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COUNCIL MEETING FEBRUARY 2009

Jules Olsman and Todd Berg, Legal Editor, *Michigan Lawyers Weekly*

Todd Berg, Legal Editor, *Michigan Lawyers Weekly* and Barry Goodman

COUNCIL MEETING MARCH 2009

David Mittleman, Mark Bernstein, Jennifer Grieco, and Michigan House Speaker Andy Dillon

Mike Janes, Jules Olsman, and Michigan House Speaker Andy Dillon

The Stain of Dickie Scruggs

On June 27, 2008, Richard, a/k/a "Dickie," Scruggs, the infamous asbestos, tobacco, mass tort lawyer from Pascagoula, Mississippi, was sentenced to a five-year prison term by U.S. District Court Judge Neal Biggers in the Northern District of Mississippi as a result of a plea agreement to charges that he attempted to bribe a Mississippi state court judge. The judge, Henry Lackey, was presiding over an attorney fee dispute involving Scruggs in a case arising out of Hurricane Katrina property damage claims. He was also sentenced in February of 2009 in yet another case involving judicial bribery. Mr. Scruggs' son, Zack Scruggs, was also sentenced to 14 months in prison as a result of his failure to report the conspiracy to bribe Judge Lackey. What fine people.

There are also allegations and innuendo swirling around Trent Lott (Scruggs' brother-in-law), the former Senate Republican majority leader, that he may have been involved in a scheme to offer a federal judgeship to the judge involved in the second bribery case.

This is not my first public diatribe involving Dickie Scruggs, who is truly the "irritable bowel syndrome" of the bench and bar. Several years ago, Mr. Scruggs (ironically) was retained by Sulzer Orthopedics to represent it in a class-action lawsuit arising out of hip implants that were contaminated with an oil residue used in the manufacturing process. In an interview with the *ABA Journal*, Scruggs explained why he as a "prominent" plaintiffs' attorney would choose to defend Sulzer in the litigation.

Jules B. Olsman

His response was, "To catch a thief, you need to be a thief." At the time he made those comments, I wrote to Mr. Scruggs, Fred Baron who was then president of ATLA (now American Association for Justice), and its Executive Board excoriating Scruggs for his despicable comments. I noted that "with friends like him, we don't need enemies."

Naturally, Mr. Scruggs' conviction was applauded by the *Wall Street Journal* editorial page. One could almost hear the editorial board singing "ding dong, the witch is dead" when expressing its glee at the image of Mr. Scruggs in prison garb.

I am confident that everyone is now sufficiently reviled by the Scruggs case. I now turn your attention to the recently argued case of *Caperton v. Massey* in the United States Supreme Court.[1] In *Caperton*, a West Virginia company found itself on the receiving end of a $50 million verdict. Concerned that one of the justices on the West Virginia Supreme Court would vote to affirm the verdict, the owner of A.T. Massey Coal Company, Don Blankenship, contributed $3 million of his own funds to the campaign of Brent Benjamin who proceeded to defeat Justice Warren McGraw in his bid for reelection to the court. When asked to recuse himself, Justice Benjamin declined. The question

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The Stain of . . .
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on appeal to the United States Supreme Court was presented as follows:

> Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the $50 million jury verdict in this case, even though the CEO of the lead defendant spent $3 million supporting his campaign for a seat on the court--more than 60% of the *total* amount spent to support Justice Benjamin's campaign--while preparing to appeal the verdict against his company. After winning election to the court, Justice Benjamin cast the deciding vote in the court's 3-2 decision overturning that verdict. The question presented is whether Justice Benjamin's failure to recuse himself from participation in his principal financial supporter's case violated the Due Process Clause of the Fourteenth Amendment.[2]

The case was argued on March 3, 2009 in the United States Supreme Court. A decision on the case is expected by the end of this term.

Incredibly, the respondent A.T. Massey Coal Company, Inc. was aided in its argument by an amicus brief joined in and supported by Michigan Supreme Court Justices Maura Corrigan and Robert P. Young, Jr. The amicus brief appallingly states as follows:

> Because the debt-of-gratitude argument has no logical stopping point and creation of an amorphous due process test will lead the public to holding the judiciary in lower esteem, this Court should not hold that lawful campaign activity creates a due process violation. Elected judges should retain their strong presumption of integrity.[3]

In response to the amicus description of the "presumption of integrity," one is tempted to ask a very simple question: Are you kidding me?

