-claimant committed fraud is not entitled to preclusive effect then why should its assessment/finding of penalties entitled to any greater deference? Does the bankruptcy court have the authority to refuse to impose penalties if the debtor-claimant committed fraud so that the restitution portion is non-dischargeable?

Is justifiable reliance a viable way to attack?

The *Green* court noted that "[u]nder the justifiable reliance standard, a creditor, such as the [UIA], is not required to make an independent investigation into the truth or falsity of every representation," but that "a creditor is 'required to use his senses, and cannot recovery if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.' This rule applies 'only when the recipient of the misrepresentation is capable of appreciating its falsity at the time by use of his senses.'" *Green, supra*, *10 (quoting *Field v. Mans*, 516 U.S. 59, 71 (1995).

Employers must report wages to the UIA quarterly, by the 25th of the following month. Therefore, if a claimant is working at a job but reporting no wages through MARVIN or some other UIA system for that purpose, the UIA theoretically will have the information necessary to identify this type of improper receipt of benefits approximately four months after the claimant begins receiving benefits. This should at least trigger an investigation by UIA sooner than two years as occurred in *Green*.

It may be appropriate in the right case to conduct discovery on UIA's capabilities for learning of a potential fraud earlier to establish that it had the ability to detect alleged fraud sooner than it did in a given case.

V. Additional issues/thoughts

Chapter 13 cases – additional argument re: non-dischargeability

In the Chapter 13 context, certain debtors have attempted to argue that the UIA's fraud debt can be bifurcated: the debt for restitution for the overpayment of benefits and the debt for the quadruple penalties. They have argued that while the debt for overpayment of benefits may be non-dischargeable under 11 U.S.C. § 523(a)(2), the quadruple penalty debt is dischargeable under 11 U.S.C. § 523(a)(7) because it is a penalty owed to a governmental unit and is not compensatory. Thus, upon completion of their plan, the debtor would get a discharge of the penalty portion because § 523(a)(7) is not one of the exceptions to discharge under § 1328(a)(2).

Judge Mark Randon accepted this argument in *Michigan Unemployment Insurance Agency v. Andrews (In re Andrews)*, 2015 WL 5813418 (Bankr. E.D. Mich.) .

However, Judge Tucker disagreed and held that the entire debt would be non-dischargeable under section 523(a)(2). *Michigan Unemployment Insurance Agency v. Kozlowski (In re Kozlowski)*, 547 B.R. 222 (Bankr. E.D. Mich. 2016).

The State prevailed in its appeal in the *Andrews* case. *Michigan Unemployment Insurance Agency v. Andrews (In re Andrews)*, 2016 WL 4497757 (E.D. Mich.) (O'Meara, J.).

The debtor's appeal in *Kozlowski* remains pending in the district court (oral argument is currently scheduled for October 21, 2016 before Judge Paul Borman).

Property interests

Debtors who have had their tax refunds or other property seized to pay a UIA debt based on the agency's determination of fraud may have a property interest as a member of the class that might have to be scheduled on Schedule A/B.

Moreover, debtors with these issues may want to contact class counsel to see if they qualify as members of the class (there is a statute of limitations issue that may limit the ability of claimants with older UIA determinations from participating in the class).

Exhibit A

Michigan Unemployment Insurance Agency's Unjust Fraud Claims

The Facts:

- In October, 2013, Michigan implemented a new automated unemployment insurance system to reduce operating costs and target fraud in unemployment insurance claims called the Michigan Integrated Data Automated System (MiDAS).
  - When MiDAS was implemented, Michigan's Unemployment Insurance Agency laid off 432 employees – or roughly one third of its staff.
  - The layoffs reduced the number of employees working directly with customers from about 260 to 184.

- From March 2014 to March 2015, 26,882 claimants were identified by MiDAS as fraudulent – five times the typical number – costing claimants **$56.9 million** in fines, as well as garnished wages and income taxes.
  - MiDAS retroactively reviewed claims made in the past six years, including individuals that MiDAS did not have up-to-date contact information for.
  - Money collected from penalties goes into a Penalty and Interest (P&I) account. The balance within the P&I account was $3.1 million at the close of FY 2010-11 and has grown to $68.8 million as of September 30, 2014.
  - Legislation passed in 2015 allows the state to use the funds – previously only used to support UIA activities and pay for representation for those who couldn't afford it – for other purposes.

- A February 2016 Auditor General report found that fraud was affirmed in **only 8 percent of appeals**. Sixty four percent of claims were reversed or dismissed, while 22 percent were remanded to UIA.
  - Despite the fact that states are required by federal law to independently verify computer-identified fraud cases, Michigan's UIA did not do so until August, 2015.
  - October, 2015, DOL sent an advisory to state unemployment benefit agencies reminding them of the requirements of Federal law pertaining to protecting individual rights in state procedures to prevent or recover unemployment compensation overpayments. The advisory said that in order to be eligible for administrative grants a state must do a number of things, including "independently verify information received from a computer cross-match with a Federal database or other automatic processes or matches before suspending, terminating, reducing, or making a final denial of UC."

- An April 2016 Auditor General report found that UIA failed to provide adequate or proper notice to those accused of fraud. Claimants accused of fraud cannot appeal those allegations without receiving notice.
  - The report found that:
    - "UIA did not effectively and efficiently process claimant and employer mail that was returned undeliverable and without a forwarding address."
    - The UIA could have improved efforts to contact claimants who did not respond to UIA's original requests for information, including for requests that were returned by USPS as undeliverable.

- The UIA did not clearly inform claimants that a failure to respond would lead to a finding of fraud.
- The UIA did not provide to claimants the facts that lead to the initial finding of fraud, which is required by both federal regulation and state law.
- The UIA would collect money from claimants despite these issues – even for those claimants that had not received notice.
- Nearly 235,000 phone calls – or 89% - made to the UIA call center went unanswered during two separate weeks in August and September 2014.

- The U.S. Department of Labor has advised the UIA to re-adjudicate instances of alleged fraud and reimburse citizens who were wrongly penalized in order to come into compliance with federal law.
  - Failing to come into compliance with the law would result in: 1) the state losing more than $100 million in federal administrative funds, and 2) employers in Michigan effectively facing higher taxes due to a reduction in Michigan's Federal Unemployment Tax Act (FUTA) tax credit, in compliance with Sec. 303(b) of the Social Security Act.

- A federal class-action lawsuit was filed in April, 2015. A state class-action lawsuit was filed in September, 2015.

- **Bipartisan** House Bill (HB) 4982 was introduced in mid-October 2015, and would, going forward, prohibit the UIA from making fraud determinations solely by computer program and improve notice requirements.

Background on unemployment insurance in Michigan:

- In March, 2011, Michigan Governor Rick Snyder shortened the amount of time that the state pays unemployment benefits from 26 weeks to 20 weeks – the fewest number of weeks of any state in the country at the time.

- In Michigan, unemployment insurance fraud carries a 400% penalty on the amount that a claimant was overpaid plus interest. No other state has a penalty above 150%.

Exhibit B

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

BUREAU OF HEARINGS

DIVISION OF UNEMPLOYMENT APPEALS

DANIEL L. DI GREGORIO,
CLAIMANT APPEAL DOCKET NO.: 15-061404

J. C. CONCRETE, INCORPORATED, 15-061394
EMPLOYER
_____/

Testimony taken and proceedings had in the above-entitled matter before Administrative Law Judge Stephen B. Goldstein, at 611 West Ottawa, Second Floor, Lansing, Michigan 48933, on Monday, February 1, 2016, commencing at 8:30 a.m.

APPEARANCES:

DANIEL DI GREGORIO	CLAIMANT
MELISSA BROWN	ATTORNEY FOR CLAIMANT
DANIELLE JOHNSON	WITNESS FOR EMPLOYER
LAURA GLYNN	UIA EXAMINER

TRANSCRIBED BY: Darlene McAninch, CER 8689
Theresa's Transcription Service
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(517) 882-0060

15-061404, 15-061394

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Lansing, Michigan

Monday, February 1, 2016 - 8:30 a.m.

* * * * *

P R O C E E D I N G S

ALJ GOLDSTEIN: On the record in the matter of Daniel Di Gregorio versus J. C. Concrete. Docket 15-061404. Today is February 1, 2016. The matter is set for an 8:30 hearing. Appearing in today's hearing is the Claimant, the Claimant's attorney, Employer, and the Unemployment Agency. Would all three of you raise your right hand please? Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth? Mr. Di Gregorio?

MR. DI GREGORIO: I do.

ALJ GOLDSTEIN: Ms. Johnson?

MS. JOHNSON: I do.

ALJ GOLDSTEIN: Ms. Glynn?

MS. GLYNN: Yes.

ALJ GOLDSTEIN: All right. Ms. Glynn, is there a companion fraud allegation in this case?

MS. GLYNN: Yes. And just to clarify, the Appeal Number -- or the Docket Number we are on right now is 15-061404. Is that correct?

ALJ GOLDSTEIN: Right. And the Claim Number is C0965167 dash 3.

UNIDENTIFIED SPEAKER: Okay. (inaudible) Appeal Number 15-061394.

ALJ GOLDSTEIN: All right. The record should reflect that under -- or that Docket 15-061394, which is the companion misrepresentation allegation, will be consolidated into this record, and we will get to that misrepresentation allegation in a minute here. This case, Docket 15-061404, concerns a Claimant appeal to a November 4th, 2015, Redetermination holding him ineligible for reconsideration under Section 32(a) of the Michigan Employment Security Act. The Denial of Reconsideration concerns a September 1, 2015, Redetermination in which the Agency alleges the Claimant is partially ineligible for benefits under Sections 27(c) and 48 of the Act. The alleged overpayments occurred for week ending July 14, 2012, and August 18th, 2012. The Agency seeks restitution under Section 62(a) of the Act. Under Section 62(a) of the Act the Agency has three years from the date of an alleged overpayment to institute an action seeking repayment of benefits. Here the alleged overpayment occurred August 18th, 2012, and the preceding month, July 14th, 2012. The Agency did not issue its Redetermination until September 1, 2015, which was beyond the three-year statute of limitations. Beyond that three-year point, the Agency lacks jurisdiction to institute an action seeking

restitution. As a result, the Agency September 1, 2015, Redetermination and the related Denial of Reconsideration will be summarily reversed. Under Docket 15-061394, the Agency alleges that the Claimant committed intentional fraud. The only statement made by the Agency in support of that conclusion is that the Claimant made a false statement knowing it to be false by failing to properly report his earnings for the period July 14th, 2012, through August 18th, 2012. The Agency fails to identify the false statement. (inaudible) allegation that the Claimant did not properly report his earnings could've been a mistake, therefore that statement in and of itself does not adequately identify what false statement the Claimant made. As a result, the Agency has deprived the Claimant of his due process rights. I will issue a written decision outlining the Michigan Court of Appeals holding on this issue so that the Agency is fully aware of what is it held -- the standard to which it is held when alleging fraud, especially when alleging fraud. On this Redetermination, I will issue a decision and order setting it aside, vacating and dismissing it, and that decision and order will be issued along with this decision and order summarily reversing the Agency's Section 27(c), 48 allegations. Any questions, Ms. Glynn?

MS. GLYNN: No. Just to add that for a jurisdiction,

the reason is is because of the possible investigation of the misrep within a six-year period is why we wrote the decision.

ALJ GOLDSTEIN: Okay. Counsel, any questions?

UNIDENTIFIED SPEAKER: I suppose I don't follow. Is there an investigation we're not aware of regarding misrepresentation, or --

UNIDENTIFIED SPEAKER: Well with this case, there was the companion misrepresentation issue, and so that's why we wrote the restitution because its within a six-year statutory.

ALJ GOLDSTEIN: Ms. -- Counsel, let me just explain. Under Section 62(a), there's no written misrepresentation. The Agency has only three years to institute an action.

UNIDENTIFIED SPEAKER: Yes. I'm aware.

ALJ GOLDSTEIN: You're aware of that already?

UNIDENTIFIED SPEAKER: Yeah. Mmm-hmm.

ALJ GOLDSTEIN: So what the Agency is essentially doing is saying well because there's an alleged misrepresentation, we have six years to institute an action, which it issued the adjudication on September of 2012. The alleged overpayments occurred just over three years before that.

UNIDENTIFIED SPEAKER: You mean 2015?

ALJ GOLDSTEIN: Yeah. That's what I meant.

UNIDENTIFIED SPEAKER: Right. I just wanted to --

ALJ GOLDSTEIN: Okay.

UNIDENTIFIED SPEAKER: I just wanted to make sure that there -- I mean from what I took from that is that there's some sort of investigation where they have proof that Di Gregorio committed fraud, but I just wanted to just clarify, so.

ALJ GOLDSTEIN: I think what Ms. Glynn is saying is the Agency is trying to preserve its jurisdiction to recover repayments or recover overpayments because they've alleged fraud.

UNIDENTIFIED SPEAKER: Okay.

MS. GLYNN: Yes. And that's what -- that's all I was stating is because --

ALJ GOLDSTEIN: For jurisdiction.

MS. GLYNN: -- (inaudible) referred to the three years, and I was --

ALJ GOLDSTEIN: Correct.

MS. GLYNN: -- bringing up six years.

ALJ GOLDSTEIN: And had the Agency effectively, sufficiently drafted an intentional misrepresentation allegation, keep in mind these redeterminations are treated as pleadings. Okay? Whenever agents of the government, government in this case -- the Agency is the government -- alleges fraud, or alleges anything, it has

an obligation to give the affected party constitutional due process of law by adequately stating with particularity what specifically a, in this case a beneficiary did, it's to support its allegations of fraud. The Agency can't say the Claimant committed intentional misrepresentation and leave it at that. That's why these are being dismissed. This claim has nothing to do with you personally. We have told the Agency time and time and time again that their misrepresentation allegations are facially defective, and they have not changed their practices. So these will continue to be dismissed as long as the Agency continues to do things the way they want. Okay.

UNIDENTIFIED SPEAKER: Yes.

ALJ GOLDSTEIN: All right. Docket 15-061404 and the companion 15-061394. We are off the record at 9:50 a.m.

(Hearing concluded.)

(Tape off.)

15-061404, 15-061394

STATE OF MICHIGAN)
) SS
COUNTY OF INGHAM)

I HEREBY CERTIFY that the foregoing testimony and proceedings, consisting of 9 typewritten pages, was mechanically recorded at the time and place hereinbefore set forth; was thereafter reduced to typewritten form; and that the foregoing is a full, true, and correct transcript of the recording so taken.

Darlene McAninch, CER 8689
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COMPLETED: March 9, 2016

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

BUREAU OF HEARINGS

DIVISION OF UNEMPLOYMENT APPEALS

DANIEL L. DI GREGORIO,
CLAIMANT APPEAL DOCKET NO.: 15-061709

J. C. CONCRETE, INCORPORATED,
EMPLOYER
_____/

Testimony taken and proceedings had in the above-entitled matter before Administrative Law Judge Stephen B. Goldstein, at 611 West Ottawa, Second Floor, Lansing, Michigan 48933, on Monday, February 1, 2016, commencing at 8:30 a.m.

APPEARANCES:

DANIEL DI GREGORIO	CLAIMANT
MELISSA BROWN	ATTORNEY FOR CLAIMANT
DANIELLE JOHNSON	WITNESS FOR EMPLOYER
LAURA GLYNN	UIA EXAMINER

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15-061709

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Lansing, Michigan

Monday, February 1, 2016 - 8:30 a.m.

* * * * *

P R O C E E D I N G S

ALJ GOLDSTEIN: On the record in the matter of Daniel Di Gregorio versus J. C. Concrete. Docket 15-061709. Today is February 1, 2016. The matter is set for an 8:30 hearing. Appearing in today's hearing are the Claimant, the Claimant's attorney, the Employer, and the Unemployment Agency. Would all three of you raise your right hand please? Do you solemnly swear or affirm to tell the truth, the whole truth, and nothing but the truth? Mr. Di Gregorio?

MR. DI GREGORIO: I do.

ALJ GOLDSTEIN: Ms. Johnson?

MS. JOHNSON: I do.

ALJ GOLDSTEIN: Ms. Glynn?

MS. GLYNN: Yes.

ALJ GOLDSTEIN: All right. Ms. Glynn, is there a companion intentional misrepresentation file on this?

MS. GLYNN: Yes. For Docket -- just to clarify, 15-061709, companion Docket is 15-061690.

UNIDENTIFIED SPEAKER: What case number?

ALJ GOLDSTEIN: I don't have that.

UNIDENTIFIED SPEAKER: (inaudible)

ALJ GOLDSTEIN: I do not have one under that docket number.

UNIDENTIFIED SPEAKER: I'm sorry. Do we have a case number?

UNIDENTIFIED SPEAKER: Oh. Case --

ALJ GOLDSTEIN: Case -- all right. Let me just start again.

UNIDENTIFIED SPEAKER: Okay.

ALJ GOLDSTEIN: This is Docket 15-061709, and the Claim Number here is C0965166 dash 0.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

ALJ GOLDSTEIN: Ms. Glynn, I'm not -- I don't even have a file with that docket number that you just mentioned.

MS. GLYNN: Okay. This is the copy of the one I have there.

UNIDENTIFIED SPEAKER: Your Honor, according to my notes, we already --

ALJ GOLDSTEIN: We already covered that.

UNIDENTIFIED SPEAKER: -- we already covered this case.

ALJ GOLDSTEIN: We already covered that one when we went on the record in Docket 15-061252, and that was made a companion file to that case.

UNIDENTIFIED SPEAKER: Okay.

ALJ GOLDSTEIN: Okay.

MS. GLYNN: Yeah. I have it as a companion with that one, according to the records.

UNIDENTIFIED SPEAKER: A companion to 15-061709 --

ALJ GOLDSTEIN: That's --

UNIDENTIFIED SPEAKER: -- as well?

ALJ GOLDSTEIN: That's what Ms. Glynn says she has that one as a companion to. How can you have a companion to two different?

MS. GLYNN: Okay. Let me check.

ALJ GOLDSTEIN: We already have covered that according to the -- and I have it right here under -- I put it together with Docket 15-061252.

UNIDENTIFIED SPEAKER: Okay.

UNIDENTIFIED SPEAKER: Ending in 2-5-2?

ALJ GOLDSTEIN: Correct. That's because the overpayment period was identical.

MS. GLYNN: Okay. And I have that one as a standalone misrepresentation issue, but I see what you're saying too, and it's the same (inaudible). Correct?

ALJ GOLDSTEIN: All right. Well that's already been taken, so I'm not gonna --

MS. GLYNN: Okay.

ALJ GOLDSTEIN: -- consolidate that with this one. Otherwise, everything will be thoroughly confused.

MS. GLYNN: Okay.

ALJ GOLDSTEIN: All right. So we'll just take this by itself then. This case involves a Claimant appeal to a November 4, 2015, Redetermination denying reconsideration under Section 32(a) of the Act, and this Denial of Reconsideration is related to a September 1, 2015, Notice of Redetermination holding the Claimant partially ineligible for benefits under Sections 27(c) and 48 of the Act. The period of alleged overpayments occurred between April 3rd, 2010, and July 3rd, 2010. The Agency is seeking restitution under Section 62(a) of the Act. Under Section 62(a) of the Act the Agency has three years from the date of an alleged overpayment to institute an action seeking repayment of benefits. Beyond that three-year statute of limitation, the Agency lacks jurisdiction to institute an action seeking repayment of benefits. Because the Agency's Redetermination was not issued until September 1, 2015, it lacked jurisdiction to seek repayment of benefits in this case, considering that the alleged overpayments occurred back in 2010. Because the Agency lacked jurisdiction under Section 62(a), it's decisions in this matter will be summarily reversed, and that includes the Denial of Reconsideration. Ms. Glynn, any questions?

MS. GLYNN: No.

ALJ GOLDSTEIN: Counsel, any questions?

UNIDENTIFIED SPEAKER: No, Your Honor.

ALJ GOLDSTEIN: All right. In Docket 15-061709, we are off the record at 10:03 a.m.

(Hearing concluded.)

(Tape off.)

15-061709

STATE OF MICHIGAN)
) SS
COUNTY OF INGHAM)

I HEREBY CERTIFY that the foregoing testimony and proceedings, consisting of 8 typewritten pages, was mechanically recorded at the time and place hereinbefore set forth; was thereafter reduced to typewritten form; and that the foregoing is a full, true, and correct transcript of the recording so taken.

Darlene McAninch, CER 8689
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COMPLETED: March 9, 2016

Exhibit C

Office of the Auditor General
Performance Audit Report

Claimant Services

Unemployment Insurance Agency, Talent Investment Agency
Department of Talent and Economic Development

April 2016

641-0318-14

State of Michigan Auditor General
Doug A. Ringler, CPA, CIA

The auditor general shall conduct post audits of financial transactions and accounts of the state and of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state established by this constitution or by law, and performance post audits thereof.

