MTLA Journal

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Two MTLA Stalwarts Up For State-Wide Election

Former MTLA Treasurer Jane Beckering, Buchanan & Beckering, Grand Rapids, is running for a seat on the Michigan Supreme Court and long-time MTLA member Amos Williams, Williams & Youngblood, Detroit, is running for Attorney General.

Beckering is running for one of two open seats on the high court, entering the race as the second Democratic nominee along side veteran Justice Michael Cavanagh. Beckering and Cavanagh face Republican nominees Justice Maura Corrigan and former politician Marc Shulman.

Williams faces incumbent Republican nominee Mike Cox.

Jane M. Beckering is a founder and partner in the Grand Rapids law firm of Buchanan & Beckering, PLC. She earned her undergraduate degree from the University of Michigan (with distinction) and her law degree from the University of Wisconsin Madison (cum laude). Ms. Beckering began her career handling commercial litigation at McDermott, Will & Emery, P.C., in Chicago. In 1992 Ms. Beckering returned to her hometown of Grand Rapids where she specializes in medical negligence and wrongful death cases. She is licensed to practice law in Michigan, Illinois, and Wisconsin.

An advocate of the proper role of the judicial system, Ms. Beckering expresses concern about the direction of the Michigan Supreme Court and its repeated rulings in favor of corporations and insurance companies at the expense of individual rights.

"The Supreme Court is specifically designed to be a nonpartisan body," Ms. Beckering has said. "It is meant to be a level playing field for all litigants. Politics should not play a role in the justices' decisions, which of late have almost uniformly favored big business and insurance companies. I want to balance the scales of justice. The public should be confident that when they appear before the Supreme Court, the decisions are based on the rule of law, not a political agenda."

Amos Williams, a Detroit native, fought in Vietnam during 1967 and 1968 winning a Bronze Star and Purple Hearts for wounds received in combat. He served in the Detroit Police Department and graduated from the FBI National Academy in Quantico. Williams is a graduate of Wayne State University and focuses his practice on civil rights, employment discrimination, and combating insurance companies who unlawfully deny claims.

"I'm a Democrat. I'm a liberal," Williams has said. "And I'm one of those damn trial lawyers everyone hates - until you need one."

"I want to take that office back from the special interests and their front guy, Mr. Cox," Williams said in an interview, "and return it to the service of the people of the state because that's who needs it and that's who deserves it."

GET OUT THE VOTE!

See page 6.

In This Issue . . .

President's Column

MTLA 2006-2007 President
Jesse M. Reiter

Open Letter To President George W. Bush:

Mr. President, We Need To Start Talking About Insurance Reform

Dear President Bush:

I have watched you over the years decry lawyers and lawsuits. You have spoken of frivolous or junk lawsuits over 150 times. You have told Americans that "it's really important that we not have our system ladened down by unnecessary lawsuits" and that "there's too many lawsuits, a lot of them frivolous and junk lawsuits."

You have blamed trial lawyers and the civil justice system for everything from high health care costs, to the federal budget deficit, a weak economy, slow job creation, and even a lack of flu vaccines. You have told Americans that you want to "put money back in the pockets of people who earned it." You have complained that "you can't have good quality of life if you can't find good docs. And the truth of the matter is, many of your doctors are leaving the state or quitting practice because of the junk and frivolous lawsuits." You have told us that "for the sake of good medical care, for the sake of availability and affordability of medicine, we've got to end these frivolous and junk lawsuits that are hurting the people…." You have complained of "[L]iberal court decisions that ha[ve] resulted in an unfair legal system, tilted in favor of personal injury trial lawyers…" and how "we must protect small business owners and workers from the explosion of frivolous lawsuits that threaten jobs across America." You have also reminded us that "government must take the side of working families."

Since you are so concerned about the civil justice system, working families, the economy and the health care costs, I have always wondered why you never mentioned insurance reform. I'm sure you are aware that insurance reform would help working families, doctors and small business owners by lowering premiums, ending insurance company fraud, and curtailing price gouging by the insurance industry.

I realize that reading is not your favorite pastime and that you're not overly curious, but insurance reform could help put money back in peoples' pockets where you believe it belongs. Though the insurance industry has given you huge campaign contributions over the years and I'm sure you feel compelled to help your friends, increasing insurance premiums are hurting doctors, small businesses owners and Americans in general. Maybe your advisers have failed to inform you of the facts regarding civil lawsuits and insurance reform. In case they haven't, let me bring you up to speed.

First, the insurance industry is the only one outside of major league baseball that is unregulated. While lack of regulation is good for insurance company profits, it's bad for everyone else. The insurance industry was originally given an anti-trust exemption under the McCarran-Ferguson Act in 1945. While insurance commissioners in every state retain the right to review rates, state regulation has been shown to be no substitute for antitrust enforcement. As a result of no regulation, the insurance industry has been able to engage in widespread wrongdoing, fraud, premium price gouging, dropping of policies, and as a result, make huge windfall profits. I know you believe that windfall profits are good for your friends, but not on the backs of doctors and working Americans.

Did you know Mr. President that despite Hurricane Katrina, the insurance industry racked up $44.8 billion in profits last year for homeowners and auto insurance alone? According to the Los Angeles Times, "The companies that provide Americans with their homeowners and auto insurance made a record $44.8-billion profit last year even after accounting for the claims of policyholders wiped out by Hurricane Katrina and the other big storms of 2005, according to the firms' filings with state regulators….an 18.7% increase over the previous year. …Besides boosting profits, the industry raised its surplus by more than 7% to nearly $427 billion, according to an analysis of company filings by the National Assn. of Insurance Commissioner, which represents regulators from the 50 states. The surplus is intended to provide a financial cushion in times of high claims." "Insurers Saw Record Gains in Year of Catastrophic Loss; they say the profits are a fluke, but the industry has worked to shift risk to clients and the public," Los Angeles Times, 4/5/06.

They did it by denying claims, rejecting legitimate claims and defrauding homeowners. In fact, Mississippi Attorney General Jim Hood described insurers who defrauded homeowners as "the robber barons of our time." Mississippi sued insurance companies alleging that adjusters tried to trick homeowners out of millions of dollars in homeowner claims. Since Katrina, Allstate has announced that it will be dropping 120,000 Gulf Coast home and condo policies while State Farm has dropped 39,000. I know you understand Mr. President that this is not good for working families. Even wealthy people like your friend Senator Trent Lott got a bad deal from the insurance industry after his Mississippi home was destroyed.

Insurance reform would prevent such fraud Mr. President and it would put money back in people's pockets where you say you need it.

In addition to Katrina, insurance companies have been caught defrauding working people all across the land. In Oklahoma, for example, a jury found that State Farm acted "recklessly" and with "malice" in handling insurance claims of families who owned homes damaged by tornados in 1999. The jury found that State Farm had intentionally undervalued damage to homes or claimed that the damage was caused by other factors instead of tornadoes. Columbia/HCA was fined $1.7 billion for Medicare insurance fraud. In 1997 the FBI raided HCA offices investigating allegations of massive systematic Medicare fraud. Within 5 years, HCA pled guilty to 14 criminal counts and agreed to pay $1.7 million to settle the case. In 1997, a former State Farm employee revealed that State Farm officials routinely defrauded policyholders and lied in court in the aftermath of the 1994 Northridge earthquake to avoid paying claims. In 1996, Prudential agreed to pay a $35 million fine and set aside money to settle policyholder suits after an investigation found the company had defrauded more than 10 million life insurance customers. In 2004, New York Attorney General Eliot Spitzer testified that his office had uncovered widespread wrongdoing within the insurance industry and that "a small group of brokers and insurance companies essentially control the market, having created a network of interlocking connections and secret payments which ensure that the bulk of business goes to certain insurers and that profits remain high. The bottom line is the consumer pays more for coverage." As you can see Mr. President, the unregulated insurance industry has been defrauding working people and taking money out of their pockets. It's time for you to change things and call for insurance reform.

Instead of calling for insurance reform though, you seem overly concerned with there being "too many lawsuits" clogging our courts. Mr. President, if you would just review your own administration's statistics, you would learn that this claim is not true. In fact, Bush Justice Department statistics show that the number of personal injury cases filed in U.S. District Courts fell 80% between 1985 and 2003. Moreover, Bureau of Justice Statistics show that the number of state personal injury trials has decreased 32% between 1992 and 2001. In Michigan and most states, civil case filings in personal injury cases have been decreasing for years.

You also seem to be obsessed with your notion that there are too many frivolous or junk lawsuits. New research in the May 11, 2006 edition of the New England Journal of Medicine shows that nearly every medical malpractice suit filed in the U.S. is meritorious and rejects claims that the civil justice system is inundated with frivolous lawsuits. Moreover, an overwhelming majority of Federal Judges, many of them appointed by you, don't see "frivolous lawsuits" as a major problem. According to a survey by the Federal Judicial Center, the research and education agency of the federal court system, "Frivolous litigation is not a major problem in the federal court system, according to an overwhelming majority of federal judges who participated in a recent survey. 70% of respondents call groundless litigation either a "small problem" or a 'very small problem,' and 15% said there was no problem at all.