Life Imitates Art

In his best selling book, *The Appeal*, John Grisham utilizes a scenario eerily similar to *Caperton v. Massey* as the basis of his plot. In the book, a large chemical company has a substantial verdict in Mississippi rendered against it. Its owner decides that he will seek to affect the outcome of the supreme court race in Mississippi. The following is an excerpt:

> "Judicial elections."
>
> "Yes. That's all we do, and we do it very quietly. When our clients need help, we target a supreme court justice who is not particularly friendly, and we take him, or her, out of the picture."
>
> "Just like that."
>
> "Just like that."
>
> "Who are your clients?"
>
> "I can't give you the names, but they're all on your side of the street. Big companies in energy, insurance, pharmaceuticals, chemicals, timber, all types of manufacturers, plus doctors, hospitals, nursing homes, banks. We raise tons of money and hire the people on the ground to run aggressive campaigns." [4]

With characters such as Dickie Scruggs and Justice Brent Benjamin to draw upon, no wonder John Grisham is so prolific. His sources of literary inspiration are endless.

It would seem inconceivable that Justices Corrigan and Young would choose to "weigh in" on a case with such obviously negative connotations and ramifications, particularly in view of the relentless debate in Michigan about whether certain members of the Michigan Supreme Court "had an agenda" that was anti-consumer and anti-civil justice. Given the intensity of the debate, it would be reasonable to

think that Justices Corrigan and Young would have studiously avoided aligning themselves with Justice Benjamin and his claim of presumed judicial integrity.

Although bribing judges, the offenses for which Dickie Scruggs was convicted, and giving $3 million to the campaign to elect a judge are vastly different acts, both cause the public's confidence in the judicial system to be profoundly and justifiably eroded.

At the time of his sentencing by U.S. District Court Judge Neal D. Biggers, Jr., Dickie Scruggs told the court:

> I deeply regret my conduct. I am sorrowful for it. It is a scar and stain on my soul that will be there forever.[5]

Both the conduct of Dickie Scruggs and the brazenness of A.T. Massey Coal Company's arguments in *Caperton* are a stain on our collective souls as lawyers and judges. It is up to each of us to assure that the damage done by Mr. Blankenship with his checkbook in *Caperton* and Dickie Scruggs with his bag of cash in Mississippi not be irreparable.

Endnotes

1. *Caperton v. A.T. Massey Coal Co.*, cert granted, ___ U.S. ____; 129 S. Ct. 593 (2008).
2. Br. of Pet. dated February 4, 2009, *Caperton v. A.T. Massey Coal Co.*, cert granted, ___ U.S. ____; 129 S. Ct. 593 (2008).
3. Br. of Amici Curiae Ten Current and Former Chief Justices and Justices in Support of Respondent, *Caperton v. A.T. Massey Coal Co.*, cert granted, ___ U.S. ___; 129 S. Ct. 593 (2008).
4. Grisham, John. *The Appeal*. New York: Bantam Dell. (2008).
5. Tr. of Sentencing, *United States v. Scruggs*, 07-CR-00192 (N.D. Miss. 2007)

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Matt received his BA from Yale University and his law degree at Kentucky's Salmon P. Chase College of Law. Matt has authored numerous articles and is frequently invited to speak at Continuing Legal Education seminars about lawyers' professional responsibilities in individual or mass tort settlements.1 In 2005, *Loyola University Journal of Public Interest Law* published a treatise Matt wrote, entitled "A Practical Approach to Avoiding Conflicts of Interest in Aggregate Settlements." In addition, Matt is the author of a legal text book (Thomson West Publishing) entitled *Negotiating and Settling Tort Cases* that addresses complex settlement-related issues. Matt is an adjunct professor at Salmon P. Chase College of Law, where he teaches a course on law practice management with an emphasis on how to avoid professional liability claims. Matt's "form-of-settlement" client counseling model (re: impact of settlement on government benefits, liens/subrogation, structured settlements, and the taxation of damages) has received national recognition and is designed to protect clients as well as help lawyers avoid "failure to inform" professional liability claims. Matt serves as the special master and/or administrator of settlement funds throughout the country. His neutral role in numerous high-profile settlements led to his selection by *Lawyers Weekly* as one of five "Lawyers of the Year" in Ohio for 2003. He was nominated by his peers and selected as an Ohio Rising Star in 2005 and 2006. His work was featured in the *LA Times* in January of 2005.

Firm Dissolution? Lateral Hire? Will You be Left on the Hook?

By Michael J. Sullivan and Monika L. Sullivan
Collins, Einhorn, Farrell & Ulanoff, P.C.

It is no surprise that the difficult economy has taken its toll on the legal field,[1] particularly in Michigan. The recession may well continue to cause firms to lay off lawyers; and even if layoffs are not involved, lawyers are ever more mobile these days. This is a far cry from the days when a lawyer might spend his or her entire career with the same law firm. Regardless of the reason for a firm ending or a lawyer leaving, a change in employment can create a potential gap in the lawyer's professional liability insurance coverage that could result in a lawyer's facing personal liability *even when the lawyer has been continuously insured* throughout his or her career. Often, this lack of coverage is not discovered until it is too late to do anything about it. The purpose of this article is to identify what a lawyer should know about his professional liability insurance coverage when he decides to change firms.

