

Medicine and Law

Effie V. Bean Cozart

The law and legal issues related to medicine and health care financing are ever changing. In this issue of *TortSource*, the TIPS Medicine and Law Committee provides feature articles on three timely topics. Edward Beitz addresses the significance of punitive damages when only a small percentage of juries award punitive damages in medical negligence cases. Kevin Cottone explains what lawyers and insurers who are “responsible reporting entities” under recent federal legislation must do to determine whether a claimant is a Medicare beneficiary and the new obligations required of them as of January 2010. Louise Derevlany examines assisted outpatient treatment and its legal requirements and discusses how assisted outpatient treatment investigations will not be impeded by HIPAA.

This issue also includes a Trial Tip by Greg Cesarano about how a lawyer’s courtroom behavior can affect the outcome of a trial, and an informative Legislative Update by Robert Ferm on the ongoing health care reform debate in Congress. Janine Smith tells us about the TIPS Law in Public Service Committee’s gardening project at Josue Homes in San Diego; Marlene Heyser recaps the TIPS events at the Del from our fall meeting in Coronado, California; and Tony Cabassa provides a preview of San Juan, Puerto Rico, the venue for the Section’s spring meeting. ❖

Effie V. Bean Cozart is an attorney with Butler, Snow, O’Mara, Stevens and Cannada, PLLC, in Memphis, Tennessee, and is a member of the TortSource editorial board. She can be reached at effie.cozart@butlersnow.com.

Punitive Damages in Medical Negligence Cases The Bark versus the Bite

Edward F. Beitz

For attorneys who do not spend their billable day filing or responding to complaints for professional malpractice, the terms “punitive damages” and “health care” probably sound foreign to one another, and perhaps a little contradictory. After all, punitive damages are intended to punish and deter, to reform the defendant and dissuade the kind of behavior or actions that brought about the lawsuit. Typically, a claim for punitive damages is only presented to a jury when there is evidence of reckless and egregious behavior or intentional and wanton conduct: the kind of behavior that deserves harsher measures than the award of ordinary compensatory damages. Think of a chemical manufacturer that poisons a local river by illegal dumping or a pharmaceutical company that buries test results that may negatively impact the bottom line. The practice of medicine, on the other hand, is generally understood to be the science of healing and preventing disease. Doctors and nurses are looked to for help and assistance. For most people, doc-

continued on page 4



Illustration by Andrew O. Alcalá

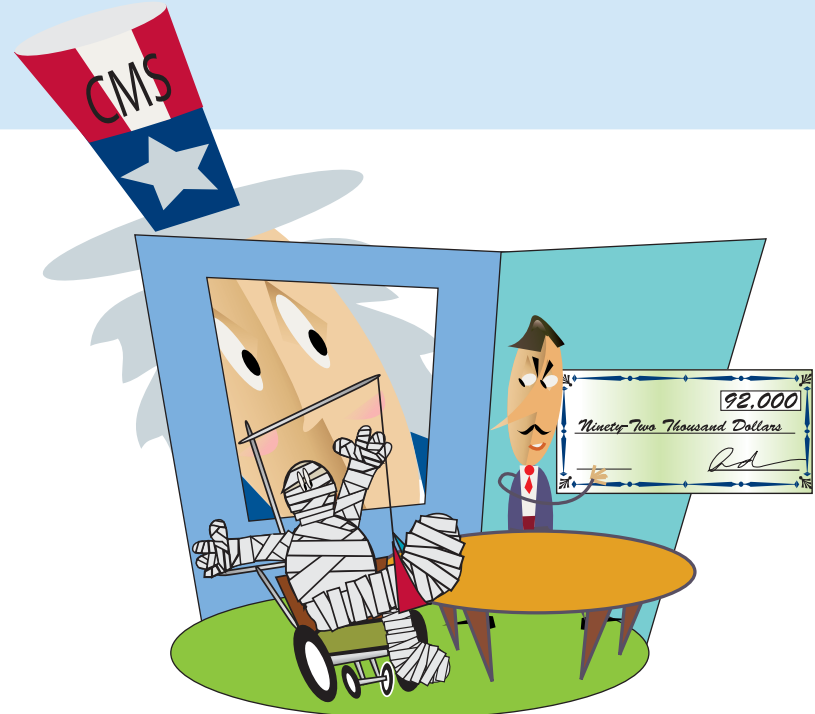


Illustration by Andrew O. Alcalá

The New Medicare Act Handling Medicare Claimants in the Future

Kevin C. Cottone

The Medicare, Medicaid and SCHIP Extension Act of 2007 represents a major effort by the U.S. Congress to protect the government’s interest in personal injury claims involving Medicare beneficiaries. Simply stated, the purpose of the Act is to ensure that the federal government is repaid for the Medicare benefits paid on behalf of a beneficiary relating to a personal injury claim. Its impact is widespread, as the Act applies to insurers and self-insurers involved in any liability, no-fault, or workers’ compensation claim. These insurers and self-insurers, referred to as responsible reporting entities (RREs) in the Act, must now determine whether a claimant is a Medicare beneficiary. If so, they must notify Medicare of the claim and, along with the claimant or plaintiff and his or her attorney, the RRE must ensure that Medicare’s interest is protected at the time of judgment or settlement. The penalties under the Act for noncompliance are significant; they can include double

continued on page 6

Meeting Round-Up

Fall Meeting in San Diego

Marlene Heyser

The fabulous Hotel del Coronado—the “Del”—on beautiful Coronado Island in San Diego provided the spectacular oceanside setting for the TIPS Fall Leadership Meeting, October 8–11, 2009. The meeting opened with the premier of a video produced by the Section’s Committee on Diversity in the Profession titled “The Diversity Factor: Capturing the Competitive Advantage.” Presentation of the video, which emphasizes how to create a competent diverse legal team, was followed by a panel discussion with attorneys who have developed successful diverse legal teams in their firms and companies. Moderated by the committee’s John Stephens, the video is available for purchase (visit www.abanet.org/tips) and is eligible for CLE self-study credit.