Article IV, Section 53 of the Michigan Constitution

OAG
Office of the Auditor General

Report Summary

Performance Audit

Claimant Services

Unemployment Insurance Agency, Talent Investment Agency, Department of Talent and Economic Development

Report Number:
641-0318-14

Released:
April 2016

The Unemployment Insurance Agency (UIA) helps jobless workers and their families by providing up to 20 weeks of regular unemployment insurance (UI) benefits while they seek new employment. UIA reported that it received 607,652 new claims and paid UI benefits totaling approximately $1.1 billion to 370,980 unduplicated claimants in fiscal year 2014. UIA's fiscal year 2014 administrative expenditures totaled approximately $155.6 million.

Audit Objective	Conclusion
Objective #1: To assess the clarity and comprehensiveness of UIA's communications with UI claimants.	Moderately clear and comprehensive

Findings Related to This Audit Objective	Material Condition	Reportable Condition	Agency Preliminary Response
UIA needs to improve its efforts to obtain and/or consider supporting information and provide claimants with the facts and rationale when it determines that claimants provided false or misleading information. Adjudicating these issues may result in reimbursement, penalties, and criminal prosecution. Also, these improvements will help claimants better understand the allegations against them to make informed decisions on their next course of action (Finding #1).	X		Agrees
UIA needs to continue to enhance existing and explore new social media methods and processes for communicating with current and prospective UI claimants. Accessible and comprehensive communications help ensure that claimants timely understand the various requirements for receiving UI benefits (Finding #2).		X	Agrees
UIA did not effectively and efficiently process claimant and employer mail that was returned undeliverable and without a forwarding address. Doing so resulted in increased printing, mailing, and workload costs of its mailroom personnel, claims examiners, and others. Also, claimants and employers did not receive important communications from UIA (Finding #3).		X	Agrees
UIA did not ensure that employers posted notices informing workers that they were covered for UI benefits. Also, more accurate instructions could have reduced the number of untimely claims, including the 45,700 ineligibility determinations issued between October 1, 2013 and February 26, 2015, for failing to apply in a timely manner (Finding #4).		X	Agrees

Findings Related to This Audit Objective (*Continued*)	Material Condition	Reportable Condition	Agency Preliminary Response
UIA should seek regular feedback from claimants to evaluate their satisfaction with UIA's service delivery systems, processes, and personnel and to timely identify and address issues requiring management's attention (Finding #5).		X	Agrees

Audit Objective	Conclusion
Objective #2: To assess UIA's efforts to ensure compliance with the U.S. Department of Labor's quality and timeliness standards related to UI claims processing.	Moderately effective

Findings Related to This Audit Objective	Material Condition	Reportable Condition	Agency Preliminary Response
UIA did not consistently meet federal performance standards related to initial benefit payments, nonmonetary determination processing, and appeals processing. In addition, UIA needs to improve the quality of its separation-related nonmonetary determinations. These conditions resulted in delayed benefit payments and improper benefit payments and claims denials, which, if left uncorrected, could result in the loss of federal administrative grant funding (Finding #6).		X	Agrees

Audit Objective	Conclusion
Objective #3: To assess UIA's efforts to identify claimants likely to exhaust their UI benefits and refer them to appropriate reemployment services.	Moderately effective

Findings Related to This Audit Objective	Material Condition	Reportable Condition	Agency Preliminary Response
UIA did not periodically evaluate whether its Worker Profiling and Reemployment Services (WPRS) system effectively reduced program participants' length of unemployment and the amount of UI benefits paid. Also, UIA did not periodically review and update its profiling model to accurately identify the claimants who were most likely to exhaust their regular UI benefits before returning to work. Annual savings to Michigan with an effective WPRS system could total over $11.7 million (Finding #7).		X	Agrees
UIA did not refer some claimants who met UIA's mandatory reemployment service participation criteria to the Michigan Workforce Development Agency for reemployment services. Also, UIA did not take sufficient action to reduce the number of claimants that it excused, without consequence, from mandatory participation in reemployment services after missing their scheduled appointment. Some claimants may not have returned to work as soon as otherwise possible, resulting in lost wages to the claimants and increased costs to the UI program (Finding #8).		X	Partially agrees

A copy of the full report can be obtained by calling 517.334.8050 or by visiting our Web site at: www.audgen.michigan.gov

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April 21, 2016

Ms. Sharon A. Moffett-Massey, Director
Unemployment Insurance Agency
Cadillac Place
Detroit, Michigan
and
Mr. Steven Arwood, Director
Department of Talent and Economic Development
300 North Washington Square
Lansing, Michigan

Dear Ms. Moffett-Massey and Mr. Arwood:

I am pleased to provide this performance audit report on Claimant Services, Unemployment Insurance Agency, Talent Investment Agency, Department of Talent and Economic Development.

We organize our findings and observations by audit objective. Your agency provided preliminary responses to the recommendations at the end of our fieldwork. The *Michigan Compiled Laws* and administrative procedures require an audited agency to develop a plan to comply with the recommendations and submit it within 60 days of the date above to the Office of Internal Audit Services, State Budget Office. Within 30 days of receipt, the Office of Internal Audit Services is required to review the plan and either accept the plan as final or contact the agency to take additional steps to finalize the plan.

We appreciate the courtesy and cooperation extended to us during this audit.

Sincerely,

Doug Ringler

Doug Ringler
Auditor General

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AUDIT OBJECTIVES, CONCLUSIONS, FINDINGS, AND OBSERVATIONS

COMMUNICATIONS WITH UI CLAIMANTS

BACKGROUND

The Unemployment Insurance Agency (UIA) has four remote interactive claim centers. One center takes unemployment insurance (UI) claims and answers claimant questions over the telephone. The other three centers process incoming correspondence, process and adjudicate* claims, and complete other claims-related tasks. Also, UIA has 15 problem resolution offices located throughout the State that provide claimants with access to telephones and computers for filing their UI claims and that offer personal assistance to claimants on UI-related matters. In addition, UIA has a designated team that answers claimant questions sent to UIA electronically.

In October 2013, UIA implemented the benefit section of its new computer system, Michigan Integrated Data Automated System (MiDAS). MiDAS provides for more efficient processing of claims than UIA's predecessor system. UIA simultaneously upgraded its Michigan Web Account Manager (MiWAM), which allows claimants to file UI benefit claims, monitor the status of claims, file appeals, and respond to fact finding requests through the Internet.

AUDIT OBJECTIVE

To assess the clarity and comprehensiveness of UIA's communications with UI claimants.

CONCLUSION

Moderately clear and comprehensive.

FACTORS IMPACTING CONCLUSION

- UIA effectively used many of the communication strategies for claimants recommended in the U.S. Department of Labor's (USDOL's) UI Claimant and Employer Message Toolkit.
- UIA provided claimants with multiple avenues for filing UI claims, completing their biweekly certifications, and communicating with UIA.
- Instructions provided to claimants when applying and certifying for UI benefits were generally clear and comprehensive.
- Most UIA form letters sent to claimants were clear and comprehensive.
- Material condition* related to obtaining the necessary information for accurately adjudicating select claims and providing claimants with the reasons supporting UIA's (re)determinations.

** See glossary at end of report for definition.*

- Reportable condition* related to enhancing methods and processes for communicating with claimants.
- Reportable condition related to ineffective and inefficient processing of undeliverable claimant and employer mail.
- Reportable condition related to ensuring that employers posted notices and provided workers with required information regarding unemployment benefits.
- Reportable condition related to not obtaining service satisfaction information from claimants.

** See glossary at end of report for definition.*

FINDING #1

UIA needs improvement in making and communicating (re)determinations of intentional misrepresentation.

UIA needs to improve its efforts to obtain and/or consider supporting information and provide claimants with the facts and rationale for claims identified as including potentially false or misleading information (intentional misrepresentation*).

Accurately adjudicating issues of intentional misrepresentation is crucial because of the statutory benefit payback provisions and significant penalties, along with the potential for criminal prosecution. Also, claimants need to know how UIA arrived at its conclusions to allow claimants to make informed decisions on whether to protest or appeal the (re)determinations.

Between October 1, 2013 and March 31, 2015, UIA issued 60,324 (re)determinations finding intentional misrepresentation on 47,350 claims. We reviewed 60 of these (re)determinations and noted:

UIA could have improved efforts to contact 22 claimants who did not respond to UIA's original requests for information related to 46 (re)determinations finding intentional misrepresentation.

a. UIA could have improved its efforts to contact 22 claimants who did not respond to UIA's original requests for information related to 46 (76.7%) (re)determinations. Also, UIA did not inform claimants that, absent new information provided by another source, failure to respond to the requests for information would result in a finding of intentional misrepresentation. Instead, the requests stated that failure to respond would result in a (re)determination based on available information. UIA assessed the 22 claimants statutorily required penalties totaling $184,795.

   The United States Postal Service (USPS) returned 2 (9.1%) of the 22 requests as undeliverable. UIA informed us that it did not resend the returned requests to claimants because the claimants' deadlines to respond to the requests, which would not change with remailing, would have already passed. Also, UIA did not open 5 (10.9%), 13 (28.3%), and 3 (6.5%) of the 46 misrepresentation issues for 6 months to 1 year, 1 to 2 years, and more than 2 years, respectively, after the last UI benefit payments for the related claims. Because of these significant time lags, some of the requests for information related to the intentional misrepresentations that UIA sent electronically may also have gone undeliverable and contributed to the high nonresponse rate.

   Although UIA's attempts to obtain claimant information met State and ET Handbook 301, 5th Edition, requirements, additional attempts to contact these claimants would have better ensured that the claimants were provided adequate due process prior to finding intentional misrepresentation.

** See glossary at end of report for definition.*

b. UIA did not obtain and/or consider sufficient information to support some adjudications made for claimants who responded to UIA's requests for information related to issues of intentional misrepresentation.

   UIA asked claimants only two questions on the requests for information:

   (1) Did the claimants intentionally provide false information to obtain benefits that they were not entitled to receive? (A "yes" or "no" answer was required.)

   (2) Why did the claimants think they were entitled to benefits?

   UIA determined intentional misrepresentation existed when claimants either answered "yes" to the first question, where a "yes" appears to be an admission, or answered "no" to the first question but checked the box for 1 of 3 of the 7 non-"other" responses to the second question. Although some of these responses appeared to provide sufficient proof of intentional misrepresentation, others did not. For example, responding "no" to the first question and that one needs the money in response to UIA's second question may not, in itself, adequately support an intentional misrepresentation (re)determination.

   The Handbook states that adjudicators should closely examine all of the facts related to (re)determinations of intentional misrepresentation. Examples of relevant facts to consider in making the (re)determinations include claimants' education levels, language barriers, and prior claims experiences.

c. UIA did not include the reasons for, or facts that led to, the written (re)determinations of intentional misrepresentation, when UIA contacted the claimant, as required by Title 20, Part 602, Appendix A of the *Code of Federal Regulations* (*CFR*) and Section 421.32(a) of the *Michigan Compiled Laws*. Instead, the (re)determinations only stated that the claimants' actions indicated that the claimants intentionally misled and/or concealed information to obtain benefits that the claimants were not entitled to receive.

RECOMMENDATION

We recommend that UIA improve its efforts to obtain supporting information and provide claimants with the facts and rationale for (re)determinations of intentional misrepresentation.

AGENCY PRELIMINARY RESPONSE

UIA provided us with the following response:

The UIA agrees that (re)determinations finding intentional misrepresentation should include the facts, supporting information, and the reason(s) on which the (re)determination is based. In 2015, the UIA began a review of its intentional misrepresentation (re)determinations processes. As a result, intentional misrepresentation matters are investigated, reviewed, and determined by staff to ensure the inclusion of relevant facts, reason(s), and conclusions within these (re)determinations. The UIA continuously reviews and implements improvements in its system in order to better serve customers.

Exhibit D

Sander Levin
U.S. House of Representatives
9th Congressional District, Michigan

April 25, 2016

The Honorable Rick Snyder
Governor, State of Michigan
George W. Romney Building
111 South Capitol Avenue
Lansing, MI 48933

Dear Governor Snyder:

As Ranking Member of the Committee on Ways & Means, which has jurisdiction over federal-state unemployment compensation programs, I am writing to make it clear that Michigan must review the claims of fraud made by the State Unemployment Insurance Agency's automated system and fully reimburse those citizens of our state who were harmed due to inaccurate determinations.

In October 2013, the State began to rely solely on the Michigan Integrated Data Automated System (MiDAS) – a computer program without human involvement – to make official determinations of fraud. This computer program was so grievously flawed that the State should have detected that there was a problem. During the year from March 2014 to March 2015, the automated system alleged close to 27,000 cases of fraud – five times the typical number of cases established by the Michigan UIA – costing claimants $57 million in fines and garnished wages and income taxes. In contrast, in 2012, the year before MiDAS was implemented, the account that holds funds collected from fraud allegations contained only $3 million.

And, in February 2016, the Michigan Auditor General found that computer-determined fraud was affirmed in only 8 percent of appeals, with a full 64 percent reversed or dismissed, and 22 percent where the UIA was asked to review them again.

I understand that because of oversight efforts by the U.S. DOL (DOL), the computer system is no longer in violation of federal law and has placed an employee back in charge of verifying any fraud allegation. That is a relief, but I am dismayed to learn that the State continues to resist recommendations to improve current notice procedures so they meet federal requirements. This foot dragging was verified in recent days by the Michigan Auditor General which found that UIA "needs to improve its efforts to obtain and/or consider supporting information and provide claimants with the facts and rationale when accusing claimants of providing false or misleading information."

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I also understand that there is a bi-partisan effort under way in the state legislature to address problems with the system going forward. I commend those efforts and I hope they result in full and adequate improvements.

But I find it shocking and deeply concerning that the State has not gone back and sought to verify allegations of fraud and moved to re-pay any unemployed worker who was wrongly accused and whose wages or tax refunds were wrongly garnished or were required to pay penalty without proper notice.

Unfortunately, in the fall of 2015, UIA only re-evaluated a small batch of the over 60,000 computer-determined fraud adjudications focusing only where the individual had appealed. This leaves out a large portion of the false fraud determinations that haven't been appealed or appealed late when it has been confirmed by the Auditor General that UIA's procedures for notice are wholly inadequate.

When I spoke to DOL, they re-iterated that they have advised the UIA to re-adjudicate all instances of alleged fraud in order to be in compliance with federal law and reimburse those wrongfully accused of fraud.

The unemployment insurance program is in place to provide assistance to workers who are unemployed through no fault of their own while they look for a new job. If fraud occurs in any government program, there is an absolute responsibility to rectify it. But when a government system fails the people it is in place to assist, there is also an absolute responsibility to rectify it.

While the UIA has taken small steps to rectify problems caused by the automated system, it is incumbent upon the UIA to verify that *all* previously alleged instances of fraud were, in fact, fraud. And, where mistakes were made, Michiganders should absolutely receive their money back. As the Governor of our State, you should insist that this be done.

As the Ranking Member of the Committee on Ways and Means, I will continue working with the DOL to ensure that Michigan's unemployment insurance program complies with all federal requirements, including a claimant's due process rights. The DOL is clearly required to withhold Michigan's federal administrative funding allocation (over $100 million annually) for UI if Michigan is not in compliance with Section 303(a)(1) or 303(a)(3) of Social Security Act which provide requirements for the operation of federal-state unemployment programs.

I would welcome hearing from you on this important matter.

Sincerely,

Sander Levin

Sander Levin
Member of Congress

Exhibit E

To: Gay Gilbert, Administrator, U.S. Department of Labor

Cc: Rose Zibert, Acting Regional Administrator, U.S. Department of Labor, Region 5

From: H. Luke Shaefer, Associate Professor, University of Michigan*

Steve Gray, General Manager, Michigan Unemployment Insurance Project

Date: 19 May 2015

Michigan Unemployment Insurance Agency: Unjust Fraud and Multiple-Determinations

The purpose of this memo is to alert you to recent changes at the Michigan Unemployment Insurance Agency (UIA) that are behind an unprecedented increase in the number of fraud cases, separation and non-separation determinations, and appeals of agency determinations. We are deeply concerned that agency procedures, made possible by new IT systems, (1) subject significant numbers of innocent claimants to unjust fraud charges, (2) further deter claims by inundating claimants with confusing multiple determination notices, and (3) exaggerate agency workloads in ways that increase federal administrative funding.

On behalf of Michigan claimants and U.S. taxpayers, we urge the U.S. Department of Labor to investigate UIA's administrative procedures to ensure the agency treats claimants fairly and complies with federal law.

1. **Unprecedented Increase in Fraud Cases, Non-monetary Eligibility Determinations, and Lower Authority Appeals is Cause for Concern**

The recent surge in fraud cases, non-monetary eligibility determinations, and lower authority appeals is particularly troubling in the context of extremely low levels of claims activity. Last year, Michigan's initial claims and benefits paid (adjusted for inflation) fell to a forty-year low, while the number of weekly claims also reached near-historic lows.[1]

a. **Fraud Cases**: Over the most recent four quarters, UIA established 26,882 fraud cases, bringing outstanding receivables to an all-time high of $56.9 million.[2] In 2014, UIA established more than five times the typical number of fraud cases and twice as many as in 2012, the previous high (Figure 1). Whereas in the past, UIA determined about 10 percent of overpayments were due to fraud, the agency now finds fraud in over one-third of overpayment cases.

b. **Non-monetary Determinations and Denials:** After taking into consideration claims activity, the rate of non-monetary determinations has never been higher in the program's recorded

[1] Dating back to 1975, weekly claims were only lower in 1999 and 2000 when the state unemployment rate was 3.7 and 3.6 percent, respectively.

[2] ETA 227, columns 1 and 71, Q2 2014 to Q1 2015 (accessed 5 May 2015).

*** Affiliations are listed for identification purposes only. The views expressed in this memo are those of the authors and do not reflect the views of any of the organizations with which they are affiliated.**

history (Figure 2). In 2014, the number of non-separation and separation determinations increased by 159 percent and 32 percent, respectively, over the previous year, even as initial claims and claimant contacts declined by nearly ten percent (Table 2).

- *Non-separation*: All non-separation categories increased year-over-year, but the rise in "disqualifying or deductible income" and "other" deserve special attention (Table 2). MiUI saw a number of cases where UIA's computers mishandled partial benefits or improperly attributed earnings to weeks when claimants were unemployed, resulting in automatic fraud determinations. (See claimant example 2.) Finally, while we do not know the cause of the six-fold increase in "other," it is concerning that these determinations do not fall within one of the standard categories.

- *Separation*: A 75 percent increase in "voluntary leaving" determinations led to the year-over-year rise in separation determinations (Table 2). The increase in voluntary leaving determinations is likely the product of a new automated procedure we call "robo-fraud," which we will discuss in greater detail.

- *Denials*: UIA denied 70 percent of a staggering 590,000 determinations in 2014. The denial rate exceeded the long-term average by 13 percentage points and was the highest rate in the program's recorded history. Interestingly, the denial rate for redeterminations fell from 52 percent in 2013 to just 4 percent in 2014. We do not know if this change is the result of a reporting error or a change in policy.

c. **Lower Authority Appeals**: After taking into consideration agency workload, appeals reached an all-time high in 2014 (Figure 3). Last year, 37,500 claimants were involved in appeals—the equivalent of roughly 150 appeals per business day. Claimant appellants outnumbered employer appellants six to one in 2014—twice the historic rate—indicating that negative agency decisions are falling disproportionately on claimants. Moreover, appeals occur less frequently than expected given the high number of determinations. For instance, appellants filed 6.4 appeals per hundred determinations last year, compared to 8.4 on average over the prior two decades.

   Our concern is that multiple and confusing determinations may discourage claimants, and disadvantaged claimants in particular, from appealing unfair agency decisions that they would win at a hearing. Additionally, because many adjudications occur months after a claimant has stopped claiming benefits, former claimants who changed addresses do not learn of the determination within the 30-day appeal window. Failing to appeal is especially damaging in overpayment and fraud cases where claimants may owe tens of thousands of dollars as a result of Michigan's exorbitant four-times fraud penalty and the 12 percent interest rate charged on restitution.

2. Failure to Meet Federal Performance Standards

Another possible reason for the lack of appeals is that the hearing system is completely overwhelmed by the number of negative agency decisions. Over the previous 12 months, claimants waited an average of 78 days—longest in the nation—for an Administrative Law Judge to hear their case (Table 2). These delays create a serious financial hardship for unemployed workers who may wait over two months for a decision. Additionally, only 65 percent of non-monetary determinations met the federal 21-day timeliness standard (Table 2). The agency's flagrant disregard of federal performance standards is reason enough for an investigation.

Table 1. Core Performance Measures, April 2014 to March 2015

Performance Measure	Michigan	Federal Standard
Non-monetary determinations, 21-day timeliness	64.5 percent	≥80 percent
Average age of pending lower authority appeals	77.9 days	≤30 days

Source: U.S. Department of Labor, State Rankings of Core Measures, (accessed 5 May 2015).