To understand the potential dilemma that a lawyer could face, there are a few basic insurance coverage principles to point out. The first is that professional liability insurance policies are almost always what are referred to as "claims-made" policies. That is, the policy covers *claims made and reported* to the insurance carrier *during the policy period*, as opposed to an occurrence policy, which covers claims that arose during the policy period regardless of when they are made or reported to the insurer. However, many professional liability policies will contain a "prior-acts" exclusion for lateral hire lawyers that excludes from coverage any claims that result from actions that occurred before the lawyer's hire date. In other words, the typical professional liability policy will cover you if a claim is made against you during the policy period, but only as long as the claim does *not* arise from actions that occurred *prior to* your joining the firm. Most policies contain some sort of retroactive date, which means that the insured is covered for claims that are based on acts or omissions that occurred on or after the retroactive date, but are asserted during the policy period. In these cases, the prior act exclusion, if applicable, would only exclude those claims that arose before the retroactive date (as opposed to the effective date). The retroactive date that can be obtained is reviewed on a case-by-case basis and is particular to each insurer.

A new attorney who maintains continuous insurance coverage with the same law firm will generally not have a gap in coverage. An issue arises, however, when a lawyer obtains new employment and is added to the new firm's "claims-made" policy. At that point, you should assess what would happen if a claim is made while you are employed with the new firm, but based on matters you handled at the old firm, particularly if the old firm is no longer in existence to defend against the matter. It used to be fairly common for the old firm's policy to pick up the defense of the departing lawyer if the firm and the departing lawyer are sued over matters the lawyer handled for the old firm. This was because the policy's definition of the "insured" included those lawyers who were employees at the time of the event that forms the subject of the claim.[2] Some policies now limit the definition of "insured" to those who are members or employees of the law firm at the time the claim is made and reported. Thus, the departing lawyer could face a gap in coverage. Consider the following example:

> Joe Lawyer has been a lawyer in Michigan for the past 20 years. During that time, he worked for The Old Reliable Law Firm. Old Reliable had a claims-made insurance policy. Old Reliable decides to dissolve for financial reasons, and Joe Lawyer must find a new employer. Joe Lawyer immediately goes to work for The New and Improved Law Firm, which has a claims-made policy that contains a prior-act exclusion. A year later, Joe Lawyer gets sued for malpractice based on a matter he handled while employed by Old Reliable. The claim is made after the policy period for Old Reliable ended and, therefore, is not covered by Old Reliable's policy. And while the claim is made during the policy period for New and Improved, it is based on prior acts and is, therefore, not covered by New and Improved's policy. The result: *Joe Lawyer faces the potential for personal liability* on the law suit despite the fact that *he was continuously insured* during his entire career.

The situation that Joe Lawyer finds himself in is one that is occurring more frequently as firms dissolve and lawyers become more mobile, and it is a result that can be disastrous to a lawyer who, after decades of continuous insurance coverage, suddenly faces potential personal liability and expensive legal fees.

So, what can a lawyer do to avoid Joe's scenario? Assuming that you have not yet left your current firm, your first area of inquiry is your current firm's insurance policy. Some insurers allow firms and lawyers to purchase what is referred to as a "tail" or an extended reporting period, which is an endorsement that extends the period of time during which a claim can be made and reported and still be covered by the policy even after the original policy period has ended. Note that coverage under a tail is typically limited to claims based on acts or omissions that occurred before the original policy period expired; i.e., the tail simply extends the time for *reporting* claims, not the time under which the claim can arise and still be covered under the policy.[3] A tail can be either unilateral or bilateral. A bilateral tail means that the tail can be obtained at the discretion of either the insurer or the insured. A unilateral tail can only be exercised at the discretion of the insurer. Tails typically come in one-year, three-year, five-year, seven-year, or unlimited time spans. It is important to remember that

regardless of the span of time chosen, the policy limit remains fixed and diminishes with each claim. In other words, an unlimited tail with a million-dollar policy would be extinguished completely if in the first year after the policy ended, a million-dollar claim is paid by the insurer. Thus, the lawyer should determine if his or her insurance policy has a bilateral tail option (if it is a unilateral option, it will be up to the insurer whether a tail will be offered) and, if it does, whether the firm is willing to purchase this tail for its departing lawyers. If a firm is dissolving for financial reasons, the likelihood of the firm's footing the bill for a tail for its departing lawyers becomes unlikely. While there is the option of purchasing a free-standing tail on your own, only a few insurers offer this option.

