THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

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Fall 2012

UPCOMING EVENTS FOR WPTLA

Monday, October 29, 2012 will be our annual **Beaver Co. dinner meeting** at the **Wooden Angel Restaurant**. A one hour CLE presentation will follow.

The annual **Comeback Award Dinner** will be held on **Tuesday, December 4, 2012,** at the **Duquesne Club in Pittsburgh**. Send in your nominations.

Save the date on **Wednesday, January 30, 2013** for our **Past President's Dinner** at the **River's Casino**.

Our junior members are invited to attend the dinner meeting on **Wednesday, March 13, 2013** at the **LeMont Restaurant** in Pittsburgh.

The dinner and **election of Officers and Board**, for WPTLA members only, will be held on **Thursday, April 11, 2013** at **The Grand Hall at The Priory** in Pittsburgh.

ERIE EVENT

By: Eric J. Purchase, Esq.

President Paul Lagnese chose Erie as the host site of the Western Pennsylvania Trial Lawyers Association fiscal year kick-off event on August 23 and 24, 2012, and attendees agreed it was a smashing success. Wrongly understood to be a town known best for ice and snow, Erie in summertime is a scenic resort city with spectacular waterfront entertainment, challenging golf courses and a decidedly friendly hospitality industry, all of which were put to full use by the WPTLA.

Thursday morning provided perfect weather for a day on the golf course, and Whispering Woods Golf Club was in pristine condition. George Audi of the James Street Group sponsored his entire foursome. Tony Mengine of Pittsburgh confirmed the greens were fast, the scenery beautiful and course management was, ahem, challenging. The course, long known locally for blind tee shots and difficult but fair play, lived up to its reputation. Atty. Tim George of Erie said more than one player reported they'd like another shot at the course, "now that I know where the hazards are." Fortunately for the players, John Bair of Milestone Consulting donated all the balls for the event.

Fresh off the round, the players and late arrivers gathered at the Bayfront Sheraton for a meeting of the board of governors where the board addressed important matters ranging from the solicitation of volunteers for the year's work to updates on important charity projects. Following the meeting, all retreated to the Sheraton's waterfront bar for a refreshing beverage and a chance to chew over the performances at Whispering Woods and speculate on the fate of a few notably absent players.

The evening continued with a succulent prime rib dinner, again sponsored by John Bair of Milestone Consulting. Mark Phenicie, Legislative Counsel to the Pennsylvania Association for Justice, spoke to the group about likely to be proposed legislation designed to restrict access to the courts for injured people as well as the PAJ's efforts to educate legislators and the public alike on the real impact of the proposed legislation. A surprise guest capped off the evening when Senator Jay Costa of Pittsburgh joined the group to offer insight into the year's election cycle.

The post-dinner activities of the attendees are shrouded in a veil of secrecy. Rumors abound of the group dispersing up State Street to a popular sidewalk taphouse and to the Presque Isle Downs Racetrack and Casino, where a prominent, *top*-level leader was reputed to have hit the house for big winnings. While one server at the sidewalk taphouse reported "a large group of well-dressed men and women who were having a lot of fun," no witness could be found willing to go on the record to confirm the evening's remaining activities. Tim Riley, when asked, would say only, "I won't comment, for the record. But I don't think it's a stretch to say that beer should be drunk only to celebrate major events, like a WPTLA Event in Erie or the fact my refrigerator is still running."*

Friday morning came early, as it tends to do. Sean Carmody, Keith McMillen and Craig Murphey deserve special thanks for their service on the panel of that day's seminar, "Journey to the Unknown: Trial of the UM/UIM Case." So, too, does Josh Geist, who moderated the CLE and John Bair of Milestone Consulting who sponsored the seminar just as he had the other activities.

By noon or so, a return home was what most had left on their agenda for the day. Those of us from

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President
Paul A. Lagnese

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A Message from the President …

By: Paul A. Lagnese, Esq.

As WPTLA moves into its new business year, I would like to thank outgoing President Josh Geist for the excellent leadership he provided to this organization over the past year.

At the end of August, we had the first board meeting of the year in Erie. At that meeting, the board came up with some goals for the upcoming year. I would like to share them with you.

1. We want to update our website. If any of you have been on the website recently you will see that its appearance is old and outdated. Also, there is not a great deal of content on the website. We are looking to update the website in both look and content. One of the things we would like to add to the website is a data bank that would contain sample complaints, discovery, motions and briefs. This would provide our "plaintiffs only" members with a very valuable resource for everyday use in representing our clients.