Of course, every once in a while, someone files a frivolous lawsuit. Unfortunately Mr. President, you are guilty in this respect. In 1998, you hired a trial lawyer and filed an unnecessary suit against a rental car company. You sued Enterprise Rent-a-Car in Austin for a fender bender even though no one was hurt and insurance would have covered the collision. You pursued the action even though the parties "exhaustively tried to resolve it short of a lawsuit." Though you felt compelled to file a frivolous lawsuit Mr. President, most suits are filed when people are seriously injured or killed from medical errors, defective products, or in serious auto accidents.

Mr. President since you are so preoccupied with frivolous lawsuits, I bet you are also unaware that insurance company payouts for claims are at their lowest levels in years. For instance, in medical malpractice cases, payouts have remained flat for more then 10 years and have decreased in the last four years. Malpractice payments paid on behalf of doctors fell 13.6% between 2001 and 2004. Medical malpractice payouts in Michigan are the lowest in the country: we are number 50 out of 50 in the United States. There is a similar trend in insurance company payouts in other types of losses around the country.

At the same time, the insurance industry is making huge profits. Insurance companies have made windfall profits for years in medical malpractice coverage. For instance, profitability of largest medical malpractice insurers (2005) was

17.7%, while the Fortune 500 average was been 8.7%. If case filings and insurance company payouts are down and insurance company profits are skyrocketing, why you might ask, aren't insurance premiums going down? Good question Mr. President. Studies show that rising premiums for doctors, for instance, are actually the result of medical malpractice insurers' price-gouging doctors. A recent study found that insurance companies have been drastically raising insurance premiums, even though claim payments have been flat or decreasing.

Moreover, medical malpractice premiums account for less than 1% of all health care spending. Medical malpractice insurance premiums rise-and-fall because of the "boom-and-bust" nature of the insurance underwriting cycle. The legal system has "little or nothing to do" with fluctuations in insurance premiums. Malpractice premiums increase when investment values decrease due to such factors as insurer mismanagement and changing interest rates. Inflation and other insurance industry forces drive up doctors' insurance premiums more than jury awards.

Mr. President, maybe it would help to ask your friends in the insurance industry why they refuse to decrease premiums even after there has been extensive tort reform in nearly every state. Unfortunately, I don't think you are going to like their answers. In fact, insurance industry officials admit that tort "reform" will not lower insurance premiums. For instance, Dennis Kelly of the American Insurance Association has said, "We have not promised price reductions with tort reform." An AIA press release stated: "[I]nsurers never promised that tort reform would achieve specific premium savings…." Lawrence Smarr, president of the Physician Insurers Association of America, admitted to the Detroit News that premiums are in part rising to make up for lost investment income. Victor Schwartz, general counsel to the American Tort Reform Association suggests that premiums increased when the insurance companies' investment income began to decline. Bob White, President of First Professional Insurance Company, the largest medical malpractice insurer in Florida, admitted that "no responsible insurer can cut insurance rates after a (medical malpractice tort 'reform') bill passes."

Mr. President, you've told Americans that lawsuits hurt the economy and drive up health care costs, but your administration's own findings say otherwise. There is no evidence that lawsuits have hindered the economy. For example, Congressional Budget Office statistics show that malpractice costs amount to "less than 2% of overall health care spending. Thus, even a reduction of 25% to 30% in malpractice costs would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small." Government Accountability Office findings show that malpractice cases have not widely affected access to health care. In fact, the GAO found that "many of the reported provider actions taken in response to malpractice pressures were not substantiated or did not widely affect access to health care…some reports of physicians relocating to other states, retiring, or closing practices were not accurate or involved relatively few physicians."

Also, you have complained that physicians are leaving the practice in droves due to lawsuits, but in fact the overall number of physicians in the U.S. has increased more then 40 percent since 1990. Moreover, the number of OB-GYNs has increased by 25 percent since 1990. At the same time, tort reform has been found to hurt patient safety. According to a recent study, "all the research that has been done so far points in the same direction: tort reform does not improve health-care outcomes" and "research suggests that at least some kinds of tort reforms might have a detrimental effect on health."

Since lawsuits do not affect access to health care or hurt the economy Mr. President, what can we do to lower insurance premiums, stop insurance company price gouging and put a clamp on insurance industry fraud? I have an idea Mr. President: we need to start talking about insurance reform. Just ask Bonnie Bowles, executive director of the Missouri Association of Osteopathic Physicians and Surgeons who recently stated that medical malpractice premiums for doctors will not drop significantly without insurance industry reform. "There is not enough accountability, and insurance companies can charge whatever the market can bear." "Without insurance industry reform, we won't see a significant drop in premiums."

Insurance reform has worked in California Mr. President; it can work across the country. In California, the first state to 'cap' victims' rights, medical malpractice premiums increased 190% during the 12 years after those limits were imposed. It was not until voters approved Proposition 103 – removing the insurance companies' anti-trust exemptions—that rates began to level off. Insurance reform is starting to pick up steam Mr. President. You may want to jump on the bandwagon or lead the way. For instance, in May 2006, Missouri lawmakers voted overwhelmingly to give the state insurance director authority to veto medical malpractice rates that are "excessive" or otherwise inappropriate in an effort to help cut doctors' insurance rates.

You could by supporting legislation to remove the antitrust exemption for the insurance industry. This would help to lower premiums for everyone; put money back in people's pockets where it belongs, and end, once and for all insurance company fraud and price gouging. The ball is in your court Mr. President. Now that you know the facts, I'm sure that you will do the right thing.

And one last thing Mr. President; the next time you want to attack our civil justice system, remember the wise advise of our 3rd President, Thomas Jefferson: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of our constitution." Since you swore to preserve and uphold the constitution, I'm sure you will strengthen that anchor calling for insurance reform. Good luck, Mr. President.

Yours truly,

Jesse M. Reiter
President, Michigan Trial Lawyers Association

Editor's Note: References to President Reiter's column can be found with his column on our website at www.mtla.net.

ATTENTION:
DEMOCRATIC LAWYERS, LAW STUDENTS & PARALEGALS

THE MICHIGAN DEMOCRATIC PARTY NEEDS THE HELP OF VOLUNTEER LAWYERS, PARALEGALS AND LAW STUDENTS ON GENERAL ELECTION DAY, NOVEMBER 7, 2006.

EVERY ELECTION MICHIGAN REPUBLICANS ATTEMPT TO SUPPRESS AND INTIMIDATE DEMOCRATIC VOTERS ESPECIALLY IN URBAN AREAS. TO PREVENT GOP VOTER SUPPRESSION VOLUNTEER LAWYERS, PARALEGALS AND LAW STUDENTS WILL BE PLACED AS CHALLENGERS IN POLLING PLACES AND LOCAL LITIGATION TEAMS WILL BE CREATED.

OUR BIGGEST NEED IS FOR VOLUNTEERS TO WORK IN POLLING PLACES- PLEASE VOLUNTEER TO DO SO IF YOU CAN.

IF YOU CAN VOLUNTEER, PLEASE COMPLETE AND RETURN THIS FORM.

I WANT TO PROTECT THE RIGHT TO VOTE BY WORKING AS A VOLUNTEER FOR THE MDP ON ELECTION DAY!!!

I AM A (CHECK ONE): _____LAWYER _____LAW STUDENT _____PARALEGAL

I WILL VOLUNTEER TO (CHECK ONE):

_____WORK IN A POLLING PLACE ON ELECTION DAY

Polls are open 7 a.m. to 8 p.m. (I can work between _____and_____)

_____BE A PART OF A LITIGATION TEAM

LOCATION WHERE AVAILABLE TO WORK: PREFERRED:_____

ACCEPTABLE:_____

NAME:_____

BUSINESS ADDRESS:_____

BUSINESS PHONE:_____BUSINESS FAX:_____

BUSINESS EMAIL:_____CELL PHONE:_____

PLEASE SEND COMPLETED FORM TO:

MICHIGAN DEMOCRATIC PARTY
ATTN: VOTER PROTECTION PROJECT
606 TOWNSEND
LANSING, MI 48933

PHONE: (517) 371-5410
FAX: (517) 371-2056

New Asbestos Litigation Court Rule

***by* Michael B. Serling, Birmingham**

On August 9, 2006, the Supreme Court entered its order establishing a new court rule concerning asbestos litigation. The Supreme Court initially took up the issue of whether to create an inactive asbestos docket for asbestosis (non-cancer) cases as a result of a petition filed by numerous defendants seeking such an inactive docket. This was initiated in 2003. The Court heard arguments on two separate occasions, most recently on May 24th of this year. The Court apparently decided not to institute an inactive asbestos docket, likely because they were convinced by the constitutional arguments that redefining the disease asbestosis was a legislative function and not within the province of the Michigan Supreme Court.

However, the Court came up with an unexpected decision dealing with the issue of consolidation, or bundling, of cases for settlement and trial. Prohibition on "bundling" Cases, ADM Order 2006-6, 476 Mich xxii (2006). The Court, in a 4-3 decision, adopted a court rule that asbestos cases can no longer be consolidated, or bundled, for settlement and trial. The issue of consolidation of asbestos cases had not been before the Supreme Court. It had not been briefed and was only brought up near the end of the two-hour plus argument on May 24th. This is largely because the Supreme Court had already proposed language for a court rule establishing an inactive asbestos docket with two alternative options – Alternative A and Alternative B. ADM File No. 2003-47, February 23, 2006. There was never any proposed rule by the Supreme Court regarding the consolidation or bundling of cases. The three justices in the minority, Cavanagh, Weaver and Kelly, severely criticized the decision as one that creates a crisis where one never existed before. The number of asbestos cases statewide is approximately 2,500. This compares with over 40,000 in the state of Ohio, almost 20 times the number in Michigan. There, legislation was recently passed creating an inactive asbestos docket.