If a tail is not an option, then a lawyer needs to consider what coverage his or her new employer is willing to provide. Keep in mind that law firms typically have an interst in keeping the number of claims made under their policy low because more claims could potentially result in higher premiums. Thus, when the firm expands the coverage period for its lawyers to include acts that occurred prior to the lawyer's operating under the new firm's risk-avoidance policies and procedures, the firm could find itself open to more potential claims and, thus, potential higher premiums. Despite this fact, some firms are willing to offer their lateral hires a "full career coverage" endorsement as an added benefit of employment. Traditionally, only the larger, more established firms offered this benefit, but as more lawyers become more portable, and more small and mid-size firms dissolve, requests for this type of coverage are becoming more common. A full-career-coverage endorsement is negotiated on a per-lawyer basis and provides insurance coverage for everything that the lawyer has done since he or she passed the bar exam, regardless of whether the claim occurred while the lawyer was working for a prior firm, so long as the claim is made under the policy period of the new firm's policy. Note that a lawyer could also negotiate a retroactive date that extends back several firm or employer changes, but like the full-career coverage endorsement, this is negotiated on a per-lawyer basis, and the end result of either would be the same.

Thus, every attorney should be asking whether his current policy allows for the purchase of a tail, and, if the attorney plans to leave a firm, the attorney should be asking the potential new employer about the possibility of purchasing a full-career-coverage endorsement (or a specified retroactive date). It is also important to remember that most liability policies contain discovery clauses. This means that you must disclose to the insurer any potential claims that you are aware of at the time you apply for coverage or else face the possibility that the claim will not be covered due to the failure to disclose. Thus, a lawyer should keep track of potential claims and fully disclose any such claims on the application for insurance. While some lawyers might think that the likelihood of getting sued is slim or that they will be with their current firm forever, the reality is that even a baseless claim can cost thousands to defend and even the largest firms can dissolve (for any number of reasons).

As lawyers, we face personal liability even after our employer is long dissolved. Simply maintaining continuous insurance coverage is not enough. You do not want to be the lawyer who, after 20-plus years of practice, suddenly faces the potential for financial ruin as the result of one bad decision or even an alleged error. This can and does happen to good lawyers who thought they were protected because they always maintained insurance coverage. Ask questions, be informed, and protect yourself.

Many thanks to Theo Nittis at ProQuest Insurance in Birmingham, Michigan (877-540-3377) for providing invaluable input regarding professional liability insurance policies and the options that are available, which were discussed throughout this article.

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ENDNOTES

1 Nathan Koppel, *The Wall Street Journal* Online, "Recession Batters Law Firms, Triggering Layoffs, Closings," January 26, 2009, http://online.wsj.com/article/SB123929542327139 79.html?mod=rss_whats_news_us (accessed March 11, 2009).

2 Ronald Mallen and Jeffrey Smith, *Legal Malpractice* (Thomson Reuters/West, 2009), vol 5, § 36:17, n 2.

3 Ronald Mallen and Jeffrey Smith, *Legal Malpractice* (Thomson Reuters/West, 2009), vol 5, §36:17, p 115.

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INSURANCE COVERAGE ADVISOR

Finding Insurance Coverage for Fun and (Especially) Profit

By Hal O. Carroll
Vandeveer Garzia, PC

We insurance coverage lawyers don't get those great war stories that trial lawyers get. Trial lawyers can always swap wonderful tales of a wild day at trial or the strange thing that happened at a deposition. But let one of us coverage lawyers start talking about the wacky insurance policy clause he read last week, and somehow no one seems entertained.

But coverage issues play a part in litigation, and often an important part, because an uncollectible defendant is no fun for anyone.

So, in the hope of bridging the gap between the two species of lawyers, and perhaps initiating some inter-species dialogue, this will begin a series of short articles on insurance, and sometimes indemnity, law and how they relate to the tort lawyer.

To begin getting at "what every tort lawyer should know about finding coverage," let's start with five assumptions that can be hazardous to coverage.

1. Don't assume coverage is the defendant's problem. Certainly defense counsel has a great incentive to find coverage, but coverage is as important to the plaintiff as it is to the defendant. Also, coverage is found, or lost, in the land of contracts, not torts. Tort concepts and contract concepts are like apples and turnips—different principles, different concepts, different ways of looking at the world and the case, and different methods of reaching the goal.

2. Don't assume insurance policies are well written. Many are, but many are not. Those "wacky clauses" that make boring war stories really do exist, especially when the policy has "manuscript forms" (forms written by the insurer itself) or when the policy is assembled from multiple forms. For example, one claims-made policy actually said "The insured must report the claim in the year in which it is made," and seven pages later said "The claim will be deemed to be 'made' when the insured reports it." So when the insured, sued in 2003, reported the claim in 2006, the claim was "made" in 2006, and therefore was reported timely. Policies, especially manuscript forms or multiple-form policies, often contain valuable nuggets.

3. Don't assume that claim representatives understand the policy. Some understand the policy well, and all learn something about how it's written and how it works, but their knowledge is often anecdotal. In terms of serious analysis, they are not always heavy hitters.