The highly regarded Pursuit of Justice Award was presented to David S. Casey Jr. at the joint Welcome, Diversity in the Profession, and Pursuit of Justice Awards Reception on Thursday evening. Casey, a senior partner with Casey Gerry Schenk Francavilla Blatt & Penfield in San Diego, has represented plaintiffs in personal injury law for over 30 years and is the son of David S. Casey Sr., recipient of the first TIPS Pursuit of Justice Award. TIPS Chair John Tarpley described David Casey Jr. as a “lawyer with unsurpassed credentials and



TIPS Law in Public Service Committee members (with Section historian John Pavlou, in foreground) contributed to a gardening project for the National AIDS Foundation/Josue Homes in San Diego. Photo by John Pavlou.

the epitome of what this award represents.”

The beach at the Del provided a stunning backdrop for the Welcome Reception and Saturday evening’s Leadership Dinner, both of which were held on the hotel’s terraces overlooking the Pacific Ocean.

The traditional TIPS golf outing was held at the Carmel Mountain Ranch Golf Club on Friday afternoon. While many TIPS members played golf, other members and guests took advantage of the beautiful weather to enjoy the beach, San Diego’s many attractions, and—of course—the many fabulous shops in and near the Del.

In between the many leisure activities, general committee chairs and chairs-elect participated in orientation and an informative committee fair, and all attendees made the rounds to a variety of task force and committee business meetings. The 2010 class for the TIPS Leaderships Academy also commenced their year with a full three-day schedule of meetings and speakers.

We extend a special thanks to Section Chair John Tarpley, Fall Arrangements Chair Dick Semerdjian, the wonderful TIPS staff, and all involved for once again producing another great meeting. If you haven’t done so already, finalize your plans now to attend the ABA Midyear Meeting in February, when TIPS will host a

fantastic gathering at the Walt Disney World Swan Hotel in Orlando, Florida. ❖

Marlene Heyser is the founder and president of Workplace Law Strategies in Newport Beach, California, and is a member of the TortSource editorial board. She can be reached at mheyser@gmail.com.



Pro Bono

Janine L. Smith

Oh, How Does Your Pretty Garden Grow?

Continuing its tradition of pro bono and community service, the TIPS Law in Public Service Committee (LIPS) participated in a garden reconstruction/planting project appropriately titled “Let Them Eat Veggies” in San Diego on October 9, 2009. Conducted during the TIPS Fall Meeting held at the historic Hotel del Coronado on Coronado Island, the project drew energetic members out on a sunny Friday to build and establish an organic garden for the residents of one of the National AIDS Foundation/Josue Homes of San Diego. The project was a joint endeavor with the San Diego County Bar Association.

Upon our arrival, the welcoming staff of the Josue Homes gave us an overview of the history and purpose of the Foundation. In 1988, Father Joe Carroll and St. Vincent De Paul Village formed the National AIDS Foundation/Josue Homes, thereby establishing the first San Diego residence for homeless people living with HIV and AIDS. The mission of the Josue Homes is to empower its residents to be self-sufficient by offering a supportive living environment, nutritious meals, and appropriate social services.

After learning about the positive impact of the Josue Homes, TIPS members were greeted by Richard Wright, owner of a San Diego landscaping company called Edible Eden, who contributed his time, talent, and materials to the project. As

Richard described to us the manner in which we would reconstruct the garden, he provided us with gloves, rakes, shovels, hoes, and even wheelbarrows. Right away, we knew our task would be labor intensive!

First, we cleared the existing garden area of overgrown weeds, rocks, and debris, which were transported by wheelbarrows and discarded. Next, the volunteers dismantled the garden’s cross-tie border and tilled the hard ground in preparation for planting new vegetation. After clearing the ground area, we transported brick pavers by wheelbarrow and constructed a beautiful new border for the garden, reminiscent of the adobe-styled roofs on the surrounding architecture.

The most daring part of the project involved TIPsters’ use of machetes to cut down the kudzu and vines entangled in the chain link fence surrounding the Josue Home’s backyard. Other volunteers favored the use of a hacksaw to scale back the leaves of an over-grown palm tree. Happily, our efforts opened the way for increased sunlight to beam into the backyard, a result that both residents and volunteers were excited to experience.

Our final task involved the assembly and installation of a specially designed underground watering system that will be used by the residents to ensure that planted flowers and vegetation receive adequate hydration and saturation. As we departed the Josue Homes, each of us reflected cheerfully about the manner in which our small efforts would ultimately benefit those homeless citizens of San Diego living with HIV and AIDS who are able to find comfort and solace at one of the Josue Homes.

Our thanks go to the members of the TIPS LIPS Committee and the San Diego County Bar Association, especially those law student volunteers who attend California Western School of Law and the University of San Diego School of Law. An extra-special thank you to TIPS’s unofficial historian John Pavlou, who generously captured every moment of this project in pictures. ❖

Janine L. Smith is a partner with Burr & Forman, LLP in Birmingham, Alabama, where she specializes in creditors rights and bankruptcy issues. She is a member of the TIPS Law in Public Service Committee and can be reached at jsmith@burr.com.

Assisted Outpatient Treatment Is It at Odds with HIPAA?

Louise A. Derevlany

For the mentally ill patient who remains resistant to treatment after discharge from a psychiatric hospital, there is an alternative to involuntary readmission. In many jurisdictions, a legal mechanism known as assisted outpatient treatment (AOT) can be used to keep these patients engaged in treatment within the community. However, to obtain such treatment, one must usually access the patient's records without his or her consent.

AOT, also known as involuntary outpatient commitment, court-ordered outpatient treatment, or mandated outpatient treatment, will allow psychiatric patients to remain in the community yet be required by court order to receive all the necessary interventions to address their mental illnesses. The key goal is to motivate the psychiatric patient to engage in treatment regularly, in the least restrictive environment, and thus avoid repeated inpatient hospitalizations.

The Legal Requirements for AOT

In jurisdictions with statutes providing for AOT, the AOT order is usually obtained by petition to the local court, with supporting affidavits, on notice to the patient. During a hearing on the petition, the court receives testimony from a health care provider supporting the petition and permits the patient to oppose or otherwise respond to the petition. As of July 2009, 43 states had mechanisms in place to obtain AOT. AOT laws have been enacted or are under consideration in Canada, Australia, Israel, the United Kingdom, and New Zealand.