Michigan asbestos cases have been handled very efficiently by asbestos judges around the state, including Wayne County Circuit Judge Robert Colombo, for many years.

The majority of the justices took aim at the process of consolidating, or bundling, cases for settlement and trial because they felt that this was depriving more serious asbestos cases of due process and was also overwhelming defendants and forcing them to settle the weaker cases. As counsel for asbestos plaintiffs for over 30 years, I have taken strong issue with the Court's decision and fully agree with the minority view. I believe that the majority of the Court failed to take into account massive tort revision instituted in Michigan over the past number of years, such as caps and the removal of joint and several liability, which has already severely limited plaintiffs' recoveries. Consolidation of cases for discovery, settlement and trial had really helped both sides and the courts of this state by avoiding lengthy and costly trials which no doubt would back up dockets throughout the state of Michigan for many years to come. Over the three decades there have been many, many trials, some won by plaintiffs and some won by defendants. The plaintiff and defense attorneys had come to know the value of the cases and had fashioned a system which had limited the unending flow of paper, motions, trials and appeals. Even the defense attorneys and their clients that had filed for an inactive asbestos docket did not expect this result.

Many of the attorneys on both sides believe that costs for all parties will now skyrocket and cases that now move through the system in two to two and a half years could be slowed to five years or more. The clogging of Michigan asbestos dockets will mean that Michigan victims of asbestos disease will have to wait and watch while most other states around the country continue compensating their victims of asbestos disease in a timely fashion. This will no doubt deplete the remaining funds available, thus leaving Michigan victims out in the cold.

The Court's decision throws into chaos the resolution of asbestos cases which the courts in this state have handled very effectively for many years. There was no asbestos litigation crisis existing in the State of Michigan prior to this

decision of the Supreme Court. Now there very well could be a crisis in our state. The decision handcuffs the ability of asbestos judges in Michigan to resolve complex mass tort litigation. Judges all around the country have employed the consolidation of asbestos cases for settlement and trial, often very effectively moving adversaries away from long and costly trials. Indeed, the Vioxx litigation, now with thousands of cases, may well move into consolidating cases for settlement and trial. Without the ability of specialized judges (asbestos, Vioxx, breast implants, etc.) to consolidate mass tort litigation, cases would take decades to resolve at enormous cost to the litigants and the courts. I believe the minority view, opposing this recent Supreme Court decision, recognized this problem. Even the majority must have felt some insecurity in their ruling because they left open the comment period on this decision until December 1, 2006. Those wishing to make comment on the adverse precedent that this could have for all types of litigation in the state of Michigan may do so by writing to the Michigan Supreme Court at PO Box 30052, Lansing, MI 48909, or email to MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-47.

Voting for Justice

Pro-justice candidates who support the right to trial by jury have a groundbreaking opportunity to win this year. Do your part to help them!

—Vote! And remind friends, family and colleagues to vote.

—MTLA has an issue letter designed to be sent to clients that you can copy or download for free!

—Contribute, volunteer, make calls, knock doors, and display a bumper sticker or yard sign!

Remember, your rights and the rights of your clients are at stake!

Coming Events . . .

Family Law Seminar
November 9th, 2006
Moderator: Sandor Gelman
Hotel Baronette, Novi

Liens Evening Forum
November 15, 2006 6-9 p.m
Co-Moderators: Jules Olsman & Troy Haney
Crowne Plaza Hotel, Novi

Employment Seminar
November 16, 2006
Co-Moderators: Cary McGehee & Barry Fagan
Hotel Baronette, Nov

E-Evidence & E-Discovery Seminar
December 1, 2006
Moderator:Richard Steinberg
Hotel Baronette, Novi

Consumer Law Seminar
December 14, 2006
Co-Moderators: Lynn Shecter & Dani Liblang
Hotel Baronette, Novi

Workers Comp Seminar
January 12, 2007
Co-Moderators: Joel Alpert, Lisa Welton,
Jeffrey Kirschner & John Charters
Hotel Baronette, Novi

***Annual Ski Seminar**
Litigation Strategies & Techniques
January 19-20, 2007
Co-Moderators: Tim Smith & Ron Weiner
Cedar River Village at Shanty Creek, Bellaire

Medicine for Lawyers:
Learn from the Doctors
February 15, 2007
Co-Moderators: Ron Weiner & Linda Turek
Hotel Baronette, Novi

State Bar Negligence Section
Seminar & Cruise
March 15-19, 2007
Limited Space Available
Contact: Julie at the World of Travel
248-203-0022

TLPJ Fights for Injury Victims Who Seek To Hold Drug Makers Accountable in Court

Pharmaceutical Industry Claims that State Law Claims Are Preempted by FDA

by Leslie A. Bailey and Leslie A. Brueckner

Leslie A. Bailey is the Brayton-Baron Fellow at Trial Lawyers for Public Justice (TLPJ), a national public interest law firm with a special litigation project on federal preemption. Leslie A. Brueckner is a staff attorney at TLPJ.

Editor's Note: See "Michigan Residents' Rezulin Claims Revived", p. 23 for the unique Michigan perspective on drug product litigation.

Are victims of prescription drugs barred from suing drug makers who fail to warn consumers of known risks, simply because the U.S. Food and Drug Administration (FDA) had previously approved the drug's label? Drug companies say "yes." But according to consumer rights advocates, the answer is a resounding "no."

TLPJ has joined the fight on this key issue by opposing federal preemption of failure-to-warn claims in *Perry v. Novartis Pharmaceuticals Corporation*. TLPJ is representing the parents of a two-year-old boy who developed cancer after taking the prescription drug Elidel to treat eczema, a skin condition. *Perry*, pending in a Philadelphia federal court, will be among the first cases to decide whether the FDA's approval of a drug label wipes out all state law remedies. It is also the first case TLPJ has taken to fight against federal preemption of prescription drug claims.

"For years, the FDA said that its approval of a drug label does *not* preempt any common-law claims," said Louis Bograd of the Center for Constitutional Litigation (CCL), TLPJ's co-counsel. "Yet under the Bush Administration, the FDA has turned about face and is coddling big drug makers at the expense of injury victims."

Within weeks of his second birthday, Andreas Perry was prescribed the topical immunosuppressant Elidel to treat his eczema. His parents were not warned that Elidel would increase their son's risk of developing cancer. Six months later, Andreas was diagnosed with lymphoblastic lymphoma, a rare form of cancer. The Perrys sued Novartis, alleging that it had failed to adequately warn of Elidel's known cancer risks.

Novartis moved to dismiss the case, arguing that the claims conflict with – and thus are preempted by – the FDA's approval of Elidel's label. Novartis bases its argument on the preamble to the FDA's new drug labeling rules, which states that failure-to-warn and some other claims against drug companies are preempted by federal law. See 71 Fed. Reg. 3922, 3934-3935 (Jan. 24, 2006). Novartis argues that the Perry family's claims would undermine federal regulatory purposes, even though, after Andreas developed lymphoma, the FDA ultimately *required* Novartis to add to Elidel's label a clear and prominent "black-box" warning of the cancer risks.

Novartis's argument is that common-law claims involving drug labels undermine the agency's authority to make "formal authoritative conclusions" about the content of labels. However, TLPJ's and CCL's brief explains that FDA regulations *already* permit manufacturers to supplement labels with warnings of newly discovered risks without prior FDA approval. Thus, remedies available under state law do not conflict with FDA regulations, but complement federal regulation and help make drugs safer.

TLPJ's and CCL's brief also argues that the FDA's newly-minted position regarding federal preemption is not entitled to deference by a reviewing court. The FDA's preamble is an advisory opinion, without legal effect. Further, the U.S. Supreme Court has held repeatedly that an agency's views are not entitled to any weight when it has taken inconsistent positions in the past.

The FDA recently filed an *amicus* letter in *Perry*, stating that "[a] failure-to-warn claim is not preempted merely because it imposes liability for a manufacturer's failure to provide a warning that has not yet been required by the FDA." It conceded that "FDA has not attempted to 'occupy the field' of prescription drug labeling, and state tort liability for failure to warn does not necessarily prevent FDA from carrying out its regulatory goals." The agency did not take a position on whether the Perrys' claims were preempted, stating that it would depend on the exact nature of the warning sought by plaintiffs (which was not specified in the complaint). "Given [this] uncertaint[y], it is not possible to decide as a matter of law whether liability on the plaintiffs' failure-to-warn claim would prevent the accomplishment of federal regulatory objectives."

"Now the question is whether our claims are preempted because they conflict with the agency's specific decisions with respect to Elidel. Given that the FDA has always known that Elidel is associated with a risk of lymphoma, we are confident that the court will agree that the answer is no," said Leslie A. Brueckner, co-counsel on the brief along with Louis Bograd, Francine Hochberg, and Leslie A. Bailey.

