



# THE ENFORCER

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## He Lied About His Assets, Now What?

Your client is sitting in your office with a brokerage statement of her former husband. She screams "He lied in his interrogatories, he lied in his deposition, what are you going to do about it?!" The pursuit of post-judgment relief may present legal hurdles for the attorney, and emotional and financial challenges for the client. What do you do when you learn that the ex-spouse misrepresented the extent of their bounty during the divorce? Their resulting Judgment of Divorce is based on a fraud and your goal is to obtain relief for your client. What next?

### The One Year Court Rule, Or Is It?

The Michigan Court Rules provide for a one-year limitation on the re-opening of a judgment based on the fraud, misrepresentation or other misconduct of the opposing party. Specifically, MCR 2.612(C) provides:

(1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

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(f) Any other reason justifying relief from the operation of a judgment.

The time limit for filing a motion under MCR 2.612(C)(1) is provided in MCR 2.612(C)(2), which states:

The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.

If you are within the one-year time limit, file your motion for relief from judgment. But what if you don't discover the misconduct until years after the entry of the Judgment of Divorce? Thinking creatively, you may think that you can bring a separate action for fraud, perhaps relying upon

MCR 2.612(C)(3):

This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

Think again.

### Applying *Nederlander*

If you don't bring your Motion under MCR 2.612(C) within one year of the entry of your client's Judgment of Divorce you do not have a remedy. Consider the implications of *Nederlander v Nederlander*, 205 Mich App 123 (1994), which states that a party may not maintain an independent cause of action for fraud which occurred during divorce proceedings.

In *Nederlander* the plaintiff sought to reopen discovery in an attempt to set aside her divorce judgment under MCR 2.612(C)(1)(c). She claimed that her ex-spouse misrepresented the value of his interest in two entities during the divorce. More than one year had passed since the entry of the divorce judgment, and not surprisingly the trial court determined that her motion was untimely.

The court did allow the Plaintiff to file an amended complaint, which alleged fraud on the court, fraudulent misrepresentations and omissions, breach of fiduciary duty, intentional infliction of emotional distress, conspiracy to defraud, and abuse of process. The amended complaint did not seek to set aside the judgement of divorce, but rather was an independent action for money damages.

The Court of Appeals also found that summary disposition of the fraud claim was proper, but on different grounds. It is enormously significant that the Court upheld the dismissal of the fraud claim under MCR 2.116(C)(8), not (C)(10). This changed everything. The post divorce judgment fraud claim became a claim on which relief could NOT be granted. The Court ruled that "the [fraud] claim was so



clearly unenforceable as a matter of law that *no factual development could establish the claim and justify recovery.*" p. 127, emphasis supplied. From this language the court makes it clear that the degree of fraud is irrelevant.

Reciting the Supreme Court's holding in *Triplett v St. Amour*, 444 Mich 170 (1993), the *Nederlander* court emphasized the importance of public policy considerations in the finality of judgments. "The Court decided that the balanced approach given in MCR 2.612(C) to competing public policy considerations concerning the recognition of fraud suits and the finality of judgments would be upset if plaintiff was allowed to file a claim of fraud." *Nederlander*, supra, p. 770 (internal citations omitted).

The court determined that because public policy concerns were controlling, the remedy would be limited to seeking redress under MCR 2.612(C). The court then underscored the importance of due diligence during the discovery process, stating:

If a party suspects that the other party has committed fraud during a divorce proceeding, then MCR 2.612(C)(1)(c) and (2) allows the party to seek redress within one year after the judgment is entered. On the other hand, we believe that allowing a party to file an independent for fraud whenever the other party, more than one year after the divorce judgment is entered, liquidates assets or consummates a business transaction is contrary to the public policy behind the finality of judgments. The exercise of due diligence during the course of liberal discovery should expose any intrinsic fraud that may be present in the divorce proceeding. *Supra*, p. 127

### **Grace and Foreman distinguished from Nederlander**

Despite *Nederlander*, under certain circumstances Michigan law does recognize an independent cause of action for fraud arising from divorce proceedings. Cases involving a property settlement agreement which is incorporated, but not merged, into a judgment of divorce, are distinct in that the settlement agreement may only be enforced employing contract remedies. If fraud induced the settlement, a separate action can be maintained. *Foreman v Foreman*, 266 Mich App 132 (2005); *Grace v Grace*, 253 Mich App 357,

365 (2002).

The Court of Appeals addressed this scenario in *Foreman* and in *Grace*, concluding each distinguishable from *Nederlander* because the plaintiff's separate actions for fraud related to the settlement agreements, and not to the divorce judgments. In both cases the parties reached a property settlement, which was incorporated, but not merged, into the divorce judgment. Both involved claims by the plaintiffs that the defendants had committed fraud in the inducement of their settlement agreements. The Court explained why *Nederlander* did not apply:

"When a property settlement agreement is incorporated and merged in a divorce judgment, it becomes a disposition by the court of the property. But, when not merged in the divorce judgment, the property settlement agreement may only be enforced by resort to the usual contract remedies and not as part of the divorce judgment." *Foreman and Grace*, quoting *Marshall v Marshall*, 135 Mich App 702, 712-713; 355 NW2d 661 (1984).

### **Lessons from Nederlander, Grace and Foreman and a Possible Solution**

Due diligence is very serious business because it doesn't matter how bad the fraud was if more than one year has passed. Settlement agreements which are not merged into the judgment are often favorable in high asset cases where confidentiality is important but may also be beneficial when potential fraud is a concern.

Finally, consider providing for an award of the property to the opposing party in the event of fraud. For example, your judgment might provide:

IT IS HEREBY ORDERED that any asset and/or property which was concealed, which value was misrepresented or is the subject of a fraudulent representation is awarded to the opposing party.

Instead of having to apply for relief from your client's Judgment of Divorce, you can now seek enforcement of its provisions. A ten year statute of limitations under MCL 600.5809(3) is much more appealing than a race to file in one year under MCR 2.612(C).