Because AOT is not voluntary, patients for whom it is sought may not be aware their medical records are being disclosed. If they are aware, they may be unwilling to consent to the records disclosure needed to support the petition. Absent disclosure, the court will not be fully apprised of the psychiatric history that led to the AOT petition. Therefore, state AOT statutes must include a provision for disclosure of medical records without patient consent.

In New York State, Mental Hygiene Law (MHL) § 3313(c)(12) provides for such disclosure when an AOT order is sought. MHL § 9.60 creates the mechanism by which New York courts can order mandatory outpatient treatment for psychiatric patients. Commonly referred to as Kendra's Law, this statute was enacted following the death of New Yorker Kendra Webdale, who was pushed onto subway tracks by an untreated mentally ill person. See *Webdale v. North General Hospital*, 796 N.Y.S.2d 861 (N.Y. Sup. Ct., N.Y. County 2005).

Under Kendra's Law, the court can order a nonhospitalized psychiatric patient to take specific medications, undergo routine urine and blood testing, remain in specific residential living arrangements, and attend weekly counseling. A patient who fails to comply with the court-ordered treatment may be hospitalized involuntarily, without the need for further court intervention. Patients typically are referred to the program following two or more psychiatric inpatient admissions within a three-year period. For patients who meet the program criteria in MHL § 9.60(c), a petition for AOT is prepared and submitted to the state supreme court in the county where the patient resides. If the court, after a hearing on the petition, finds the patient needs AOT, it issues one immediately. The initial AOT period is six months and renewals can be sought for additional periods of up to one year each.

Courts Uphold AOT over HIPAA Patient Privacy Rights

In a recent New York case, a patient tried to thwart an AOT petition by asserting that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) preempted use of medical records obtained without the patient's consent at the AOT hearing. During that

hearing under Kendra's Law for Patient M.M., Mental Hygiene Legal Services (MHLS), representing the patient, moved to preclude petitioner Dr. Charles Barron, director of the psychiatry department at Elmhurst Hospital Center, from introducing into evidence testimony by the examining psychiatrist based on the patient's hospital records, which were obtained without the patient's consent. MHLS also sought to prevent the introduction of the records into evidence. *In re Barron v. M.M.*, 852 N.Y.S.2d 696 (N.Y. Sup. Ct., Queens County 2007). (Because all proceedings under Kendra's Law are confidential, the patient's name cannot be used in this article.)

New York State law expressly authorizes hospitals and health care facilities to disclose patient records, without the patient's express consent, to a director of community services or his or her designee for a Kendra's Law investigation. MHL § 13.31(c)(12). Indeed, an involuntary outpatient treatment program could not survive if patient consent for records was required. The lower court, at the hearing on the petition, agreed that several regulatory exceptions to HIPAA's patient consent requirements, including 45 C.F.R.

§§ 164.512(b)(1)(i) and 164.501, permit disclosure of confidential hospital records in this situation.

The lower court, after oral argument on the issue and submission of trial memoranda, held that the hospital record disclosures at issue under MHL § 9.60 are allowed under HIPAA without patient consent. 852 N.Y.S.2d at 701. The court found that the director of community services, as a public health authority, is attending to public health investigations and public health interventions in seeking AOT. Therefore, under the MHL, in conjunction with several exceptions to HIPAA, the disclosure of the patient's records was appropriate. The records were properly obtained by Barron and could be admitted into evidence and referred to in the examining psychiatrist's testimony.

On appeal by MHLS, New York's Appellate Division, Second Department, also was asked to determine whether, in a proceeding pursuant to Kendra's Law for an order authorizing AOT, a physician could obtain the patient's prior medical records without the patient's knowledge or consent without violating HIPAA. MHLS argued that HIPAA required the petitioner either to get a court order for the records to be released or to obtain a HIPAA compliant authorization from the patient. Although state law permits the petitioner to obtain these records without a signed consent or court order to pursue an application for AOT, MHLS argued that the state law was preempted by HIPAA.

The Appellate Division, confirming the lower court's decision, determined that an AOT investigation qualifies as a public health investigation or as a public health intervention under 45 C.F.R. § 164.512(b)(1)(i). *In re Miguel M. v. Charles Barron*, 882 N.Y.S.2d 698 (N.Y. App. Div., 2d Dept. 2009). Thus, under this exception to HIPAA, disclosure of the patient's medical records was appropriate, without either a court order or the patient's signed consent. The appellate court determined that HIPAA did not preempt the state's MHL, under which AOT investigations are performed. The court held that 45 C.F.R. § 160.203 exempts this provision of state law from preemption because it is for "public health surveillance, investigation, or intervention."

Conclusion

The public health investigation required to pursue AOT should be able to proceed unhampered by HIPAA requirements based on the exceptions to HIPAA in 45 C.F.R. §§ 164.512 and 160.203. Under these regulations, HIPAA will not be a barrier to public health investigations, such as one undertaken to prepare an AOT application, that require review of confidential patient medical records without patient consent. While HIPAA is a shield for unauthorized disclosure of a patient's medical records, it is clear from these recent proceedings in New York that it cannot be used as a sword by a psychiatric patient to exclude testimony and evidence in an AOT proceeding. ♦

Louise A. Derevlany is a partner at Heidell, Pittoni, Murphy & Bach, LLP, in Garden City, New York, specializing in medical liability and risk management. She can be reached at lderevlany@hpmb.com.

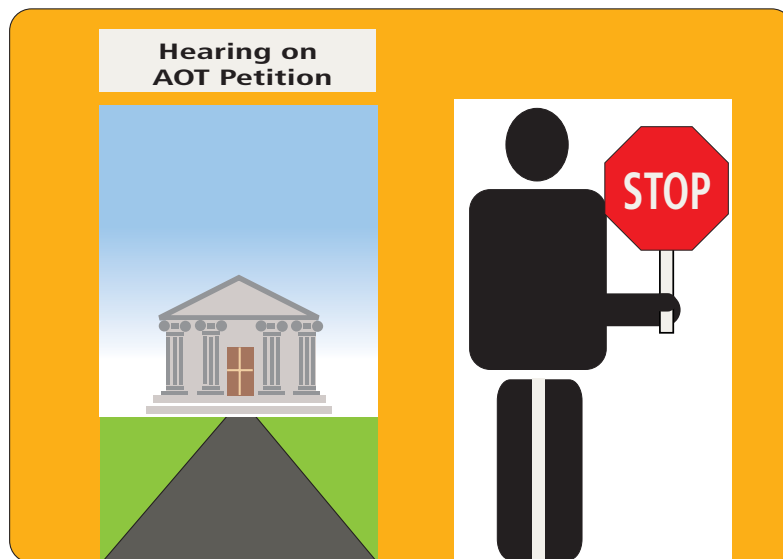


Illustration by Andrew O. Alcalá

Punitive Damages in Medical Negligence Cases: The Bark versus the Bite

continued from page 1

tors and nurses do not top of the list of people they want to see punished.