3. "Robo-Fraud" and Multiple Adjudications Explain the Unprecedented Rise in Agency Actions Against Claimants

In 2014, the Michigan Unemployment Insurance Project (MiUI) noticed a significant uptick in clients seeking our help with fraud-related cases and the number of clients being inundated by multiple determination notices. Through the appeals process, MiUI learned that UIA introduced a new, automated computer system that is behind the surge in fraud cases and eligibility determinations. Multiple determinations confuse and frustrate claimants. More seriously, the procedure we refer to as "robo-fraud" is grossly unjust and potentially violates state and federal law.

a. **Robo-fraud**: UIA's computers search through past and present claimant records, scanning for wage-record irregularities, in addition to reporting discrepancies between claimants and their former employers related to the reason for separation from employment. MiUI frequently sees partial benefits cases where the agency automatically brings fraud charges against claimants who made good-faith efforts to accurately report wages. As claimant example 4 illustrates, in addition to charging claimants with fraud well after their benefits expired, UIA is unable to provide any evidence of wrongdoing at appeals hearings.

   More often, however, claimants request help with separation fraud. After UIA's computer system identifies a separation discrepancy, it automatically sends claimants a questionnaire threatening to issue a "determination based on available information," if they fail to respond within ten days. As is illustrated by Exhibit 1, the agency does not explain in any

detail the nature of the problem in the questionnaire itself or in the ensuing fraud determination letter. (Not until the appeals hearing, do claimants learn the details of the agency's accusations.)

On the back of the questionnaire there are two questions. The first question asks if claimants intentionally provided false information (Exhibit 1). The second question asks claimants why they should have been entitled to benefits. Notably, "I was legally entitled to benefits" is not one of the eight possible responses. The sole purpose of these self-incriminating questions is to provide evidence in support of subsequent fraud charges. Indeed, from a claimant's perspective, there is no "right" way to respond to the questionnaire. UIA automatically levels fraud charges in the following circumstances:

i. when claimants do not respond within ten days;

ii. when claimants provide a timely response that differs from their former employers' response to a similar questionnaire; and

iii. when UIA's disjointed computer system fails to properly record on-time responses that are consistent with employer reports.

Because many Administrative Law Judges recognize the absurdity of this process, MiUI rarely loses robo-fraud cases at appeals hearings. However, we are only able to represent a fraction of claimants swept up by robo-fraud. Even those claimants who are able to afford a lawyer should not be forced to defend themselves against baseless charges. The following are other aspects of robo-fraud that should concern the U.S. Department of Labor.

- **Claimants treated unfairly:** There is no rational reason for UIA to assume by default that reporting discrepancies between claimants and their former employers or the failure to return a questionnaire in ten days constitute fraud. Likewise, there is no justification for accepting by default an employer's explanation for the separation from employment. Claimants and their former employers frequently disagree about the nature of job loss for a variety of reasons, including simple reporting mistakes and good-faith disputes over the specific details. As claimant example 1 illustrates, UIA is retroactively charging claimants with fraud in cases where employers never contested the benefit claim.

- **Claimants do not receive timely notices:** UIA levels fraud charges against claimants whose benefits ended months or even years ago. Because UIA does not have current address information or a way to verify receipt, claimants do not always receive the questionnaires or determination letters. In these cases, claimants do not find out about the charges until UIA is about to garnish their wages and tax refunds or levy their

bank accounts. Furthermore, after missing all appeals deadlines, claimants must go through the added hurdle of submitting a good-cause request to reopen their cases.

- **Misaligned financial incentives may encourage employers to provide misinformation:** Robo-fraud offers employers a financial incentive to misrepresent the reason for job loss. All employers must do to guarantee a benefit denial is state that their former employees quit, regardless of the real reason for the separation. While UIA is quick to charge claimants with fraud, as far as we can tell employers who provide false information regarding a claimant's separation face no consequences whatsoever. At worst, UIA may charge employers for benefits, if former employees successfully navigate the onerous appeals process.

- **Double-standard applies to claimants and employers:** Even though MiUI rarely loses robo-fraud cases at appeals hearings, we are unaware of a single instance of the agency charging an employer with fraud for misrepresenting the reason for separation. There is no explanation for why robo-fraud should only work against claimants when it is just as reasonable to assume that employers make misrepresentations. (See claimant example 3.)

- **Disadvantaged claimants at greatest risk:** Claimants charged with fraud are not eligible for a hardship restitution waiver (allowed under Michigan law for indigent claimants), nor are they eligible for free representation at appeals hearings through Michigan's Advocacy program. By adding fraud charges on top of garden-variety eligibility decisions, UIA ensures that claimants will be unable to seek financial relief or free representation. It is reasonable to assume many claimants are ill-equipped to advocate on their own behalf or cannot afford a private attorney. Indeed, pro-bono attorneys we spoke with are overwhelmed with robo-fraud cases.

- **Lawsuit filed against UIA for robo-fraud:** On April 21, the United Auto Workers, the Sugar Law Center, and a group of citizens filed a complaint against UIA in federal court to stop robo-fraud.[3]

b. **Multiple Adjudications:** "Multiple adjudications" are at least partially responsible for the unprecedented rise in eligibility determinations. UIA cites improved efficiency as one of the benefits of the new automated IT infrastructure.[4] However, in the case of eligibility determinations described above, increased efficiency has not improved customer service

[3] *Zynda et al* v. *Zimmer et al,* No. 2:2015cv11449 (Michigan Eastern District Court, 2015).
[4] Michigan Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency, Michigan Integrated Data Automated System & Unemployment Insurance Modernization Project, NASCIO award nomination, http://tinyurl.com/q6dsgvm.

for claimants or resulted in the more efficient use of federal resources. The U.S. Department of Labor should not reward UIA for exaggerating its workload in a way that increases federal funding or for replacing staff, who once reviewed claimant records, with an IT system.

- While the IT improvements were intended to reduce paperwork, the new computer systems made it much easier (efficient) for UIA to issue multiple determinations related to a single claim. Claimant example 4 illustrates how multiple adjudications resulted in a client receiving 20 determinations on related remuneration issues pertaining to a single claim.

- In a case study touting its services, the company behind UIA's new computing systems, Fast Enterprises, credits a $9 million increase in Michigan's federal administrative funding to the "[i]ncreased non-monetary determination efficiency" made possible by the new computing system.[5]

4. **Automatic Garnishment of Wages and Tax Refunds:** As a result of robo-fraud and 2011 state legislation, there is now an uninterrupted pipeline from workers' bank accounts, tax refunds, and wages to UIA. From the initial fraud determination to the garnishment of wages and tax refunds, there are few legal barriers in place to protect claimants from UIA. (See claimant example 2 below.) Moreover, Michigan's severe four-times fraud penalty makes it more difficult for thousands of claimants to recover from unemployment.

   - Whereas in the past, UI returned fraud proceeds to the UI trust fund, Public Act 269 of 2011 allows the agency to retain a portion of collections, giving UIA a financial incentive to find fraud where none exists.[6]

   - The legislation also increased the percentage of wages that UIA may garnish from 20 to 50 percent and eliminated the requirement that the agency seek a court order before garnishing wages. This policy is particularly harmful to low-wage workers who cannot afford to have their paychecks reduced.

   - UIA often garnishes tax refunds and wages with little or no notice. UIA likely fails to provide proper notification because the agency does not have current mailing addresses for claimants who may have collected benefits months or years prior.

[5] Fast Enterprises. Michigan's Unemployment Insurance Solution. http://www.fastenterprises.com/documents/MichiganCaseStudy.pdf.

[6] For a summary of Public Act 269 of 2011, see http://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-0806-N.pdf.

Recommendations

Our analysis of administrative data provides evidence of a system-wide effort that charges innocent claimants with fraud and discourages unemployed workers from claiming benefits. The recent procedural changes behind these increases are leading to a loss of confidence in the state unemployment insurance program. In our experience, innocent claimants accused of committing fraud are often overwhelmed by a sense of injustice, while exaggerated accounts of fraud undermine confidence in the unemployment insurance system.

The dramatic procedural changes wrought by the automated IT infrastructure justify a review by the U.S. Department of Labor to ensure that agency procedures treat claimants fairly and comply with federal law. We urge you to consider the following actions:

1. Investigate the causes behind the unprecedented increase in fraud cases, non-monetary determinations, and appeals.

2. Conduct a comprehensive review of UIA's recent staff reductions as well as new automated procedures, including robo-fraud, multiple adjudications, the garnishment of claimant wages and tax refunds, and the levying of claimant bank accounts.

3. Review the integration of UIA's IT systems to verify that the online claimant portal is user friendly and that agency forms, such as the fraud questionnaire and fraud determination, serve a legitimate purpose, are easy to understand, are accessible for persons with disabilities or limited English proficiency, and provide meaningful information.

Thank you for your consideration. Please feel free to contact us with further questions.

H. Luke Shaefer

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*** Affiliations are listed for identification purposes only. The views expressed in this memo are those of the authors and do not reflect any of the organizations with which they are affiliated.**

About the Authors

H. Luke Shaefer, Ph.D. is an associate professor at the University of Michigan School of Social Work. His research on the effects of Unemployment Insurance and other public programs in the U.S. has been published in *Journal of Public Policy Analysis and Management*, *Monthly Labor Review*, *Social Service Review*, and *Health Services Research*. He is an elected member of the National Academy of Social Insurance. He received his Ph.D. in Social Service Administration from the University of Chicago.

Steve Gray is the general manager and a founder of the nonprofit Michigan Unemployment Insurance Project (MiUI), which marshals law students to represent jobless workers denied unemployment insurance benefits by the state. Steve is also a clinical assistant professor and director of the University of Michigan Law School's Unemployment Insurance Clinic. He specializes in public benefits litigation and advocacy and administrative law. As a 2008-09 Fulbright Scholar, Steve help establish a legal aid clinical program and taught at the University of Namibia Law School. Steve has worked in civil legal aid in one capacity or another since his graduation from the University of Illinois College of Law in 1987.

Claimant Anecdotes[7]

Example 1: UIA Charges Claimant with Fraud after Employer Error

Amanda Balma is a Certified Nursing Assistant who was working at a rehabilitation center in Okemos, MI. The rehabilitation center laid Amanda off in early 2014 after learning that she was pregnant and could no longer preform the heavy lifting required to care for patients. Her employer encouraged her to apply for unemployment insurance benefits. The employer characterized her separation for the unemployment insurance agency as a leave of absence as they hoped to hire Amanda back once her lifting restriction ended. Amanda applied for and received benefits without incident from March through August 2014.

Three months after her benefits ended, Amanda, now a new mother, received a notice from the unemployment insurance agency stating that she committed an intentional misrepresentation and owed over $20,000 in fines. Her employer's well-intentioned, but mistaken, mischaracterization of the layoff as a leave of absence triggered the agency's computers to issue an automatic fraud determination. As the agency performs no due diligence, Amanda and her newborn child will start their lives together over $20,000 in debt to the state.

Example 2: Agency Error Leads to Automatic Garnishment of Tax Refund

After losing his job in February 2014, electrician and Washtenaw county resident, Kevin Grifka applied for and received unemployment insurance benefits, before finding work in the fall of 2014. Months after his benefits ended and he had returned to work, the agency sent him a notice claiming that he owed over $12,000. This was the first time Kevin had any indication that there was a problem; yet, the administrative hearing system denied his request for an appeal because the agency claimed Kevin did not respond on time to an initial ineligibility letter, a notice he never received.

The agency decided retroactively that Kevin was ineligible for benefits because its computer system erroneously spread his earnings over an entire quarter, including the period of time when he was unemployed and receiving benefits. A human reviewing Kevin's file would have spotted this mistake. Not recognizing the error, however, the agency's automated system went to work, totaling up the amount overpaid, plus penalties, and printing off a form letter. Perhaps the most troubling aspect of Kevin's case is that nothing prevented the agency from garnishing $9,000 from his federal and state tax refunds as payment for its own mistakes.

Example 3: Claimant and Former Employer Disagree over the Reason for Job Loss

[7] Examples 1-3 are taken from *Zynda et al* v. *Zimmer et al,* No. 2:2015cv11449 (Michigan Eastern District Court, 2015). The fourth example uses a pseudonym and is based on information provided by a claimant attorney.

Brian Saylor, a resident of Oakland County, worked for a lawn sprinkler and plumbing business in 2013, until a manager told him he was laid off with only a few days remaining in the season. After losing his job, Brian collected UI benefits for 15 weeks until he received a letter from the agency stating that he committed fraud by intentionally providing false information. The agency assessed over $19,000 in penalties because Brian's employer claimed that he quit his job, which if true, may have made him ineligible for benefits.

Spotting the discrepancy between the claimant and employer explanations for the job loss, the agency's computer system automatically determined that Brian was ineligible for benefits and that he committed fraud. When Brian appealed, an Administrative Law Judge found no proof that Brian quit his job, reversing the agency's initial ineligibility and fraud decisions. Brian's case illustrates the clear double-standard at work. A simple discrepancy between an employer and a former employee is enough for the agency to deny benefits and, more seriously, charge claimants with fraud. When Administrative Law Judges decide for claimants, UIA does not charge the employer with fraud. Meanwhile, there is no mechanism in place to penalize UIA for leveling unjustified charges or failing to meet its burden of proof.

Example 4: Multiple Adjudication and Wrongful Partial Benefit Fraud Charges

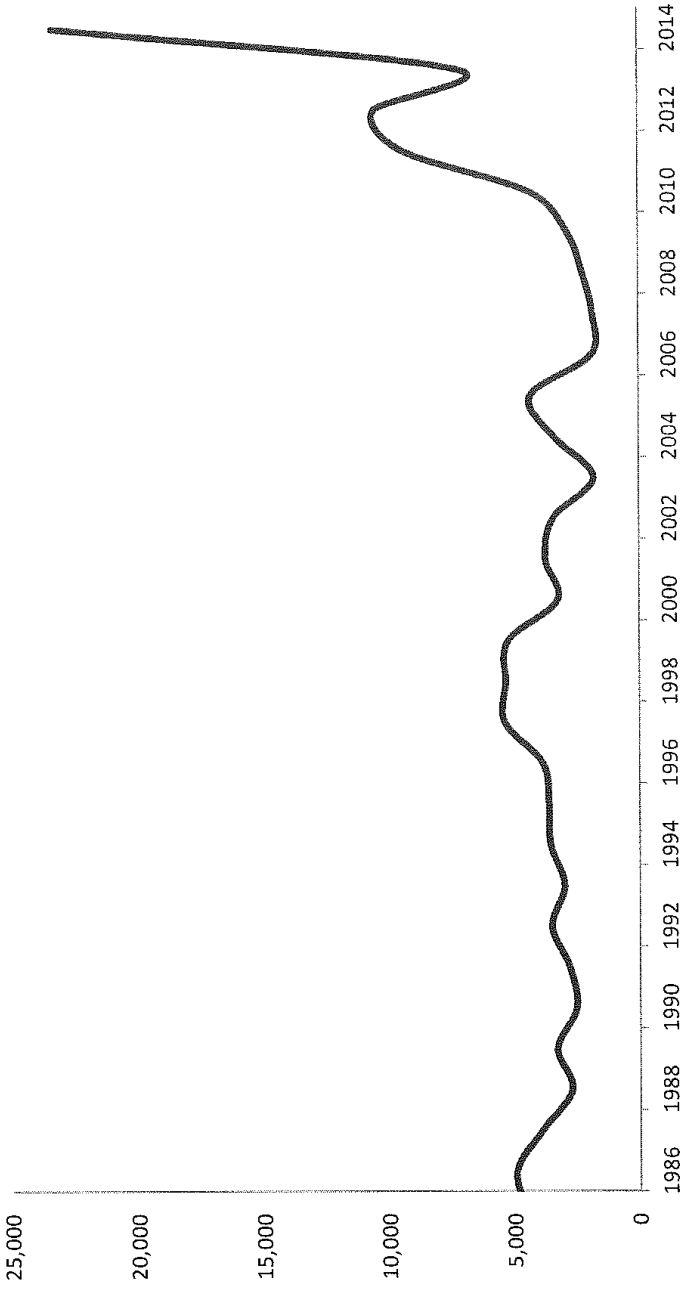
Ms. Barbara Hills started receiving UI benefits in 2009 after losing her full-time job. During the recession, Barbara struggled to find full-time employment but landed several part-time jobs that qualified her for partial benefits. She dutifully reported her wages each week and never heard from the unemployment insurance agency about any issues with her eligibility.

Imagine the shock Barbara felt when a series of determination notices began piling up in her mailbox in May and June 2014. Not only did UIA find Barbara ineligible for benefits from October 2010 to August 2013 because her wages were too high, the agency also accused her of committing fraud for misrepresenting her earnings. Between restitution and a four-times fraud penalty, Barbara owed the state over $60,000. Over a two month period, UIA's computer system automatically mailed Barbara ten overpayment and ten fraud determinations, all for the same underlying issue. She had to protest each of these determinations separately.

As is true in nearly all robo-fraud cases, UIA was unable to provide any evidence of misrepresentation at a hearing before an Administrative Law Judge. Once the judge determined that Barbara had not committed fraud, many of the overpayment redeterminations exceeded the statute of limitations. After adjudicating the first determination, the parties agreed that Barbara did not commit fraud and did not owe anything for the expired determinations. Nonetheless, the Administrative Law Judge separately adjudicated the remaining 19 redeterminations, mindlessly reading through the instructions and procedures for each redetermination.

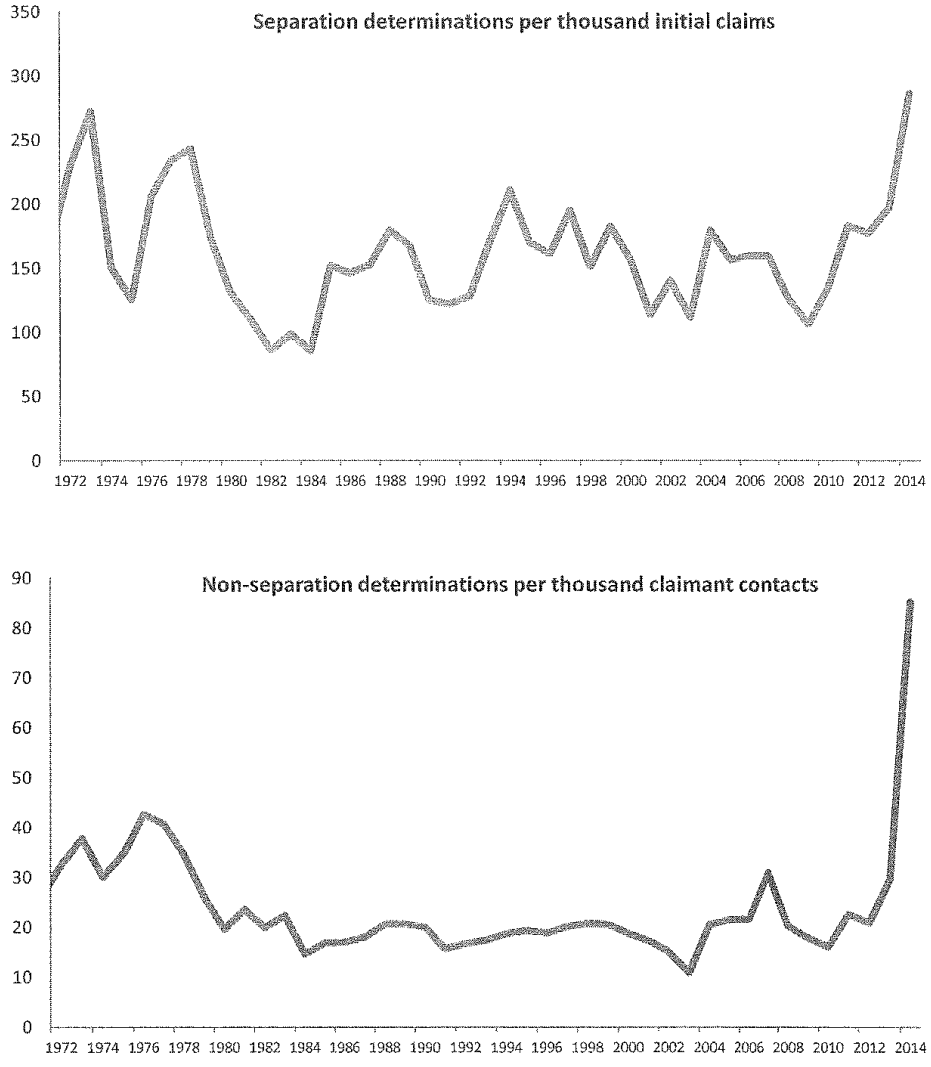
UIA's automatically generated determination notices create a great deal of confusion and frustration for claimants, in addition to wasting court resources. Had a person reviewed Barbara's case, she would have packaged the determinations together. More fundamentally, whereas the computer was unable to parse the case's underlying merits, a person may have found a better solution than flooding Barbara with letters and demanding an exorbitant penalty.

