

STATE BAR OF MICHIGAN

Negligence Law Section

Q U A R T E R L Y

THE OFFICIAL NEWSLETTER OF THE STATE BAR OF MICHIGAN NEGLIGENCE LAW SECTION

RECENT EVENTS

Summer Meeting, July 25, 2010
Turtle Creek Casino



Justice Cavanaugh and David Christensen



The Manions and Judge Maceroni



Jules Olsman, Judge Pat Donofrio, and José Brown

VIRTUES DON'T CHANGE; ONLY CIRCUMSTANCES DO OUR MICHIGAN CONSTITUTION IS OUR FOCUS

When I was a younger lawyer, the “v” stood for versus (plaintiff versus defendant). One party won; one party lost. As an elder seasoned, but still naïve, lawyer, the “v” stands for virtues. Virtues in a lawsuit determine the winner: honesty, wisdom, courage, perseverance, fairness, and justice. On September 17 we observed the 223rd anniversary of the Constitutional Convention. On this date in 1787, 55 delegates signed the Constitution. The anniversary of our Constitution passed without any pomp and circumstance, but it forced me to consider whether the framers discussed and argued virtues when drafting our country’s foundation. I believe the framers believed virtues don’t change but circumstances do. How does this mantra apply to our section?

There are innumerable changes in circumstances the framers could not envision over two centuries ago. For example:

- The Internet and its impact on free speech, libel, slander, and invasion of privacy
- Gay marriage; don’t-ask-don’t-tell military policies
- Illegal immigrants
- Gender equalit
- Abortion and right-to-die issues
- The constitutional right to national healthcare

There will be changes in circumstances, but how the Constitution

is interpreted to these issues is crucial! There is an ongoing debate in our U.S. Supreme Court between Justice Antonin Scalia as to whether the Constitution



José T. Brown

is a “dead document” and “look at the words or textualism” vs. Justice Stephen Breyer who argues that our Constitution evolves and must change and adapt with “active liberty.” Per Justice Breyer, the Constitution must evolve to consider both kinds of liberty, ancient and modern. Both justices make plausible rational arguments for their position without personal attacks. I happen to agree with both of them. To me it depends on the day of the week.

Why is this important to our section?

I observe the total ineptitude in Lansing. Our Michigan legislature for years has failed to do anything close to the right thing. Since the implementation of term limits, the sole motivation for many of the rookie legislators is to be reelected (how do we get from the House to the Senate?) The motivation is fueled by satisfying their constituents and their campaign donors. There is no give and take. There is total gridlock, and it will continue with term limits. I have always regretted voting for term limits.

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STATE BAR OF MICHIGAN

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Virtues Don't Change ...**Continued from page 1**

It's a mistake that needs to be changed. However, as long as Michigan has term limits, our judicial branch is the only constant. Our Constitution becomes our section's most important vehicle to raise appellate concerns.

Our judges at both the Court of Appeals and Michigan Supreme Court wield far more power than a gavel. We are entering an unprecedented era in Michigan government. Over 60 percent of the Michigan House and Senate will be *new* members in November 2010, along with a *new* secretary of state, a *new* attorney general, and a *new* governor. There will also be two justices elected to the Michigan Supreme Court. It is those two seats that will be paramount to our section. If past history determines future performance, more than 20 percent of the voters will simply vote for the "incumbent." It appears likely that our Supreme Court will maintain the present justices and allegiances.

There continues to be an ongoing debate as to how Michigan elects, but first appoints, judges in this state. The debate concerns taking the money and politics out of the election, deleting the incumbency designation, and campaigning on a truly non-partisan ballot. The debate swirls with solutions as to whether a blue ribbon panel should recommend appointments, whether the State Bar of Michigan should be involved in providing more than a simple ranking system to the incumbent governor, and limitations on campaign contributions for the non-partisan candidates nominated by political parties at their convention. The Michigan public doesn't understand the depth or meaning of the Scalia v Breyer debate of textualism v active liberty. The Michigan public doesn't presently understand the makeup and allegiances of our Michigan Supreme Court. Until term limits are reversed and the gridlock is stopped, the Michigan Court of Appeals and Supreme Court have become both branches of government. This is evidenced by the turn of events in the Michigan Supreme Court civil cases of *McCormick*, *Holman*, and *O'Neil*. Should the public be afforded

debates by campaigning Judges? Does this deserve public consideration?

One of our most significant rights (inalienable freedoms) as a U.S. citizen is the right to a trial by jury. The goal of the Negligence Section is to strive to protect the public's right to jury trial, to enhance the practice of negligence law among its members, and to conduct educational functions for its members and the public. The Negligence Section of the State Bar of Michigan is a practice section comprised of equal numbers of both plaintiff and defense attorneys who practice negligence law. Frequently, we are referred to as "trial attorneys." Many lawyers publicly declare our sole motivation is pursuit of large verdicts and billable hours. Whether referring to "trial attorneys" in the pejorative sense makes little difference, "trial attorneys" will always be criticized.

As trial attorneys working in the field of law, we are directly impacted by *McCormick*, *Holman*, and *O'Neil*. Our primary goal as a section is preservation of the right to a jury trial and other constitutional guarantees. It does not matter which side of the "v" we represent; trial attorneys are painted with the same brush. As a section we argued in support of the right to a jury trial without picking and choosing sides.¹ The rights provided by our U. S. and Michigan Constitution through our amicus brief in the *McCormick* case provided that the decision regarding injuries should be made by the fact finder, the jury.

It is important to note that none of the parties in the *McCormick* case raised the issue of the right to trial by jury under the Michigan Constitution. This was first raised in our negligence law amicus brief. The footnotes in the *McCormick* opinion recognize a constitutional conflict between the statute, MCLA 500.3135(2)(a), and MCR 2.116(C)(10). The Supreme Court also recognized, "Given the allocation of decision-making authority between a judge and a jury is 'a quintessentially procedural determination.'" The *McCormick* case recognized, through footnote 7, that the legislature cannot make law that conflicts with a constitutional guarantee².