Certainly, suing your doctor is not a foreign concept in the United States. And yes, stories of physician or hospital error can frighten patients and lead to mistrust of the medical profession. But a negligence suit against a medical professional is initiated for the purpose of compensation and with the goal of making the injured party whole through money damages. It is generally understood that the health care provider was trying help the patient, even if that provider ultimately failed to conform to the standard of care. Accordingly, punitive damages are rarely awarded in a medical negligence trial.

Punitive Claims Still Have Significant Impact

Despite the fact that they are rarely awarded, punitive damages are frequently pursued in medical malpractice cases at the pleading stage. Regardless of the statistical reality for punitive awards against medical providers, plaintiffs attorneys understand the psychological threat and bargaining power these claims create. Defense counsel should be aware of the impact a punitive threat may have on their client's resolve and the importance of addressing these claims at the outset of a case.

This discussion will be aided with some statistical input from the Department of Justice, as it will put the fear and anxiety surrounding punitive damages within the appropriate "myth versus reality" spectrum. The most recent special report from the Bureau of Justice Statistics concerning civil bench and jury trials in state courts analyzed data from the nation's 75 most populous counties. According to that report, punitive damages were awarded to only 5 percent of all plaintiff winners in general civil trials in 2005. Taking into account the added fact that plaintiffs only prevailed in approximately 23 percent of all medical malpractice trials that year, the statistical danger of a punitive damages claim in medical malpractice litigation is relatively small.

Common sense dictates that this low statistical percentage should deflate much of the force a punitive damages claim brings to medical cases, especially where the facts pled

do not portray the type of egregious behavior and wanton conduct warranting a punitive award. However, dismissing these claims out-of-hand would overlook the unique realities concerning punitive awards in medical malpractice that stand separate and apart from civil litigation as a whole.

It should be recognized that, while punitive damages are only awarded in a small percentage of jury trials where punitive damages were both sought and a plaintiff's verdict rendered, the highest median punitive damages award for all negligent tort cases in 2005—\$2.8 million—was in medical malpractice cases. Indeed, of the six medical trials sampled where punitive damages were awarded, the Department of Justice reported that five punitive damages verdicts exceeded \$1 million.

Given this statistical analysis (available at www.ojp.usdoj.gov/bjs/pub/pdf/cbjtsc05.pdf), a defendant health care provider would understandably be concerned with the potential for a staggering award, no matter how unlikely, when he or she hears about awards in the million dollar range. And unlike compensatory damages, punitive damages are *not* insurable in a number of jurisdictions, including New Jersey, New York, Pennsylvania, and Massachusetts. In these jurisdictions and others, a defendant medical professional facing a punitive damages claim cannot rely on malpractice insurance to foot the bill, and the physician or other provider may have to satisfy the award out of his or her own pocket.

The potential for high awards, no matter how remote a possibility, makes a punitive damages claim an attractive prospect for plaintiffs attorneys in those jurisdictions where punitive claims are recognized. Even though these claims are only viable in the limited circumstances of the most egregious

behavior—for example, where a dying patient's cries for help are repeatedly ignored—experienced plaintiffs counsel know that the threat of a punitive damages claim can shake a physician's resolve and significantly strengthen a plaintiff's settlement posture.

Address Punitive Claims at the Earliest Opportunity

Just as a good plaintiffs attorney must evaluate a case to determine if there is a good faith basis to assert a punitive damages claim, defense counsel must take these claims seriously, no matter how rarely punitive damages are awarded. For the reasons discussed above, it is in defense counsel's interest to dispose of a punitive damages claim as early in the litigation as possible. Extinguishing the threat of punitive damages can help a physician or nurse client relax without the threat of personal liability for a verdict. This will allow the defendant health care provider to be a stronger, clearer thinking advocate in defense of his or her own case.

However, a defense attorney's ability to address these claims at the outset of litigation may be limited in some jurisdictions. For example, the approach differs greatly depending on the side of the Delaware River where an attorney practices. In Pennsylvania, a fact-pleading jurisdiction, a claim for punitive damages can be addressed by way of preliminary objection in lieu of an answer. The validity of a punitive damages claim can be challenged on the facts *as pled*, and defense counsel may argue that the allegations do not raise the type of reckless, wanton, or willful conduct warranting a punitive damages award. Meanwhile, across the river, New Jersey attorneys practice in a notice-pleading jurisdiction, where complaints are not required to be fact intensive. New Jersey practice does not have a routine avenue to strike a punitive damages claim before the close of pleadings. Such claims are usually addressed by way of a summary judgment motion in the course of discovery.

Regardless of jurisdiction, the threat of punitive damages can have a significant psychological impact on medical malpractice litigants long before the case ever gets to trial. While the bark of a punitive damages demand may be far worse than its actual bite, these claims should be given careful consideration by counsel, and the issue should be raised and addressed as soon as possible. ❖

Edward F. Beitz is an associate in the Philadelphia office of White and Williams, LLP. He is a member of the firm's litigation department and health care group and focuses his practice on medical malpractice defense. He can be reached at beitze@whiteandwilliams.com.



TortSource

A Publication of the Tort Trial
& Insurance Practice Section

TIPS Chair: John R. Tarpley
TIPS Chair-Elect: Jennifer Busby
Editorial Board: Mary R. Vasaly, Chair
Samuel J. Arena Jr.
Effie V. Bean Cozart
Matthew J. Evans
Emily R. Gifford
Marlene Kay Heyser
Patricia G. Hughes
Madeline J. Meacham
Briana Marie Montminy
Maureen Mulligan
Aaron E. Pohlmann

Editor: Jane Harper-Alport
Art Director: Andrew O. Alcalá

ISSN # 1521-9445.