2. We want to strengthen our relationships with our business partners. In these economic times, organizations like WPTLA have an ongoing struggle generating revenue to keep their organizations active and viable. We believe that one way to do that is to strengthen our relationships with our business partners. By doing so, not only will we generate revenue but we will also be availing ourselves of the outstanding products and services our business partners provide to each of us in our practices.

3. We want to continue our commitment to electing public officials who are going to protect and promote the rights of our clients. As you are aware, the rights of our clients are under fire from those in the Pennsylvania legislature whose agenda is topped by placing caps on damages and attorneys fees. As an organization whose goal is to protect the rights of injured people we need to do everything we can to beat back these attacks on our clients' rights. To aid in that effort we would like to create a WPTLA Political Action Committee that can be used to help support candidates who support the rights of injured people.

In addition to trying to advance those important goals, we will have our annual 5K race on October 20, 2012 to raise money for the Pittsburgh Steelwheelers; the Comeback Award Dinner on December 4, 2012 to honor an injured person who has battled back from adversity; the Past Presidents Dinner on January 30, 2013; and the Judiciary Dinner on May 3, 2013. I hope to see you at some or all of these great events.

If you have any questions, complaints or suggestions regarding WPTLA, please feel free to contact me.

ERIE EVENT … *(Continued from Page 1)*

Erie were grateful you came to the furthest corner of the Commonwealth to enjoy the beautiful weather with us. It was a great event.

* Apologies to Dave Barry

BUSINESS PARTNERS

WPTLA is undertaking a new venture with regard to sponsorship opportunities. Rather than seeking sponsorships from businesses on an ad hoc basis, we created exclusive Business Partner relationships with businesses that regularly provide services to our members. These exclusive sponsorships provide our Business Partners the following benefits:

· Sponsorship at a regular dinner meeting, including presentation time;
· Sponsorship at the annual Golf Outing;
· Business Sponsor recognition and invitation to both our annual Judiciary and Comeback Award Dinners;
· A full page ad in our Bi-Annual Directory;
· A full page ad in an edition of The Advocate;
· A link on our website.

We have already obtained commitments from the following nine Business Partners:

Alliance Medical Legal Consulting

Covered Bridge Capital

FindLaw

Finley Consulting & Investigations

Forensic Human Resources

IWP

National Settlement Consultants

Stratos Legal

The Duckworth Group

Of course for this program to work our members need to support our Business Partners. So if you are not currently using any of our Business Partners please take the time to find out about each of them and please make an effort to use their services.

In This Issue

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COMP CORNER

By: Thomas C. Baumann, Esq.

WORKERS' COMPENSATION SECTION-MESSAGE FROM THE CHAIR
The PA Chambers' Attack on Doctors and Lawyers

All workers' compensation Claimants attorneys – and treating physicians – need to be aware that the Pennsylvania Chamber of Business and Industry is proposing major changes to the Workers' Compensation Act that will likely make getting quality care more difficult for their clients. Here are some of the lowlights.

Alter the Fee Schedule. Among the many proposed changes is one to alter the fee schedule by which Pennsylvania doctors are paid for treating work-related injuries. Another proposal is to adopt a Medicare fee schedule modified to reflect current fee levels by specialty, according to the most recent Workers' Compensation Research Institute data. This proposal would likely have a significant adverse effect on orthopedic surgeons and neurosurgeons. The changes in reimbursement might well induce many of the high-quality practitioners in these two areas to avoid workers' compensation cases.

Double the Panel Period. Another proposal would likely further limit and reduce the quality of care our clients receive. The Chamber proposes to extend the panel period from 90 days to 180 days. Many panels do not include the best surgeons out there, which means that many initial surgeries would not be performed by the best people in their respective fields. An extension of the captive period could also be yet a further inducement for top doctors to forgo treating work-related injuries.

Eviscerate Utilization Review. The Chamber also proposes a plan that would eviscerate utilization review. Rather than letting a workers' compensation judge determine reasonableness and necessity of treatment, the judge would be required to utilize a so-called impartial peer review physician. The judge would then be bound by the peer-reviewed determination, effectively removing the fact-finding ability of the workers' compensation judge. Everyone on either side in the system should oppose this proposal.