A second negligence law amicus brief was submitted under *Colaiani* on September 17, 2010, and provides the statute of limitations should allow for a common law discovery rule based upon Michigan constitutional guarantees of due process. As a section, we were invited to brief the issue by the Michigan Supreme Court. Our section took advantage of this opportunity. Our brief has been submitted. Oral arguments on the *Colaiani* case are scheduled for October 7, 2010.

Our section must continue to argue the rights of Michigan citizens guaranteed under the Michigan Constitution.³ That was the basis of our argument under *Colaiani*: the right to due process and jury trial.

I believe the title of this article bears repeating: Virtues Don't Change; Only Circumstances Do. We must continue to understand "v" stands for "virtues," not "versus." It is my hope that our section will maintain its dedication throughout the coming years to continue representing both sides of the "v." We should focus on our Constitution as a vehicle for assistance. Our section has the unique opportunity to educate new legislatures, and assist the

appellate courts with our amicus briefs. The Past Presidents Society will aid in this ongoing marathon.⁴

I have been honored to serve as your chairperson for the past year. The Negligence Law Section Board of Directors, our Executive Director Madelyne Lawry, and Legislative Liaison Todd Tennis, have kept my focus on the "v." In some small way I'm beginning to understand the words of Abraham Lincoln: "The better part of one's life consists of his friendships."

Endnotes

- 1 McCormick amicus curiae brief submitted before Michigan Supreme Court on 12-29-09, page 1—Statement of Interest of Amicus Curiae.
- 2 *McCormick* Opinion page 11.
- 3 The Negligence Section presents this brief in accord with the court's invitation because one of its primary aims is the preservation of a right to jury trial. The Negligence Section is very directly concerned with the outcome of this case. The amicus believes that the court's decision in *Trentadue* which held actions can

accrue and be barred by a statute of limitations before an injured party could possibly have known of existence of a cause of action is illegally erroneous and equitable and an unconstitutional infringement on the public's right to jury trial and the U. S. Constitution.

- 4 The Past Presidents Society, more affectionately referred to by me as "dead presidents," consists of the following elder, well-seasoned, experienced litigators: Charles Barr, George Bedrosian, Mark Bello, Kathleen Bogas, William Booth, Victor Bowman, Janet Brandon, Lamont Buffington, Timothy Donovan, J. Michael Fordney, Linda Galbraith, Thomas Geil, David Getto, Barry Goodman, Arnold Gordon, Walter Griffin, Robert Hammond, Clifford Hart, Honorable Cornelia Kennedy, Timothy Knecht, John Kruse, Joseph Lujan, Richard McClear, Carol McNeilage, Cynthia Merry, Eugene Mossner, Jules Olsman, Thomas Peters, Paul Rosen, Sherwin Schreier, Robert Siemion, George Sinas, and Judy Susskind.

McCormick Update

By David E. Christensen
Gursten Koltonow Gursten Christensen & Raitt PC

The Supreme Court issued the most highly anticipated tort law decision of the past six years, *McCormick v Carrier*, ___ Mich ___ (Docket No. 136738, rel'd 7/31/10). In terms of the preservation of Michigan citizens' right to trial by jury, the opinion was a home run. The majority opinion by Justice Cavanagh completely reversed *Kreiner v Fischer*, 471 Mich 109 (2004), which had been the high court's last word on the no-fault serious impairment of body function threshold, and had taken away the right to jury trial for many Michigan automobile accident victims.

The No-Fault Act requires that a plaintiff have an injury that amounts to

a serious impairment of a body function in order to get his case to a jury. The threshold is defined by MCL 500.3135 as (1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life. The 2004 *Kreiner* decision, authored by former Chief Justice Taylor, made it far more difficult for people injured by negligent drivers to get their case before a jury.

Among the many new requirements established by *Kreiner*, the most significant was that "the effect of the impairment on the course of a plaintiff's *entire* normal life must be considered," and if "the *course or trajectory* of the plaintiff's normal life

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has not been affected, then the plaintiff's general ability to lead his normal life has not been affected...." 471 Mich at 131.

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McCormick Update

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This language led to a great many cases being dismissed by judges.

Kreiner also defined a non-exclusive list of factors for courts to consider when making the threshold determination, including the: (a) nature and extent of impairment, (b) type and length of treatment, (c) duration of the impairment, (d) extent of residual impairment, and (e) future prognosis. These factors have been translated into an overall “temporal consideration” which evolved to be one very important over-arching factor in these cases: the length of time the plaintiff was impaired.

The *Kreiner* case invited a huge increase in summary disposition motions, and a correlating increase in appeals. This resulted in the Court of Appeals becoming the ultimate fact finder with extremely inconsistent results. In the previous *DiFranco v Pickard*, 427 Mich 32 (1986), regime, there were only a handful of appeals of threshold motions. In over five years of *Kreiner*, there were over 250 appeals.

Now *McCormick* has reversed the *Kreiner* threshold definition, reinstated the plain language of the statute, and eliminated the list of factors as they “expressly or impliedly include a temporal component.” The case also has clarified the first two elements of “objective manifestation” and “important body function.”

While the statute requires an “objectively manifested impairment,” it has been commonplace for lawyers and courts to argue about whether an *injury* is manifested objectively, and not the *impairment* flowing from an injury, as the statute specifies. This will no longer be the case. The operative definition of this element is “an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function... [An impairment that is] observable or perceivable from actual symptoms or conditions.” Slip op at 15, 34. The opinion also left the door open to the

possibility of establishing an objectively manifested impairment without actual medical documentation. Slip op at 16.

The “important body function” element will now be decided on a case-by-case basis, as it is a subjective analysis. Important body function is now defined as “a body function of value, significance, or consequence to the injured person.” Slip op at 34.