TortSource is published quarterly by the Tort Trial & Insurance Practice Section of the American Bar Association and

is generously funded by Thomson West.

American Bar Association
321 N. Clark St., Chicago, IL 60654-7598

Copyright ©2010 American Bar Association

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request reprints, go to www.abanet.org/reprint.

The materials contained herein represent the opinions of the authors and editors and should not be construed to be those of either the American Bar Association or the Tort Trial & Insurance Practice Section unless adopted pursuant to the bylaws of the Association. Nothing contained herein is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. These materials and any forms and agreements herein are intended for educational and informational purposes only.

www.abanet.org/tips





Legislative Update

Robert M. Ferm

The Health Care Reform Debate Continues . . .

The debate over health care reform continued to overshadow every other domestic political issue throughout the fall of 2009. By November, a version of the health care reform bill had passed the House of Representatives, and the Senate was poised to begin debate on two measures. The 2,074-page bill is named “The Patient Protection and Affordable Care Act.” The House version includes the controversial government-run insurance plan or “public option,” with a provision that would allow the states to opt out. It was anyone’s guess whether or not health care reform would become a reality in 2009. Robert Pear and David M. Herszenhorn, *New York Times*, Nov. 19, 2009.

Democrats needed a simple majority of 218 votes in the House, which they received by a vote of 220 to 215. Procedural rules in the Senate require 60 votes on a motion to bring a bill to the floor; the vote on November 21 was 60–39.

Rising Health Care Costs

A continuing debate about the efficacy of the House bill and the Senate proposals questions whether the measures fundamentally address reshaping how health care is delivered and how doctors are paid. Medical spending is driven by prices charged for medical services and the volume of care delivered. *New York Times*, Nov. 19, 2009. Proponents of the House and Senate proposals argue that these issues are addressed in the legislative proposals under consideration because estimates predict that the measures would reduce the rate of growth in annual Medicare payments to providers by more than \$100 billion over the next decade. Proponents argue that the “Cadillac” coverage provision of the Senate finance bill, which would impose an excise tax on expensive health plans, would cause insurers to redesign plans to fall beneath the threshold. These plans are anticipated to include greater co-pays and deductibles, forcing insureds to be more thoughtful about excess utilization. Other cost saving measures identified in the proposals include uniformity in medical forms, electronic medical records, the creation of health insurance exchanges, pilot projects for alternatives to fee-for-service delivery systems, and negotiation of drug prices.

Concerns of the Employer Community

The employer community remains concerned that, in the end, employers will be forced to offer more expensive coverages, new taxes will drive up the cost of coverage, ERISA protections will be eroded, underpayment to providers will exacerbate the cost shift to private coverage, and a weak individual mandate will result in deterioration of a healthy pool in the insurance market that will lead to consequentially higher costs. Missing from the measures are serious attempts to address medical malpractice reform and the related cost driver of the practice of defensive medicine.

Other Federal Legislative Developments

The debate on the appropriate approach to the regulation of financial services has elevated the consideration of proposed legislation on regulating insurance as a segment of the financial services industry. Provisions on surplus lines and reinsurance reform, referred to as the Nonadmitted and Reinsurance Reform Act of 2009 (NRRRA), are included in the financial service regulatory reform bill introduced by Senator Christopher Dodd (S. 1363). The draft of the Restoring American Financial Stability Act contains the most recent version of NRRRA, which passed the House in September (H.R. 2571). The bill would make it easier for risk managers to access the surplus lines market and set up a uniform system of allocating and remitting surplus lines premium taxes. The bill also would simplify reinsurance regulation, addressing the issue of elimination of extra territorial application of state reinsurance laws. *Business Insurance*, Nov. 16, 2009, www.businessinsurance.com.

The financial services bill also includes provisions the insurance industry believes will make insurers subject to bank regulatory oversight, including a fund used to pay for resolving insolvent financial firms. Insurers support the need for systemic risk regulation but have cautioned that federal proposals subjecting financial services entities to supervision should start from the premise that certain segments of the insurance industry—specifically property and casualty companies engaged in insurance activities—should not be subject

to such supervision. Arthur D. Postal, *National Underwriter (Property and Casualty—Risk and Benefits Management Edition)*, Nov. 18, 2009.

The concept of a federal insurance office authority is contained within the Federal Insurance Office Act of 2009 on mark-up before the House Financial Services Committee. State regulators, state legislators, their trade representatives, and consumer advocacy groups continue to express alarm at the perceived significant shift of authority to regulate the business of insurance from the states to the federal government. These groups are concerned that the federal insurance office proposed by the legislation would enable an override of existing insurance law without meaningful dialogue with the states. The National Association of Insurance Commissioners has requested an amendment providing for greater coordination between the new federal agency and state regulators. The amendment would provide Congress and the courts with authority to limit the federal agency’s authority in insurance matters. Arthur D. Postal, *National Underwriter (Property and Casualty—Risk and Benefits Management Edition)*, Nov. 2 and Nov. 18, 2009.

Both the House and Senate continue to debate a partial repeal of the McCarran-Ferguson Act’s antitrust exemption for health and medical malpractice insurers. The health care package unveiled by the Senate does not include a partial repeal of the antitrust exemption for health and medical malpractice insurers, nor does it include language that would enable the Federal Trade Commission to oversee and study the insurance sector. It is predicted, however, that a repeal of the exemption could be introduced by way of amendment. Arthur D. Postal, *National Underwriter (Property and Casualty—Risk and Benefits Management Edition)*, Nov. 18, 2009.

The TIPS Governmental Affairs Committee will continue to monitor and report on developments in health care reform, federal regulation of the insurance industry, and other legislation of interest to TIPS members. ❖

Robert M. Ferm is a member of Hall & Evans, LLC in Denver, Colorado, and is chair of the TIPS Governmental Affairs Committee. He can be reached at fermr@hallevans.com.