Figure 1: Number of Annual Fraud Cases Established



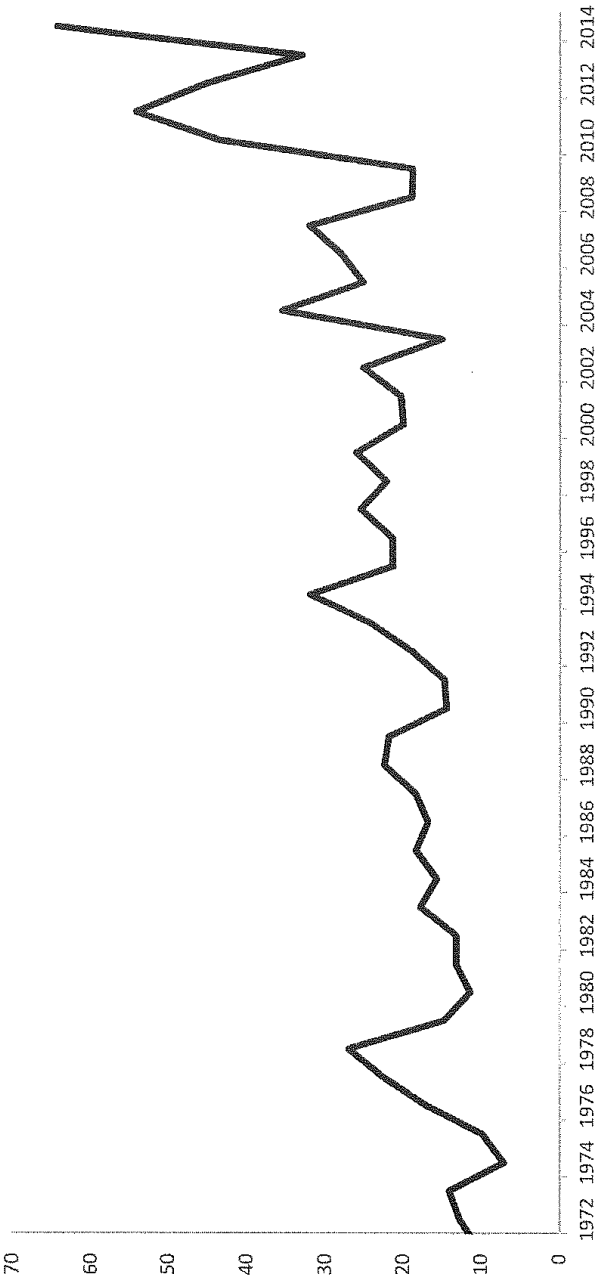
Source: Authors' analysis of U.S. Department of Labor, ETA 227, accessed 21 March 2015.

Figure 2: Annual Separation and Non-Separation Determinations



Note: Claimant contacts are initial claims plus continued claims. Charts exclude multi-claimant determinations.
Source: Authors' analysis of U.S. Department of Labor, ETA 207, accessed 21 March 2015.

Figure 3: Annual Number of Claimants Involved in Appeals per thousand Initial Claims



Note: Includes only single-claimant, lower authority appeals.
Source: Authors' analysis of U.S. Department of Labor, ETA 5130, accessed 21 March 2015.

Table 2. Michigan Non-separation and Separation Determinations and Denials

A. Non-separation Determinations

	Initial and Continued Claims	**Total Non-separation Issues**	Able, Available & Actively Seeking	Disqualifying or Deductible Income	Refusal of Suitable Work	Report Require Call-ins & other	Refusal Profiling Referrals	Other (aliens, athlete, school)
2009	15,167,973	**271,156**	67,070	27,243	8,985	111,840	13	56,005
2010	9,229,289	**148,179**	45,069	10,949	4,193	61,221	8	26,739
2011	7,172,896	**162,102**	47,062	7,455	4,361	75,497	7	27,720
2012	6,383,148	**133,626**	37,823	4,438	2,369	69,748	10	19,238
2013	5,479,612	**163,106**	37,352	9,177	1,541	90,525	262	24,249
2014	4,964,688	**422,973**	69,917	43,232	3,231	166,296	478	139,819
% change 2013-14	*-9%*	***159%***	*87%*	*371%*	*110%*	*84%*	*82%*	*477%*

B. Separation Determinations

	Initial Claims	**Total Separation Issues**	Voluntary Leaving	Discharge for Misconduct	Other
2009	1,463,878	**155,630**	57,050	97,819	761
2010	905,747	**122,202**	40,363	81,410	429
2011	768,447	**140,778**	51,090	89,038	650
2012	709,182	**125,835**	43,775	81,553	507
2013	639,539	**126,292**	40,918	83,419	1,955
2014	583,161	**166,926**	71,454	95,472	0
% change 2013-14	*-9%*	***32%***	*75%*	*14%*	*-100%*

C. Denial Rates

	Total Determinations & Redeterminations	Total Determinations	Total Redeterminations
2009	53%	52%	57%
2010	53%	57%	44%
2011	59%	62%	52%
2012	62%	63%	58%
2013	64%	67%	52%
2014	57%	70%	4%

Note: Includes single-claimant totals only.
Source: Authors' analysis of U.S. Department of Labor, ETA 207, accessed 21 March 2015.

UIA 1302
(Rev. 06-14)
Rick Snyder
GOVERNOR

State of Michigan
Department of Licensing and Regulatory Affairs
Unemployment Insurance Agency
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

Authorized By
MCL 421.1 et seq.
Sharon Moffett-Massey
DIRECTOR

[redacted]

Mail Date: [redacted]
Letter ID:
CLM:
Name:

Notice of Determination

Case Number: [redacted]
SSN:
Claimant:

BYB:
Employer Number:
Involved Employer:

Issues and Sections of Michigan Employment Security Act involved: Misrepresentation and 62(b).

Your actions indicate you intentionally misled and/or concealed information to obtain benefits you were not entitled to receive.

Benefits will be terminated on any claims active on [redacted]

You are disqualified for benefits under MES Act, Sec. 62(b). Restitution is due under MES Act, Sec. 62 (a). The wages used to establish your claim are cancelled and no further benefits will be paid based on those wages. In addition, you are required to pay the penalty assessed based on this determination under MES Act, Sec. 54(b). If the amount of restitution due is less than $500, the penalty is double the restitution due, except that for a subsequent intentional misrepresentation the penalty amount is four times the restitution due. If the amount of restitution due is $500 or more, the penalty is four times the restitution due.

Calculation of interest and penalty amount is shown later on this form.

If you disagree with this (re)determination, refer to "Protest Rights and Appeal Rights" on the reverse side of this form.

LARA is an Equal Opportunity Employer/Program.

UIA 1713 C/E
(Rev. 06-14)
Rick Snyder
GOVERNOR

State of Michigan
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Unemployment Insurance Agency
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Authorized By
MCL 421.1 et seq.
Sharon Moffett-Massey
DIRECTOR

[redacted]

Mail Date: [redacted]
Letter ID: [redacted]
CLM: [redacted]
Name: [redacted]

6

Request for Information Relative to Possible Ineligibility or Disqualification

Employer Name [redacted]
Employer Number
Benefit Year Begin

A question of eligibility and/or qualification has been raised on this claim. Please respond to the questions on the reverse side of this form. You should keep a copy for your records. The completed form must be received by UIA within 10 calendar days of the mail date shown. ***Failure to respond to this request for information will result in issuance of a determination based on available information.***

Respond by Mail:	UIA PO Box 169 Grand Rapids MI 49501-0169
Fax:	(517) 636-0427
Inquiry Line:	1-866-500-0017
TTY Customers:	1-866-366-0004

Respond online: You can submit "Request for Information Relative to Possible Ineligibility or Disqualification" responses electronically through MiWAM. To access MiWAM, go to www.michigan.gov/uia, and click on the link, "UIA Online Services for Unemployed Workers". If you already have an existing MiWAM account, log in and select "Additional Fact Finding is required for your claim". If you do not have an existing MiWAM account, you can register to create an account by selecting "Register As a New User", and follow the prompts. Online responses must be submitted within 10 calendar days of mail date shown above.

If it is determined that you intentionally made a false statement, misrepresented the facts or concealed material information to obtain benefits, then the penalty provisions of Sections 54 and 62(b) of the Michigan Employment Security Act will be applied and you would be subject to any or all of the following:

- You would have to repay money received **and** would have to pay a penalty of two times (if less than $500 of improper payments) or four times (if $500 or more of improper payments) the amount of benefits fraudulently received.
- The two times penalty would be increased to a penalty of **4 times** the amount of improper payments if it were a second or subsequent offense.
- Your benefits would be stopped and you will lose remaining benefits.
- You would be required to pay court costs (if prosecuted) and fines, face jail time, or you may be required to perform community service, or all of these.
- Intentional misrepresentation to obtain benefits in excess of $3,500 is a felony and you may be prosecuted in criminal court.

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(Rev. 06-14)

[redacted]

Additional information is necessary regarding Misrepresentation: Voluntary Quit/Personal Reasons.

Did you intentionally provide false information to obtain benefits you were not entitled to receive?

Yes No

Why do you believe you were entitled to benefits?

1. I needed the money
2. I had not received my payment when I reported for benefits
3. I reported the net dollar amount instead of the gross dollar amount paid
4. I did not understand how to report my earnings or separation reason
5. I thought my employer reported my earnings for me
6. Someone else certified (reported) for me
7. Someone else filed my claim for me
8. Other

You may provide a statement and evidence regarding this issue before a (re)determination is made on this matter. You must provide a response to the questions above and if you failed to previously report this information, explain why. This form must be received by the Agency within 10 calendar days of the mail date shown on page 1. Submit copies (not the originals) of any records which you believe support your position, such as pay stubs, layoff slip, federal income tax form, W-2, etc. If you require additional space, attach additional page(s). Please include your name, Claim ID and Letter ID as shown on page 1 of this form on all documents that you submit.

Certification: I certify that the information I have reported is true and correct to the best of my knowledge and belief. I understand that there are penalties of fines and/or imprisonment and/or community service for false statements as indicated on the front side of this form.

Signature | Date | Telephone Number

Print Name | Title

Exhibit F

MCAC 1852

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

In the Matter of

DANIEL L. DiGREGORIO, Appeal Docket No.: 16-000012-248399

Claimant, Social Security No.: XXX-XX-5045

J C CONCRETE INC.,

Employer.

REMAND ORDER

On September 1, 2015 the Unemployment Insurance Agency (Agency) issued numerous redeterminations involving the claimant. Some of the redeterminations found the claimant partially ineligible for benefits under Section 48 of the Michigan Employment Security (MES) Act. Others found the claimant liable for restitution and subject to penalty under Sections 54(b), 62(a) and 62(b) of the MES Act. The claimant protested the redeterminations. However, his protests were untimely. Consequently, the Agency issued multiple redeterminations dated December 4, 2015. The December 4, 2015 redeterminations denied claimant's request for reconsideration due to late protest.

Pursuant to the claimant's timely appeal of the Agency's December 4, 2015 redeterminations, a consolidated ALJ hearing was held on February 1, 2016. The ALJ issued decisions which vacated the Agency's September 1, 2015 redeterminations and December 4, 2015 redeterminations and found the claimant was not liable for restitution under Section 62(a) of the Michigan Employment Security (MES) Act. The Agency's timely appeal from those decisions place this matter before the Michigan Compensation Appellate Commission (Commission). After reviewing the record, we set aside the ALJ's decision and remand this matter comprised of several consolidated adjudications to the Michigan Administrative Hearing System (MAHS) for collective reassignment to a different ALJ for a new hearing. Our reasons are as follows.

The ALJ did not develop a record in any of the cases. Rather, the ALJ concluded the Agency's redeterminations were improper summary legal conclusions, or "facially invalid" and therefore declared them void. He then reasoned that no protest or appeal of the redetermination could ever be untimely, obviating-in his view-the need to address the question of good cause for late protest.

As to a finding of "facially invalid," the ALJ in essence found violative of due process the actions of the UIA in this matter. In so doing he exceeded his authority. The power to address and decide constitutional questions resides with courts of general equitable and legal powers. Dation v Ford Motor Co., 314 Mich 152, 160 (1946). The MAHS is not a court of general jurisdiction and, in fact, does not exist within the framework of the judicial branch of

government. It resides within the executive branch of government and its authority is more akin to the quasi judicial authority of the former department of labor and industry as discussed in Dation. Generally speaking, an administrative board, commission or department possessing powers of such character does not undertake to determine constitutional questions. *Id.* at 159.

Assuming for the sake of argument the redeterminations were legally deficient, the ALJ could not address that issue without first finding the claimant had good cause for his failure to timely protest the redeterminations. The ALJ failed to do so. Consequently, his decisions must be set aside and these matters remanded for a new hearing and decision.

IT IS THEREFORE ORDERED that the ALJ's decision in this matter is set aside.

IT IS FURTHER ORDERED that this matter is remanded to MAHS for reassignment along with its companion cases.

IT IS FURTHER ORDERED that the ALJ to whom this case and its companions are assigned shall notice a new hearing. **The parties should carefully read the notice of hearing as they must call in for the hearing using an access code.**

IT IS FURTHER ORDERED that during the hearings the ALJ shall take evidence regarding the reason for the claimant's failure to timely protest the Agency's September 1, 2015 redeterminations.

IT IS FURTHER ORDERED that regardless of what the ALJ finds with respect to good cause, the ALJ shall also make a sufficient record to support findings with respect to the underlying questions of eligibility, restitution and, where applicable, fraud.

IT IS FURTHER ORDERED that after receiving evidence the ALJ shall make findings of fact and then issue a decision consistent with those findings.

IT IS FURTHER ORDERED that the Commission retains no jurisdiction in this matter.

George H. Wyatt III, Chair

Danielle M. Brown, Commissioner

Lester A. Owczarski, Commissioner

Dated and mailed at Lansing, Michigan, on JUL 29 2016

Legally Insufficient Notice and Unemployment Insurance Agency Determinations

By: Leila McClure[1], Marina Hunt[2], and Steve Gray[3]
University of Michigan Law School Unemployment Insurance Clinic
April 22, 2016

Frequently, unemployment insurance claimants and employers must rely only on short letter determinations and redeterminations (notices[4]) they receive from the Agency that provide little or no information about why the Agency has taken the action of which it is notifying the party. This confuses most parties and can often prevent them from adequately responding to a negative action taken against them by the Agency. The sparse or confusing notices prevent them from either making, effective protest and appeal decisions, or unable to prepare for hearings. The following article discusses the circumstances in which Agency notices are legally insufficient and what effect that should have on administrative proceedings.

Agency Required to Comply with US Department of Labor Standards

In the administration of its duties enumerated in the Michigan Employment Security Act, the State of Michigan must "cooperate with the appropriate agency of the United States under the Social Security Act." M.C.L. 421.11(a). Per this requirement, the Unemployment Insurance agency is statutorily required to comply with relevant regulations promulgated by the Department of Labor.

Relevant Department of Labor Notice Standard

Section 6013 of Appendix A to Part 602 of the Employment Security Manual requires the State of Michigan to include "in written notices of determination furnished to claimants sufficient information to enable them to understand the determinations, the reasons therefor, and their rights to protest, request reconsideration, or appeal." 20 CFR § 602 App. A, 6013(C)(2)

With regards to disqualification from benefits, the Department of Labor provides that: "If a disqualification is imposed, or if the claimant is declared ineligible for one or more weeks, he must be given not only a statement of the period of disqualification or ineligibility and the amount of wage-credit reductions, if any, **but also an explanation of the reason for the ineligibility or disqualification. This explanation must be sufficiently detailed so that he will understand why he is ineligible or why he has been disqualified**, and what he must do in order to requalify for benefits or purge the disqualification. **The statement must be individualized to indicate the facts upon which the determination was based**, e.g., state, "It is found

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[2] Marina Hunt is a 2nd year student at the University of Michigan Law School
[3] Steve Gray is a Clinical Assistant Professor and Director of the University of Michigan Law School Unemployment Insurance Clinic
[4] The Michigan UIA refers to letters they send out advising employers or claimants of some action they have taken on a claim as either determinations or redeterminations. For the purpose of simplicity and unity with the case law we will refer to them here as "notices".

that you left your work with Blank Company because you were tired of working; the separation was voluntary, and the reason does not constitute good cause," rather than merely the phrase "voluntary quit." **Checking a box as to the reason for the disqualification is not a sufficiently detailed explanation**. However, this statement of the reason for the disqualification need not be a restatement of all facts considered in arriving at the determination." 20 CFR § 602 App. A, 6013(C)(2)(h) (2012) (Emphasis Added).

In the Department of Labor Advisory, Unemployment Insurance Program Letter, No. 01-16 concerning "Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures, the Department of Labor specifically instructed on what qualifies as sufficient notice for fraud determinations. To satisfy federal law, the individual accused of fraud must "be provided with a written determination which provides **sufficient information to understand the basis for the determination** and how/when an appeal must be filed and must also include the facts on which the determination is based, the reason for allowing or denying benefits, the legal basis for the determination, and potential penalties or consequences." USDOL Unemployment Insurance Program Letter No. 1-16, page 2 (emphasis added). The Letter also provides a description of the information that must be included in a written determination:

1) A summary statement of the material facts on which the determination is based;
2) The reason for allowing or denying benefits; and
3) The conclusion of the decision based on the state's law

Relevant Michigan Law

In *Snyder v. RAM Broadcasting,* No. 82 23718 AE, Washtenaw Circuit Court (April 26, 1983) (Digest No. 16.39), the Circuit Court held that a "Notice of Hearing which [does] not give a plain statement that claimant's eligibility pursuant to Section 28(1)(a)… might be raised was not an adequate notice of the issue when it merely used the words 'Ability/Availability/Seeking Work/Eligibility.'" The reasoning the court used in deciding this notice was inadequate was that it was "not a plain statement of the matters asserted," meaning that "words and phrases divided by slashes and followed by a string citation to given sections of the Act do not provide a reasonably understandable notification that an issue will be considered, especially where the notification is intended for a lay person."

Recently in *Proulx v. Horiba Subsidiary Inc.,* 14-006880-241108 (Oct. 2, 2014) (Digest No. 18.21), an unpublished decision by the Michigan Compensation Appellate Commission (MCAC), the body held in part that the agency's fraud redetermination was insufficient because "it merely provide[d] a conclusory statement with no fact-finding to support it."

Agency Practice

The Unemployment Agency's practice of sending conclusory statements of disqualification or findings of misrepresentation violates both the mandatory

Department of Labor standards and existing Michigan law. Examples of insufficient notice under the Department of Labor standard include:

- "Your actions indicate you intentionally misled and/or concealed information to obtain benefits you were not entitled to receive"
- "You quit your job with COMPANY on DATE due to other personal reasons"
- Redeterminations including only the underlying issue and relevant statute number, such as: "Ability 28(1)(c)"

Good Cause to Re-Open

Pursuant to UIA Rule 270(1)(e), ""fail[ure] to receive a reasonable and timely notice" is good cause for reconsideration and reopening. Section 32(a) of the MESA provides that "the claimant and other interested parties shall be promptly notified of the determination and the reasons for the determination." Based on the failure to comply with Department of Labor standards and existing Michigan law, any agency determination or redetermination is void if it does not include:

- An explanation of the reason for the ineligibility or disqualification that is sufficiently detailed so that the claimant knows why he or she is ineligible
- Information about what the claimant must do to appeal or requalify for benefits
- Individualized facts to indicate how the decision was reached

Effect of Insufficient Notice

Void ab initio

Insufficient notice of an agency decision makes that decision null and can be treated as *void ab initio*. The Michigan Court of Appeals has held that a failure to give proper notice as required by the applicable statute "is a jurisdictional defect that renders the subsequent proceedings void." *Kanouse v Montcalm County Drain Comm'r*, unpublished opinion per curium of the Court of Appeals, issued March 19, 2002 (Docket No. 236285), p 2. Likewise, the Court of Appeals held in a workers' compensation case that improper notice renders a subsequent judgment potentially voidable. *Abbott v Howard*, 182 Mich App 243 (1990).

Procedural Due Process

The notion that insufficient notice renders a subsequent decision void also comes from a two-step analysis:

(1) Inadequate notice is a violation of procedural due process rights, and
(2) Decisions that relied on a lack of due process cannot be sustained.

Under step (1), it is clear from U.S. Supreme Court jurisprudence that proper notice is fundamental to due process. *See, e.g., Mullane v Central Hanover Bank & Trust Co.*, 339 US 306 (1950). In a case specifically about the rights of welfare recipients, the U.S. Supreme Court said that due process requires "timely and adequate notice detailing the reasons for" an agency decision, and"[t]hese rights are important in

cases such as those before us, where recipients have challenged proposed terminations." *Goldberg v Kelly*, 397 US 254 (1970). *See also Cosby v Ward*, 843 F2d 967 (CA 7, 1988) (failure to provide adequate written notice of issues to be raised at unemployment compensation hearing violated fair hearing requirement).

Under step (2), courts have voided judgments that were founded on violations of procedural due process. Often these cases fall under procedural rules such as FRCP 60(b)(4) and MRCP 2.612(c)(1)(d), which allow courts to provide relief from judgments that are void. Courts have interpreted those rules as applying to judgments that arose from inadequate process. *See, e.g., In re Ruehle*, 307 BR 28 (Bankr CA 6, 2004) (upholding a lower court's decision to vacate an order where one party was denied due process of law).