4. Don't assume the reservation of rights letter or the declination letter is well written. This follows from the previous point. Most of these letters are written by claims people, not attorneys. Often they learn about writing reservation letters by looking at reservation letters written by other claim reps, who in turn looked at other letters. That is why so many letters form the same pattern, where they say "I now direct your attention to ...," and then proceed to quote huge hunks of policy language, followed by little actual analysis.

5. Don't assume the broker is the friend of the insured. Sure, the law says that an independent agent, which is what a broker is, is presumed to be the agent of the insured. "[T]he independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *West American Ins Co v. Meridian Mutual Ins Co,* 230 Mich App 305, 310; 583 NW2d 548 (1998). But some brokers have their own view. Some in fact do see themselves as advocates of the insured, but some do not, and pledge allegiance to the insurer. The insured, or the defense counsel or the plaintiff's counsel, who relies on the broker to help find coverage may be disappointed if the coat is turned.

Next time, we'll look at some practical steps to take.

Hal O. Carroll

Hal O. Carroll is a founder and the chairperson of the Insurance and Indemnity Law Section of the State Bar of Michigan. He is a chapter author of Michigan Insurance Law and Practice, *published by ICLE, and has lectured and written many articles in the areas of insurance coverage and indemnity. He can be reached at hcarroll@VGpcLAW.com or hcarroll@chartermi.net, or (248) 312-2909.*

LAW SCHOOL FORUM
FEBRUARY 26, 2009
MSU COLLEGE OF LAW

Jules Olsman, Hon. Jane Beckering, and José' Brown

Steve Galbraith and Jennifer Grieco

The Power of Web 2.0

By David S. Mittleman
Church Wyble PC

I am not suggesting to any of you that you toss your yellow-page advertising or pitch your TV commercials, particularly if they are working for you. But I am sure that my 20-year-old daughter, Hannah, and 16-year-old son, Max, have never used a telephone book, and never will. People are increasingly finding ways to avoid TV ads through devices like TiVo and watching television shows via the Internet. So how do you capture those missing eyeballs? Technology.

Recently I attended a lecture by Garrentt Graff. He was Howard Dean's first webmaster during his presidential bid and the first blogger to be admitted to cover a White House press briefing. He recently wrote a book, *The First Campaign*, in which he tells how the flattening of the world has transformed politics and set the stage for what happened in the 2008 elections. The power of social networking and Web 2.0 has not only changed the political landscape forever, but also the way we do business and the legal landscape. You see, there is a conversation going on out there and you have two choices: join the conversation or don't. Regardless of your personal choice, the conversation is going to continue with or without you.

Social media and social networking sites such as Facebook, Myspace, and Linkedin are not just for kids. A social network is a social structure on the Internet made up of people and organizations that are tied by one or more specific types of interdependency such as values, visions, ideas, financial exchange, and/or trade. Social media is the content created by people using accessible publishing technologies that is intended to facilitate communications with peers and with public audiences via the Internet. For example, a "web log," or blog for short, is a website that is updated with regular entries by an individual or group of people similar to a short op-ed piece, but it's published for the whole world to find.

Most of you by now (even those not in yellow pages or on TV) have a website. That is merely a start. Having a good optimized website is the foundation to being successful on the Internet, but that alone is not enough. Web 2.0 allows you to reach out to establish your online position by blogging. Writing a blog can help you share information, establish yourself as an expert, and interact with potential clients. Old-fashioned marketing in a new world.

"Change is the law of life. And those who look only to the past or present are certain to miss the future."

–John Fitzgerald Kennedy

By establishing your blog, you are joining the conversation. Now you have to extend your message from a marketing perspective. Merely creating good content doesn't mean you that people will find you. Just like with real estate, location is everything on the Internet. Search engines like Google rank web pages, including blog posts, on the basis of their relevance to a search query. What makes you relevant is much like the "special sauce." While subjective, we do know some important criteria such as freshness in content, density of the relevant subject matter, frequency of your blogging, your seniority, and the popularity of your site or blog as judged by others willing to link to you. This demonstrates to the search engines that your site or blog has value to others on the Internet, thereby increasing your importance in search results. The more people who link to you, the higher your site will rank when people search for terms through Google or other engines.

You can go it alone, as there are many do-it-yourself or low-cost programs like wordpress.com, blogger.com, and typepad.com. Once you find out how much you like blogging, you may want to work with a company that professionally markets law firms and lawyers and promotes their blogs. Be careful to find out and understand what you are getting for your money. The best method that I have found to maximize my exposure and create my location on the Internet at an affordable cost is by joining a blogging network. This allows a newcomer to join

Continued on next page

David S. Mittleman

David S. Mittleman is a trial lawyer with almost 25 years of experience, concentrating in auto, medical, dental, and pharmacy negligence cases. He graduated from Duquesne University School of Pharmacy in 1979 and Thomas M. Cooley Law School in 1985. He is a partner in the law firm of Church Wyble PC and was recently included in "The Best Lawyers in America 2009." Contact info: 2827 East Saginaw, Lansing MI 48912.