InMotion

Thomas L. Davis, a member with Frost Brown Todd LLC in Indianapolis, Indiana, was awarded the Honorable Paul H. Buchanan Jr. Award of Excellence, the highest award bestowed by the Indianapolis Bar Association. With a personal injury defense and business litigation practice, Davis is a past IBA president, vice president of the Indianapolis Legal Aid Society’s board, and serves on the Indiana Pro Bono Commission.

Judith F. Goodman, cofounder and a partner of Goodman & Jacobs LLP in New York, New York, was named a 2009 Super Lawyer in the area of insurance coverage by the publishers of *Super Lawyers* magazine, New York Metro edition. She is a member of the TIPS Book Publishing editorial board and a former chair of the *TortSource* editorial board.

Fletcher Dal Handley Jr., principal of the Handley Law Center in El Reno, Oklahoma, was selected as one of the top personal injury attorneys in Oklahoma by the publishers of the 2009 Oklahoma edition of *Super Lawyers* magazine. Handley is profiled in *TortSource*’s “When I Was a Young Lawyer” interview on page 7 of this issue.

Francine L. Semaya, chair of the insurance transactional and regulatory group at Nelson Levine de Luca & Horst in the firm’s New York City office, was named one of *Business Insurance* magazine’s “Women to Watch” for 2009. She was selected for her outstanding accomplishments in the field of legal insurance regulatory matters. Semaya is chair of the TIPS Task Force on Federal Involvement in Insurance Regulation Modernization.

John Stevens, a partner with Gifford Stevens LLC in Denver, Colorado, was named a 2009 Super Lawyer by the publishers of the Colorado edition of *Super Lawyers* magazine. His firm focuses on litigation in the areas of commercial, property and casualty, insurance, and personal injury. ❖

The New Medicare Act: Handling Medicare Claimants in the Future

continued from page 1

damages and a \$1,000 per day fine, applied separately to each claim.

A Heightened Diligence for All Involved

For defense attorneys, if your client is an RRE, you need to work with it to determine whether a claimant or plaintiff is a Medicare beneficiary at the earliest date possible. To do so, the RRE can ask the claimant, but it cannot solely rely on the claimant's response. The RRE has an independent obligation under the Act to check with the governmental agency that runs Medicare, the Centers for Medicare and Medicaid Services (CMS). To do so, the RRE must establish an electronic link with CMS. A cottage industry of subcontractors available to help establish the electronic reporting system for the insurers and self-insureds has been burgeoning. Thus, if you are an insurer or self-insurer and have not yet implemented a system, there are companies in place to assist you.

The RRE must secure a Social Security number for the claimant or plaintiff and then query CMS directly for verification. The query is done electronically. Even if the RRE learns at the outset of a claim that the claimant or plaintiff has not received Medicare benefits, it should still query CMS periodically for Medicare status throughout the course of the claim. Defense attorneys can assist with this process through routine, initial written discovery requests, which should now insist on a Social Security number, verification of any Medicare or public benefits status, and the amount of any benefit received. Attorneys should review any records received in litigation for any information suggesting Medicare status. It should also be a routine line of questioning at deposition.

The effective date for the obligation of RREs to report settlements or judgments involving Medicare beneficiaries is January 1, 2010. Thereafter, RREs will have to submit quarterly, electronic reports on all settlements or judgments involving claimants and plaintiffs who, as of the date of payment, were Medicare beneficiaries. RREs also have to report on non-Medicare beneficiaries where there are ongoing obligations to pay medical expenses that extend into the Medicare years.

Time Is of the Essence

Once on notice of the settlement or judgment, CMS will alert its Medicare secondary payer recovery contractor (MSPRC), who will then assemble data relating to the claim and issue interim statements and itemizations to the beneficiary. An RRE may obtain a copy of the statement from the MSPRC, but only upon the written consent of the beneficiary. The process of data collection and obtaining a statement from the MSPRC could take more than six months to complete. Thus, the parties should initiate this process at the earliest opportunity in the claim.

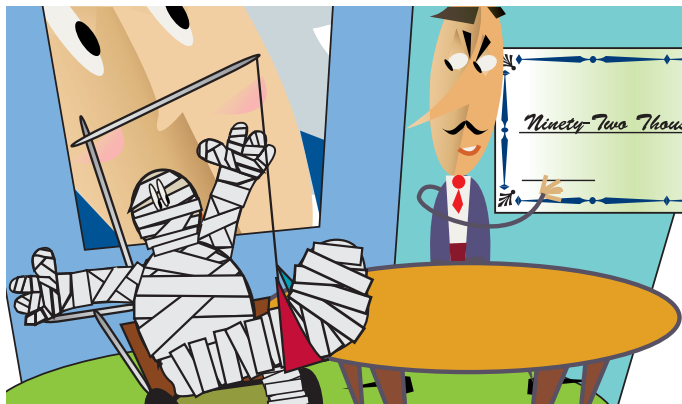
The parties should do so because several factors could influence the amount of the reimbursement. The initial demand from CMS may be incorrect; for example, it might include a claim for reimbursement for medical treatment unrelated to the claim. This would require protracted communications back and forth with the MSPRC until an agreed upon figure is reached. A beneficiary may also seek a reduction in the CMS demand through a hardship petition, although it is anticipated that such petitions will be disfavored. There is also the reduction in the lien amount made for "procurement costs," which are the fees a claimant or plaintiff pays to his or her attorney and the costs incurred in developing the claim. The dilemma confronting the RRE is that it is the beneficiary who is to supply the MSPRC the information regarding a proposed settlement and applicable litigation costs and attorney fees. Future dealings with Medicare will require a level of cooperation among the adverse litigants to a claim.

For those involved in insuring and defending actions, the more important question, and the concern leading into the future, is how to timely identify and address Medicare's interest when it comes time to settle the claim. Indeed, the prior common practice to include in a release a provision that a claimant is responsible for

reimbursing Medicare will no longer protect an RRE from a later claim. Given the potential fines and liabilities under the Act, RREs must ensure that Medicare's interest is addressed while everyone is still seated at the settlement table. It is also no longer feasible to expect to settle a claim on the courthouse steps without knowing the full extent of Medicare's interest. For example, with catastrophic injury claims,

Medicare's lien interest could exceed the settlement value of the claim, particularly if the claim involves questionable liability. Accordingly, the parties to a settlement must identify and consider the true extent of Medicare's interest at the outset of negotiations and include it as part of the consideration in the settlement or resolution of the claim. ♦

Kevin C. Cottone is a partner in the Philadelphia office of White and Williams LLP. He is a member of the litigation department and focuses on medical professional liability, personal and long-term care, and insurance fraud and disability. He can be reached at cottonek@whiteandwilliams.com.