Curtail Medication Sources. Prescription drugs are also in the sights of the Chamber. It proposes to allow employers to require the use of a Prescription Benefits Manager to provide drugs to injured employees. We have all seen in the past how that has worked out with the insurance company pharmacies. Our clients are given a prescription card to fill their medications with either a local pharmacy or in mail-order pharmacy controlled by the carrier. Things will work reasonably well until the medications are just summarily cut off. This proposal would effectively wipe out the claimant oriented mail-order pharmacies. These organizations have grown as a result of the problems claimants have traditionally had obtaining their medication from a pharmacy beholden to or under control of the carriers. As practitioners, we would face many more calls from clients about problems obtaining medication if this goes into effect.

What every workers' compensation attorney needs to do. When you are taking a deposition of one of your clients' treating physicians, you must make that physician aware of the proposed changes to the Workers' Compensation Act. You must inform the orthopedic surgeons and neurosurgeons of the proposed threat to their income through the change in the fee schedules and the longer duration for panel treatment. The better the physicians are informed of what is happening, the more pressure can be brought to bear on the legislature.

BY THE RULES

By: Mark E. Milsop, Esq.

Recent Superior Court Case Highlights the Importance of Following Proper Procedure Where a Bankruptcy Is Involved

The Pennsylvania Superior Court's recent decision in Gubbiotti v. Santey, 2012 PA Super 131, 2012 Pa. Super. LEXIS 1059, 2012 WL 2389449 (Pa. Super. 2012), highlights the problems that can be encountered when a bankruptcy issue occurs in a personal injury action. In, Gubiotti, the defendant obtained summary judgment dismissing a civil action against him following a discharge in bankruptcy. According to the factual discussion in the Court's opinion, the defendant filed bankruptcy under Chapter 7 and listed the plaintiffs as an unsecured non-priority claim. The plaintiffs were also provided a suggestion of bankruptcy. The plaintiffs did not file an objection to discharge. Four months after the fact, a discharge in bankruptcy was granted. The defendant subsequently filed an Amended New Matter (with leave of Court) and moved for Summary Judgment. The plaintiffs argued that the matter should not be dismissed because they were seeking to recover from the defendant's insurance carrier. In support of the argument, the plaintiffs cited to 40 P.S. §117[1]. The Court ultimately rejected application of §117 since the Court read the section to come into play only once there was a judgment to enforce. Accordingly, the plaintiff was out of court.

Given the Gubbiotti decision, the question becomes what should be done when a defendant declares bankruptcy? The answer will depend on whether or not you have an interest in eventually collecting against the assets of the defendant, in whole or in part. There are three possible scenarios:

If you do not know the answer or do not know whether there is liability insurance, then you will need to attend the meeting of the creditors to gather information.

If you know that there is insurance and will not attempt to collect from the debtor's personal assets, you should immediately file a motion for relief from the automatic stay. In this motion, you will stipulate that you will not be seeking to recover from the debtor's personal assets. See In re Glunk, 342 B.R. 717, (Bankr. E.D. Pa. 2006)

You should note that in practice, once the relief from the automatic stay is granted, the bankruptcy issue usually does not re-emerge. However, out of an abundance of caution, I include the following language in my proposed order in the bankruptcy court, "In the event that her action continues after the grant of a post bankruptcy injunction, this Court recognizes that said action shall not be subject to the same."

If you wish to continue to pursue the bankruptcy action, you will need to file a proof of claim in the bankruptcy court, object to discharge if the proposed discharge does not address your client's claim, and potentially pursue an adversary action.

You also need to be concerned if your client files for bankruptcy.

If your client files for bankruptcy after the date of injury, the claim/action is considered an asset of the bankruptcy estate. This means that your client no longer has control of the case. In order to proceed, you should contact your client's bankruptcy attorney and the trustee. Normally, one of these individuals will file a Petition to have you appointed as "Special Counsel". Once you reach the point of attempting to settle the case, you will need approval from the bankruptcy court. Again, you should work with your client's attorney and the trustee. Whether your client will realize money from the action, and how much, will depend on what exemptions the client has claimed and is eligible for. Generally, the proceeds may be claimed as a general exemption or under one of the specific exemptions for personal injury claims. See 11USC §522(d)[2].

[1]40 P.S. §117 provides:

No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, … shall hereafter be issued or delivered in this State by any corporation, or other insurer, authorized to do business in this State, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, … because of such insolvency or bankruptcy, then an action may be maintained by the injured person,… against such corporation, under the terms of the policy, for the said amount of the judgment in the action, not exceeding the amount of the policy.