Justice Cavanagh’s majority opinion states “...affect the person’s ability to lead his or her normal life’ is to have an influence on some of the person’s capacity to live in his or her normal manner of living.” Slip op at 20. The Court emphasized that the general ability to lead a normal life need only be “affected, not destroyed.” Slip op at 20.

A significant departure from the *Kreiner* analysis is found in the directive for courts to consider not only whether the impairment has caused a person to completely cease a pre-accident activity

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Pro Bono Month Calls Attention to Unmet Civil Legal Needs of the Poor

For the second year running, the State Bar of Michigan has designated October as Pro Bono Month, joining the American Bar Association and many other states to highlight the need for and importance of pro bono assistance.

Like lawyers all across the country, Michigan attorneys will be taking part in events to educate the public and the legal profession about pro bono work especially in the face of Michigan’s severe economic crisis, rise in foreclosures, and high unemployment and poverty rates. All these factors have contributed to greater demand for legal services. The State Bar’s theme for Pro Bono Month this year is “now more than ever—pro bono is more than just the right thing to do.”

State Bar President Charles Toy said lawyers have the unique ability to volunteer their legal expertise to those in need. “October provides us with an opportunity to highlight the unmet legal needs of the poor, and to recommit ourselves to the spirit of our Voluntary Pro Bono Standard—annually provide 30 hours of pro bono legal services, accept three pro bono cases, or contribute \$300 to legal aid programs.” Lawyers who cannot provide service can meet their obligation with a donation to the Access to Justice Fund; many lawyers do both.

Pro Bono Month is also an opportunity to honor those in the legal profession who provide volunteer legal help for the needy or donate to legal programs through the Access to Justice Fund. Law firms, bar associations, legal service providers, judicial associations, and others are encouraged to organize events in October to celebrate pro bono. Resources to assist in planning can be found at www.michbar.org/probono.cfm. For more information, please contact Candace Crowley at the State Bar, ccrowley@mail.michbar.org.

Holman v Rasak and Qualified Protective Orders: A “Win-Win” for Defendants

By R. Paul Vance
Cline Cline & Griffin, PC

The Michigan Supreme Court recently issued an opinion in *Holman v Rasak* that impacts both sides of the V during the discovery phase of personal injury litigation, particularly medical malpractice.¹

In a 5-2 decision, the Michigan Supreme Court held that ex parte interviews of a plaintiff's treating physician are permitted under Michigan law and consistent with the Health Insurance Portability and Accountability Act (“HIPAA”), provided that “reasonable efforts” have been made to secure a qualified protective order.²

Background

The plaintiff in *Holman* filed a wrongful death medical malpractice action alleging that the defendant physician failed to properly diagnose and/or treat the decedent, resulting in her death. During the discovery phase of the lawsuit, defense counsel sought to interview the decedent's treating physician; however, plaintiff refused to sign a HIPAA release allowing the disclosure of oral communication. As a result of plaintiff's unwillingness to sign the release, defendant moved for a qualified protective order to permit an ex parte interview with the decedent's treating physician. The trial court denied defendant's motion and held that HIPAA pertains only to documentary evidence and does not authorize ex parte oral interviews.

As a result of the trial court's decision, leave to appeal was sought and granted. In addressing whether HIPAA permits defense counsel to seek ex parte interviews with a plaintiff's treating physician, the Michigan Court of Appeals held that an ex parte interview with a treating physician is appropriate “if a qualified protective order, consistent with 45 CFR 164.512(e)(1), is *first* put in place.”³

Subsequently, the Supreme Court granted leave to address whether HIPAA permits defense counsel to conduct ex

parte interviews with a plaintiff's treating physician under a qualified protective order.

Analysis

The opinion of the majority begins by recognizing the precedent set by *Domako v Roe*⁴, which established that ex parte interviews with a plaintiff's treating physician were lawful and a normal part of the discovery process in Michigan. The Supreme Court in *Domako* specifically ruled that defense counsel in a medical malpractice action is permitted to seek an ex parte interview with a plaintiff's treating physician once the plaintiff has waived the physician-patient privilege with respect to that physician.⁵

After establishing that Michigan law allows defense counsel to conduct ex parte interviews with a plaintiff's treating physician, the majority's opinion then addressed whether HIPAA's privacy provisions conflict with Michigan law. Specifically, the Court explored the disclosure of protected health information without a written authorization from plaintiff.

Writing for the majority, Justice Corrigan cited 45 CFR 164.512(e), which allows a covered entity to use or disclose protected health information without written authorization in several situations.⁶ Relevant to ex parte interviews, 45 CFR 164.512(e) contains two instances which allow for dissemination of protected health information without signed authorizations. As the majority pointed out, a covered entity may disclose protected health information without a signed authorization, if:

1. The disclosure is in the context of judicial and administrative proceeding and in response to an order of a court or administrative tribunal; or
2. The disclosure is in the context of judicial and administrative proceeding and in response to a subpoena, discovery request, or other lawful process that is *not* accompanied by

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an order of a court or administrative tribunal.⁷

In reliance upon 45 CFR 164.512(e), the majority held that Michigan law is not “contrary” to HIPAA because it is possible for a covered entity to comply with both Michigan law and HIPAA.⁸ In determining that Michigan law was not “contrary” to HIPAA, the majority referred to a New York Court of Appeals case which concluded that HIPAA does not prevent ex parte interviews from taking place but “merely superimposes procedural prerequisites.”⁹ Thus, the majority in *Holman* concluded that because it is possible for defense counsel to insure that any disclosure of protected health information by the covered entity complies with 45 CFR 164.512(e) by making “reasonable efforts” to obtain a qualified protective order, HIPAA does not pre-empt Michigan law.¹⁰

It is important for practitioners to recognize that the majority's opinion has ruled that even when an order of a court is lacking, a covered entity may disclose protected health information as long as it receives “satisfactory assurance” that “reasonable efforts” have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e)(1)(v).¹¹

Practical Considerations

Although the *Holman* majority has determined that ex parte interviews

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Holman v Rasak . . .