Mark Your Calendar

Data Privacy Breaches and U.S. Data Security Laws: New Worries, New Laws, New Roles for Counsel
January 20, 2010, teleconference
(312-988-5597)

11th Annual Windstorm Insurance Conference
January 25–28, 2010, Jacksonville, FL
(312-988-5672)

Fidelity and Surety Law Committee Midwinter Meeting
January 26–29, 2010
San Francisco, CA
(312-988-5672)

Obtaining and Retaining a Diverse Judiciary
(in conjunction with ABA Midyear Meeting)
February 3, 2010, Orlando FL
(312-988-5672)

ABA Midyear Meeting
February 5–7, 2010, Orlando, FL
(312-988-5672)

18th Annual Insurance Coverage Litigation Committee Midyear Meeting
February 25–28, 2010, Phoenix, AZ
(312-988-5672)

UIA Winter Seminar: The Pitfalls of Cross Border Joint Ventures Transaction and Litigation Risks
February 27–March 6, 2010, Salt Lake City, UT
(312-988-5672)

TIPS/LEL Joint 2010 Workers' Compensation Midwinter Conference
March 4–6, 2010, Phoenix, AZ
(312-988-5708)

Emerging Issues in Motor Vehicle Litigation
April 8–9, 2010, Phoenix, AZ
(312-988-5708)

19th Annual Toxic Torts & Environmental Law Committee Spring Meeting
April 9–10, 2010, Phoenix, AZ
(312-988-5672)

TIPS/ABOTA National Trial Academy
April 17–21, 2009, Reno, NV
(312-988-5656)

Property Insurance Law Committee Spring Meeting
April 29–May 2, 2010
Half Moon Bay, CA
(312-988-5672)

Fidelity & Surety Law Committee Spring Meeting
May 6–7, 2010, New Orleans, LA
(312-988-5708)

TIPS Spring Leadership Meeting
May 12–16, 2010, San Juan, PR
(312-988-5672) ♦



“When I Was a New Lawyer”

Fletcher D. Handley Jr.
The Handley Law Center
El Reno, Oklahoma

What is your background, and what inspired you to become a lawyer?

I earned an undergraduate degree in journalism/professional writing. While working for a small newspaper and trying to complete my first novel in my spare time, it occurred to me that if I continued doing what I was doing, I was probably going to be broke for the rest of my life. I was accepted to law school, but still planned to be a writer until I took a course in oral argument. My professor there told me I had the presence to be a good trial lawyer, so I decided to practice law.

Where did you go to law school, and what did you do right after that?

I attended the University of Oklahoma College of Law. I received a legal intern license after my second year of law school in May 1978. I immediately accepted a part-time job with the firm of Fogg, Fogg and Howard in my hometown of El Reno, Oklahoma. In 1982 it became Fogg, Fogg & Handley, and I practiced there for 30 years until I opened The Handley Law Center in June 2008.

Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them and how have they helped you to become so successful?

My first trial experience was while I was still a legal intern. Opposing counsel kept objecting to my questions on direct as leading. The judge sustained most of them, but let me ask enough not to prejudice my client. I decided I knew very little about the rules of evidence and came out of that experience determined that I would learn the rules, and learn how to use them to my advantage.

Whom do you most admire?

One of the problems with getting older is that most of the people you admired are all dead now. My parents, high school teachers, college professors, older lawyers, and a couple of judges are in that category. I have always admired several people in TIPS. Hugh Reynolds and Leo Jordan quickly come to mind.

What is your greatest source of professional pride?

I was selected as Oklahoma's Outstanding Young Lawyer of 1983. I've had a few very good jury verdicts and settlements that have really helped my clients, about which I am very proud. My oldest son recently graduated from law school and passed the bar. I take a great deal of pride in that.

What got you started with ABA involvement?

A TIPS member named Scott Miller invited me to attend the Auto Law Committee meeting in Atlanta in 1991. I decided to go, and through that meeting I came to know dozens of great lawyers, several of whom became—and still are—among my very best friends.

What was the worst professional advice you ever received?

I once was told by a senior attorney never to accept an offer from the defense—always make them accept your offer. Over the years I found that it worked better for me and my clients if we could get the defense to make an offer we could accept.

What was the best professional advice you ever received?

The lawyers I went to work for as an intern in 1978, Rupert Fogg, Richard Fogg, and John Howard, all told me to put the client's interest first. If I took good care of the client, they said, I would be taken care of in that process. That advice has probably served me better than any other.

What personality trait has served you best over the years?

Good listening skills and patience.

What challenges you the most?

Dealing with young lawyers who don't understand the concepts of timeliness, preparedness, and civility.

What is the one thing you cannot stand (regarding the law or lawyers)?

The intentional distortion of truth that the tort reform movement is based on; the willingness of any lawyer to embrace it; and the way so many otherwise good people blindly accept it.

What is your favorite type of legal work?

Trials. Everything else that I do is secondary to trial work. It's the fear of being “out-lawyered” that keeps the blood flowing and the skills sharp.

What are your future ambitions?

To be the best lawyer I can be. To be successful in a few more cases and help some people who need the help. To hopefully give something back to the profession before I'm done.

What can the ABA do to be a good home to young lawyers?

Teach them to respect the law and to demand access to justice and judicial independence. Give them the opportunity to learn from the best, and inspire them to become the best. ❖



Fletcher D. Handley Jr.
then and now.



Fletcher D. Handley's Advice for New Lawyers:

- Be on time.
- Be properly groomed and attired.
- Be prepared.
- Be respectful to the court, opposing parties, and counsel.
- Put your client's interest first. ❖

TIPS Supreme Court Admissions Ceremony

It's winter now, but a special spring event in is only a few months away: The U.S. Supreme Court Admissions Ceremony is coming to TIPS in San Juan, Puerto Rico.