[2]The personal injury specific exemptions found under 522(d)(11) are:
(D) a payment, not to exceed $ 21,625, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

HOT OFF THE WIRE!

By: Chris Hildebrandt, Esq.

THIRD CIRCUIT COURT OF APPEALS

Medicare Advantage Organizations have a private right of action to sue primary payers which fail to provide reimbursement for claim-related medical expenses.

In Re Avandia Marketing, 685 F.3d 353 (3rd Cir. 2012)

This case stems from a complaint filed by Humana, a Medicare Advantage Organization ("MAO"), seeking reimbursement from GlaxoSmithKline for payment of medical expenses incurred as a result of injuries caused by the drug Avanida. Humana claimed that under the Medicare Secondary Payer Act ("MSP") it was granted secondary payer rights and, thus, it was entitled to reimbursement for covered expenses it paid related to Claimants in the Avandia MDL action.

The Third Circuit held that MAOs have an equal and parallel private right of action to sue primary payers where those payers fail to provide for payment or appropriate reimbursement to MAOs. Focusing on the secondary payer provision found at 42 U.S.C. § 1395w-22(a)(4) and § 1395y(b)(3)(A), the Third Circuit determined that a MAO is a secondary payer like Medicare. According to the Third Circuit, the "language of the MSP private cause of action is broad and unrestricted and therefore allows any private plaintiff with standing to bring an action." According to the Third Circuit, Congress did not intend to deny MAOs the same right as traditional, fee for service Medicare Parts A and B. To the contrary, the Third Circuit opined that if MAOs were denied a private cause of action, it would hinder MAOs from providing benefits to its enrollees and would run counter to Congress's stated goal to utilize the private sector to create more efficient and less expensive healthcare options for Medicare entitled individuals.

SUPREME COURT OF PENNSYLVANIA

A plaintiff seeking recovery for damages pursuant to the rescue doctrine must demonstrate that the damages were not the result of a superseding cause.

Bole v. Erie Insurance Exchange, 2012 Pa. LEXIS 186 (August 20, 2012)

Plaintiff, a volunteer firefighter, was responding to a call in his personal vehicle when, on his way to the fire station, a bridge on his property collapsed as he drove over it, causing serious injuries. Plaintiff made a claim for underinsured motorist ("UIM") benefits. A divided arbitration panel determined that Plaintiff was not entitled to benefits because the bridge collapsed due to intervening circumstances not attributable to the injured victim. The decision was affirmed by the trial court. The Superior Court affirmed in a divided opinion; Judge Donohue dissented, finding that Plaintiff was only crossing the bridge because the injured victim had crashed and it was irrelevant whether the injured victim did not cause the bridge to collapse.

The issue before the Supreme Court was whether Plaintiff, who was engaged in a rescue, could recover under the rescue doctrine for injuries caused by a superseding cause. Plaintiff's position was that the rescue doctrine eliminates the need to prove that the injured victim was the proximate cause of Plaintiff's injury and that the rescue doctrine applies whenever the rescuer has a reasonable belief he is responding to another in imminent peril.

The rescue doctrine provides that "[i]t is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the land or chattels of himself or a third person from harm." Thus, the rescue doctrine permits injured rescuers to recover when their recovery would be otherwise barred by the strict application of the defense of contributory negligence.

The Supreme Court held that the rescue doctrine will not make an original tortfeasor liable for injuries attributable to a superseding cause, i.e., "an act which is so extraordinary as not to have been reasonably foreseeable." The Supreme Court declined to overturn the arbitrators' finding that the bridge collapse was not reasonably foreseeable, noting "it is not reasonable to foresee a bridge more than three miles away, on the rescuer's own property, would collapse and injure appellant as he drove to the station."

SUPERIOR COURT OF PENNSYLVANIA

A plaintiff's personal injury claim will be discharged in bankruptcy unless the plaintiff objects to the discharge; 40 Pa. C.S. § 117 does not protect a claimant from discharge and only permits garnishment of an insurance company for a judgment entered against a bankrupt of insolvent insured.

Gubbiotti v. Santey, 2012 PA Super 131 (June 26, 2012)

Plaintiffs were injured in an automobile

Continued on Page 7

HOT OFF THE WIRE! … *(Continued from Page 6)*

collision and brought claims against Defendant. Four years after Plaintiffs filed their complaint, during the litigation of the claim, Defendant filed a Chapter 7 bankruptcy petition, listing Plaintiffs' personal injury claims as creditors holding unsecured non-priority claims. Plaintiffs' counsel had notice of Defendant's bankruptcy proceeding. Plaintiffs, however, did not file an objection to discharge or petition to determine the dischargability of their claims.