Lack of Jurisdiction

An ALJ's Authority

Where there is an occurrence of insufficient notice or a void determination, an Administrative Law Judge has the authority to dismiss or adjourn a hearing based on lack of jurisdiction over the matter. An ALJ's authority to return jurisdiction can be inferred from both the Michigan Employment Security Act and the MAHS hearing rules issued by LARA. Section 33 of the Act authorizes MAHS to accept cases on appeal and then give them to Administrative Law Judges so long as they deal with redeterminations issued by the agency in accordance with Section 32a. MESA 421.33(1). Section 32a(1) details the agency's decision-making process, by which a determination or redetermination is issued at *each* step, followed by "a hearing on the redetermination before an administrative law judge." MESA 421.32a(1). According to these rules, the ability to have a hearing with an ALJ is contingent upon the existence of an agency decision. Without a valid determination or redetermination, the judge does not have jurisdiction over the case under MESA.

Also, it is standard practice for an ALJ to return a matter to the Agency when they can't find an Agency determination to support it. ALJs commonly return matters to the Agency when no determination can be found in their system or in the hearing file. Legally insufficient notice is akin to that situation.

The administrative hearing rules, issued by LARA for MAHS, support the principle that the ALJ has broad discretion in deciding how to handle a case, including issues that arise before or after hearings and questions of jurisdiction. For example, Rule 106 contains a lengthy list of powers that the ALJ has, including the power to, "on an administrative law judge's own initiative, adjourn hearings." Department of Licensing and Regulatory Affairs Michigan Administrative Hearing System Administrative Hearing Rules (eff. January 15, 2015), R 792.10106(1)(o). In addition, Rule 110 allows the ALJ to decline to consider a document that was not properly served on all parties, which is another form of inadequate notice. *Id.* R 792.10110(8).

Application to Good Cause

The fact that a claimant or employer received insufficient notice in the determinations provides her with good cause for filing a late appeal. The Agency's

administrative code provides that 'good cause' for reconsideration under MCL 421.32a includes among other things failure "to receive a reasonable and timely notice, order, or decision." Mich Admin Code R 421.270(1)(e). Where a determination is legally insufficient on its face, it does not provide reasonable notice as required by 270(1)(e). On that basis, there is good cause for reopening, rehearing, or late appeals.

Appropriate Remedies

There are two possible appropriate remedies when the UIA has provided notice that does not meet the Department of Labor standards. First, a notice could be deemed unreasonable on its face. With a finding of unreasonable notice, the notice can be voided and jurisdiction should return to the Agency to issue a notice that complies with the above-mentioned standards. Alternatively, the unreasonable notice could form the basis for good cause for reopening or late appeal. Under a finding for good cause for reopening or late appeal, a case would then proceed on the underlying merits of the unemployment claim.

Discharging Michigan Unemployment Insurance Benefit Overpayments and Penalties in Bankruptcy

By James Eland[1] and Steve Gray[2] – University of Michigan Law School Unemployment Insurance Clinic
Amy E. Ruark[3], Bonner Di Salvo, PLLC
October 2016

In 2014 alone, state unemployment insurance benefit payments to unemployed workers totaled $41.9 billion in the United States. Every year, unemployment insurance funds provide a valuable safety-net for workers who find themselves involuntarily unemployed. However, a disturbing trend has developed in Michigan that has transformed the state's unemployment insurance system from a blessing to a curse for many families throughout the state.

Imagine receiving a notice in the mail stating that you fraudulently received unemployment insurance benefits and that you owe tens of thousands of dollars in restitution and penalties. Even more concerning, this notice contains no factual allegations and only includes a conclusive statement alleging that you intentionally misled the Michigan Unemployment Insurance Agency in order to obtain benefits that you were not entitled to receive. There is no clear indication of why you were not entitled to receive benefits, and the letter further informs you that you will be subject to a 400% penalty and may be criminally liable, too. Due to recent changes in Michigan's administration of its unemployment insurance system, motivated by the state's desire to reduce "overpayments", this frightening notice has been mailed to countless families across the state.

In response to increasing pressure to address what was believed to be an epidemic of unemployment insurance benefit overpayments and abuse, the Michigan Unemployment Insurance Agency contracted and paid $47 million for the development of a new a computerized benefit

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management system. The new UI benefit management system is called MIDAS. Through a set of preprogrammed algorithms, MIDAS seeks to detect benefit overpayments, with a particular focus on detecting fraudulent overpayments. As a result, fraud accusations rose 500% shortly after the system's implementation. However, the way in which the program handles fraud determinations is troubling. No human ever has to verify its findings. Furthermore, any inconsistencies between what the employer reports and the claimant reports automatically result in fraud allegations against the claimant, not the employer. Once the fraud determination is generated, the state can deny future benefit payments, garnish income taxes and wages, and take all other collection actions allowed by law against the claimant.

A vast majority of these "fraud" allegations are easily dismissed once they are appealed and the cases are heard by an Administrative Law Judge since the allegations originate from what usually amounts to simple clerical or computer error leading to a lack of evidence of fraud. However, claimants often fail to meet the thirty-day appeal deadline, often because they simply do not not receive the notice or understand the process. As a result, numerous former unemployment insurance claimants are left with no option other than to file bankruptcy in order to discharge the onerous financial penalties. Prior to the institution of MIDAS, it was uncommon for the state to file an adversarial proceeding seeking a declaration that the overpayment and penalties were nondischargeable based on fraud. However, since the institution of MIDAS, it is now routine for a claimant filing bankruptcy to find an adversarial proceeding initiated by the state, seeking a declaration of nondischargability of the unemployment insurance benefit restitution and penalties under 11 U.S.C. § 523(a)(2) and (a)(7) respectively. This article will examine the relationship between (a)(2) and (a)(7) and will examine what role collateral estoppel could play in the adversarial proceeding. The goal is to

explore the possible avenues of relief for the Michiganders who have fallen victim to the irresponsible administration of an overzealous computer program.

Throughout this analysis, it is important to note the main goal of the bankruptcy laws enacted by Congress. As Justice Sutherland wrote back in 1934, "[the bankruptcy code] gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Presumably in the pursuit of limiting the remedy of bankruptcy to debts incurred by an "honest but unfortunate debtor", Congress has implemented numerous statutory provisions that limit what debts may be discharged in bankruptcy. Among these limiting provisions are the sections that the Michigan Unemployment Insurance Agency has relied upon in their attempts to preclude unemployment benefit restitution and penalties from discharge in bankruptcy proceedings.

The types of debts excepted from discharge are listed in 11 U.S.C. § 523. At issue in the attempt to discharge restitution and penalties due to the Michigan Unemployment Insurance Agency are 11 U.S.C. §§ 523(a)(2) & 523(a)(7). The former exempts debts obtained by false pretenses, false representation, or actual fraud, and the latter exempts debts that are fines or penalties, payable for the benefit of a governmental unit, which "[are] not compensation for actual pecuniary loss". These provisions leave two questions for debtors attempting to discharge their unemployment insurance debt; One, is the Agency's fraud determination an adjudication that is binding on the bankruptcy proceeding? Second, is the assessed penalty "compensation for actual pecuniary loss"?

There is no dispute that res judicata (claim preclusion) and collateral estoppel (issue preclusion) play a powerful role in our common law system. However, in the context of bankruptcy proceedings, the general rule of preclusion may not be applicable. The Supreme Court held that "[r]efusing to apply res judicata permit[s] the bankruptcy court to make an accurate determination whether respondent in

fact committed the [deceit and fraud required by 523(a)(2)]". *Brown v. Felsen*, 442 U.S. 127, 138 (1979). The Court has also held that generally "collateral estoppel principles ... apply in discharge exception proceedings pursuant to § 523(a)." *Grogan v. Garner*, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991).

However, The Supreme Court in *Grogan* did not decide the narrower question of whether collateral estoppel also applies to default judgments. See *Bay Area Factors v. Calvert* (*In re Calvert*), 105 F.3d 315, 318 n.4 (6th Cir. 1997) (citing *Brown v. Felsen*, 442 U.S. 127. The sixth Circuit stated that administrative decisions must be given a preclusive effect in federal court when a state agency "'is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" *Pack v. Mt. Morris Consol. Sch.*, 487 F. App'x 267, 270 (6th Cir. 2012) The Court of Appeals further explained that in Michigan "collateral estoppel" applies when, " (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment; (2) the same parties had a full and fair opportunity to litigate the issue; and (3) there is mutuality of estoppel. *Id*., (citing *McCormick v. Braverman*, 451 F.3d 382, 397 (6th Cir. 2006) (citing *Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 845–46 (Mich. 2004)). In an administrative decision three additional requirements must be met, "First, the administrative decision must have been adjudicatory in nature; second, it must provide a right to appeal; and third, the legislature must have intended to make the decision final absent an appeal. *Id*. citing *Nummer v. Treasury Dep't, 533 N.W.2d 250, 253 (Mich. 1995).* Where the Defendant is not afforded a hearing, the administrative ruling is not adjudicatory and collateral estoppel does not apply. *In re Williams, 14-5718, United States Bankruptcy Court, E.D. Michigan, Southern Division, Detroit, April 15, 2016.* The Agency's determination, conducted solely by a computer program, upon which a finding of fraud was entered, is not an adjudication.

The result of this analysis is that the Michigan Unemployment Insurance Agency has been unsuccessful when invoking collateral estoppel against the debtor in cases where the fraud determination was made without a hearing. *See also In re Turner, 09-53722-wsd, United States Bankruptcy Court, Eastern District of Michigan, Southern Division, March 5, 2010 and In re Nemes, 15-20332-dob, United States Bankruptcy Court, E.D. Michigan, Northern Division, Bay City, November 30, 2015.*

Unfortunately, even if a debtor succeeds in defending the fraud charge under 523(a)(2) in the adversarial proceeding and the debt is held to be dischargeable, his victory is only partial in a Chapter 7 context. 11 U.S.C. 523(a)(7)(B) makes the penalty portion of the debt nondischargeable if it is imposed within 3 years of the filing of the bankruptcy case. This is especially unfortunate for Michigan debtors, where Michigan's unemployment insurance fraud penalty is the highest in the nation at 400% of the overpayment (the next closest state's penalty is 100%). Therefore, the penalty represents a significant portion of the original unemployment insurance debt. Setting aside Constitutional arguments that the 400% penalty is an excessive fine, there are limited courses of action for the debtor to discharge the penalties in bankruptcy.

11 U.S.C. 1328(a)(2) does not include 523(a)(7) as an exception to discharge. Therefore, if the Debtor files a Chapter 13 case, the penalty portion of the debt would be discharged along with the overpayment portion, absent an adversary proceeding determination of fraud. If an adversary proceeding to determine the debt is nondischargeable based on fraud is filed by the Agency in a Chapter 13, there is currently a split in the cases as to whether penalties are subject to a nondischargeability finding under 523(a)(2).

Judge Randon of the United States Bankruptcy Court for the Eastern District of Michigan has recently held that penalties assessed by the Michigan Unemployment Insurance Agency are not subject

to a 523(a)(2) determination of fraud in a Chapter 13 bankruptcy. *In re Andrews*[4], No. 15-46058, 2015 WL 5813418, at *2 (Bankr. E.D. Mich. Oct. 2, 2015, on appeal). However, Judge Tucker recently rejected the decision in *Andrews*. *In re Kozlowski,*, No. 15-51057, 2015 (Bankr. E.D. Mich. March 25, 2016). Even filing Chapter 13 bankruptcy may result in the debtor being unable to obtain relief from the quadruple penalty.

Second, if the debtor has received a Chapter 7 discharge and the penalty portion was not determined to be nondischargeable, the debtor could file a subsequent Chapter 13 four years after the filing of the Chapter 7 and receive a discharge of the penalty or wait eight years to file a subsequent Chapter 7 and receive a discharge (assuming no determination of nondischargeability in the subsequent cases).

With these distinctions in mind, it is possible to formulate an informed strategy on how to advise clients who are exploring bankruptcy as a possible solution to their financial woes, of which a portion is unemployment insurance restitution and the associated penalties arising from a default fraud determination by the Agency.

While Chapter 7 proceedings are the often preferred method of discharging consumer debt, if a significant portion of your client's debt burden includes unemployment insurance restitution and penalties, filing a Chapter 13 may be a good option. While it is possible, as articulated above, to discharge the underlying restitution in a Chapter 7 bankruptcy proceeding, there is a significant risk that the penalties will be nondischargeable even without a finding of fraud. By filing a Chapter 13, you afford your client the opportunity to discharge both the restitution and penalties, ultimately leaving him in a better position, provided that the debt is not determined to be nondischargeable and that he can adhere to the additional requirements and burdens of a Chapter 13 bankruptcy.

[4]As of October 2016 *Andrews* is on appeal at the 6th Circuit.

In addition, it may be possible to re-open the restitution and penalty determinations in separate proceeding with the Unemployment Insurance Agency. The UIC has had success reopening UIA fraud determinations mailed between October of 2013 and October of 2015; especially if the claimant did not receive the the original determination. Contact the MLAW Unemployment Insurance Clinic for advice and possible referral on these cases.

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Robo-Fraud in Unemployment Insurance Cases
Prepared by: the Michigan Unemployment Insurance Clinic
Michigan Law School

Definition, Context and Systemic Impact:

- Fraud occurs when a claimant makes an "intentional misrepresentation" to the Unemployment Insurance Agency ("UIA"). MESA § 62.
- If the UIA makes a finding of fraud, claimants are required to pay back any "overpayment," and a penalty of up to 400% of the initial "overpayment" amount, plus 1% interest.
- Claimants accused of fraud are statutorily denied a hardship waiver, regardless of indigence.
- Bankruptcy proceedings rarely discharge debts from fraud.
- Beginning in 2011, the UIA implemented a robo-fraud system.
- **Of the thousands of robo-fraud determinations, only 8%** have been affirmed on appeal.

Problems with the Process:

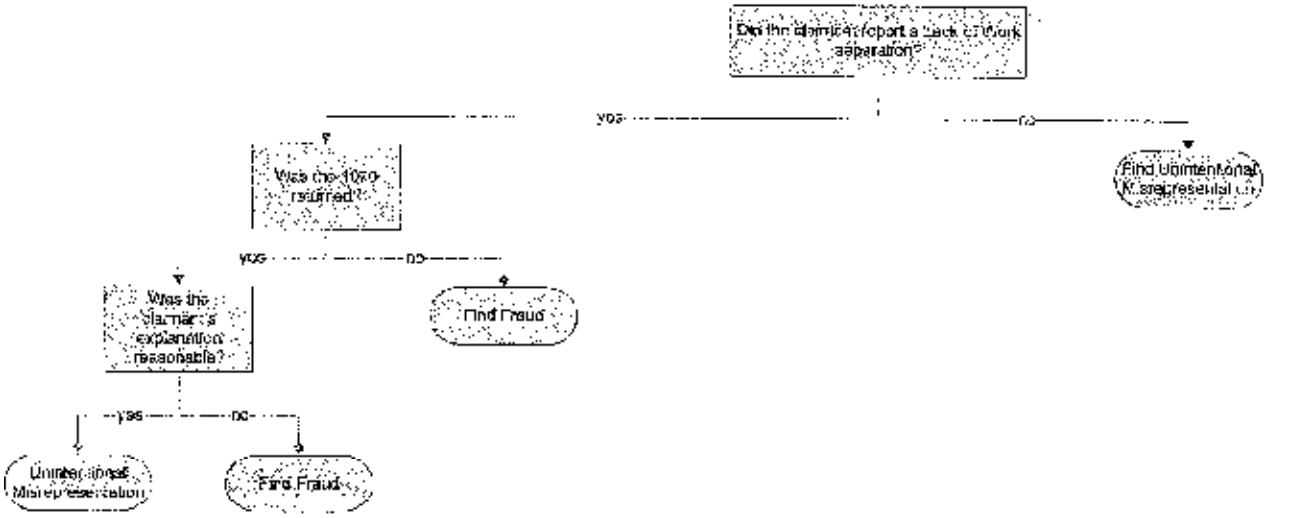
1. **Automatic Fraud Determinations**
   The UIA *automatically* finds fraud when claimants:
   - do not respond to the agency's questionnaire within ten days;
   - provide a timely response but their responses are inconsistent with employers' responses; or
   - provide a timely and consistent response, but the UIA's computer system fails to properly record the responses.
2. **Confusion over Multiple Adjudications is Exacerbated by Lack of Access to UIA Employees**
   - The new computer systems make it nearly automatic to issue multiple determinations for a single claim, even having 30 determinations for one case.
   - This can be extremely confusing and inefficient for claimants and there is little guidance or access to UIA representatives when claimants reach out in search of explanations.
   - For the few claimants who get hold of UIA representatives, the UIA representatives will often acknowledge that they do not understand the computer determinations themselves.
   - The lack of explanation for different determinations is confounding to claimants.
3. **Lack of Due Process and Notice**
   - As a result, often claimants will not know that they are being accused of fraud.
   - The UIA system **automatically rejects** appeals for being late.
   - The actual UIA fraud notices are often **facially deficient and fail to explain the discrepancy** that actually caused the finding of fraud to take place.
   - Claimants must respond without guidance or a description of the evidence against them.
4. **Automatic Garnishment of Wage and Tax Refunds**
   - The UIA enforces its determination by garnishing wages and withholding tax returns. **(This is often the first notice that a client has of the fraud charge).**
   - Because the computer system automatically determines fraud: interests and penalties are immediately applied before any further fact-finding or ALJ decision.
   - Interests and penalties can accrue even while a claimant is in the appeal process.

Suggestions for Legislative Reform:

- Lower fraud penalties from 200% or 400% to restitution and interest.
- Require that a UIA Agency representative review, fact-find and sign-off on every robo-fraud determination before it is sent to claimant.
- Remove the "reason for separation" and "late questionnaire" categories from the computer system, since the inquiry that must follow cannot be done robotically.

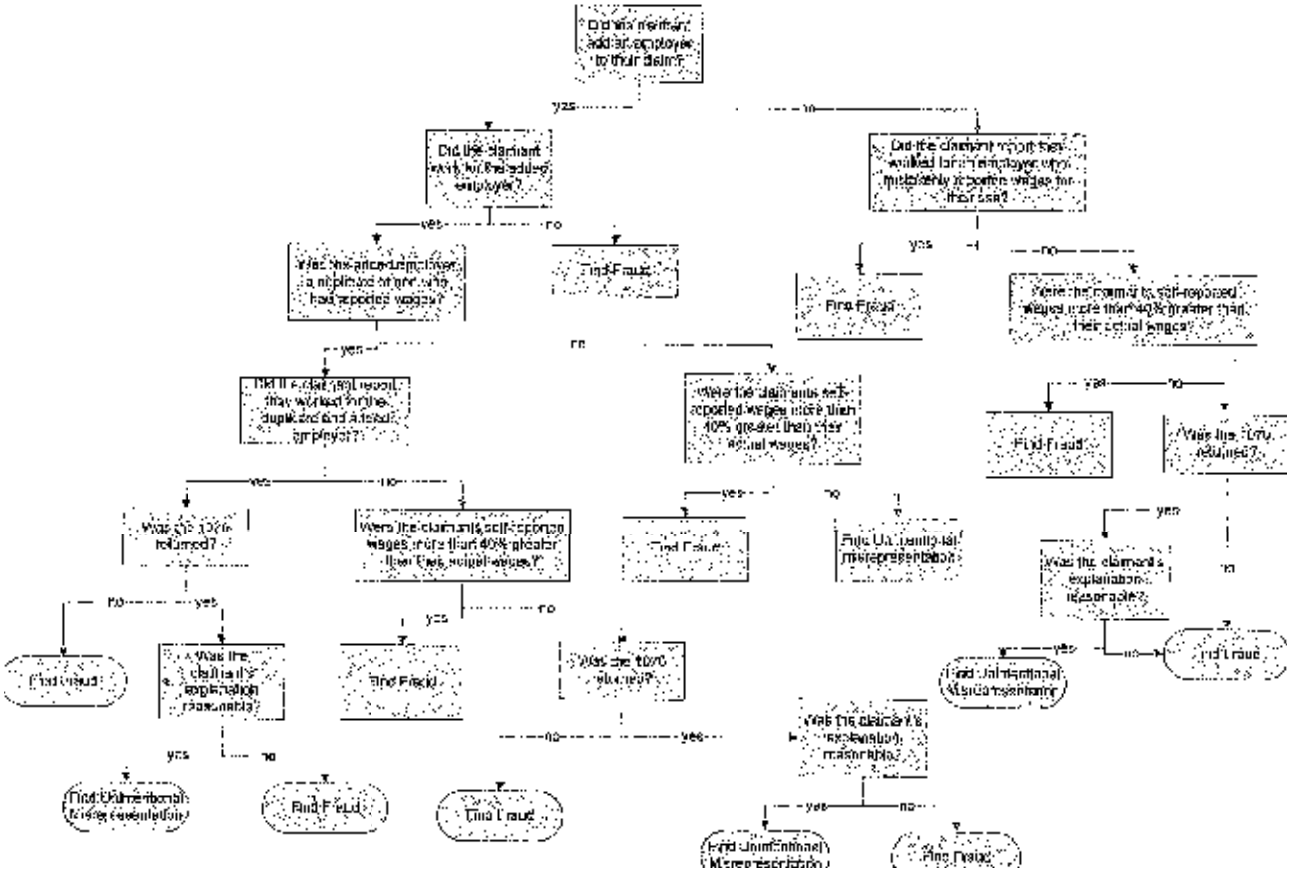
Fraud Finding Decision Tree

Misreported Separation Reason Issue



Fraud Finding Decision Tree

Base Period Wages Issue



To: Gay Gilbert, Administrator, U.S. Department of Labor

Cc: Rose Zibert, Acting Regional Administrator, U.S. Department of Labor, Region 5

From: H. Luke Shaefer, Associate Professor, University of Michigan*

Steve Gray, General Manager, Michigan Unemployment Insurance Project

Date: 19 May 2015

Michigan Unemployment Insurance Agency: Unjust Fraud and Multiple-Determinations

The purpose of this memo is to alert you to recent changes at the Michigan Unemployment Insurance Agency (UIA) that are behind an unprecedented increase in the number of fraud cases, separation and non-separation determinations, and appeals of agency determinations. We are deeply concerned that agency procedures, made possible by new IT systems, (1) subject significant numbers of innocent claimants to unjust fraud charges, (2) further deter claims by inundating claimants with confusing multiple determination notices, and (3) exaggerate agency workloads in ways that increase federal administrative funding.