Perry is part of TLPJ's Access to Justice Campaign, which includes fighting federal preemption. The Perry family's trial counsel is Larry M. Roth of Orlando, Florida. TLPJ's brief in *Perry* is available online at www.tlpj.org.

Special recognition to MTLA's newest

Monthly JUSTICE PAC Contributors!

Their ongoing commitment to their clients and profession is greatly appreciated!

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Beth A. Wilcoxon
Michael J. Morse, PC, Southfield

Many thanks also to the stalwarts who have increased their monthly support.

Raymond J. Andary
Andary & Andary, Mt.Clemens

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Cox, Hodgman & Giarmarco, Troy

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Ronni Tischler
Miller, Shpiece & Tischler, Southfield

Sept 29 *Day With David Ball Seminar* One of "Best MTLA Seminars Ever"

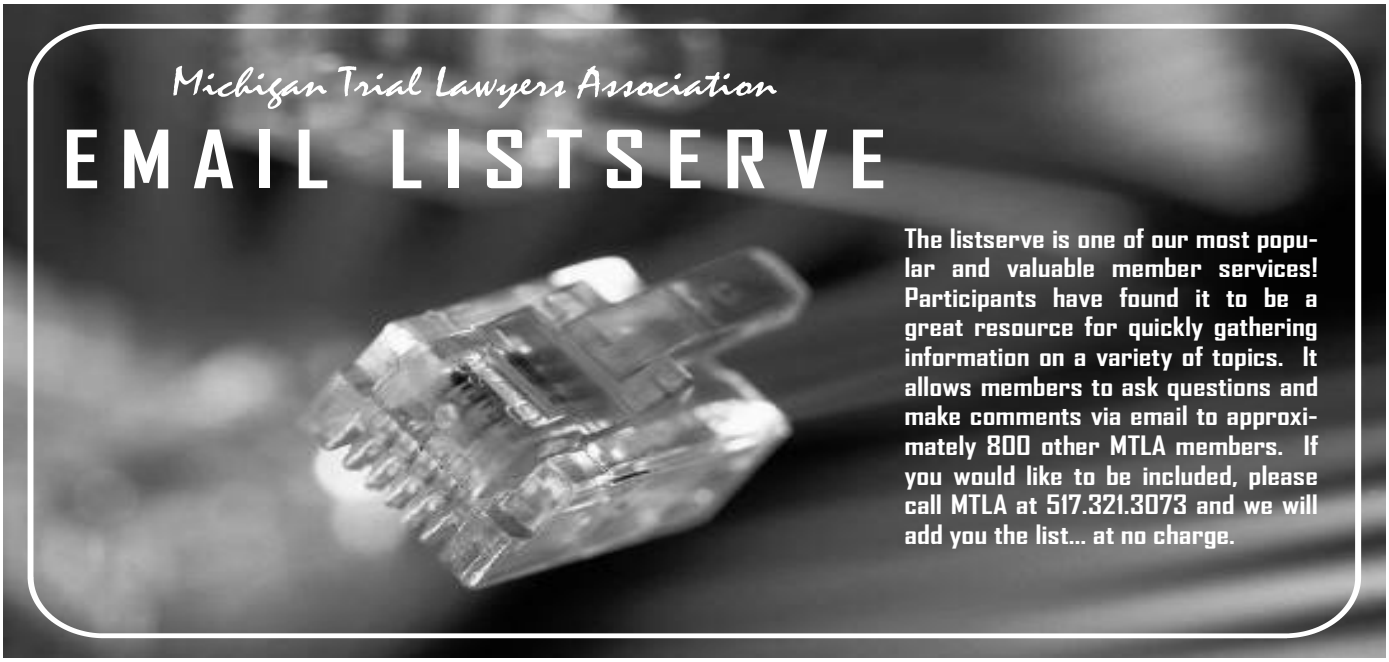
Over 170 MTLA members gathered to listen and learn from renowned jury expert David Ball on September 29, 2006 at the Crown Plaza Hotel in Novi.

Reaction was immediate, and overwhelmingly positive.

David Ball spoke on subjects ranging from Damages and Tort Reform, and the Fundamentals of Damages, to Damages in Opening and Closing.

Due to the cutting edge material presented, the seminar was not taped and there are no recordings for sale.

David Ball, Ph.D. from Durham, NC delivered an outstanding seminar to MTLA Plaintiff Members on September 29th.



"Election Update" Series

Traveling election presentation educates members

MTLA leadership has been conducting a traveling presentation, "Election Update," designed to educate members and provide a comprehensive analysis of election issues.

MTLA Executive Board member Bernie Mindell was the host of the kickoff session of the Election Update presentation series on August 15, 2006, and MTLA Executive Board Member Barry Gates hosted the September 12 session.

Officers, Board members and other members came to gather to see a hard-hitting summary of the election landscape and to discuss particular races.

Election Update participants socialize and discuss the upcoming election at the September 12, 2006 session.

MTLA Executive Director Jane Bailey explaining the dynamics of the November 7, 2006 election.

Executive Board member Glenn Saltsman (left), MTLA President Elect Robert Raitt, and MTLA Executive Board member Scott Goodwin at the August 15 Election Update presentation.

Hats Off and a Big Thanks to MTLA Team Amicus!

MTLA would not be able to accomplish what it does without the dedicated members who work so hard and sacrifice so much on its behalf. These determined men and women have volunteered endless hours tracking and analyzing decisions or writing Amicus Briefs for the benefit of our clients. They are true MTLA leaders who deserve the gratitude of every MTLA member. If you have an Amicus Question, please contact Co-Chair Jan Brandon at 248.855.5580 or jmbjdc@aol.com or Co-Chair Robert June at 734.481.1000 or bobjune@voyager.net.

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Wisconsin Medical Malpractice Caps Overturned

by *Robert S. Peck*

Mr. Peck is the President of the Center for Constitutional Litigation, P.C.

This month's National Perspective reviews a single important decision, *Ferdon v Wisconsin Patients Compensation Fund*, 701 NW2d 440, 466 (2005), which held by a 4-3 vote that Wisconsin's cap on noneconomic damages in medical malpractice cases violates that state constitution's guarantee of equal protection. The decision is particularly significant because of the extent to which it reviewed and examined the available empirical evidence supporting such a cap and found it wanting on a rational relationship basis.

The case had its genesis when Matthew Ferdon was injured during the course of his delivery at birth. The doctor pulled him out by his head, causing a form of palsy. He and his parents sued the doctor and the hospital for his resultant injuries of partial paralysis and a deformed right arm. Multiple surgeries and therapy now await Ferdon in the future, although his right arm will never function normally. A jury found the doctor negligent and awarded Ferdon $403,000 in future medical expenses and $700,000 in noneconomic damages (approximately $10,000 a year for the rest of his life expectancy). His parents were awarded $87,600 in future care costs for Matthew.

Also named as a defendant pursuant to state law as the excess insurance carrier, the Wisconsin patient compensation fund moved to conform the noneconomic damage award to the state's inflation-adjusted damage cap of $350,000. Ferdon then challenged the constitutionality of the cap on multiple grounds, including the rights to equal protection, a jury trial, a remedy, due process, and separation of powers. Both the trial court and court of appeals upheld the cap. The supreme court reversed in a lengthy opinion, reaching only the equal protection grounds.

In beginning its analysis, the Court determined that the cap did not merit examination under the strict scrutiny approach to equal-protection questions. Rather, the Court applied rational-basis analysis, a weaker and more deferential form of review.

While noting the legislature's supremacy in making political, economic and social choices and presuming that the facts needed to sustain an act were conclusively found by the legislature, the Court also stated that a "court need not, and should not, blindly accept the claims of the legislature." Thus, to be meaningful, judicial review must include a "thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose." The Court then applied what it called "rational basis with teeth," in which it "conduct[ed] an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose."

The Court then found that the cap divided "the universe of injured medical malpractice victims into a class of severely injured victims and [one of] less severely injured victims," as measured by their noneconomic damages. In addition, the Court found that the cap, which applied "per occurrence," created issues between a single claimant with a claim exceeding the cap and multiple claimants arising out of a single incident.

Next, the Court considered the legislative findings that supposedly supported the cap. Despite the legislature's obvious interest in assuring the availability of health care in Wisconsin, the Court found that the legislature could not have wanted to do so "by shielding negligent health care providers from responsibility for their negligent actions," and thereby rewarding negligent providers. Instead, the legislature enacted the cap "to ensure the availability of sufficient liability insurance at a reasonable cost to cover claims of patients" negligently injured by a health care provider.

The Court then examined the severe burden the cap placed on children, who disproportionately make up the subclass of claimants subject to the cap. It concluded, "when the legislature shifts the economic burden of medical malpractice from insurance companies and negligent health care provid-

ers to a small group of vulnerable, injured patients, the legislative action does not appear rational." The Court added:

"If the legislature's objective was to ensure that Wisconsin people injured as a result of medical malpractice are compensated fairly, no rational basis exists for treating the most seriously injured patients of medical malpractice less favorably than those less seriously injured. No rational basis exists for forcing the most severely injured patients to provide monetary relief to health care providers and their insurers."