The bankruptcy court granted Defendant's discharge of all his debts. Defendant subsequently amended his New Matter to include the affirmative defense of discharge from bankruptcy and was granted summary judgment against Plaintiffs. On appeal, Plaintiffs questioned whether the trial court erred in granting Defendant summary judgment, contending that "a genuine issue of material fact exists as to whether plaintiff/appellant is entitled to recover from defendant/debtor/appellee's car insurance policy that was in effect at the time of the crash."

Plaintiffs' position was that summary judgment was improperly granted because they were seeking recovery from Defendant's insurance carrier, not Defendant individually. Plaintiffs relied on 40 Pa. C.S. § 117, which states *inter alia* "that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy . . .." The Superior Court rejected Plaintiffs' position, noting that § 117 only permits the garnishment of an insurance company for a judgment entered against an insolvent or bankrupt insured. Here, Defendant's liability had not been determined, and no judgment had been entered, thus § 117 did not provide Plaintiffs with relief. Accordingly, the trial court's entry of summary judgment against Plaintiffs was affirmed.

Comeback Award Dinner
Tuesday, Dec. 4, 2012
Duquesne Club, Pittsburgh, PA

Which of your clients will you nominate?

SPONSOR SPOTLIGHT

NAME: Cindy Miklos

BUSINESS/OCCUPATION: Client Development Consultant, FindLaw

FAMILY: Married to Angelo and we have three children, Anna, 7; Anthony, 5; and Abbey, 4.

INTERESTS: I am an avid Penguins and Steelers fan. In my spare time, I love to cook.

PROUDEST ACCOMPLISHMENT: Being a Mother.

FUNNIEST/WEIRDEST THING TO HAPPEN TO YOU ON THE JOB: A couple years ago I was meeting with a client and I was looking at the photos of his children on the wall. I realized he had a photo of me hanging on the wall behind him. It was a picture of his daughter scoring a basket that appeared in the Johnstown Tribune Democrat in 1990, and the person who was getting scored on in the photo was a 15 year old me. For the record, my team won that game.

FAVORITE RESTAURANT: Mortons

FAVORITE MOVIE: The Departed

FAVORITE SPORTS TEAM: Pittsburgh Penguins

FAVORITE PLACE(S) TO VISIT: Capri, Italy

WHAT'S ON MY CAR RADIO: Everything from Country to Hair Nation.

PEOPLE MAY BE SURPRISED TO KNOW THAT: I am a big Jersey Shore fan.

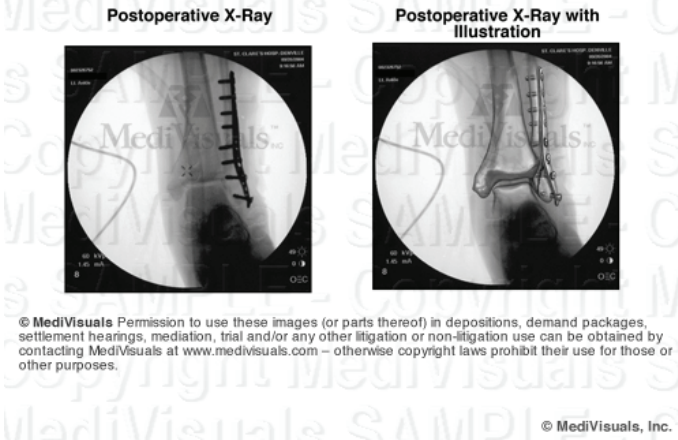
SECRET VICE: Reality TV and wine. They go together really well.