On behalf of Michigan claimants and U.S. taxpayers, we urge the U.S. Department of Labor to investigate UIA's administrative procedures to ensure the agency treats claimants fairly and complies with federal law.

1. Unprecedented Increase in Fraud Cases, Non-monetary Eligibility Determinations, and Lower Authority Appeals is Cause for Concern

The recent surge in fraud cases, non-monetary eligibility determinations, and lower authority appeals is particularly troubling in the context of extremely low levels of claims activity. Last year, Michigan's initial claims and benefits paid (adjusted for inflation) fell to a forty-year low, while the number of weekly claims also reached near-historic lows.[1]

a. Fraud Cases: Over the most recent four quarters, UIA established 26,882 fraud cases, bringing outstanding receivables to an all-time high of $56.9 million.[2] In 2014, UIA established more than five times the typical number of fraud cases and twice as many as in 2012, the previous high (Figure 1). Whereas in the past, UIA determined about 10 percent of overpayments were due to fraud, the agency now finds fraud in over one-third of overpayment cases.

b. Non-monetary Determinations and Denials: After taking into consideration claims activity, the rate of non-monetary determinations has never been higher in the program's recorded

[1] Dating back to 1975, weekly claims were only lower in 1999 and 2000 when the state unemployment rate was 3.7 and 3.6 percent, respectively.

[2] ETA 227, columns 1 and 71, Q2 2014 to Q1 2015 (accessed 5 May 2015).

*** Affiliations are listed for identification purposes only. The views expressed in this memo are those of the authors and do not reflect the views of any of the organizations with which they are affiliated.**

history (Figure 2). In 2014, the number of non-separation and separation determinations increased by 159 percent and 32 percent, respectively, over the previous year, even as initial claims and claimant contacts declined by nearly ten percent (Table 2).

- *Non-separation*: All non-separation categories increased year-over-year, but the rise in "disqualifying or deductible income" and "other" deserve special attention (Table 2). MiUI saw a number of cases where UIA's computers mishandled partial benefits or improperly attributed earnings to weeks when claimants were unemployed, resulting in automatic fraud determinations. (See claimant example 2.) Finally, while we do not know the cause of the six-fold increase in "other," it is concerning that these determinations do not fall within one of the standard categories.

- *Separation*: A 75 percent increase in "voluntary leaving" determinations led to the year-over-year rise in separation determinations (Table 2). The increase in voluntary leaving determinations is likely the product of a new automated procedure we call "robo-fraud," which we will discuss in greater detail.

- *Denials*: UIA denied 70 percent of a staggering 590,000 determinations in 2014. The denial rate exceeded the long-term average by 13 percentage points and was the highest rate in the program's recorded history. Interestingly, the denial rate for redeterminations fell from 52 percent in 2013 to just 4 percent in 2014. We do not know if this change is the result of a reporting error or a change in policy.

c. **Lower Authority Appeals**: After taking into consideration agency workload, appeals reached an all-time high in 2014 (Figure 3). Last year, 37,500 claimants were involved in appeals—the equivalent of roughly 150 appeals per business day. Claimant appellants outnumbered employer appellants six to one in 2014—twice the historic rate—indicating that negative agency decisions are falling disproportionately on claimants. Moreover, appeals occur less frequently than expected given the high number of determinations. For instance, appellants filed 6.4 appeals per hundred determinations last year, compared to 8.4 on average over the prior two decades.

   Our concern is that multiple and confusing determinations may discourage claimants, and disadvantaged claimants in particular, from appealing unfair agency decisions that they would win at a hearing. Additionally, because many adjudications occur months after a claimant has stopped claiming benefits, former claimants who changed addresses do not learn of the determination within the 30-day appeal window. Failing to appeal is especially damaging in overpayment and fraud cases where claimants may owe tens of thousands of dollars as a result of Michigan's exorbitant four-times fraud penalty and the 12 percent interest rate charged on restitution.

2. Failure to Meet Federal Performance Standards

Another possible reason for the lack of appeals is that the hearing system is completely overwhelmed by the number of negative agency decisions. Over the previous 12 months, claimants waited an average of 78 days—longest in the nation—for an Administrative Law Judge to hear their case (Table 2). These delays create a serious financial hardship for unemployed workers who may wait over two months for a decision. Additionally, only 65 percent of non-monetary determinations met the federal 21-day timeliness standard (Table 2). The agency's flagrant disregard of federal performance standards is reason enough for an investigation.

Table 1. Core Performance Measures, April 2014 to March 2015

Performance Measure	Michigan	Federal Standard
Non-monetary determinations, 21-day timeliness	64.5 percent	≥80 percent
Average age of pending lower authority appeals	77.9 days	≤30 days

Source: U.S. Department of Labor, State Rankings of Core Measures, (accessed 5 May 2015).

3. "Robo-Fraud" and Multiple Adjudications Explain the Unprecedented Rise in Agency Actions Against Claimants

In 2014, the Michigan Unemployment Insurance Project (MiUI) noticed a significant uptick in clients seeking our help with fraud-related cases and the number of clients being inundated by multiple determination notices. Through the appeals process, MiUI learned that UIA introduced a new, automated computer system that is behind the surge in fraud cases and eligibility determinations. Multiple determinations confuse and frustrate claimants. More seriously, the procedure we refer to as "robo-fraud" is grossly unjust and potentially violates state and federal law.

a. Robo-fraud: UIA's computers search through past and present claimant records, scanning for wage-record irregularities, in addition to reporting discrepancies between claimants and their former employers related to the reason for separation from employment. MiUI frequently sees partial benefits cases where the agency automatically brings fraud charges against claimants who made good-faith efforts to accurately report wages. As claimant example 4 illustrates, in addition to charging claimants with fraud well after their benefits expired, UIA is unable to provide any evidence of wrongdoing at appeals hearings.

More often, however, claimants request help with separation fraud. After UIA's computer system identifies a separation discrepancy, it automatically sends claimants a questionnaire threatening to issue a "determination based on available information," if they fail to respond within ten days. As is illustrated by Exhibit 1, the agency does not explain in any

detail the nature of the problem in the questionnaire itself or in the ensuing fraud determination letter. (Not until the appeals hearing, do claimants learn the details of the agency's accusations.)

On the back of the questionnaire there are two questions. The first question asks if claimants intentionally provided false information (Exhibit 1). The second question asks claimants why they should have been entitled to benefits. Notably, "I was legally entitled to benefits" is not one of the eight possible responses. The sole purpose of these self-incriminating questions is to provide evidence in support of subsequent fraud charges. Indeed, from a claimant's perspective, there is no "right" way to respond to the questionnaire. UIA automatically levels fraud charges in the following circumstances:

i. when claimants do not respond within ten days;

ii. when claimants provide a timely response that differs from their former employers' response to a similar questionnaire; and

iii. when UIA's disjointed computer system fails to properly record on-time responses that are consistent with employer reports.

Because many Administrative Law Judges recognize the absurdity of this process, MiUI rarely loses robo-fraud cases at appeals hearings. However, we are only able to represent a fraction of claimants swept up by robo-fraud. Even those claimants who are able to afford a lawyer should not be forced to defend themselves against baseless charges. The following are other aspects of robo-fraud that should concern the U.S. Department of Labor.

- **Claimants treated unfairly**: There is no rational reason for UIA to assume by default that reporting discrepancies between claimants and their former employers or the failure to return a questionnaire in ten days constitute fraud. Likewise, there is no justification for accepting by default an employer's explanation for the separation from employment. Claimants and their former employers frequently disagree about the nature of job loss for a variety of reasons, including simple reporting mistakes and good-faith disputes over the specific details. As claimant example 1 illustrates, UIA is retroactively charging claimants with fraud in cases where employers never contested the benefit claim.

- **Claimants do not receive timely notices**: UIA levels fraud charges against claimants whose benefits ended months or even years ago. Because UIA does not have current address information or a way to verify receipt, claimants do not always receive the questionnaires or determination letters. In these cases, claimants do not find out about the charges until UIA is about to garnish their wages and tax refunds or levy their

bank accounts. Furthermore, after missing all appeals deadlines, claimants must go through the added hurdle of submitting a good-cause request to reopen their cases.

- **Misaligned financial incentives may encourage employers to provide misinformation:** Robo-fraud offers employers a financial incentive to misrepresent the reason for job loss. All employers must do to guarantee a benefit denial is state that their former employees quit, regardless of the real reason for the separation. While UIA is quick to charge claimants with fraud, as far as we can tell employers who provide false information regarding a claimant's separation face no consequences whatsoever. At worst, UIA may charge employers for benefits, if former employees successfully navigate the onerous appeals process.

- **Double-standard applies to claimants and employers**: Even though MiUI rarely loses robo-fraud cases at appeals hearings, we are unaware of a single instance of the agency charging an employer with fraud for misrepresenting the reason for separation. There is no explanation for why robo-fraud should only work against claimants when it is just as reasonable to assume that employers make misrepresentations. (See claimant example 3.)

- **Disadvantaged claimants at greatest risk**: Claimants charged with fraud are not eligible for a hardship restitution waiver (allowed under Michigan law for indigent claimants), nor are they eligible for free representation at appeals hearings through Michigan's Advocacy program. By adding fraud charges on top of garden-variety eligibility decisions, UIA ensures that claimants will be unable to seek financial relief or free representation. It is reasonable to assume many claimants are ill-equipped to advocate on their own behalf or cannot afford a private attorney. Indeed, pro-bono attorneys we spoke with are overwhelmed with robo-fraud cases.

- **Lawsuit filed against UIA for robo-fraud**: On April 21, the United Auto Workers, the Sugar Law Center, and a group of citizens filed a complaint against UIA in federal court to stop robo-fraud.[3]

b. Multiple Adjudications: "Multiple adjudications" are at least partially responsible for the unprecedented rise in eligibility determinations. UIA cites improved efficiency as one of the benefits of the new automated IT infrastructure.[4] However, in the case of eligibility determinations described above, increased efficiency has not improved customer service

[3] *Zynda et al* v. *Zimmer et al,* No. 2:2015cv11449 (Michigan Eastern District Court, 2015).
[4] Michigan Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency, Michigan Integrated Data Automated System & Unemployment Insurance Modernization Project, NASCIO award nomination, http://tinyurl.com/q6dsgvm.

for claimants or resulted in the more efficient use of federal resources. The U.S. Department of Labor should not reward UIA for exaggerating its workload in a way that increases federal funding or for replacing staff, who once reviewed claimant records, with an IT system.

- While the IT improvements were intended to reduce paperwork, the new computer systems made it much easier (efficient) for UIA to issue multiple determinations related to a single claim. Claimant example 4 illustrates how multiple adjudications resulted in a client receiving 20 determinations on related remuneration issues pertaining to a single claim.

- In a case study touting its services, the company behind UIA's new computing systems, Fast Enterprises, credits a $9 million increase in Michigan's federal administrative funding to the "[i]ncreased non-monetary determination efficiency" made possible by the new computing system.[5]

4. **Automatic Garnishment of Wages and Tax Refunds:** As a result of robo-fraud and 2011 state legislation, there is now an uninterrupted pipeline from workers' bank accounts, tax refunds, and wages to UIA. From the initial fraud determination to the garnishment of wages and tax refunds, there are few legal barriers in place to protect claimants from UIA. (See claimant example 2 below.) Moreover, Michigan's severe four-times fraud penalty makes it more difficult for thousands of claimants to recover from unemployment.

   - Whereas in the past, UI returned fraud proceeds to the UI trust fund, Public Act 269 of 2011 allows the agency to retain a portion of collections, giving UIA a financial incentive to find fraud where none exists.[6]

   - The legislation also increased the percentage of wages that UIA may garnish from 20 to 50 percent and eliminated the requirement that the agency seek a court order before garnishing wages. This policy is particularly harmful to low-wage workers who cannot afford to have their paychecks reduced.

   - UIA often garnishes tax refunds and wages with little or no notice. UIA likely fails to provide proper notification because the agency does not have current mailing addresses for claimants who may have collected benefits months or years prior.

[5] Fast Enterprises. Michigan's Unemployment Insurance Solution. http://www.fastenterprises.com/documents/MichiganCaseStudy.pdf.
[6] For a summary of Public Act 269 of 2011, see http://www.legislature.mi.gov/documents/2011-2012/billanalysis/Senate/pdf/2011-SFA-0806-N.pdf.

Recommendations

Our analysis of administrative data provides evidence of a system-wide effort that charges innocent claimants with fraud and discourages unemployed workers from claiming benefits. The recent procedural changes behind these increases are leading to a loss of confidence in the state unemployment insurance program. In our experience, innocent claimants accused of committing fraud are often overwhelmed by a sense of injustice, while exaggerated accounts of fraud undermine confidence in the unemployment insurance system.

The dramatic procedural changes wrought by the automated IT infrastructure justify a review by the U.S. Department of Labor to ensure that agency procedures treat claimants fairly and comply with federal law. We urge you to consider the following actions:

1. Investigate the causes behind the unprecedented increase in fraud cases, non-monetary determinations, and appeals.

2. Conduct a comprehensive review of UIA's recent staff reductions as well as new automated procedures, including robo-fraud, multiple adjudications, the garnishment of claimant wages and tax refunds, and the levying of claimant bank accounts.

3. Review the integration of UIA's IT systems to verify that the online claimant portal is user friendly and that agency forms, such as the fraud questionnaire and fraud determination, serve a legitimate purpose, are easy to understand, are accessible for persons with disabilities or limited English proficiency, and provide meaningful information.

Thank you for your consideration. Please feel free to contact us with further questions.

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Steve Gray is the general manager and a founder of the nonprofit Michigan Unemployment Insurance Project (MiUI), which marshals law students to represent jobless workers denied unemployment insurance benefits by the state. Steve is also a clinical assistant professor and director of the University of Michigan Law School's Unemployment Insurance Clinic. He specializes in public benefits litigation and advocacy and administrative law. As a 2008-09 Fulbright Scholar, Steve help establish a legal aid clinical program and taught at the University of Namibia Law School. Steve has worked in civil legal aid in one capacity or another since his graduation from the University of Illinois College of Law in 1987.

Claimant Anecdotes[7]

Example 1: UIA Charges Claimant with Fraud after Employer Error

Amanda Balma is a Certified Nursing Assistant who was working at a rehabilitation center in Okemos, MI. The rehabilitation center laid Amanda off in early 2014 after learning that she was pregnant and could no longer preform the heavy lifting required to care for patients. Her employer encouraged her to apply for unemployment insurance benefits. The employer characterized her separation for the unemployment insurance agency as a leave of absence as they hoped to hire Amanda back once her lifting restriction ended. Amanda applied for and received benefits without incident from March through August 2014.

Three months after her benefits ended, Amanda, now a new mother, received a notice from the unemployment insurance agency stating that she committed an intentional misrepresentation and owed over $20,000 in fines. Her employer's well-intentioned, but mistaken, mischaracterization of the layoff as a leave of absence triggered the agency's computers to issue an automatic fraud determination. As the agency performs no due diligence, Amanda and her newborn child will start their lives together over $20,000 in debt to the state.

Example 2: Agency Error Leads to Automatic Garnishment of Tax Refund

After losing his job in February 2014, electrician and Washtenaw county resident, Kevin Grifka applied for and received unemployment insurance benefits, before finding work in the fall of 2014. Months after his benefits ended and he had returned to work, the agency sent him a notice claiming that he owed over $12,000. This was the first time Kevin had any indication that there was a problem; yet, the administrative hearing system denied his request for an appeal because the agency claimed Kevin did not respond on time to an initial ineligibility letter, a notice he never received.

The agency decided retroactively that Kevin was ineligible for benefits because its computer system erroneously spread his earnings over an entire quarter, including the period of time when he was unemployed and receiving benefits. A human reviewing Kevin's file would have spotted this mistake. Not recognizing the error, however, the agency's automated system went to work, totaling up the amount overpaid, plus penalties, and printing off a form letter. Perhaps the most troubling aspect of Kevin's case is that nothing prevented the agency from garnishing $9,000 from his federal and state tax refunds as payment for its own mistakes.

Example 3: Claimant and Former Employer Disagree over the Reason for Job Loss

[7] Examples 1-3 are taken from *Zynda et al* v. *Zimmer et al,* No. 2:2015cv11449 (Michigan Eastern District Court, 2015). The fourth example uses a pseudonym and is based on information provided by a claimant attorney.

Brian Saylor, a resident of Oakland County, worked for a lawn sprinkler and plumbing business in 2013, until a manager told him he was laid off with only a few days remaining in the season. After losing his job, Brian collected UI benefits for 15 weeks until he received a letter from the agency stating that he committed fraud by intentionally providing false information. The agency assessed over $19,000 in penalties because Brian's employer claimed that he quit his job, which if true, may have made him ineligible for benefits.

Spotting the discrepancy between the claimant and employer explanations for the job loss, the agency's computer system automatically determined that Brian was ineligible for benefits and that he committed fraud. When Brian appealed, an Administrative Law Judge found no proof that Brian quit his job, reversing the agency's initial ineligibility and fraud decisions. Brian's case illustrates the clear double-standard at work. A simple discrepancy between an employer and a former employee is enough for the agency to deny benefits and, more seriously, charge claimants with fraud. When Administrative Law Judges decide for claimants, UIA does not charge the employer with fraud. Meanwhile, there is no mechanism in place to penalize UIA for leveling unjustified charges or failing to meet its burden of proof.

Example 4: Multiple Adjudication and Wrongful Partial Benefit Fraud Charges

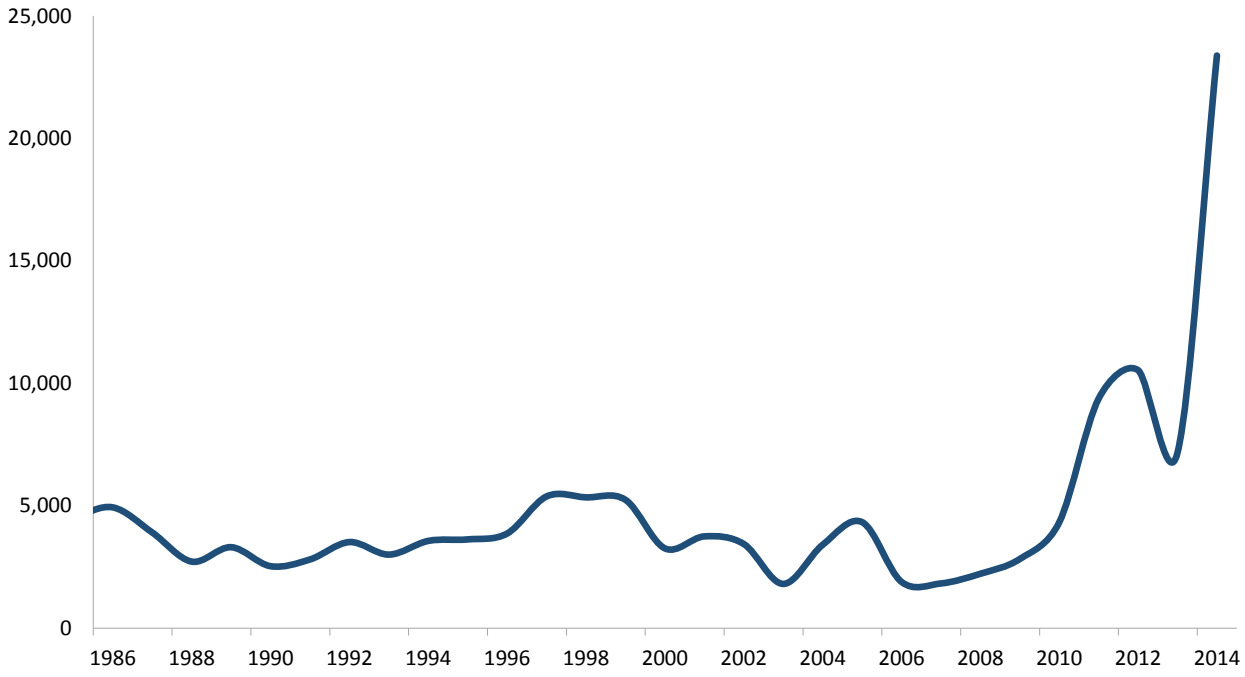
Ms. Barbara Hills started receiving UI benefits in 2009 after losing her full-time job. During the recession, Barbara struggled to find full-time employment but landed several part-time jobs that qualified her for partial benefits. She dutifully reported her wages each week and never heard from the unemployment insurance agency about any issues with her eligibility.