While noting the intuitive appeal of a cap when the objective is to reduce insurance premiums, it found that there was no rational basis for the assumption. Reviewing the available empirical literature and government reports, the Court found that caps do not have a measurable impact on medical malpractice insurance premiums. It recognized that few claims are ever filed for medical injuries and still fewer are awarded damages above the cap. While the defendant fund argued that the cost of defending meritless lawsuits contributes greatly to rising premiums, the Court found no connection between those cases and ones in which a judge or jury determined that actual and substantial malpractice took place. The cap affected only meritorious cases.

The Court also found no rational relationship existed between the cap and the legislative objectives of keeping the state fund's annual assessments to health care providers low or enabling it to operate on a sound financial basis. After all, the fund, both before and after the cap, annually ran surpluses. Any reduction in fund assessments would not necessarily benefit health care providers as their premium increase from higher limits could overset or even be larger than the assessment decrease. Nor would a reduction in assessments contribute to the state's physician supply, the Court reasoned, because few high medical malpractice verdicts ever make a claim against the fund. In fact, the fund had not had to pay out in more than 87% of medical malpractice claims naming the fund as a party.

Furthermore, no rational relationship existed between the legitimate legislative objective of lowering health care costs and capping noneconomic damages. The Court said that "even assuming that a $350,000 cap affects medical malpractice insurance premiums . . . , medical malpractice insurance premiums are an exceedingly small portion of overall health care costs." In Wisconsin, less than one dollar of every $100 spent on health care between 1987 and 2002 could be traced to medical malpractice costs. The Court then found that any savings that could be gained by capping damages would "have no effect on a consumer's health care costs."

In response to the "fleeing doctors" rationale, the Court cited the "non-partisan U.S. General Accounting Office[, which] concluded that doctors do not appear to leave or enter states to practice based on caps on noneconomic damages in medical malpractice actions." Moreover, the GAO report found that claims of physician departures were substantially overblown and instead were a problem only in scattered rural areas, where the problem has always existed.

Finally, the Court found little credence to the claim that fear of liability engenders the costly practice of defensive medicine.

In the end, the Court found that the legislature's "rationales [were] so broad and speculative" that they could not support the constitutionality of the cap. While there was no rational basis to believe capping damages yielded significant benefits, it was clear that the costs would be improperly borne by the most severely injured claimants.

Interest Rates for Money Judgments

The average interest rate paid at auctions of 5-year United States Treasury Notes during the 6 months immediately preceding July 1, 2006 was 4.815%. The statutory interest rate "floats" 1% over that figure. *See MCL 600.6013(6), 600.6455(2).*

www.michigan.gov/treasury

Serious Medical Errors: Where Are They Coming From?

Hospital errors causing death have been estimated at 44,000 to 98,000 annually. See R. Wachter & K. Shojania, "Internal Bleeding: The Truth Behind America's Terrifying Epidemic of Medical Mistakes" (New York: Rugged Land Press 2004). The Institute of Medicine's now-famous report on medical errors "To Err is Human: Building a Safer Health System" (National Academy Press, Kohn, Corrigan & Donaldson, eds, 1999), brought considerable public attention to medical errors and their prevention. The Institute of Medicine estimated then "every hospital has somewhere between 5 and 10 deaths from medical errors each year." In 2002, New England Journal of Medicine reported a national survey of 830 physicians and 1207 members of the public. selected at random, where 35% of physicians and 42% of the public reported experiencing a medical error in their own care or that of a family member sometime in their life. R. Blendon, et al., "Views of Practicing Physicians and the Public on Medical Errors," NEJM, Vol. 347(24), December 12, 2002, pp. 1933-1940. An error causing "serious health consequences" was reported by 18% of physicians and 24% of the public surveyed, including death reported by 7% of physicians and 10% of the public.

Four main forces obstructing a system-wide cure for unsafe health care have been identified: "an outdated mental model for medical mistakes, collective inattention to patient safety, a reimbursement system that provided no incentives for safety, and a fragmented organizational structure." R. Wachter, "The End of the Beginning: Patient Safety Five Years After 'To Err is Human'", Health Affairs, 2004 Jul-Dec; Suppl Web Exclusives:W4-534-545 (November 30, 2004). The chief of medical service at UCSF Medical Center, Dr. Robert Wachter sums up: "Amid signs of progress, there is still a long way to go."

Trial lawyers, usually working on a client-by-client basis, often uncover isolated pieces of the medical liability puzzle. Now a new medical study collectively examines diagnostic mistakes in the ambulatory setting. T Gandhi, A. Kachalia, E. Thomas, A. Puopolo, C. Yoon, T. Brennan & D. Studdert, "Missed and Delayed Diagnosis in the Ambulatory Setting: A Study of Closed Malpractice Claims", Annals of Internal Medicine, Vol. 145(7), October 3, 2006, pp. 488-496. Retrospective review of 181 claims involving diagnostic errors that harmed patients concluded that the most common breakdowns of the diagnostic process in the sample were:

- Failure to order an appropriate diagnostic test;
- Failure to create a proper follow-up plan;
- Failure to obtain an adequate history or perform an adequate physical examination; and
- Incorrect interpretation of diagnostic tests.

Interestingly enough, the study disclaimed that "reviewers were not blinded to the litigation outcomes" and the reliability of error determination was "moderate". The study concluded that diagnostic errors that harm patients are "typically the result of multiple breakdowns and individual and system factors." With correct measures, diagnostic errors would often be preventable.

Related Reading:

1. Kachalia, A., Gandhi, T., et al., "Missed and Delayed Diagnoses in the Emergency Department: A Study of Closed Malpractice Claims From 4 Liability Insurers", Annals of Emergency Medicine ("E-published ahead of print", September 22, 2006), examining 79 closed claims.

2. Editorial, "Is Ambulatory Patient Safety Just Like Hospital Safety, Only Without the 'Stat'", Annals of Internal Medicine, Vol. 145(7), October 3, 2006, pp. 547-549.

3. Commentary, P. Pronovost, M. Miller & R. Wachter, "Tracking Progress in Patient Safety: An Elusive Target", JAMA, Vol. 296(6), August 9, 2006, pp. 696-699.

4. D. Studdert, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," NEJM, Vol 354(19), May 11, 2006, pp. 2024-2033, "Our findings suggest that moves to curb frivolous litigation, if successful, will have a relatively limited effect on the caseload and costs of litigation. The vast majority of resources go toward resolving and paying claims that involve errors."

5. Sounding Board, "The Patient's Right to Safety—Improving the Quality of Care Through Litigation Against Hospitals", NEJM, Vol 354(19), May 11, 2006, pp. 2063-2066.

6. C. Zahn & M. Miller, "Excess Length of Stay, Charges, & Mortality Attributable to Medical Injuries During Hospitalization," JAMA, Vol. 290(14), October 8, 2003, pp. 1868-1874.

7. S. Weingart & L. Iezzoni, "Looking for Medical Injuries Where the Light Is Bright," JAMA, Vol. 290(14), October 8, 2003, pp. 1917-1919.

8. T. Lee, Editorial, "A Broader Concept of Medical Errors", NEJM, Vol. 347(24), December 12, 2002, pp. 1965-1967.

MTLA Stalwart Wins Distinguished Brief Award

MTLA Member **Donnelly W. Hadden** was one of the winners of the Thomas M. Cooley 2006 Distinguished Brief Award.

Each year, the Distinguished Brief Award is given in recognition of the most scholarly briefs filed before the Michigan Supreme Court. Winners were recognized for their outstanding legal writing at the Distinguished Brief Awards Dinner on July 22 at the Lansing Country Club.

Congratulations Donnelly!

MTLA's 2006 Judicial Endorsements

Only candidates who have sought MTLA's endorsement are considered for endorsement. We do not solicit judicial candidates to request our endorsement. The following list of candidates have received MTLA's endorsement as of our publication deadline.

Supreme Court
Jane Beckering
Hon. Michael Cavanagh

Court of Appeals - First District
Hon. Diane Marie Hathaway

Macomb County Circuit Court
Carrie Fuca

Saginaw County Circuit Court
Hon. Darnell Jackson

46th Circuit Court
Janet Allen

55th Circuit Court
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55th District Court
Hon. Thomas P. Boyd

56th District Court
Hon. Julie Reinke

Wayne County Probate
Frank S. Szymanski
Dan Hathaway

Medical Malpractice Seminar Received Rave Reviews by 80 attendees

MTLA hosted a "Michigan Med Mal Law Update" on Friday, October 6, 2006. Co-moderated by MTLA President Jesse Reiter and MTLA Vice-President Judith Susskind, the seminar featured an outstanding line-up of speakers and topics.

Speakers included Marc Lipton, Southfield; Joey Niskar, Southfield; Janet Brandon, Farmington Hills; David R. Parker, Detroit; Mark Granzotto, Royal Oak; Mark Bendure, Detroit; Norman Tucker, Southfield; and Andrew Muth, Ypsilanti.

Mark Granzotto

Mark Bendure

co-moderator MTLA Vice-President Judith Susskind, David R. Parker, Co-moderator MTLA President Jesse Reiter, Andy Muth, Marc Lipton, and Joey Niskar

MTLA Hall of Fame

MTLA sincerely thanks and is pleased to recognize **MTLA Hall of Fame** members whose generosity and financial commitments help us to serve our members and their clients through effective representation at both the state and national levels. Contributions support **MTLA, JUSTICE PAC,** and **ATLA PAC** and are based on a two year election cycle (Nov. 2004-Oct. 2006).