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are permitted under Michigan law and consistent with HIPAA regulations, the majority's opinion also recognizes that HIPAA *does not* require a trial court to grant a defendant's motion for a qualified protective order allowing for defense counsel to conduct an ex parte interview of plaintiff's treating physicians.¹² In effect, the majority's decision in *Holman* does nothing to disturb the status quo as far as this state's circuit courts are concerned. As the majority notes, "a trial court retains its discretion under MCR 2.302(C) to issue protective orders and to impose conditions on ex parte interviews."¹³ Nonetheless, the majority's opinion clearly establishes that a qualified protective order *does not* need to be entered prior to an ex parte interview taking place.¹⁴

Pursuant to the decision in *Holman*, a defendant must merely move the trial court for entry of a qualified protective order in order to satisfy the requirements of 45 CFR 164.512(e)(1)(ii)(B) for the release of oral information. In a practical sense, even if a plaintiff successfully opposed entry of a HIPAA-compliant qualified protective order, it would not deprive defense counsel of the right to an ex parte interview with plaintiff's treating physicians. Therefore, defense counsel will be entitled to conduct an ex parte interview with plaintiff's treating physician even though a HIPAA-compliant qualified protective order was never entered. The same was recognized by the dissent when Justice Hathaway opined:

Under the majority's analysis, only a reasonable effort to secure [a qualified protective order] is required, which can only mean that the request could be incompletely made or denied altogether and an ex-parte interview could still take place.¹⁵

Motions for Qualified Protective Orders in Light of *Holman*

Although the court's decision explicitly states ex-parte interviews are allowable under both Michigan law

and HIPAA, the court does not provide guidance for how trial courts should address motions for entry of qualified protective orders and under what circumstances said motions should be granted or denied.

The *Holman* decision clearly has ruled that the denial of a defendant's motion for entry of a HIPAA-compliant qualified protective order is well within the trial court's discretion. The majority also points out that the trial court may impose its own conditions on ex-parte interviews when a motion for a qualified protective order is before the court.¹⁶ Recognition of the trial court's ability to impact the conditions of an ex parte interview will inevitably lead to continued battles over qualified protective orders.

In medical malpractice litigation, typically defense counsel will seek entry of a HIPAA-compliant qualified protective order in the early stages of the discovery process. More often than not, plaintiff will oppose the defendant's motion, and in lieu of an outright denial, plaintiff's counsel often asks the court to add certain requirements to the qualified protective. Additional conditions often sought by plaintiff's counsel include: (1) a requirement that defense counsel notify plaintiff's counsel prior to and/or after the ex parte interview; (2) to allow plaintiff's counsel to be present but not participate in the ex parte interview with plaintiff's treating physician¹⁷; or (3) provide plaintiff's counsel a summary of what was discussed with plaintiff's treating physician after the ex parte interview is conducted. In this writer's experience, trial courts throughout the state of Michigan have denied qualified protective orders or entered orders which contain these added requirements requested by plaintiff's counsel. However, just as many trial courts have granted qualified protective orders without hesitation and without the conditions noted above.

Thus, the battle wages on. Inevitably this will lead to some gamesmanship on behalf of the litigators. For example,

defense counsel could conceivably file a motion for qualified protective order but set the hearing date multiple weeks in the future. This tactic would seemingly satisfy the requirements set forth by the *Holman* majority and allow defense counsel to meet with plaintiff's treaters prior to the trial court actually making a ruling on the motion.¹⁸ On the other hand, it is possible that in the future plaintiff's counsel may pre-empt a defense motion for a qualified protective order and file his own motion for a protective order asking for additional requirements in the order should an ex parte interview by the defense take place.

Consequently, from a practitioner's point of view, the fight to conduct an ex parte interview of a plaintiff's treating physician should not be over.

Conclusion

What litigators can take from the *Holman* decision is that defense counsel must *at least* seek the entry of a HIPAA-compliant qualified protective order prior to conducting an ex parte interview with plaintiff's treating physician. Yet, this is essentially a "win-win" situation for defense because even when a request for a qualified protective order is denied by the trial court, defense counsel is still entitled to conduct an ex parte interview as long as he provides the covered entity with "satisfactory assurance" that "reasonable efforts" have been made to secure a qualified protective order.

While the Supreme Court has resolved the issue of whether HIPAA permits defense counsel to conduct ex parte interviews, it has not provided any practical guidance to the trial courts when addressing the entry of a motion for a HIPAA-compliant qualified protective order. Unfortunately, this leaves the door open for gamesmanship by the attorneys and does not change how discovery will be conducted in the future.

Endnotes

- 1 486 Mich 429, — N.W.2d —, 2010 WL 2756993 (July 13, 2010).

- 2 *Id.* at *1.
- 3 *Holman v Rasak*, 281 Mich App 507, 513, 761 NW 2d 391 (2008) (emphasis added).
- 4 438 Mich 347 (1991).
- 5 *Id.* at 361.
- 6 *Holman*, 438 Mich at *4.
- 7 *Holman, supra*; see also 45 CFR 164.512(e)(1)(ii)(A) and (B) (emphasis added).
- 8 *Id.* at *4-5.
- 9 *Id.* at *5; quoting, *Arons v Jutkowitz*, 9 NY 3d 393, 415 (2007).
- 10 *Id.* at *5 (“Ex parte interviews are permitted under Michigan law, and nothing in HIPAA specifically precludes them. Because it is possible for defense counsel to ensure that any disclosure of protected health information by the covered entity complies with 45 CFR 164.512(e) by making ‘reasonable efforts’ to obtain a qualified protective order, HIPAA does not preempt Michigan law concerning ex parte interviews.”)
- 11 *Id.* at *7.
- 12 *Id.* at *8.
- 13 *Id.*
- 14 “[A]s long as the covered entity receives satisfactory assurance that reasonable efforts have been made to secure a qualified protective order that meets the requirements of 45 CFR 164.512(e) (1)(v), disclosure of protected health information by a covered entity during an ex parte interview is consistent with both Michigan law and HIPAA.” *Id.* at *7 (internal citations omitted).
- 15 *Id.* at *9.
- 16 *Id.* at *8 (“...a trial court retains its discretion under MCR 2.302(C) to issue protective orders and to impose conditions on ex parte interviews.”)
- 17 However, if plaintiff’s counsel is present at the interview of a treater, by definition, it is no longer an ex parte meeting.
- 18 Such a tactic may usurp the trial court’s ability to enforce its own orders, a concern the dissent was readily cognizant of. See, at *9.