Imagine the shock Barbara felt when a series of determination notices began piling up in her mailbox in May and June 2014. Not only did UIA find Barbara ineligible for benefits from October 2010 to August 2013 because her wages were too high, the agency also accused her of committing fraud for misrepresenting her earnings. Between restitution and a four-times fraud penalty, Barbara owed the state over $60,000. Over a two month period, UIA's computer system automatically mailed Barbara ten overpayment and ten fraud determinations, all for the same underlying issue. She had to protest each of these determinations separately.

As is true in nearly all robo-fraud cases, UIA was unable to provide any evidence of misrepresentation at a hearing before an Administrative Law Judge. Once the judge determined that Barbara had not committed fraud, many of the overpayment redeterminations exceeded the statute of limitations. After adjudicating the first determination, the parties agreed that Barbara did not commit fraud and did not owe anything for the expired determinations. Nonetheless, the Administrative Law Judge separately adjudicated the remaining 19 redeterminations, mindlessly reading through the instructions and procedures for each redetermination.

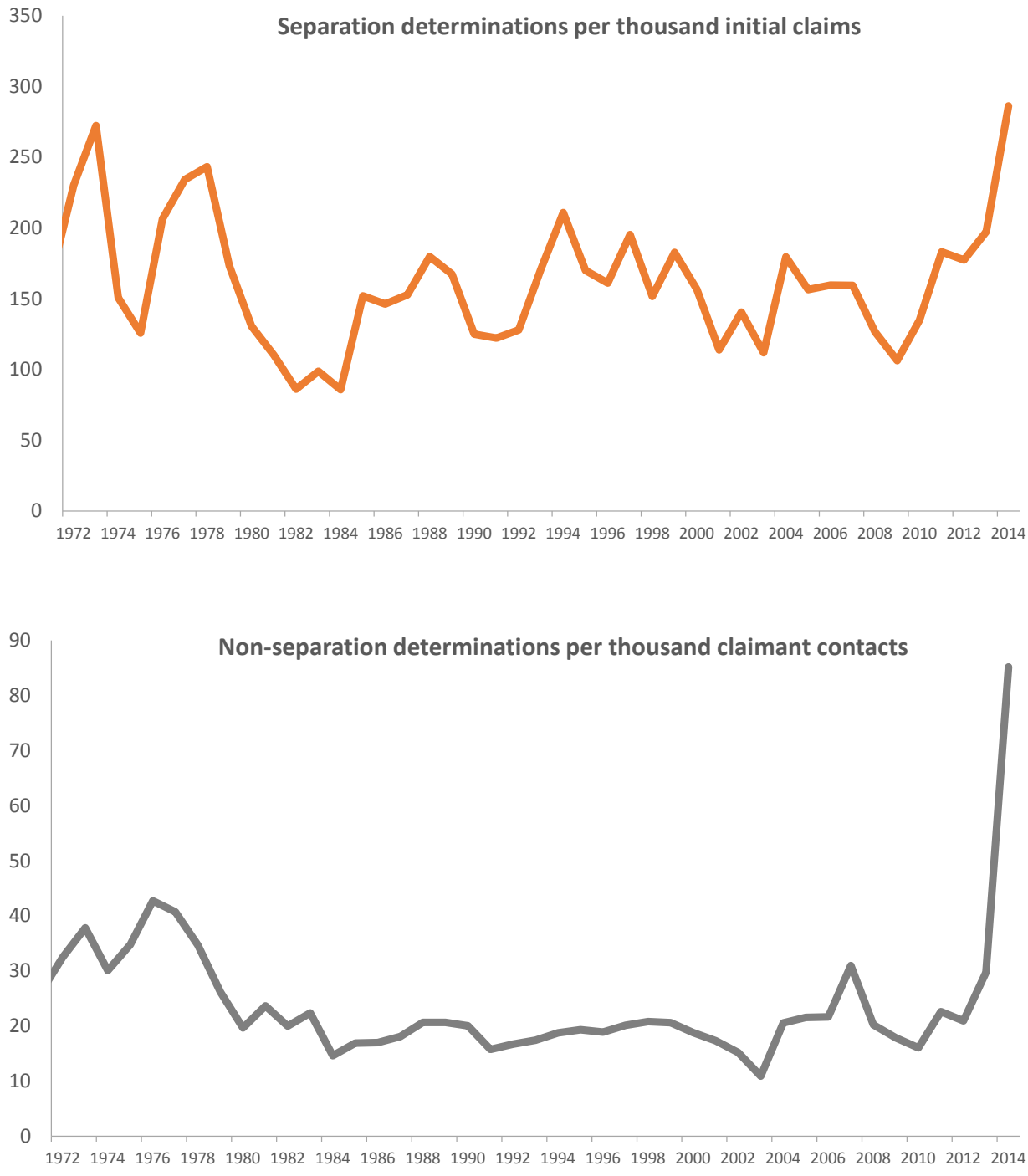
UIA's automatically generated determination notices create a great deal of confusion and frustration for claimants, in addition to wasting court resources. Had a person reviewed Barbara's case, she would have packaged the determinations together. More fundamentally, whereas the computer was unable to parse the case's underlying merits, a person may have found a better solution than flooding Barbara with letters and demanding an exorbitant penalty.

Figure 1: Number of Annual Fraud Cases Established



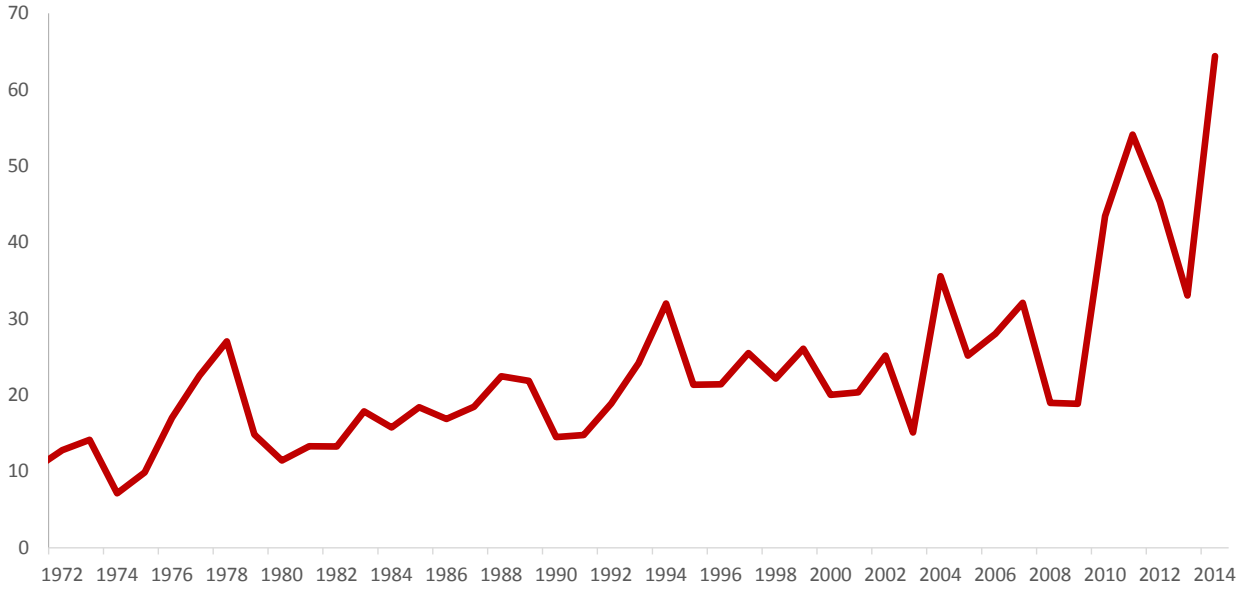
Source: Authors' analysis of U.S. Department of Labor, ETA 227, accessed 21 March 2015.

Figure 2: Annual Separation and Non-Separation Determinations



Note: Claimant contacts are initial claims plus continued claims. Charts exclude multi-claimant determinations.
Source: Authors' analysis of U.S. Department of Labor, ETA 207, accessed 21 March 2015.

Figure 3: Annual Number of Claimants Involved in Appeals per thousand Initial Claims



Note: Includes only single-claimant, lower authority appeals.
Source: Authors' analysis of U.S. Department of Labor, ETA 5130, accessed 21 March 2015.

Table 2. Michigan Non-separation and Separation Determinations and Denials

A. Non-separation Determinations

	Initial and Continued Claims	**Total Non-separation Issues**	Able, Available & Actively Seeking	Disqualifying or Deductible Income	Refusal of Suitable Work	Report Require Call-ins & other	Refusal Profiling Referrals	Other (aliens, athlete, school)
2009	15,167,973	**271,156**	67,070	27,243	8,985	111,840	13	56,005
2010	9,229,289	**148,179**	45,069	10,949	4,193	61,221	8	26,739
2011	7,172,896	**162,102**	47,062	7,455	4,361	75,497	7	27,720
2012	6,383,148	**133,626**	37,823	4,438	2,369	69,748	10	19,238
2013	5,479,612	**163,106**	37,352	9,177	1,541	90,525	262	24,249
2014	4,964,688	**422,973**	69,917	43,232	3,231	166,296	478	139,819
% change 2013-14	*-9%*	***159%***	*87%*	*371%*	*110%*	*84%*	*82%*	*477%*

B. Separation Determinations

	Initial Claims	**Total Separation Issues**	Voluntary Leaving	Discharge for Misconduct	Other
2009	1,463,878	**155,630**	57,050	97,819	761
2010	905,747	**122,202**	40,363	81,410	429
2011	768,447	**140,778**	51,090	89,038	650
2012	709,182	**125,835**	43,775	81,553	507
2013	639,539	**126,292**	40,918	83,419	1,955
2014	583,161	**166,926**	71,454	95,472	0
% change 2013-14	*-9%*	***32%***	*75%*	*14%*	*-100%*

C. Denial Rates

	Total Determinations & Redeterminations	Total Determinations	Total Redeterminations
2009	53%	52%	57%
2010	53%	57%	44%
2011	59%	62%	52%
2012	62%	63%	58%
2013	64%	67%	52%
2014	57%	70%	4%

Note: Includes single-claimant totals only.
Source: Authors' analysis of U.S. Department of Labor, ETA 207, accessed 21 March 2015.

UIA 1302
(Rev. 06-14)
Rick Snyder
GOVERNOR

State of Michigan
Department of Licensing and Regulatory Affairs
Unemployment Insurance Agency
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

Authorized By
MCL 421.1 et seq.
Sharon Moffett-Massey
DIRECTOR

[redacted]

Mail Date: [redacted] 10
Letter ID:
CLM:
Name: [redacted]

Notice of Determination

Case Number: [redacted]
SSN:
Claimant:

BYB:
Employer Number:
Involved Employer: [redacted]

Issues and Sections of Michigan Employment Security Act involved: Misrepresentation and 62(b).

Your actions indicate you intentionally misled and/or concealed information to obtain benefits you were not entitled to receive.

Benefits will be terminated on any claims active on [redacted]

You are disqualified for benefits under MES Act, Sec. 62(b). Restitution is due under MES Act, Sec. 62 (a). The wages used to establish your claim are cancelled and no further benefits will be paid based on those wages. In addition, you are required to pay the penalty assessed based on this determination under MES Act, Sec. 54(b). If the amount of restitution due is less than $500, the penalty is double the restitution due, except that for a subsequent intentional misrepresentation the penalty amount is four times the restitution due. If the amount of restitution due is $500 or more, the penalty is four times the restitution due.

Calculation of interest and penalty amount is shown later on this form.

If you disagree with this (re)determination, refer to "Protest Rights and Appeal Rights" on the reverse side of this form.

UIA 1713 C/E
(Rev. 06-14)
Rick Snyder
GOVERNOR

State of Michigan
Department of Licensing and Regulatory Affairs
Unemployment Insurance Agency
3024 W Grand Blvd, Detroit, MI 48202
www.michigan.gov/uia

Authorized By
MCL 421.1 et seq.
Sharon Moffett-Massey
DIRECTOR

[redacted]

Mail Date: [redacted]
Letter ID: [redacted]
CLM: [redacted]
Name: [redacted]

6

Request for Information Relative to Possible Ineligibility or Disqualification

Employer Name [redacted]
Employer Number
Benefit Year Begin

A question of eligibility and/or qualification has been raised on this claim. Please respond to the questions on the reverse side of this form. You should keep a copy for your records. The completed form must be received by UIA within 10 calendar days of the mail date shown. ***Failure to respond to this request for information will result in issuance of a determination based on available information.***

Respond by Mail:	UIA PO Box 169 Grand Rapids MI 49501-0169
Fax:	(517) 636-0427
Inquiry Line:	1-866-500-0017
TTY Customers:	1-866-366-0004

Respond online: You can submit "Request for Information Relative to Possible Ineligibility or Disqualification" responses electronically through MiWAM. To access MiWAM, go to www.michigan.gov/uia, and click on the link, "UIA Online Services for Unemployed Workers". If you already have an existing MiWAM account, log in and select "Additional Fact Finding is required for your claim". If you do not have an existing MiWAM account, you can register to create an account by selecting "Register As a New User", and follow the prompts. Online responses must be submitted within 10 calendar days of mail date shown above.

If it is determined that you intentionally made a false statement, misrepresented the facts or concealed material information to obtain benefits, then the penalty provisions of Sections 54 and 62(b) of the Michigan Employment Security Act will be applied and you would be subject to any or all of the following:

- You would have to repay money received **and** would have to pay a penalty of two times (if less than $500 of improper payments) or four times (if $500 or more of improper payments) the amount of benefits fraudulently received.
- The two times penalty would be increased to a penalty of **4 times** the amount of improper payments if it were a second or subsequent offense.
- Your benefits would be stopped and you will lose remaining benefits.
- You would be required to pay court costs (if prosecuted) and fines, face jail time, or you may be required to perform community service, or all of these.
- Intentional misrepresentation to obtain benefits in **excess** of $3,500 is a felony and you may be prosecuted in criminal court.

LARA is an Equal Opportunity Employer/Program.

UIA 1713 C/E
(Rev. 06-14)

[redacted]

Additional information is necessary regarding Misrepresentation: Voluntary Quit/Personal Reasons.

Did you intentionally provide false information to obtain benefits you were not entitled to receive?

Yes No

Why do you believe you were entitled to benefits?

1. I needed the money
2. I had not received my payment when I reported for benefits
3. I reported the net dollar amount instead of the gross dollar amount paid
4. I did not understand how to report my earnings or separation reason
5. I thought my employer reported my earnings for me
6. Someone else certified (reported) for me
7. Someone else filed my claim for me
8. Other

You may provide a statement and evidence regarding this issue before a (re)determination is made on this matter. You must provide a response to the questions above and if you failed to previously report this information, explain why. This form must be received by the Agency within 10 calendar days of the mail date shown on page 1. Submit copies (not the originals) of any records which you believe support your position, such as pay stubs, layoff slip, federal income tax form, W-2, etc. If you require additional space, attach additional page(s). Please include your name, Claim ID and Letter ID as shown on page 1 of this form on all documents that you submit.

Certification: I certify that the information I have reported is true and correct to the best of my knowledge and belief. I understand that there are penalties of fines and/or imprisonment and/or community service for false statements as indicated on the front side of this form.

Signature	Date	Telephone Number
Print Name	Title	

Advising and Defending Clients Who Owe Overpayment of Unemployment Benefits and Penalties to The Michigan Unemployment Insurance Agency (UIA)

By
Shirley Horn
Law Office of Shirley Horn
25600 Woodward Ave Ste 214
Royal Oak MI 48067

INTRODUCTION

The Michigan Unemployment Insurance Agency (UIA) has been under ever-increasing scrutiny regarding the grossly deficient process of investigating overpayment of unemployment claims before making a determination of fraud, as well as an alarming rise in fraud determinations due to "robo-fraud" since 2013. In many cases, an investigation had not even been made by a human before a determination of fraud had been made. Not until September 2015 did the UIA change its practice to require an actual investigation by staff before making a determination of fraud. The UIA is also under scrutiny regarding the appeal process and whether claimants have been denied due process of law.

The Michigan Auditor General, in a UIA Performance Audit issued April, 2016, found that only 8% of those UIA determinations of fraud were upheld on appeal by administrative law judges from 10/1/13 through 3/31/2015. (Mi. Aud. Gen. Report No. 641-0593-15, April 2016). Further, two quasi-class action lawsuits are pending in state and federal courts alleging that the claimants who are determined to have fraudulently received overpayment of benefits by the UIA have been denied due process of law. Per the Michigan Auditor General, The Federal Department of Labor, U.S. Congressman Sander Levin, and by the UIA's own admissions (Michigan Auditor General Reports) the UIA has deficiently processed possible UIA fraud cases and has not complied with Federal Department of Labor guidelines. [1]

The number of bankruptcy adversary proceedings filed by the UIA in Michigan seeking to except discharge of benefit overpayments and penalties pursuant to 11 U.S.C. 523(a)(2) has risen exponentially

[1] The 2016 Michigan Auditor General Report Summary, The Federal Department of Labor October 2015 letter to State Unemployment Agencies, and U.S. Congressman Sander Levin's letter to Governor Snyder are attached to these seminar materials.

over the past two to three years. In virtually all of the adversaries, the UIA has sought recoupment of overpayment of benefits plus interest plus 400% penalties plus filing fees.

Yet, to this day, not one of these adversaries has reached a trial on the merits in the Eastern District of Michigan, and only one case has reached a trial on the merits in the Western District of Michigan. State of Michigan, Dep't of Licensing & Regulatory Affairs, Unemployment Insurance Agency v Green (In re Green), 2016 WL4750137 (Bankr. W.D. MI 2016)(AP No.14-80184). A vast majority of the adversary proceedings are settled at over double the overpayment (The Michigan Attorney General typically offer a settlement early in the case reducing the 400% penalty to 100% (actual overpayment + 1 x penalty + interest + $350 costs). Worse, the UIA obtains a default judgment in a large percentage of the adversaries.

The question presented here is what have we as bankruptcy practitioners been doing, what have we not been doing and how may we collectively do better to protect our clients regarding debt owed to the UIA?

I. Bankruptcy UIA Adversary Proceedings Statistics

To determine how the UIA bankruptcy adversaries are being resolved (as well as the sheer volume of closed and pending cases) a search of PACER-CM/ECF was done regarding UIA fraud adversary cases in the E.D. of Michigan. The results, which span approximately the last 14 months, from 5/15/15 to 9/29/16, are as follows:

752 UIA Adversaries alleging 523(a)(2) exception to discharge were filed from 5/15/15 to 9/21/16.

586 UIA Adversaries were resolved/ closed from 5/15/15 to 9/29/16.

166 UIA Adversaries are still open/ pending as of 9/29/16.

Of the **586 closed adversaries** above, the resolution was as follows:

403 Consent Judgments/settlements (68.7% or 74.6% if procedurally dismissed cases are not factored.)

126 Default Judgments (21.5% or 23.3% if procedurally dismissed cases are not factored)

46 Dismissed for procedural reasons (dismissal of the underlying case, linked to wrong case, moot, conversion, etc)

11 Dismissed voluntarily by the UIA/AG (.018% or .02% if procedurally dismissed cases are not factored.)

In order to get a sense of the consent judgments, typical settlement terms, and determine whether the underlying bankruptcy case where default judgments were entered were mostly *pro se* cases, **150 of**

the 585 closed cases were examined closely. The 150 examined adversaries consisted of the first 75 adversaries and the last 75 adversaries of the 586 closed adversaries from 5/15/15 through 9/29/2015:

Of the **150 Examined Closed Adversaries**, the results regarding settlements and default judgments were as follows:

4 Default Judgments *without* an attorney in the underlying case (Pro Se).

26 Default Judgments *with* an attorney in the underlying case (**24** Chapter 7 & **2** Chapter 13) (17.3%, or18.5% if procedurally dismissed cases are not figured.)