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We appreciate the support of the numerous contributors giving less than $1200 per two year election cycle, but due to space limits, we are unable to list their names.

Michigan Residents' Rezulin Claims Revived

A recent US Court of Appeals opinion, *Desiano v Warner-Lambert & Co* (CA 2, Docket #05-1705, 10/5/06), reopens the door to Michigan residents pursuing Rezulin claims, consistent with the fraud exception of the Michigan FDA immunity statute, MCL 600.2946(5)(a).

Appellants in this case are all Michigan residents alleging injuries caused by Rezulin, a drug marketed and sold by defendant Warner-Lambert for treatment of type-2 diabetes. The FDA originally approved Rezulin in 1997. After adverse liver-related effects were documented in patients taking Rezulin, defendants agreed to a series of label changes, which were authorized by the FDA between November 1997 and June 1999. In March 2000, defendants withdrew Rezulin from the United States market. See *Desiano v Warner-Lambert Co*, 326 F3d 339, 344 (CA 2, 2003). Product liability litigation, beginning in Michigan and California state courts, alleged common law claims. The drug companies removed the actions to federal court, and all claims were subsequently consolidated and transferred by the Judicial Panel on Multidistrict Litigation to Judge Lewis A. Kaplan in the Southern District of New York.

In the District Court, the drug companies moved for judgment on the pleadings on the ground that liability was foreclosed under Michigan state law. They argued the Michigan "fraud" exception to immunity, MCL 600.2946(5)(a), was impliedly preempted by the Federal Food, Drug and Cosmetic Act, 21 USC 301 *et seq.*, and Medical Device Act, 21 USC 360e(b)(1)(A)-(B), and therefore had to be severed from the rest of the Michigan immunity law.

The 2nd Circuit opinion, written by Judge Guido Calabrezi, recognized that a presumption against federal preemption of state law applies in the context of traditional common-law claims preserved by states to protect the health and safety of their citizens. See *Medtronic v Lohr*, 518 US 470, 475 (1996); *Metropolitan Life Ins Co v Massachusetts*, 471 US 724, 756 (1985); *Cipollone v Liggett Group, Inc*, 505 US 504, 544 (1992) (Blackmun, J, concurring in part and dissenting in part). Moreover, a fraud-based exception to Michigan's immunity statute, MCL 600.2946(5)(a), does not raise the same concerns that animated the Supreme Court's decision in *Buckman Co v Plaintiffs' Legal Comm*, 531 US 341 (2001).

The Michigan legislature has provided a general immunity for drug manufacturers with a specific exception for circumstances involving, among other things, fraud on the FDA, rather than a specific cause of action for fraud on the FDA. *Garcia v Wyeth-Ayerst Labs*, 385 F3d 961, 965-966 (CA 6, 2004). The 2nd Circuit declined to follow *Garcia's* reading of *Buckman*, because there are three differences between the nature of the claim which MCL 600.2946(5) exempts from abolition and the preempted claim in *Buckman*. Given the bases of *Buckman*'s holding, "each of these is crucial." *Desiano*, Slip Opinion, p. 14.

Presumption Against Preemption. The product liability cause of action (which survives the 1995 changes made by MCL 600.2946[5]) cannot reasonably be characterized as a state's attempt to police fraud against the FDA. Rather, as *Garcia* recognized, the object of the Michigan legislative scheme was to regulate and restrict when victims could continue to recover under preexisting state products liability law. The Michigan legislature's desire to rein in state-based tort liability falls squarely within its prerogative to "regulat[e] matters of health and safety," which is a sphere in which the presumption against preemption applies, indeed, stands at its strongest. *See Buckman*, 531 U.S. at 348 (citing *Medtronic*, 518 U.S. at 485).

Traditional Common Law Liability. Second, Appellants are not pressing "fraud-on-the-FDA" claims, as the plaintiffs in *Buckman* were understood by the Supreme Court to be doing. They are, rather, asserting claims that sound in traditional state tort law.

Immunity as Affirmative Defense. Third, the Michigan Supreme Court has indicated that proof of fraud against the FDA is not even an *element* of a products liability claim like the one here brought. *See Taylor v Gate Pharmaceuticals, Inc*, 468 Mich 1, 6-7, 13; 658 NW2d 127 (2003). The 1995 amendment of the statute went one step further and provided that compliance with federal governmental standards (established by the FDA) is conclusive as a "measuring device" on the issue of due care for drugs. However, the existence of properly-obtained FDA approval becomes germane *only* if a defendant drug company chooses to assert an affirmative defense made available by the Michigan legislature in MCL 600.2946(5). *Desiano*, Slip Opinion, pp. 19-20.

The United States District Court for the Southern District of New York (Kaplan, J.) had held that Michigan law shields pharmaceutical companies from products liability claims unless there is evidence that the drug company misrepresented or withheld material information in obtaining FDA approval for its drug. The district court concluded that Michigan plaintiffs' claims could not be distinguished from the "fraud-on-the-FDA" claim found to be preempted by federal law in *Buckman*. Vacated and remanded.

Interestingly, the 2nd Circuit said that the new FDA regulatory comments on preemption,71 Fed. Reg. 3922, 3934-3935 (Jan. 24, 2006), would not apply because they only cover labeling claims and because the FDA would be exceeding its authority absent a clear statement from Congress. *Desiano*, Slip Opinion, footnote 9, pp. 20-21.

Attorneys for the plaintiffs included: David B. Rodes, Goldberg, Persky & White, P.C., Pittsburg, and on the brief, MTLA Executive Board Member David R. Parker, Charfoos & Christensen, PC, Detroit; Jerome D. Goldberg, Southfield; and Vincent J. Carter, Girardi Keese, Los Angeles.

Medical Malpractice Non-Economic Damage Cap Consumer Price Index Adjustments

Pursuant to MCL 600.1483, Subsection 4 (1), the State Treasurer of the State of Michigan has certified that the annual percentage increase in the Detroit consumer price index for the 2005 calendar year was 2.9%. For causes of action arising after September 30, 1993, this results in a cumulative 36.7% increase in the standard limitation of noneconomic damages for a 2006 limitation of $382,800 and a cumulative 36.7% increase in the limitation on nonecomomic damages for certain permanent disabilities for a 2006 limitation of $683,500. For causes of action alleging medical malpractice arising before October 1, 1993, the 2.9% increase in the Detroit consumer price index results in a cumulative 78.7% increase in the previous $225,000 limitation of noneconomic damages for a 2006 limitation of $402,100.

www.michigan.gov/treasury

Insurance Bureau Adjusts Work Loss Payment Effective October 1, 2006

As prescribed by Administrative Rule 500.811, the statutory adjustment was applied to the previous maximum of $4,400 per month. Accordingly, the new maximum work loss payment effective October 1, 2006 through September 30, 2007 is $4,589 per month for work loss benefits under personal protection insurance policies.

The new maximum also applies to survivor's loss benefits.

www.michigan.gov/ofis

Verdicts & Settlements

Debra Freid, Verdicts & Settlements Editor

Keith Richardson v Flint School District
Genesee County Circuit Court
Hon. Archie L. Hayman

In this disparate treatment race discrimination claim, the state court followed the federal "adverse action" standard instead of the "ultimate employment action" standard, and justice actually prevailed.

Keith Richardson, a teacher/coach with an impeccable 40-year record of achievement in the heavily integrated Flint Public School system, was falsely accused of assaulting a teenage African-American student and then falsely portrayed publicly as a racist bully. Richardson, who is white, was written up, suspended for several weeks, and had to endure the stress of public humiliation, which led to treatment with a cardiologist and also forced him into early retirement. An African-American teacher at the same school was involved in a virtually identical incident with a teenage African-American student, but nothing happened – no write-ups, no discipline and no negative publicity.

On December 6, 2001, a notoriously troubled teenage African-American student disrupted Mr. Richardson's classroom. When Mr. Richardson sent this student out of class to go to the Administrator's office, the student came back and shoved him, at which point Mr. Richardson used reasonable force to gain control of the student and restrain him.

Astonishingly, the defendant's predominantly African-American administration took the student's side and suspended Mr. Richardson for several weeks. Even more astonishingly, Keith Richardson dedicated his entire adult life to teaching and coaching in the multi-racial environment without a hint of racial animus, was falsely portrayed publicly as being a racist bully over this incident involving an incorrigible student. The stress over the suspensions and false portrayal of being a racist bully became so great that Plainitiff retired early.

Simultaneously with the suspension, Keith Richardson had to endure the uncertainty of the school's arbitration process. After approximately one and a half years, the arbitrator, an independent African-American arbitrator from Detroit, issued an opinion which found that Keith Richardson did not use unreasonable force upon the student.

The lawsuit was filed under the Michigan Elliot Larson Civil Rights Act, using a disparate treatment claim. Defendant filed two motions for summary disposition, a motion for reconsideration and an application for leave to appeal which were unsuccessful. The case then proceeded to ADR and the evaluators assessed the settlement value to be $175,000, which both sides accepted.

Plaintiff was represented by Tom Pabst of Flint.