Power of Web 2.0
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an existing branded network that has an established presence on the Internet, like InjuryBoard.com

InjuryBoard.com is a national network of over 100 member firms and over 500 individual lawyers that cover an exclusive geographic region. They have been a leader in pioneering technology and leverage information to help attorneys connect with those in need. Their mission is to create technologies and opportunities that help people connect to make the world a safer and fairer place. They also stress the value of improving the often tarnished image of a trial attorney, helping us all appear less of the caricature of a trial lawyer and more like the champions of justice we all know ourselves to be. It gives trial lawyers the opportunity to speak out to a wider audience on issues like safety and rights that are being stripped away by tort deformers, a voice not typically heard by many people.

This social technology trend is causing a "groundswell," a world transformed by social technology. This ever-shifting and growing revolution includes blogs, wikis, podcasts, and YouTube. Consumers (clients) have the ability to have much more control over how they receive information. They are not getting it from places that feed things to them; rather, they are actively seeking out information through Google. More than that, they are participating in the conversation by posting their thoughts on blogs, comment sections in online newspaper articles, and otherwise engaging the general population. To reach people in the new technological age, you cannot be a bystander hoping people stop and ask you for help. You need to be a part of the conversation by actively participating in the social technology.

Honorable Doug Shapiro
Michigan Court of Appeals

By Andrew Muth
Andrew Muth, PC

Herb Shapiro was sworn in as a judge of the Supreme Court of Bronx County, New York in 1975 at age 54. He served with distinction there for 17 years until he retired in 1991.

His son, Doug Shapiro, was sworn in as the newest judge of the Michigan Court of Appeals on February 1, 2009, at age 54.

I had the personal and professional pleasure of practicing with Doug for 18 years. When we first met, Doug had recently finished a two-year clerkship for Justice Brickley of the Michigan Supreme Court, who was a moderate Republican before that description became an oxymoron. Doug's path to his selection as Justice Brickley's clerk was unique. Growing up in New York, he chose the University of Michigan over Yale because Yale did not admit any women undergraduate students. Whether that reflected his early commitment to social justice or was purely hormonal is subject to debate. Although always an exceptional student, Doug made today's undergraduates who talk of a five or six-year plan look speedy by comparison. He simply had too many eclectic intellectual pursuits to follow. After graduating cum laude from the undergraduate school, he was admitted to the University of Michigan Law School and graduated there, again cum laude.

When Doug started his civil trial practice in Ypsilanti, he had several challenges, the first of which was that he had never tried a case or done a deposition. He brought impressive strengths, however: an unerring ethical rudder, a capacity for incredibly hard work, and superior intellect. His path to trial success was like most of ours, bumpy to start. He lost his first three trials and despaired that he would ever win one. As the members of this section know, being a trial lawyer can be a humbling profession.

But learn he did; of his last 15 trials, he won plaintiff verdicts in 14. In most of the cases, there was no offer extended, and in most of the cases, he won verdicts far in excess of the case evaluations, and frequently in excess of $1 million. He tried automobile cases, premises cases, products cases, and medical malpractice cases. He generously donated his talents pro bono to local ballot initiatives and to nonprofit groups whose causes he supported. Doug was remarkably successful for clients who had obvious personal flaws or psychic bruises from difficult lives. Because he was compassionate and accepting of his clients, jurors were, too. I often joked with Doug that if his clients had a convoluted psychiatric history, uncertain employment, and disrupted family relationships, he had the defense right where he wanted them.

The characteristics that made Doug a great lawyer will serve him well as a judge in the Court of Appeals. Being ethical, hard-working, and smart is a winning combination, and he will be an outstanding appellate judge.

Unfortunately, when Doug was formally invested on March 27, 2009, his dad, Herb, was not be here to witness it, having passed away in 2007. But Herb saved his robes for Doug in the event that Doug became a judge. Consequently, at his investiture, Doug wore his dad's robes, a fitting symbol of tradition and renewal.

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Hon. Douglas Shipiro

Drug Immunity Back on the Hot Seat

By Todd Tennis
Captiol Services, Inc.

Legislative sessions last two years, and when they finish, all legislation that has not been signed into law by the governor dies. This, in fact, is the most statistically likely fate of any bill introduced in the Michigan House or Senate. However, while the bills may die, the issues live on, and most legislation rises like a phoenix from the ashes to be reborn with a new bill number (and often a new sponsor) in subsequent sessions. And so it is with several bills that are important to the Negligence Law Section that failed to make it through the process during the 2007-2008 session. In particular, legislation to repeal Michigan's pharmaceutical immunity law has been reincarnated into the 2009-2010 session.