TIPS Chair John Tarpley announced that the Section will once again offer a unique opportunity for its members and for nonmembers to participate in a group admissions ceremony for the U.S. Supreme Court. The ceremony will be held at the TIPS Spring Leadership Meeting on Friday, May 14, 2010, in San Juan, Puerto Rico. The invitation to participate in this event is extended to both TIPS members and nonmembers, but prompt action is required by all interested because a lawyer must first apply and meet the U.S. Supreme Court's qualifications for admission. Successful applicants must assemble and return to the ABA/TIPS office all required paperwork by *Friday, February 26, 2010*.

Instructions for Application

To apply, download the bar instructions of the U.S. Supreme Court at <http://www.supremecourtus.gov/bar/barinstructions.pdf>, as well as the application for admission at <http://www.supremecourtus.gov/bar/barapplication.pdf>. After determining that you comply with the U.S. Supreme Court guidelines and qualifications, complete and send your documents, along with payment (\$265 for TIPS members; \$325 for nonmembers) made payable to the American Bar Association (ABA) Tort Trial & Insurance Practice Section (TIPS) to American Bar Association, Attn.: Felisha A. Stewart, Tort Trial & Insurance Practice Section, U.S. Supreme Court Admissions, 321 North Clark Street, Mailstop 18.2, Chicago, IL 60654.

TIPS must receive the paperwork and payment by *February 26, 2010*, for an applicant to qualify for participation. This opportunity is first come, first served, so apply early to be sure all qualification requirements for admission have been met. ❖



Trial Tip

Gregory M. Cesarano

Intangibles in the Courtroom

A jury trial is a battle to win the minds (if not the hearts) of the jurors by using the weapons of words and exhibits. Because so much of the trial is psychological, you—the trial lawyer—must be ever vigilant about how you are perceived. At trial, you are always “on stage,” and your audience—the jury—pays as much attention to how you behave, dress, and speak as they do to the witnesses on the stand. A juror’s perception is formed by how you look, how you act, and how you sound.

When working up a case, you will appear before the trial judge, either in person or by written memorandum. You must always be completely candid, honest, and forthright to establish your standing with the judge. If the judge trusts you and respects your ability, it will be evident when you are in the courtroom. The jury picks up cues from the judge, and when the judge looks to you for leadership in the courtroom, it is a powerful endorsement of your credibility, and by implication, your case.

Where the evidence overwhelmingly favors one side, there may be little you as a lawyer can do that will lose the case. However, when the issues are close, counsel’s ability to communicate can be the deciding factor. Choose your words carefully,

not only when formulating questions, but when expressing yourself at any time in court.

Use powerful words. When representing a plaintiff, use “smash up” or “crash” rather than words with a defensive connotation like “accident” or “incident.” By the same token, use powerful phrasing. In a wrongful death case, for example, ask “Who will teach this young boy to ride a bike, hit a baseball, or say his prayers?” Alliteration can be a persuasive tool when used skillfully. Julius Caesar’s “Veni, Vidi, Vici. I came, I saw, I conquered” is an excellent example of this. On the other hand, poor grammar or even light-hearted banter can be perceived negatively.

It is not always what you say or how you say it that will persuade a jury—jurors see and respond to everything that goes on. Avoid joking around in the courtroom, even with the courtroom staff. Always be aware of your posture and positioning in the courtroom. Sit up straight at counsel table. Do not whisper in your client’s or co-counsel’s ear if you can possibly avoid it. Jurors will notice each move you make, and no one likes to be left out of a secret. Write a note instead. If opposing counsel drops a bombshell, control your facial gestures and don’t even blink.

The search for justice in a courtroom ideally is controlled by the objective facts and evidence, but realistically, the interaction of psychology on the art of persuasion is equally important. To achieve success in the battle for the minds of the jurors, be prepared to use all of the weapons at your disposal, both tangible and intangible ♦.

Gregory M. Cesarano is a shareholder of Carlton Fields, P.A., in Miami, Florida, who focuses his practice on trials of civil lawsuits, representing product manufacturers, insurers, and other corporate defendants. He is chair of the TIPS Trial Techniques Committee and can be reached at gcesarano@carltonfields.com.

Luis A. “Tony” Cabassa is a partner at Wenzel Fenton Cabassa, P.A., in Tampa, Florida, where he practices employment law. He is the chair of the TIPS Employment Law Committee and can be reached at lcabassa@wfsclaw.com.

If you have time to venture outside of San Juan, you should visit El Yunque Rainforest, which is located about an hour from the Ritiz-Carlton. Other possible excursions are the Rio Camuy Cave Park and the Arecibo Observatory, both of which are located about an hour and a half from TIPS’s hotel. Puerto Rico also boasts some of the world’s best golf courses, including El Conquistador and Dorado Beach. I look forward to seeing you on the island of Puerto Rico and sharing a cold Piña Colada (or a few) with you! ♦

San Juan, Puerto Rico, is the oldest city under a United States flag. The Ritiz-Carlton is located in close proximity (10 to 15 minutes) to the Historic Old San Juan tourist district, which includes beautiful traditional Spanish architecture and cobblestone streets. Old San Juan is also home to El Morro Fortress (built by the Spanish beginning in 1539), art galleries, museums, shops, cafes, bars, and restaurants.



The luxurious Ritiz-Carlton Hotel in San Juan, Puerto Rico, will host the TIPS Spring Leadership meeting in mid-May. Ideally located on eight acres of prime beachfront property in beautiful Isla Verde, the Ritiz-Carlton offers five exceptional restaurants, including BLT Steak, Il Mulino New York, Mares, and the Ocean Bar & Grill. The Ritiz-Carlton also features a 24-hour casino for those TIPsters who enjoy gambling.

TIPS Spring Meeting
May 12-16, 2010

Luis A. “Tony” Cabassa

“My San Juan”



A Publication of the Tort Trial & Insurance Practice Section



American Bar Association
321 N. Clark Street, Chicago, IL 60654-7598

Vol. 12 No. 2 Winter 2010

Non-Profit
Organization
U.S. Postage
PAID
American Bar
Association