2010
STATE BAR OF MICHIGAN
ANNUAL MEETING &
SOLO AND SMALL FIRM INSTITUTE

Negligence Law Section Meeting


Friday October 1, 2010
 1 p.m. - 3 p.m.
 DeVos Place, Grand Rapids

**ATTORNEY AMY TRIPP:
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 WITHOUT HER**

- Setting up Special Needs Trusts
- Advising Counsel and Clients on Government Benefits
- Obtaining Probate Court Approval of Settlements and Trusts
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Amy Tripp
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Remarks of Justice Michael F. Cavanagh State Bar of Michigan Negligence Law Section • July 25, 2010

Editors' Note: The Negligence Law Section of the State Bar of Michigan proudly conferred its Outstanding Achievement Award upon Justice Michael F. Cavanagh for his long and distinguished service on the Michigan Supreme Court during our recent Annual Summer Meeting.

It is my pleasure to be here with you today. I appreciate your dedication to the fair, equitable, and speedy administration of negligence litigation in this state. It is because I appreciate these efforts that I am also honored to accept this award recognizing the critical role that juries play in our civil justice system.

As many of you know, I have been a judge for nearly 40 years, and I have had the pleasure of serving at every level of our court system. This extended judicial service comes with risks, however. Case after case, year after year, a judge is presented with troubling, and sometimes horrific fact patterns. And yet, over time, it is possible for a judge to begin to suffer compassion fatigue and become somewhat desensitized to the suffering caused by the tragic facts presented in a case. I think a good judge struggles daily to hopefully avoid the mechanical indifference referred to by British author G. K. Chesterton when he wrote:

The horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strangely, they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop.

Judges need to be reminded of the real-world implications of the cases that they consider each day.

I believe that this is where the jury steps in to play one of its most important roles. Juries serve to ground a judge in the real world and remind them of the real world impacts of each case by ensuring that common sense is a key component of every trial. Juries are comprised of members of the community, many of whom will never experience the court systems as anything but a juror. Litigation is not part of their everyday lives. Thus, juries bring a wealth of everyday experiences and common sense that may be otherwise lacking in the courtroom. And, by viewing the facts of a case from this perspective, juries are critical to reaching an equitable result.

I think that juries also serve to ground you, the litigators, in the real world. When a case is tried before a jury, the litigators are required to view the strengths and weaknesses of their case through the eyes of the jury. Thus, the jury trial ensures that common sense remains a critical element of every civil case for not only the judge, but also the attorneys. Because common sense often leads to the most just result, I can think of no better argument in favor of preserving jury trials in civil cases.

I showed up to work at the Supreme Court on the first day of January 1983. This year I started my 28th year on the Court. Overall, it's been the experience of a lifetime. My own role is to keep doing my part of the work of the Court and to try, where helpful, to assist in gaining consensus. This is not an easy time, but the answer is the same as in any period when an organization faces challenges. We need to stay focused on what is important. Get our work done. Treat each



Justice Michael F. Cavanagh

other with respect and courtesy. It sounds trite. But it is the only way.

The people of this great state have always supported our Michigan Supreme Court, and they have had much to be proud of, over the years. I hope the Court can continue to enjoy the respect of the people. More than 200 men and women have served on the Michigan Supreme Court. God willing, a far greater number will serve in the future. I received this Court in good shape from those who came before me, and I intend to do everything I can to make sure that whoever comes after us will receive a Court that is healthy in every way.

You in the Negligence Section have my deepest respect for aiding in the fair and just administration of the law by advocating in favor of preserving jury trials in civil cases. It is that zealous advocacy, from both sides of the negligence bar, that leads me to commend you all. And it is because I admire all your efforts that I am so honored to accept this award. Thank you.

INSURANCE COVERAGE ADVISOR: Occurrence and Claims-Made Policies

By Hal O. Carroll
Vandever Garzia, PC

Broadly speaking, there are two types of liability policies: occurrence and claims-made. Occurrence-based policies are the more common type of liability policies. Auto policies and homeowners policies are of this type, as are the ever-present "GL" (general liability) and CGL (commercial general liability) policies. Claims-made policies are mainly used to insure professional liability.

The distinction between the two is simple enough. For the types of claims covered by occurrence-based policies, the liability-causing event can easily be traced to a specific date because it is based on a specific event, usually an accident-causing injury. For professional liability, though, the professional service often stretches over a period of time, so it is difficult or impossible to identify the liability-causing event. But the date of the claim is easier to identify.

Apart from these practical reasons, the insurer has economic incentives as well. Since the insurer's exposure for occurrence-based claims can lie dormant until a statute of limitations expires, the insurer can't "close its books" at the end of a policy year. But if the insurer is only obligated for a claim when the claim itself is made in a policy year, its exposure is less.

Thus, the difference. "An 'occurrence' policy protects the policyholder from liability for any act done while the policy is in effect, whereas a 'claims made policy' protects the holder only against claims made during the life of the policy." *Stine v Continental Casualty Co*, 419 Mich 89, 98; 349 NW2d 127 (1984).

Claims-made policies "are of relatively recent origin and were developed primarily to deal with situations in which the error, omission or negligent act is difficult to pinpoint and may have occurred over an extended period of time." *Stine* at 98-99.

Because the two types of policies have these fundamental differences, the

attorney who is evaluating coverage needs to read the policies somewhat differently and look for different things.