INTRA-OPERATIVE TRAUMA: THE OVERLOOKED INJURIES

By: Robert Shepherd MS, Certified Medical Illustrator,
Vice President and Director of Eastern Region Operations, MediVisuals Incorporated

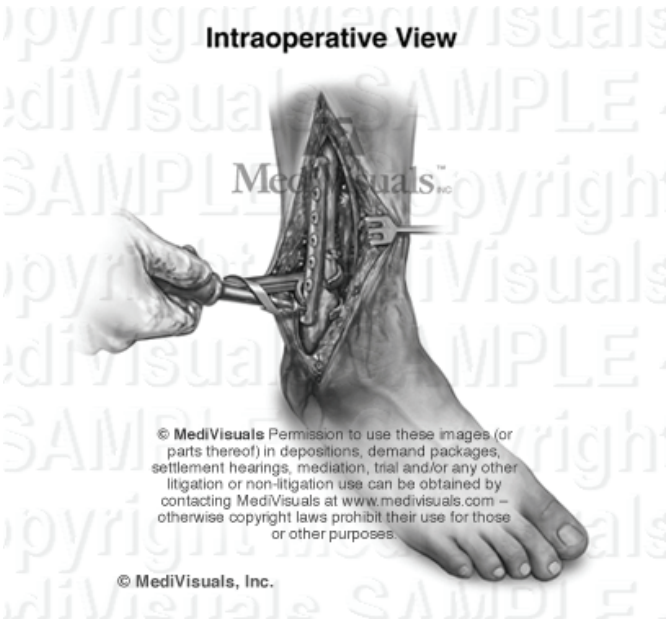
The surgical trauma that a plaintiff has to undergo after the initial bodily injuries following a traumatic event are always major points of emphasis when arguing damages in a personal injury case. This is certainly the situation with cases that involve broken bones that require invasive surgical procedures to realign broken bone fragments ("reduce") and secure ("fixate") the bones with hardware to keep them properly aligned during healing. Too often, however, the emphasis is solely on the effects on the bones from these "Open Reduction and Internal Fixation" (ORIF) procedures, and very little emphasis is placed on the surgical disruption of the soft tissues that takes place during these procedures.

In a case involving ORIF of a distal fibula (a.k.a. lateral malleolus) fracture, in order to emphasize the surgical trauma endured by a plaintiff, an attorney may have a visual prepared of a postoperative X-ray. The visual may consist of only a postoperative X-ray or a print of the X-ray with a corresponding illustration (see the below figure).



The above images are certainly helpful, but fail to address the intra-operative trauma to the soft tissues that is required to gain access to the bone fragments. For that purpose, intra-operative illustrations that truthfully depict the soft tissue disruption should be considered (see the below figure) or even an animation showing the procedures such as the one at this link: http://www.medivisuals.com/fibularplatingORIF.aspx

Illustrations or animations that at least touch on the soft tissue disruption allow testifying physicians the opportunity to explain the many tissues traumatized during the procedure and allow insurance adjustors, mediators, and jurors an opportunity to take these additional injuries into consideration when determining the severity of a plaintiff's entire injuries.



Many attorneys considering realistic illustrations such as the one above, express a concern that judges may not allow the images to be used because they are too "graphic" or "inflammatory". Certainly, counsel should make themselves aware and consider the preferences of certain jurisdictions and specific judges before determining whether an illustration should be developed that realistically depicts injuries or whether diagrammatic (cartoon-like) illustrations should be developed instead. There are a number of very good arguments to support the use of "realistic" illustrations over "cartoons". Those arguments as well as other discussions regarding illustration styles will be addressed in future blogs.

(Shepherd, Robert. "Intra-Operative Trauma: The Overlooked Injuries." *MediVisuals Incorporated.* MediVisuals Incorporated. 7 Sept. 2012. Web. 19 Oct. 2011.)

Events for 2012-2013

Monday, October 29, 2012
Dinner meeting at The Wooden Angel in Beaver, followed by 1-credit CLE.

Tuesday, December 4, 2012
Comeback Award Dinner at The Duquesne Club in Pittsburgh.

Wednesday, January 30, 2013
Past Presidents Dinner at the Rivers Casino in Pittsburgh.

Wednesday, March 13, 2013
Junior Member dinner meeting at the Le-Mont Restaurant in Pittsburgh.

Thursday, April 11, 2013
Members Only Meeting at The Grand Hall at The Priory, in Pittsburgh, where elections for Officers and Board of Governors for 2013-2014 will take place.

Friday, May 3, 2013
Annual Judiciary Dinner at Heinz Field in Pittsburgh.

May/June – Golf Outing

PICTURES & PROFILES QUESTIONNAIRE

Name: Erin K. Rudert

Firm: Edgar Snyder & Associates

Law School: University of Pittsburgh

Year Graduated: 2005

Special area of practice/interest, if any: Personal Injury

Most memorable court moment: Arguing a motion for partial summary judgment in Westmoreland County, because it was the first I had ever affirmatively filed in a non-coverage case and my argument was based on offensive non-mutual collateral estoppel (it does exist outside of law school!). This day in court stands out because it was the Monday morning after "Snowmageddon" and I am still amazed that the court was open and everyone showed up on time for the argument.