Confidential - John Doe v James Doe, PAC, Dr. Jack Doe, MD, and XYZ Medical Center, PC
Kalamazoo County Circuit Court
Hon. J. Richardson Johnson

In this medical malpractice case, the plaintiff won what is believed to be the first such verdict in Kalamazoo County in the last 25 years, after obtaining concessions from the defense expert on cross-examination.

The Plaintiff, a 22-year-old body builder with a well documented history of pre-existing bicuspid aortic valve disease had treated with Defendant XYZ Medical Center, P.C., a family practice clinic, since he was a teenager. Individuals with bicuspid aortic valve disease are at an increased risk for infection to the lining of the heart and the heart valves (endocarditis).

On June 22, 2000, the Plaintiff appeared at the Defendant Medical Center and was seen and examined by a Physician's Assistant, who was working under the direction and supervision of a family practitioner. He presented with a history of fever, night sweats, weight loss, nausea and malaise. The physician's assistant made a diagnosis of irritable bowel syndrome and started him on Prevacid to reduce gastric acidity. The Plaintiff returned on July 26, 2000 and, at this time, presented with bilateral knee and ankle pain in addition to the previous complaints. Plaintiff indicated that his knees and ankles had been swollen for the better part of a week. It was noted that there was blood in his urine on lab work. The Physician's Assistant ordered an arthritis panel and gave the patient Vioxx samples.

Within a couple of days, the Plaintiff was unable to continue working and complained to his mother who scheduled an appointment with her own internist, who saw the Plaintiff on August 2, 2000. Plaintiff was still complaining of weight loss, fever, night sweats, dizziness and, now, pain in the upper left quadrant with deep breathing, frequent urination and morning vomiting. The internist immediately suspected endocarditis and referred the Plaintiff to a cardiologist who performed an echocardiogram the following day. Plaintiff was admitted thereafter to Bronson Hospital with a diagnosis of endocarditis and treated with intravenous antibiot-

ics. He was transferred to Cleveland Clinic on August 12, 2000, where he underwent 2 surgeries including the replacement of his aortic valve with a human transplant and the mechanical replacement of his mitral valve.

Medical expenses, which were reimbursed by Blue Cross, totaled $ 211,152.48. The Plaintiff was off work for a period of recuperation, and his wage loss totaled $15,000.

Given the fact that the Defendants' chart documented a clear history of bicuspid aortic valve disease, the standard of care required the Defendants to draw and evaluate blood cultures to rule out endocarditis when the Plaintiff presented with symptoms of that disease including night sweats, fever and significant weight loss. In fact, the defendants' expert cardiologist conceded on cross examination that, if the hypothetical facts were correct as to Plaintiff's symptoms on his first visit to the doctor on June 22nd, Plaintiff had presented with signs consistent with endocarditis. The jury concluded that the diagnosis had, in fact, been missed. The Plaintiff then established that the Defendants' failure to evaluate Plaintiff for endocarditis early on resulted in a worsening of the underlying condition and the need for two open-heart surgeries. Had the condition been timely diagnosed and treated, there was a reasonable degree of medical certainty that it could have been alleviated with antibiotic therapy alone.

The jury returned a verdict for the Plaintiff, and awarded $211,152.48 for past medical expenses; $15,000 for past wage loss; $75,000 for pain and suffering; and $14,457.01 for future medical expenses for Coumadin therapy, for a total verdict of $347,882.93. When costs and interest were added, the verdict was increased to $367,489.56. The parties settled for $332,584.49, a 10% discount in exchange for defendants waiving their appeal rights.

Plaintiff was represented by Douglas Merrow of Portage.

Estate of Christopher Lindsey v Estate of Ryan Rice and Penny Rice
Jackson County Circuit Court
Case No.: 04-2500-NI

In this third-party automobile negligence claim, Plaintiff's counsel took the time necessary to develop Plaintiff's injuries, and therefore his damages, with his many treating physicians, which provided a compelling basis for settlement, prior to case evaluation, at 97% of the policy available.

At the time of his serious injury in a vehicle crash on November 30, 2003, Christopher Lindsey was a 19-year-old high school student, unmarried with no children. At the time of the crash, Christopher Lindsey was the front seat passenger in a car driven by his friend, Ryan Rice, also age 19. Just before, Ryan Rice and Christopher had been at a party with other teens, where they both had consumed drugs and alcohol.

Later that evening, around 2:00 a.m., Ryan Rice and Christopher Lindsey left the party to pick up a friend. Ryan Rice, who was under the influence of drugs and alcohol, lost control of his car on a curve while traveling at a high speed and struck a tree. Neither boy was seat belted. Ryan Rice was killed instantly and Christopher Lindsey was life-flighted to the University of Michigan Hospital with serious closed-head injuries, a broken jaw, a broken leg and dental injuries. Christopher Lindsey was later released from the University of Michigan to a brain injury rehabilitative center and then to an independent living program, and has permanent brain injury residuals.

Plaintiff maintained that the Defendant Ryan Rice was negligent in causing the crash by driving carelessly after having consumed drugs and alcohol. Plaintiff maintained that Co-Defendant Penny Rice was negligent under the owner's liability statute for providing the vehicle, that was titled and insured in her name, to Ryan Rice despite his very poor driving record.

Plaintiff requested that the Defendant tender the policy limits of $500,000 pre-suit. However, the carrier refused to pay **any** amount largely because of Plaintiff's own intoxication. Plaintiff filed suit. The key to success was developing the Plaintiff's damages with his many physicians, and ensuring, through the use of Plaintiff's sworn deposition, that he (Plaintiff) had no role in Defendant Ryan Rice's intoxication or in his reckless driving. Only hours after receiving Plaintiff's case evaluation brief, the Defendant offered to pay $485,000 or 90% of the policy to avoid the evaluation. Plaintiff accepted and the case settled.

Plaintiff was represented by Dennis Hurst of Jackson

Kelly Symons, as Personal Representative of the Estate of Daniel Symons v Dr. Robert Prodinger, Dale Russell, PA and Battle Creek Emergency Room Physicians
Case No.: 04-768-NH

This medical malpractice verdict was successful where Plaintiff's counsel highlighted the tragedy of "cost-cutting medicine", which encourages the Physician's Assistant to do all the work of the doctor, even thought the P.A. does not have the training or knowledge of a supervising physician.

In 2004, the Plaintiff's decedent, Dan Symons, then only 35 years old, went to Battle Creek Health Systems with left arm, shoulder and back pain. Dan Symons was placed on the "Fast Trac". Once on the "fast trac," a patient like Symons is seen, diagnosed, treated and discharged entirely by a P.A. without consultation with an Emergency Room Physician.

Unfortunately, the P.A. here did not order an EKG to rule out a cardiac origin for the pain and he discharged Mr. Symons with a diagnosis of acute myofacial strain. Dan

Symons was discharged, went home and died in bed, of an acute myocardial infarction only 8 ½ hours later.

At the time of his death, Dan had been employed as a computer engineer, earning $33,000 per year. He was survived by his wife, three children, his mother, sister and a brother.

The Plaintiff sued Battle Creek Emergency Room Physicians, the contract group responsible for providing emergency room care at the Battle Creek Hospital, as well as the Physician's Assistant, Dale Russell, and his supervising physician, Dr. Robert Prodinger, a board certified emergency room physician, both of whom were employed by Battle Creek Emergency Room Physicians Group.

Plaintiff's experts included P.A. James VanRhee of Kalamazoo, Michigan; Dr. Christopher Barton, expert in emergency room care, from San Francisco, California; Cardiologist, Dr. Douglas Stewart of Seattle, Washington; and economist, Dr. Adrian Edwards of Kalamazoo, Michigan.

At trial, counsel reminded the jury that the law, MCLA 333.17078(2) requires a Physician's Assistant to "conform to minimum standards of acceptable and prevailing practice for the supervising physician," and that the patient cannot be the one to suffer if, through efforts to save money, the treatment group chooses to use a "fast trac" system. In fact the board certified emergency room physician, defendant Dr. Prodinger, admitted that he never even knew that Symons was in the emergency room.

After a 5-day trial, the Jury returned a verdict for the Plaintiff, and awarded all economic damages requested of $1,057,486 (past and future losses as identified by the longer verdict form) as well as $100,000 for conscious pain and suffering and $150,000 for next of kin loss.

Plaintiff was represented by Frederick Eagle Royce, III, of Douglas and Samuel Field, of Kalamazoo.

Confidential Settlement

The settlement of this birth trauma case for $1.3 million demonstrates that, when properly handled, these cases have substantial value even in the face of significant *Daubert* and *Fulton* challenges.

In this case, the pregnant Plaintiff presented to the hospital at 21 weeks gestation with a complaint of spotting. On exam, her cervix was three centimeters dilated and 100% effaced with bulging membranes. An amniocentesis revealed an elevated white blood cell count but no culture evidence of infection and therefore an emergency cerclage was placed for a diagnosis of incompetent cervix. The patient was advised of a poor prognosis for the pregnancy if she delivered between 23 and 26 weeks' gestation and she was discharged home on a 10-day course of antibiotics. Approximately three weeks later, she returned to the hospital with a history of discharge. The resident physician did not see discharge but tested for contractions, a urinary tract infection and STDs. After discussing the case with the attending physician, the patient was discharged. Six days later the patient experienced preterm premature rupture of membranes. Chorioamnionitis was diagnosed and the plaintiff's minor delivered via cesarean section at just over 25 weeks' gestation. Plaintiff-minor suffers from mental retardation and mild

cerebral palsy secondary to prematurity and chorioanmnionitis.