Retroactive date. If the policy covers claims made only in the policy year, is there any limitation on how long before the policy period the underlying occurrence or liability-causing events took place? One of the attractions of claims-made coverage from the perspective of the insurer, after all, is limiting the extent of its exposure. This is what a "retroactive date" does. It will usually be stated in the declarations pages, and it specifies the date after which the underlying events must have occurred.

A variation on this theme is a policy that states that its retroactive date is the inception date of the policy, but that if the insured renews, then the retroactive date will be the first date on which the insurer provided coverage. So, if the insured bought a policy that took effect on January 1, 2001, the coverage on that first day would be minuscule, and would get increasingly larger during the year and in subsequent years as long as the insured renews.

Tail coverage. This raises a related question. Obviously an insured who is going to switch claims-made coverage from one insurer to another needs to pay close attention to the actual effective periods of coverage. With occurrence policies this is not a problem, but with claims-made policies it can be serious. That is why it is important also to look at "tail" coverage. This is a provision, often called "extended reporting period" or something similar, that will extend coverage after the end of the policy year. If the insured keeps renewing with the same insurer, tail coverage is not a problem. But if the insured does not renew coverage, having the option to buy tail coverage can be critical.

Reporting requirement. Another characteristic of claims-made policies is that in addition to requiring

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that the claim be made in the policy period it must also be reported in the policy period. This also is a reflection of the principle that the insured is receiving limited coverage in exchange for a reduced premium. Most policies allow a short grace period, so that if a claim comes in the last day of the policy year the insured will not be deprived of coverage by late reporting.

Late Notice and Prejudice. We discussed this in the summer 2009 issue, so it doesn't require a long discussion here. On the one hand, *Schubiner v New England Ins Co*, 207 Mich App 330; 523 NW2d 635 (1994) holds that "[w]e decline to apply the general insurance principle that the insured must show prejudice where it is claiming lack of notice." On the other hand, MCL 500.3008 makes no distinction at all between claims made and occurrence policies and provides that the failure to give timely notice "shall not invalidate any claim made by the insured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible."

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Making the Impossible Medicare Reimbursement Procedures Possible: Finality, Clarity and Security May be on the way for Medicare Beneficiaries, Insurers and the Trust Fund

By Donna M. MacKenzie
Olsman Mueller Wallace & MacKenzie PC

On March 9, 2010, Representative Patrick Murphy (DPA) introduced H.R. 4796, the Medicare Secondary Payer Enhancement Act (MSPEA) of 2010, into the U.S. House of Representatives.

The bi-partisan legislation proposes several changes to the Medicare Secondary Payer (MSP) Act. The bill has been referred to the Subcommittee on House Ways and Means and the Subcommittee on House Energy and Commerce.

The House has not yet voted on the proposed legislation and, as we all know, a majority of bills and resolutions never make it out of committee. So why should we be convinced that this bill is going to survive?

The MSPEA currently has 30 co-sponsors, 10 of whom are Republicans. In addition, the bill has broad support from virtually every sector of the MSP-regulated community, including attorneys, brokers, insureds, insurers, insurance and trade associations, self-insureds, and thirdparty administrators.

Recognizing that the roadblocks in the current legislation discourage settlement, slow down the return of trust fund dollars, and ultimately render many cases involving Medicare beneficiaries unseizable, the Medicare Advocacy Recovery Coalition (MARC) is also behind the MSPEA.

The proposed enhancements to the MSP are outlined below.

Final demand before settlement

One of the most significant changes in the MSPEA is the creation of two alternative options for resolving Medicare's claim for reimbursement, both of which allow a claimant to obtain a final demand before settlement.

The first alternative would allow a claimant to request a final demand at any time beginning 120 days prior to

the reasonably expected date of such settlement, judgment, award, or other payment. CMS would then have 60 days to provide a final demand amount. In the event that CMS fails to respond in that 60-day period, however, CMS would lose its claim for reimbursement. Moreover, where a claimant reimburses CMS within 60 days of the final demand, the reimbursement would be deemed to satisfy obligations of the claimant for conditional payments.

The second alternative would allow a claimant to calculate and pay the conditional payment amount voluntarily, prior to the issuance of a final demand. During the 90-day period preceding the reasonably expected date of such settlement, judgment, award, or other payment, a claimant would have the option of making a good faith effort to calculate the amount of the reimbursement based upon available billing data for the related items and services. Once the calculated amount is submitted to CMS, CMS would then have 75 days to contest the amount and to provide a final demand for the balance of the remaining amount owed. In the event that CMS contests the amount paid by the claimant, the claimant would have the ability to appeal the final demand.

Relaxation of the reporting requirements

The new enhancements would amend the penalty provisions to provide the government with discretion to impose monetary penalties rather than requiring the government to impose such penalties. Such determinations would be based upon the intentional nature of the violation. In addition, a three-year (rather than the current six-year) statute of limitations would be imposed on MSP recovery actions. Finally, CMS would have to develop safe

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harbors from sanctions for meeting the mandatory reporting requirements.

De minimus threshold

The act would set a minimum threshold of \$5,000 for MSP recovery actions. Payments under this threshold would be exempt from MSP.

Protection of Social Security and health identification claim numbers

Under the MSPEA, reporting entities would not be required to access or report Social Security Numbers or health identification claim numbers.

User fees

The act would impose a one-time \$30 user fee for each expedited voluntary payment and/or request for a final demand of conditional payment.

Regardless of Outcome, 2010 Election Will Bring Changes

By Todd Tennis
Capitol Services, Inc.

As summer comes to a close, the big news in Lansing has surrounded the race for governor and Supreme Court. The resignation and withdrawal of Justice Elizabeth Weaver sent shock waves through the Lansing political establishment, and the subsequent appointment of Justice Alton Davis to fill her seat creates some extra drama to an election that was already bound to be historic.