House Bills 4316-18 seek to address the costly mistake that has been Michigan's drug immunity law. HB 4316, sponsored by Representative Lisa Brown (D-West Bloomfield), would repeal Michigan's statute barring claims against drug companies for products that have received FDA approval. HB 4317, sponsored by Representative Deb Kennedy (D-Brownstown), would make the repeal retroactive so that claims could be filed by victims of injuries attributable to FDA-approved drugs during the time the immunity was in place. HB 4318, sponsored by Representative Dian Slavens (D-Canton), would allow civil suits to be filed under the Consumer Protection Act if a business misrepresented the risks involved with a drug, herb, dietary, or botanical supplement.

The question is finally being asked: If drug companies aren't paying for the treatment of people injured by their products, who is?

These bills were reported out of the House Judiciary Committee on March 18. By the time this article goes to print, it is hoped that they will have passed the full House and moved over to the Senate. This would essentially mirror the actions taken by the last legislature, and it does not appear at this time that the Senate is any more likely to take the bills up than it was last year. The pharmaceutical industry and the Michigan Chamber of Commerce have made the preservation of immunity for drug companies a top priority. These groups carry a lot of weight with Senate Majority Leader Mike Bishop (R-Rochester), and it will take a great deal of grassroots support to force movement in the Senate.

On the other hand, there may be a new wrinkle in this issue that forces the Senate to take a closer look at the bills. Proponents of the bills have always focused on the injured victims and the injustice they face by being residents of the only state in the nation that prohibits them from seeking recovery for damages done by drug manufacturers. While simple fairness and justice are the most

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important reasons to strike down the law, recently, light is also being shed on the social costs of protecting drug companies from liability. The question is finally being asked: If drug companies aren't paying for the treatment of people injured by their products, who is?

The simple answer is: us. Scratch the surface, and the numbers are eye-popping. A recent review of the potential recovery from just one major drug case (in this instance, Vioxx) found that if Michigan victims had been able to participate in the settlement process for that case, they could have recovered over $80 million. In every other state in the nation, the bulk of that $80 million would have gone to repay Medicaid, Blue Cross, self-paid employer health insurance pools, hospitals, and health care providers for the costs of providing treatment to injured victims. Michigan's decision to shield drug companies from having to pay for their negligent actions is costing Michigan taxpayers, health insurers, and health care providers millions of dollars every year.

This point has not been lost on the Michigan Department of Community Health, which is interested in exploring subrogation of Medicaid expenses spent to treat victims of negligent pharmaceutical injuries. While the savings to the Medicaid system could be substantial, the private health insurance industry—especially Blue Cross/Blue Shield of Michigan—is currently leaving huge amounts of money on the table due to the legal immunity of drug companies. Their sister companies in every other state have been able to recover millions of dollars in treatment costs for victims of negligent drug manufacturers. With the Blues weathering a fiscal storm of their own, repeal of drug immunity could mean the difference in life or death for them in Michigan.

For too long, this argument in the eyes of many legislators has come down to "Business vs. Victims." Democratic lawmakers have been more likely to side with victims, and Republicans more likely to side with business. The key to moving ahead with these bills is to show that immunity for drug manufacturers is more than just a fairness issue; it is also an economic one.

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Medicare is watching YOU: New mandatory reporting requirements ensure that Medicare will no longer be ignored

By Donna M. MacKenzie
Olsman Mueller Wallace & MacKenzie


Donna M. MacKenzie

Donna M. MacKenzie devotes a majority of her practice to representing individuals injured as a result of nursing home neglect and malpractice. She also concentrates in the litigation of other personal-injury matters, including automobile accidents and senior investment fraud. Ms. MacKenzie has written numerous appellate briefs on behalf of injury victims in the United States Supreme Court, United States Court of Appeals for the Sixth Circuit, Michigan Supreme Court, and the Michigan Court of Appeals.

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As if taking a page straight out of George Orwell's novel, Medicare is implementing its own surveillance system later this year to ensure that its right to reimbursement is not ignored. This system will be policed by insurers, who will now have mandatory reporting requirements.

To guarantee that this system will work, Medicare is threatening insurers with a hefty fine of $1,000 for each day that Medicare is left in the dark.

Until the passage of Section 111 of MMSEA—the Medicare, Medicaid, and SCHIP Extension Act of 2007—Medicare did not have a reliable way of ensuring that it was notified of its right to reimbursement in liability, no-fault, and workers' compensation cases. However, with the passage of these mandatory reporting requirements, Medicare will now rely on insurers to make certain that it has notice of these types of claims.

Implementation of the mandatory reporting requirements begins with a testing period for all insurers in July. In October 2009, submissions will be required.