Plaintiff alleged that the Defendant should have ordered a wet-mount to be performed at 24 weeks, when the plaintiff presented at the hospital triage, which would have shown bacterial vaginosis. Antibiotics would then have been required and the preterm delivery would have been avoided until 28 weeks or later. Plaintiff-minor would then have been near-normal to normal. However, Defendants asserted that there was no vaginal discharge seen on the March 24th admission, and even if there was, it was not the type of vaginal discharge which suggested bacterial vaginosis and required a wet-mount. Moreover, the Defendant argued that even if bacterial vaginosis was found, the medical literature indicates that there was little to no benefit of treatment, and certainly not a benefit of greater than 50%, as would be required under the *Fulton* case. Furthermore, Plaintiffs likely had a bacterial colonization back at 21 weeks' gestation when membranes were bulging as evidenced by the elevated white count in the amniotic fluid. Chances were, Plaintiff was going to deliver at 24 to 26 weeks no matter what happened, as evidenced in the medical records when the cerclage was placed.

The case settled at the time of the second facilitation. At the time, the Defense had filed two interlocutory appeals involving several *Daubert* Motions and one *Fulton* 50% Loss of Chance Motion, and motions attacking the specificity of the Affidavit of Merit and the Notice of Intent.

Plaintiff's expert was the InFocus Research Group.

Plaintiff was represented by Jesse Reiter and James McCullen of Bloomfield Hills.

Linda Riley v State Farm Mutual Auto Insurance Company
Wayne County Circuit Court
Hon. Wendy M. Baxter
Case No.: 04-413186-NI

In this No-Fault case, State Farm refused to tender an offer until the eve of trial. The jury disagreed with State Farm's assessment of the case and awarded Plaintiff her no-fault benefits

In this case, Ms. Riley, a State Farm insured, suffered neck, shoulder and low back injuries in an auto accident. Diagnoses included not only cervical and lumbar pain, but also a herniated disc at L4-L5. State Farm contended that the Plaintiff's pain was not related to the auto accident, but instead to other pre-existing conditions.

Despite the fact that the Plaintiff's treating physician, Dr. Leonard Ellison, supported Plaintiff's position that the injuries were accident related, State Farm rejected the case evaluation of $7,500 and refused to make any offer at all until the eve of trial, when it tendered the $7,500 but only if plaintiff would waive all future benefits. State Farm had refused the offer to arbitrate as well.

After a trial, the Jury returned a verdict of $22,360.02.

Motions for fees and costs were pending.

Plaintiff was represented by Leo Neville of Southfield.

Mike Sherman v Pro Com Towers
Wexford County Circuit Court
Hon. Charles Corwin
Case No.: 03-17788

On August 15, 2001, Mike Sherman was employed as a Senior Maintenance Engineer by Raycom Media (TV 7&4) in Traverse City. Defendant, ProCom Towers, was hired by plaintiff's employer to paint the structure and grease the "guy-wires" of its 1,200 foot broadcast tower in Harrietta, Michigan. Plaintiff was assigned by his employer to monitor the work of ProCom at the tower site and make sure that the maintenance activities did not damage the tower or other equipment.

ProCom "rigged" the tower with cables and ropes to move men and equipment up and down the structure. The cable was secured at one end and moved by a winch mounted on a small trailer and then hitched to a pick-up truck. The pick-up truck also served as the anchor for the winch and cable which was necessary because the weight of the equipment being hoisted, as well as the cable itself, exerted significant pull on the winch.

During the process of "shutting down," it was necessary to secure the hoist cable so that it would not sway in the wind. This was typically accomplished by removing the slack from the cable and then clamping it to the tower or some other fixed object.

Removing the slack required the cable to be tensioned. To prevent the trailer and winch from being pulled toward the tower as the cable is tightened, chocks or wood blocks are placed beneath the wheels of the trailer. The pick-up truck that had been used as the anchor was unhitched from the trailer to transport workers back to the hotel.

According to defendant's employees who were present that day, when the trailer was unhitched from the truck, the tongue immediately began to lift up and the trailer was being pulled toward the tower. Two of the employees struggled to regain control. Mike Sherman was in the process of closing down the broadcast buildings when he noticed several of the ProCom employees "struggling" with the trailer. As he approached to help, the trailer suddenly shifted, striking him on the left leg causing a severe injury.

Three ProCom employees testified that the trailer shifted because "someone" removed the blocking from the right trailer wheel. When the trailer was unhitched, the tension in the cable pulled the trailer and, without the blocking, it pivoted in the direction of Mike Sherman. Only the owner of ProCom denied fault claiming that the incident was an "act of God."

Plaintiff's experts included Terry Martin of Traverse City, who ran a local tower repair and maintenance company, and David Brayton, a construction site expert, of Portage, Michigan.

Plaintiff suffered a severe ankle fracture in the accident. Over the ensuing 1½ years, the doctors tried to repair the damage with multiple surgeries. When those procedures failed to alleviate the debilitating symptoms caused by an entrapped nerve, Plaintiff, then age 49, lost his left leg below the knee to amputation. He has not been able to return to work and suffers significantly emotionally as well. The case was evaluated at $1,000,000 which Plaintiff accepted but Defendant rejected. After several facilitations, the carriers agreed to settle the case for $1,000,000.

Plaintiff was represented by Daniel O'Neil of Traverse City.

Wolff v Serlin
Oakland County Circuit Court
Hon. Denise Langford-Morris
Case No.: 04-059027

In this intriguing automobile negligence claim, Counsel for Plaintiff was able to strike Defendant's non-party at fault defense when the defendant repaired the vehicle twice, before Plaintiff's experts could examine it.

In 2004, the Plaintiff was browsing at a local Barnes and Noble bookstore with his young son when a Ford Escape SUV, driven by the defendant, crashed through the front window of the store and rammed into the Plaintiff, just missing his son. The Defendant claimed that her car had surged forward unexpectedly and insisted that she had not done anything wrong. However, the responding police officer had noted that the defendant was actually driving the car with her left foot, because her right foot was immobilized by a large walking boot cast. To complicate matters further, the Ford Escape was actually recalled twice by Ford; however, neither recall related to any type of defect that would cause the sudden surging described by the Defendant. Based upon the defendant's claim that it was the SUV itself that caused the accident, the Defendant filed a non-party-at-fault notice, naming Ford. In an effort to short circuit a products claim, Plaintiff filed a Motion to strike that defense, citing the Defendant's "expoliation" of the evidence (i.e., the pre-suit repairs to the SUV) which had occurred before Plaintiff's experts could examine the car. When the motion was first filed, the Judge took it under advisement. However, once the Defendant had the car repaired a second time **while** the litigation was pending, the Judge granted Plaintiff's renewed motion to strike the non-party-at-fault defense. Once that defense was eliminated, the Defendant admitted liability. Plaintiff's experts who were helpful in the presentation of this motion included

accident reconstructionist Carl Savage, of Grand Blanc, and Conley Ray, a mechanical engineer out of New Boston.

As a result of the Defendant's negligence, the Plaintiff suffered a tibea plateau fracture which required two surgeries over the next year. Although Plaintiff was not left with significant restrictions thereafter, he could no longer run or participate in marathons as he had before. There was no significant economic loss because the Plaintiff was self employed in the restaurant business. The case was largely tried on Plaintiff's pain and suffering and loss of the ability to engage in his hobby of running.

The jury returned a verdict of $200,000. When polled, 6 of the 7 jurors agreed on the verdict. There was one runner on the jury who was particularly favorable. Interestingly, despite the admitted liability and the clear injury suffered by the plaintiff, the one dissenting juror was of the opinion that the plaintiff deserved no award. That dissenting juror was a minister.

Plaintiff's treating surgeon, Dr. James Goulet, of U of M in Ann Arbor, testified on his behalf.

Plaintiff was represented by Timothy Klisz of Canton.

William Weishaar v H&K Quick Oil Change, LLC
Oakland County Circuit Court
Hon. Fred Mester
Case No.: 05-065829

In this Consumer Protection Act claim, Plaintiff's counsel obtained a verdict of 3 times the out-of-pocket losses and was able to file for an award of fees as well.

In this case, the Defendant, H&K Quick Oil Change, used an incorrect oil filter when performing an oil change on Plaintiff's Geo Tracker. The filter dislodged a short time later, draining the oil and causing the engine to seize. The cost of the oil change was $28.05 but the cost of the engine repair was $4,665.00.

The Plaintiff's expert was a certified master mechanic, Anthony Zolinski of St. Clair.

The case was evaluated for $15,000 which the Defendant rejected.

At trial, the Court permitted the jury to consider, not only the Plaintiff's out of pocket costs, but also his aggravation, inconvenience and the "frustration of (his) legitimate expectations" under the Consumer Protection Act. The jury returned a verdict of $17,193.05. Plaintiff's counsel filed motions for statutory attorney fees under the Consumer Protection Act and for case evaluation sanctions.

The Plaintiff was represented by Dani Liblang and Michael Carelli of Birmingham.

MTLA Past President **Kathleen Bogas**
was elected 2006-2007
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Congratulations, Kathy!

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