Similarly, the nominations of business executive Rick Snyder and Lansing Mayor Virg Bernero (and their subsequent choices of State Representative Brian Calley and Southfield Mayor Brenda Lawrence as running mates) have been drawing a huge amount of attention as each vies for the right to be the next hand on Michigan's tiller. What has received less attention is what is happening in the Michigan legislature, where the shake-up will be truly extraordinary.

Term limits for many Michigan elected officials have been the law of the land since 1992. They limit any individual from serving any more than three two-year terms in the House and two four-year terms in the Senate. They also limit the service as governor, lieutenant governor, secretary of state, or attorney general to two four-year terms. In the nearly 20 years they have been in effect, they have served to broom out a sizeable number of state representatives and state senators every few years. This year, however, will be record-setting.

Of 38 state senators, only 9 are eligible to run for re-election due to term limits. Similarly, of 110 state representatives—due to incumbents being term limited, running for higher office, or just leaving politics—at least 52 seats will be filled by freshmen next year. Even with many of the vacant Senate seats being filled by former state representatives, the “brain drain” in the Michigan legislature will be significant.

Moreover, there is a real battle for partisan control of each chamber. Currently the Republicans have a 22-

16 majority in the Senate, while the Democrats have a 65-42 edge in the House (with 3 vacancies). Democratic chances to recapture the Senate were reduced earlier this year when two of their most highly touted candidates (Representative Gary McDowell and Representative Marc Corriveau) decided against running for the State Senate. Mr. McDowell is now the Democratic candidate for the 1st Congressional District being vacated by Congressman Bart Stupak, and Mr. Corriveau withdrew from the Senate race just after the filing deadline. Republicans are confident they will maintain control of the Michigan Senate, and are looking to expand their margin.

In the Michigan House, the Republican caucus has a large hill to climb to take power. They need to flip 12 seats to reach an even 55-55 split, and 13 seats to take an outright majority. Despite the large number of seats the GOP needs to win, term limits and other circumstances have placed a huge number of House seats in the “toss-up” category. Therefore, a Republican majority in the 2011 Michigan House of Representatives is by no means out of the question. The momentum Democrats had in 2008 has largely switched to the other side, and they will undoubtedly lose seats in both the Michigan and U.S. House of Representatives. The only question now is whether it will be enough to lose their majorities.

Term limits will also ensure we will have a new governor, attorney general, and secretary of state. Businessman Rick Snyder and Mayor Virg Bernero won the Republican and Democratic nods, respectively, to vie to replace outgoing Governor Jennifer Granholm. Bernero faces a headwind that is a combination of the low approval rating of the outgoing governor and his opponent's ability to self-fund his campaign. Mr. Snyder spent over \$6 million of his own money to win the primary, and that kind of firepower will be vital in this year's election. Bernero

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Todd Tennis

Occurrence ...

Continued from page 9

Read the whole policy. In any event, it is always important to read the whole policy. Two examples will illustrate, both from real life.

(1) The policy says that the claim must be reported in the year when it is made, but later says a claim is “deemed to be made when reported.” This makes every claim timely. It would be hard to find a worse drafting error, but a large insurer made it.

(2) The policy is assembled from separate forms, and a form entitled “reporting of claims” says that the claim must be reported “as soon as practicable.” This is language that is normally used in an occurrence policy, and is always held to require that the insurer show prejudice from late notice. In a claims-made policy it provides the insured an argument that the prejudice requirement applies here as well.

The moral is always the same with any policy: never assume what it says. You have to read the whole thing.

Regardless of Outcome ...

Continued from page 5

is confident in his “Main Street vs. Wall Street” message, but he will have to make use of “free media” and the grassroots networks of his support groups to try and keep pace with his opponent.

The Democratic nominees for attorney general and secretary of state were decided earlier this year when the Democratic Party for the first time chose to endorse candidates for those offices at the spring convention. Genesee County Prosecutor David Leyton beat out attorney and Wayne State Governor Richard Bernstein in a tough convention floor fight to win the Democratic nomination for attorney general. Wayne State University Law Professor Jocelyn Benson won the

Democratic nomination for secretary of state.

The Republican nominees for those two seats were decided much more recently at the traditional August convention. Former congressman, state senator, and Court of Appeals Judge Bill Schuette won a hotly contested convention fight against Senate Majority Leader Mike Bishop to be the Republican nominee for attorney general. For secretary of state, Oakland County Clerk Ruth Johnson defeated four rivals—Senator Cameron Brown, Calhoun County Clerk Anne Norlander, Representative Paul Scott, and Senator Michelle McManus—to win the nomination.

Although term limits don’t affect Michigan’s judicial branch as they do the legislative and executive, the action of former Supreme Court Justice Elizabeth Weaver will ensure that there will be at least one new face on the court in 2011. Her resignation in late August, and the subsequent appointment of Justice Alton Davis, set off a firestorm on both sides of the aisle. By resigning, Justice Weaver handed Democrats the hugely important incumbent designation for their candidate, Alton Davis. Despite recent events, the incumbency designation on the ballot is a tremendous advantage for any judicial candidate.

Republicans were outraged at both Justice Weaver and Governor Granholm, accusing them of shady politics and backroom deals. Justice Robert Young, who himself is running for reelection this year, called Granholm “Governor Blagojevich,” while former Justice Clifford Taylor dubbed Justice Weaver “Weaver the Deceiver.” Democrats quickly nominated Alton Davis to run for “reelection” in November, along with Oakland County Circuit Court Judge Denise Langford-Morris. In addition to Justice Young, the Republicans nominated Wayne County Circuit Judge Mary Beth Kelly.

Before Justice Weaver’s resignation, it was likely that the Democrats would have only nominated one candidate for the Supreme Court, thereby tacitly endorsing what would have been an independent run by Weaver. However, her resignation turned the tables largely in the Democrats’ favor. The Republicans will have to win both seats now to reestablish a 4-3 majority on the high court, whereas the Democrats only need to win one of two.