Once implemented, insurers will be required to first determine whether a claimant is entitled to Medicare benefits and if so, report the identity of such claimant to Medicare (along with "other information as the Secretary may require"). This notification must be accomplished "within a time specified by the Secretary after the claim is resolved through a settlement, judgment, award

or other payment." Submissions by insurers will be in electronic format.

The $1,000 penalty against insurers applies per day of non-compliance for each claimant.

So how does this new "surveillance" system further Medicare's reimbursement rights? If the Medicare lien is not satisfied as required, Medicare can recover from "any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan." 42 USC 1395y(b)(2)(B)(iii).

Translation: everyone is on the hook.

The above section of the Medicare Secondary Payer Statute was the subject of *United States of America v. Paul J. Harris,* United States District Court, Northern District of West Virginia, Civil Action No. 5:08CV102. In *Harris*, after receiving a final demand from Medicare for $10,253.59, the plaintiff's attorney distributed the settlement funds to his client without first satisfying the Medicare lien. The court allowed Medicare to recover the proceeds directly from the plaintiff's attorney.

Harris is significant for a number of reasons. First, *Harris* confirms the right of the government to recover from any entity that has received a primary payment, including an attorney. In addition, *Harris* proves that Medicare will pursue reimbursement of all settlements, no matter how small.

If personal liability and high penalties are not motivation enough, when Medicare initiates litigation to recoup its conditional payments, the United States may recover up to double the amount of the conditional payment.

You thought your nights were restless now... Medicare has transformed George Orwell's nightmare into reality.

For more information, visit http://www.cms.hhs.gov/mandatoryinsrep/

SBM
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Negligence Law Section
Tuesday, May 19, 2009
The Ultimate Medicare Liens Forum
for Plaintiff and Defense Counsel
6 p.m. - 9 p.m.
Michigan State University
Management Education Center
811 W. Square Lake Road
Troy, Michigan 48098

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Updated form 4/8/09

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Negligence Law Section
Northern Michigan Council Events

Barbeque – Sunday, July 19, 2009
Turtle Creek Casino & Hotel
7741 M-72 East
Williamsburg MI 49690
(231) 534-8880
6:00 p.m. – 7:30 p.m.

Golf *Arcadia Bluffs Golf Club – Monday, July 20, 2009
3224 Bischoff Road
Arcadia, MI 49613
(800) 494-8666
Tee times start at 9:00 a.m.
Golf is limited to 52 players

Date_____

First Name_____ Last Name_____

Guest_____

Firm_____

Address_____

Phone_____ Fax_____

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❑ **Please register me for the Barbeque on Sunday July 19, 2009 @ Turtle Creek Casino & Hotel. For room reservations call (231) 534-8880.**
❑ **Please register me to play golf on Monday July 20, 2009 @ Arcadia Bluffs**

*****All golfers must provide a valid credit card to use in the event of a late cancellation or no-show. All credit card numbers will be secured and only used if the golfer does not cancel before **July 7, 2009** or does not show up on **July 20, 2009**. Please sign and complete the following and return to Negligence Council office to confirm your registration. The Negligence Council is authorized to process my credit card if I do not cancel my golf by July 7, 2009 or do not appear on July 20, 2009.

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revised form 3/12/09

THE 2009 EARL J. CLINE MEMORIAL NEGLIGENCE AWARD WINNER— GEORGE GOOGASIAN

Photo: Michigan Lawyers Weekly

George Googasian

The Negligence Section is proud to award the 2009 Earl Cline Award to George A. Googasian. The award is given annually to a lawyer who has demonstrated leadership, advocacy, and civility in his practice. It is awarded to those people who have made a difference in our profession and who have helped improve the civil justice system.

Earl Cline was a highly respected lawyer in Flint. He was a mentor to many young lawyers. His colleague Timothy Knecht, a past chair of our section, said of him: "Earl garnered respect because he had respect."

George also has been a mentor to many in our profession. He grew up in Pontiac. He graduated from Northwestern in 1961. He began his career as an assistant U.S. attorney in Michigan. He practiced with the Beier Howlett firm for many years. He is currently the founder and president of the Googasian Firm in Bloomfield Hills.

He served with distinction as president of the State Bar of Michigan from 1992-1993, always advocating on behalf of the best interests of the public and our profession. He did likewise as president of the Oakland County Bar Association from 1985-1986.

George Googasian is a highly respected trial lawyer whose skills have resulted in many substantial verdicts in a variety of cases. He is a skilled writer and author. He is quick to share his experience and knowledge with anyone who seeks it.

George Googasian is truly a "lawyer's lawyer," who is respected by all who work with and against him in the court system.

We are proud to award this great honor to such a truly great lawyer, friend, and respected colleague.

Celebrating the 54th Year of the Negligence Council

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