107 Consent Judgments (71.3%, or 76.4% if procedurally dismissed cases are not factored. (**92** settled at the overpayment plus 1xPenalty plus % and fees (85.9%), **7** settled for more and **8** settled for less)

3 Dismissed voluntarily by the UIA/AG (.02%)

10 Dismissed for procedural reasons (underlying case dismissed, moot, not eligible for discharge, failure to file notice of default, etc.)

These figures represent a stark disconnect with the findings in the Auditor General Report and the allegations in the two quasi-class action lawsuits regarding highly questionable findings of fraud by the UIA. The compelling question is why? Why are such a large percentage of bankruptcy cases with an attorney in the underlying case defaulted? Further, are we "robo-settling"? Is there simply a lack of understanding by the bar of the fairly complex issues presented in these cases? Is this due to an inability of the client to bear the costs of litigating? Or a combination of these?

II. PRE-FILING CONSIDERATIONS AND ADVISING YOUR CLIENT

Although a bankruptcy attorney may limit the scope of representation and has no duty to defend a client in an adversary proceeding, a competent attorney should advise about the issues presented and options available to the debtor regarding the probability of UIA filing an adversary proceeding if penalties have been assessed. It is perfectly acceptable to charge a reasonable and non-refundable consultation fee for a detailed review of the issues before signing a retainer agreement.

At the initial consultation, whether you intend to assist in the defense of a UIA adversary proceeding or not, it is important to specifically ask if your potential client has any overpayment of benefit debt and if penalties were assessed. Obtaining this information at the initial consult is critical in advising your client so they may make an informed decision about:

1.) When to proceed with a bankruptcy

2.) Determining which chapter of the code is in their best interest

3.) Determining whether they should seek a late UIA appeal with ALJ

4.) Their options regarding defending and/or settling a potential UIA adversary proceeding (As previously stated, The Michigan Attorney General typically offer a settlement early in the case reducing the 400% penalty to 100% (overpayment + 1 x penalty + % + $350 costs.)

If you are unable or unwilling to fully advise your client about the issues they face and fully advising them about their options of how to proceed- whether this is due to lack of compensation or other reasons- be aware of the possible applicability of Rule 1.7(b) of The Michigan Rules of Professional Conduct regarding possible conflict of interest. That rule provides, in relevant part:

> *(b) A lawyer shall not represent a client if the representation of that client may be materially limited…by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and*
>
> *(2) the client consents after consultation. …*

Reference: MRPC 1.7(b).

In order to be assured that there is not a conflict of interest when limiting the scope of the advice and representation regarding exception to discharge issues, this limitation of representation should be ***fully disclosed*** to the potential client. The client should be made aware that they may have defenses or alternate courses of action available to them beyond what you are willing to do, and that they may seek the advice of another attorney regarding the repercussions and issues they face if a bankruptcy case is filed when they owe overpayment and penalties to the UIA.

A. <u>Pre-filing assessment of the UIA debt in determining how to counsel client.</u>

1. Do not assume your client is guilty of fraud. Simply because the UIA made a determination that your client made a false representation and assessed punitive penalties, your client may likely be innocent. (See April 2016 Michigan Auditor General Performance Report (attached to these materials) wherein it was found that **only 8%** of UIA determinations of fraud were upheld on appeal.)

2. Get as much factual background from client as possible at this early stage. This is a generalized and short Q&A to get a sense of the issues, as it is not unusual for a client to have no documentation or only partial documentation at this juncture.

-Get their side of the story and try to get a sense of the timeline of events and the issues. For example: What was the allegation? I.E. Was the allegation that they quit? Does the client deny that they quit? Was the allegation that they failed to report income while collecting "underemployment" benefits? Does the client admit this? If so, what was the reason? Was it due to mistake, misunderstanding, inadvertence, negligence etc. and not an actual *intent* to defraud? Did they read the UIA employee handbook? What is client's education level? Did they get notice from the Agency while collecting benefits of a possible overpayment or disqualification issue? How long after the benefits were received was the Redetermination made? Were they sent a questionnaire regarding the benefits in question? Did they fill out the questionnaire? Do they remember if they were sent a questionnaire before a Redetermination was made or after? Did they correct their method of reporting income once they learned of an issue? If they did not appeal, then why not? Did they receive notices? Did they move during any relevant time periods? What was their understanding of the process? Did they use MARVIN or WAM? (This is relevant to the question of whether the claimant ever actually received notices.)

Other relevant questions besides the factual merits:

- were penalties assessed? (If not, then UIA is not likely to refer case to AG office)
- how much overpayment/penalties $$ is actually at stake? (If nominal, then settle)
- review for possible Collateral Estoppel Issues (*See materials re: Collateral Estoppel*)
    1. Did they participate in the appeal process?

2. Were the elements of 523(a)(2)(A) "actually litigated"?

3. Was there a criminal plea?

-How long after the benefits were received was the Determination of fraud made? (Possible statute of limitations/deficient pleading defense under MCL 421.62 *(See the "Di Gregorio Administrative Hearing transcript" attached to seminar materials).*

3. Possibly advise seeking a late Appeal through the UIA

If your client has not already filed an appeal of the UIA determination of fraud, you may want to advise your client to seek a late appeal if they have a decent defense on the merits (however, settling the case if there is not a good defense is wise.) If your client chooses to try to get a UIA hearing, he or she may hire an attorney who specializes in UIA appeals, or seek help with The University of Michigan Unemployment Assistance Clinic run by Steve Gray, Director and Clinical Assistant Professor at The University of Michigan in Ann Arbor. This clinic allows law students, under the supervision of an experienced attorney, to advise and defend claimants in the UIA appeal process. You may find more information at: https://www.law.umich.edu/clinical/unemploymentinsurance.

B. <u>Advising Client re: dischargeability issues and Chapter 7/13 options as well as non-bankruptcy options</u>.

Although a client may be eligible for a Chapter 7, when a substantial amount of money is at stake for UIA overpayment and penalties, your client should be made aware of the issues so that he or she may make an informed decision about whether to proceed with a bankruptcy, or whether a Chapter 7 or Chapter 13 is in his/her best interest. It is the client, ultimately, who decides the best course of action to take.

<u>Factors to consider when advising client about Chapter 7 or Chapter 13:</u>

- The legal question of whether UIA fraud penalties are excepted from Chapter 13 discharge is currently pending in the 6th circuit. Michigan Unemployment Insurance Agency v. Andrews (In re Andrews), 2015 WL 5813418 (Bankr. E.D. Mich. Oct. 2, 2015) (*reversed* and *remanded,* US. District Ct., E.D. MI 15-cv-13681-jco); Notice of Appeal to 6th Circuit filed Sept. 21, 2016. If the 6th Circuit overturns the District Court, then a debtor in a Chapter 13 only faces the possibility of an Adversary Proceeding under 11 U.S.C. 523(a)(2) seeking exception to discharge of the actual overpayment and interest, but not the penalties. Conversely, a debtor who files a Chapter 7 may be on the hook for everything.
- In a Chapter 7, governmental fines and penalties owed to a governmental unit are automatically excepted from discharge under 11 U.S.C. (523(a)(7) and the UIA is not obligated to file an Adversary Proceeding to have penalties excepted from discharge. An Adversary Proceeding is only required for 11 U.S.C. 523(a)(2), (a)(4), and (a)(6).[2] If the UIA does not refer a case to the Michigan Attorney General, then an Adversary Proceeding seeking to except the overpayment and penalties under 523(a)(2) will not be filed. This can and does happen. The PROBLEM in this scenario is that since a discharge occurs right after the deadline to file an Adversary Proceeding, the debtor may not be able to timely convert the case to a Chapter 13 in order to take advantage of 11 U.S.C.1328(a), known as the "super discharge", where 523(a)(7) governmental debts are dischargeable. See In re Williams, Case No. BT 14-01038 (Bankr. W.D. Mich., Nov. 26, 2014) (J.Boyd); In re Voshell, Case No. DG 13-00454 (Bankr. W.D. Mich. Sept. 9, 2013)(J. Dale.)
- Although filing a Chapter 13 for the sole purpose of "funding" attorney fees for the filing of a case is unethical and prohibited, it is arguably allowable to file a Chapter 13 to delay garnishment of tax refunds, and to fund representation in defending an Adversary Proceeding. (If this is one of the reasons to file a Chapter 13, it is important for the attorney to discuss the potential fees and costs of litigation, what the attorney will and will not do, and advise the client that they may seek the advice of another attorney. Although a Chapter 13 may not be financially feasible, if the

[2] Per uscourts.gov, maintained by the Administrative Office of the U.S. Courts, "Generally speaking, the exceptions to discharge apply automatically if the language prescribed by section 523(a) applies. The most common types of nondischargeable debts are certain types of tax claims, debts not set forth by the debtor on the lists and schedules the debtor must file with the court, debts for spousal or child support or alimony, debts for willful and malicious injuries to person or property, debts to governmental units for fines and penalties, debts for most government funded or guaranteed educational loans or benefit overpayments, debts for personal injury caused by the debtor's operation of a motor vehicle while intoxicated, debts owed to certain tax-advantaged retirement plans, and debts for certain condominium or cooperative housing fees. The types of debts described in sections 523(a)(2), (4), and (6) (obligations affected by fraud or maliciousness) are not automatically excepted from discharge. Creditors must ask the court to determine that these debts are excepted from discharge. In the absence of an affirmative request by the creditor and the granting of the request by the court, the types of debts set out in sections 523(a)(2), (4), and (6) will be discharged.

debtor can afford a modest but reasonable Chapter 13 payment, this may be the preferred option for him or her.

- If your client has no real defense to fraud in that they admit they were fraudulent, then Chapter 7 may be the obvious and preferable choice. The Chapter 7 is quicker and less expensive and the debtor may settle with the UIA for minimal costs/attorney fees and get a great deal by having the penalties reduced and a manageable repayment plan as part of the settlement.
- If there are not more urgent or compelling reasons to file a bankruptcy, your client may want to postpone the filing of a bankruptcy case and seek the assistance of an Unemployment Law attorney or the free Michigan Unemployment Assistance Clinic in Ann Arbor to see what options are available to them to fight the UIA determination or to seek a waiver. *This is not an advised option if your client's defense is weak, as settling the case in bankruptcy with reduced penalties could be more beneficial.*

C. Advising Client re: Costs to defend Adversary Proceeding and available options/alternatives

-Attorney Fees/costs vs. Amount at stake

-E.D. Pro Bono Program

-Defending/settling options (with or without an attorney)

-Attempting to get a UIA administrative hearing while the Adversary Proceeding is pending, or before filing a bankruptcy case. This may be a great option for the client because it may knock out the overpayment AND the penalties without the need to defend an Adversary Proceeding.

II. DEFENDING ADVERSARIES

A. Attempting to Get Voluntary Dismissal of the Adversary Complaint by the Attorney General

The AG is reasonable in many cases and if you can show that there really was no fraud, or that it would be extremely difficult to prove, the AG will voluntarily dismiss the Adversary Proceeding.

Subpoena records from employer, and file a Request for Production of Documents requesting all documentation regarding the case from the UIA including the documentation the UIA relies upon to establish misrepresentation.

Early in the case subpoena records from the employer and send The Attorney General a Request for Production of Documents. Request all documents in the UIA's possession relative to the claimant which may not be attached to the complaint. Request documentation the UIA relies upon to establish actual misrepresentation, all intra-agency correspondence, and all correspondence to and from the UIA re: the case. Request proof of the mailing of notices, and notices sent to a WAM account. (Interrogatories and Request for Admissions may be sent later in the discovery process.)

B. Defending UIA Adversary Proceeding on the merits and Discussion of Elements of Fraud

UIA adversary proceedings are based on 11 U.S.C. § 523(a)(2)(A). That section provides:

*A discharge under section 727 ... of this title does not discharge an individual debtor from any debt--***(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;*

To except a debt from discharge under § 523(a)(2)(A), the creditor must show:

1) the debtor obtained money, property, services, or credit;
(2) through a material misrepresentation;
(3) that, at the time, the debtor knew was false or made with gross recklessness as to its truth;
(4) the debtor intended to deceive the creditor;
(5) the creditor justifiably relied on the false representation; and
(6) its reliance was the proximate cause of loss.

Rembert v. AT&T Universal Card Services., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998) (citations omitted.)

The UIA bears the burden of proving **all** elements of fraud by a preponderance of the evidence standard. Grogan v. Garner, 498 U.S. 279, 291, 111 S. Ct. 654, 661 (1991).

Exceptions to discharge are strictly construed against the creditor. In re Rembert, 141 F.3d at 281, citing Manufacturer's Hanover Trust v. Ward (In re Ward), 857 F.2d 1082, 1083 (6th Cir.1988);) exceptions to discharge "are to be strictly construed in favor of the debtor", Tweedie v. Hermoyian (In re Hermoyian) (Bankr. E.D. Mich., 2012) citing United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029, 1034 (6th Cir. 1999).

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i. "Intent" (subjective standard)

Under *Rembert*, "intent is measured subjectively... '[A] debtor's intent to deceive a creditor occurs when the debtor makes a false representation which the debtor knows or should have known would induce another to advance money, goods or services to the debtor.' *Bernard Lumber Co. v. Patrick* (*In re Patrick*), 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001) (citation omitted). An intent to deceive may be inferred from a '[r]eckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation.' *Haney v. Copeland* (*In re Copeland*), 291 B.R. 740, 786 (Bankr. E.D. Tenn. 2003) (citation omitted). Nonetheless, '**[i]f there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor.**' *Star Banc Fin., Inc. v. Bird* (*In re Bird*), 224 B.R. 622, 627 (Bankr. S.D. Ohio 1998) (citations omitted)." Gaft v. Sheidler (In re Sheidler) (B.A.P. 6th Cir., 2016). (Emphasis added).

[Panel Discussion: In re Green , 2016 WL4750137 (Bankr. W.D. MI 2016)]

In many instances, claimants for underemployment benefits fail to accurately report their earnings. This may be caused by a variety of factors, none of which may arise to an "intent" to defraud. Mistake, inadvertence and misunderstanding are common. Relying on misinformation heard from fellow employees that the employer reports the earnings so the claimant does not need to report the earnings, may not be seen as actions arising to an actual intent to deceive.

Further, if a UIA investigation is made *during* the receipt of benefits, and the claimant having received notice of an issue thereafter corrects the method of reporting, this is evidence of a lack of intent to deceive.

iii. "Justified" Reliance re: underemployment claims

In Field v. Mans, 516 U.S. 59, 116 S. Ct. 437, 133 L.Ed.2d 351 (1995), the United States Supreme Court explained the concept of justifiable reliance. The appropriate standard is not "reasonableness" in the sense of whether an objectively reasonable person would have relied upon the debtor's false representations. Rather, the inquiry is whether the actual creditor's reliance was "justifiable" from a subjective standpoint. Field v. Mans, 516 U.S. 59, 74-75,[586 F.3d 792]116 S. Ct. 437, 133 L.Ed.2d 351 (1995). In determining whether a creditor's reliance was justifiable, a court should examine **"the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than [applying] a community standard of conduct to all cases."** (Emphasis added) *Id.* at 71, 116 S.Ct. 437. Even under the "justifiable" test, however, the plaintiff must **"use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.... of the facts of the transaction before entering into it."** (Emphasis added) *Id.* (quotation omitted). Moreover, this test "does not leave [objective] reasonableness irrelevant, for the greater the distance between the reliance claimed and the limits of the [objectively] reasonable, the greater the doubt about reliance in fact." *Id.* at 76, 116 S.Ct. 437.

The UIA has an initial duty to rely on claimant representations in order to ensure the prompt payment of benefits. California Department of Human Resources Development v. Java, (In re Java), 402 U.S. 121, 91 S. Ct. 1347, 28 L.Ed.2d 666 (1971). However, whether the continued reliance on a claimant's statements is "justified" when the UIA is in position of information to the contrary may be another matter. The UIA receives quarterly wage statements from the employer and those statements must be sent within 25 days of quarter's end by the employer. Yet, tn the April 2016 Auditor General Report, the UIA stated it does not review the employer wage statements until the end of the fourth quarter. Is it justified to not review the reports in the UIA's possession?? If the UIA fails to cross match these reports with the statements made by the claimant, at what point is the continued reliance on the claimant statements, while ignoring the employer quarterly reports, no longer "justified"? In many (most) instances, a determination of fraud was never made during the receipt of benefits, *but was issued after the benefit period ended.* Further, the UIA *admitted* in its response to the Auditor General that a material defect is present in their procedures when a determination is made without first investigating the facts and sending

a questionnaire to the claimant.[3] This may be deemed an admission at trial and goes to the question of *whether the UIA practices demonstrate justified reliance and were potentially in violation of federal mandate*. Had the claimant been made aware of an issue, the claimant would have had an opportunity to correct their method of reporting/ non-reporting of wages. Further, the UIA would have been able to mitigate the loss it incurred by investigating earlier in the case. In some instances, a determination of benefits has not been made until a full *two years' worth of benefits have been received*.

Further, in separation from employment cases, an Employer may state early in the process that the claimant "quit." The UIA had an opportunity to begin an investigation surely within a more reasonable time period.

The UIA acts as a fiduciary. As such, should the UIA "justified reliance" standard be higher than a plaintiff who is not in such a position of being entrusted with public taxpayer funds? Should not the standard of the agency be higher than most plaintiffs? Is this not particularly true when the UIA is potentially acting in violation of the Social Security Act?

iii. Damages

The Bankruptcy judge, as trier of fact, may find that the UIA was not justified in its reliance for the entire time frame in question. Arguably, the judge may be able to reduce the damages or disallow the punitive damages because of the actions or inaction of the UIA in terms of its reliance and the question of when the reliance was no longer "justified."

C. Defending and Filing Motions for Summary Disposition

Collateral estoppel defense; filing a defendant motion for summary disposition due to statute of limitations (3 year general overpayment of benefits vs. 6 year fraud pursuant to MCL 421.62); and failure to plead fraud with particularity to survive the 3 year statute of limitations (*Di Gregorio*

[3] Finding # 1 by The Michigan Auditor General in the April 2016 UIA Audit Report found that from October 1, 2013 thru March 31, 2015 the UIA "did not meet various federal claims processing performance standards regarding nonmonetary determinations (misrepresentation determinations) processing, and appeals processing." **The UIA agreed with this finding**. Finding #6 found that the UIA "needs to improve its efforts to obtain and/or consider supporting information and provide claimants with the facts and rationale for claimants identified as including potentially false or misleading information ("intentional misrepresentation). **The UIA agreed with this finding as well.**

Administrative Law Judge Hearing) are discussed by other panel members, and reader is referred to those materials.

C. Proposed Settlement Language

The Attorney General has standard settlement language approximately two pages in length. In addition to this standard language, consider the following:

-Make sure to get a monthly payment that the debtor can definitely afford.

-Make the first payment due no less than30 days after the bankruptcy case ends.

-Attempt to get 30 day (not 15 day) future default language.

-Require that the UIA must file a notice of default in the adversary case and file a certificate of service stating that the debtor and the attorney were served.

-Ensure there is added language that the settlement does not affect debtor's ability to collect future unemployment benefits.

-Add language that allows for the suspension or ability to request reduced payments if the debtor becomes unemployed or disabled (short term and long term).

-Ensure that the 1% allowable interest only begins to accrue 30 days after the bankruptcy case ends.

-Add language that the UIA will deduct and apply payments made by the Chapter 13 trustee if applicable.

D. Resources For Assistance With Defending UIA Adversary Proceedings

Since a large portion of debtors who owe the UIA are without the means to entirely fund the costs of defending an adversary proceeding, possible resources to assist with handling adversary proceedings to keep costs down, and to assist an attorney with adversary defense inexperience, (particularly solo practitioners who do not have the resources of a larger firm.)

a. Students from University of Michigan Unemployment Assistance Clinic
   - Discuss Student Practice rule re: assistance with defense

- Referral to Michigan Unemployment Assistance Clinic so case may be litigated by an administrative hearing judge

b. Pro bono program (E.D.)

c. Proposal for the creation of CBA or FBA sponsored Afternoon Clinics, and the creation of a committee, list serve, or similar forum regarding UIA issues or adversary proceedings in general so that attorneys may collaborate and discuss defense strategies, as well as have a resource to share sample subpoenas, requests for production of documents, interrogatories, request for admissions, witness lists, etc.

CONCLUSION

Bankruptcy practitioners arguably have an ethical obligation to fully advise clients about all of their options when a UIA debt is involved and to make full disclosure regarding possible limitation of representation. The debtor has several available options of how to proceed, and the best strategy depends on the specific circumstance of the client. Automatically settling these cases without a thorough factual inquiry and worse yet, allowing defaults to occur, should be viewed by all of us as unacceptable in light of the deficiencies of the UIA process of determining fraud as well as denying many claimants due process of law. Help is available to the practitioner and the debtor in defending these adversary proceedings as outlined in these materials. Hopefully, more educational resources and afternoon clinics will become available to us so that we may more competently represent and defend our clients on this important issue. Good luck!