There has yet to be an election where so many incumbents were barred from reelection solely due to Michigan’s constitutional term limits. When one factors in the rising tide of anti-incumbent sentiment among the electorate, it is likely that more than a few current office-holders will be ousted. No matter which party comes out ahead this November, there will be plenty of new faces in Lansing in 2011.

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TAON Update

New Michigan Rule of Professional Conduct 1.15A, also known as the Trust Account Overdraft Notice Rule (TAON) takes effect on September 15, 2010. Michigan lawyers need to know about the serious consequences of a trust account overdraft—financial institutions will be required to report overdrafts to the Attorney Grievance Commission. If you can help us inform members of the rule, we would appreciate it tremendously.

A brief summary of the requirements of the TAON Rule is provided below:

- Financial institutions doing business in Michigan must submit a signed agreement to the State Bar of Michigan to obtain approval to maintain lawyer trust accounts as defined by MRPC 1.15(a).
- Lawyers must confirm that their financial institutions are on the list of approved financial institutions posted on the State Bar's website at http://www.michbar.org/opinions/TAON_list.pdf.
- No further action is required by lawyers for their preexisting IOLTA accounts; these accounts have already been identified as lawyer trust accounts by financial institutions when opened by lawyers.
- Lawyers must contact their financial institutions to change the name on their non-IOLTA accounts to include the term "trust" or "escrow," if not already included in the account name.
- Lawyers may download a form from the State Bar's website at http://www.michbar.org/opinions/TA_notice_fillable.pdf and submit the completed form to their approved financial institutions for each non-IOLTA trust account and provide a copy to the State Bar.
- Lawyers must continue to safeguard client and third-party funds held in trust to avoid all overdrafts to their IOLTA and non-IOLTA accounts.
- Approved financial institutions maintaining lawyer trust accounts must submit overdraft reports within five banking days of any overdrafts to the grievance administrator of the Attorney Grievance Commission. Forms and additional information are available on the State Bar's website at <http://www.michbar.org/opinions/TAON.cfm>.

McCormick Update

Continued from page 4

or “lifestyle element,” as *Kreiner* required, but also whether a person who continues to be able to lead his/her pre-accident normal life has had his/her *general ability* to do so nonetheless affected. There is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected. Similarly, there is no mandated minimum amount of time an impairment must last in order to satisfy the threshold. Slip op at 20.

The Court reiterated the *Kreiner* mandate that each case should be decided upon its own facts and circumstances. It noted that a brief impairment may be devastating to one person, whereas a near permanent impairment may have little effect on another person.

The shape of the application of the principles of McCormick remains to be seen. There are eight cases being held in abeyance awaiting the issuance of this opinion. The facts, injuries, and impairments in those cases vary significantly, so there will be much more news in the near future as they are decided under *McCormick*.

The Negligence Section filed an amicus brief in this matter. The *McCormick* opinion acknowledged the Negligence Section’s argument in this matter, which primarily challenged the constitutionality

of the threshold statute, MCL 500.3135(2) (a), that asks the judge to make important dispositive factual determinations instead of the jury. The argument focused on the potential deprivation of the right to trial by jury. That section requires a judge to resolve material disputed facts such as (1) the extent to which an injury impairs a body function or the extent a person relied upon that function as part of pre-accident life, or (2) whether the threshold is met even though reasonable people could differ. Footnote 7 to *McCormick* made clear that there is a possibility that this statutory provision conflicts with MCR 2.116(C)(10), which, if true, would render the statute unenforceable. It did not rule on this issue in *McCormick* because there was no material factual dispute, but explicitly left the door wide open for future challenges. This argument is consistent with the furtherance of the Negligence Section’s mission of preserving the right to jury trials.

McCormick inarguably lowers the bar from the *Kreiner* standard. There is great debate about how *McCormick* will impact the automobile liability scene. Will it lead to a huge influx of new filings? Perhaps at first, but this may subside in time. Over the past five years, the industry has largely refused to settle auto negligence

claims before suit was started, and frequently held out until a *Kreiner* motion was filed and, perhaps, an appeal was completed. With summary disposition on threshold becoming less likely under the new standard, perhaps more cases will be settled early on, or even before suit is filed. The industry, and, interestingly, the *McCormick* dissenters, heralded a certain “increase in insurance premiums” to flow from the *McCormick* case. While it is above my pay grade to predict when the auto insurance industry will raise its premiums, it is noteworthy that there was certainly no general reduction in premiums following the *Kreiner* decision. Coupling this evidence with the fact that the liability portion of drivers’ insurance premiums is typically a very small fraction (usually between 5 percent and 20 percent) of our total insurance premium, it should not logically lead to a meaningful change in premiums.

This new era leaves promises that much new law will be developed in the coming months. Of course, with the entire State House, nearly the entire State Senate, and the governor’s office up for election this November, a new legislature and governor could reverse the relief *McCormick* promises to provide in one fell swoop. Stay tuned.

Town Hall Meeting to Focus on Addiction

Brighton Hospital, WLNS TV-6, and WHTV My 18 will co-sponsor a town hall meeting about addiction in the legal community from 8-9 p.m. on Thursday, Sept. 30, 2010 at Atrium Event Center, located at 2685 Jolly Road in Okemos.

J. Theodore Everingham, an attorney who owns Everingham & Associates in Grosse Pointe Farms and serves on the Brighton Hospital Board of Trustees, will host the meeting. State Bar of Michigan Lawyers and Judges Assistance Program Administrator Martha Burkett and Brighton Hospital Vice President of Medical Affairs, Dr. Tony Dekker, will present educational materials. There will be a question and answer period at the end of the meeting.

Members of the legal community, law students, medical service providers, and members of the general public are encouraged to attend this free event. Food and beverages will be available. For more information, call (810) 225-2531.



Photos from the Summer Meeting July 25, 2010



The Cohrans and
Judge Michael Kelly



Jody Aaron, José
Brown, and Jordan
Holmes



Jules Olsman, Tom
Waun, Judge Pat
Donofrio, and
William Yahne

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