Most embarrassing (but printable) court moment: More frustrating than embarrassing-being asked to show my PA Attorney's License.

Most memorable WPTLA moment: Participating in our 5K the first year I was a member and meeting the Steelwheelers.

Happiest/Proudest moment as a lawyer: My first moment as a lawyer: having my Dad move for my admission to practice law before the Supreme Court of Pennsylvania.

Best Virtue: I'm often told that I'm very compassionate.

Secret Vice: If I told everyone, it wouldn't be a secret! My not-so-secret vice is ice cream.

People might be surprised to know that: I have played ice hockey for 20 years and, currently play on three different teams: a women's travel team (Pittsburgh Piranhas) and two local men's teams. I'm also fluent in Spanish and lived in Madrid for a year.

Favorite movie (non-legal): Alien

Favorite movie (legal): Chicago

Last book read for pleasure: The Pillars of the Earth

My refrigerator always contains: Very cold air.

My favorite beverage is: Coffee.

My favorite restaurant is: It depends on my mood, but I do like Six Penn Kitchen.

If I wasn't a lawyer, I'd be: An orthopedic surgeon. Or I'd own a coffee/pastry shop.

PAST COMEBACK AWARD WINNERS: Where are they now?

Phillip Macri

By: Lawrence M. Kelly, Esq.

Phillip Macri was the 2001-2002 Comeback Award winner.

Phillip suffered quadriplegia as a result of an injury he sustained while swimming at Virginia Beach just prior his senior year in high school.

Phillip was a three (3) year starter as point guard on New Castle High School's basketball team prior to his injury. He was an outstanding athlete and student.

Notwithstanding his injuries, which left him wheelchair bound, Phillip completed his senior year in high school with the help of his best friend, Robert Kerr. Following his senior year in high school, he matriculated at Westminster College where he graduated with a degree in Communications. Following graduation, Phillip worked as a paralegal with the law firm of Luxenberg Garbett Kelly & George, P.C., and then opened a sporting goods store, Macri's Sports, which has been opened for over 10 years.

Phillip's store provides athletic gear to high schools and colleges in the area. He employs two (2) people other than himself. In addition to his sporting good store, Phillip does motivational speaking engagements throughout Western Pennsylvania. A true inspiration to all that know him, Phillip has a powerful story he tells that he hopes motivates young people.

In addition to his work at Macri's Sports and his speaking, Phillip also established a scholarship fund. Every year he runs a golf tournament which is sponsored in large part by members of the Western Pennsylvania Trial Lawyers Association. The proceeds of that golf event are used to sponsor scholarships to local high school students who have over come a disability to achieve success.

Phillip was recently selected to the Lawrence County Historical Society Sports Hall of Fame. He continues to live in Lawrence County with his father, Charles Macri. Phillip lost his mother, Dorothy Macri, two (2) years ago. Dorothy was Phillip's primary caretaker, and following Phillip's injury had dedicated her life to his well being.

Phillip continues to be an inspiration to all of those who come in contact with him. He epitomizes the Comeback Award each day by the simple eloquence of his example.

Jennifer Quinio

By: Bernard C. Caputo, Esq.

Jennifer Quinio was awarded the Comeback Award in 2008/2009. In the summer of 1996, between her sophomore and junior year at the University of Pittsburgh, she was in a major car accident and suffered a traumatic brain injury. The injury to her brain made it difficult for her to perform daily functions such as walking and sleeping and affected her memory, concentration, personal relationships, and personality. She was diagnosed with permanent impairment to her cognition and a permanent change in her personality.

She returned to school in 1997 and graduated the following year with a degree in Art History.

Since receiving the award, Jennifer Quino has been doing very well. In 2009, she married Jeremy Hedges, and they bought house together six months ago. She still runs her art gallery, Modern Formations, which won the 2011 City Paper "Best Of" contest for Best Gallery for Local Artists. She continues to teach Zumba classes.

Amy Palmiero-Winters

By: Alan L. Pepicelli, Esq.

Envision a grueling 130-mile, twenty-four-hour-log race under extreme conditions. Amy Palmiero-Winters thrives in this type of race. Some may view her love for ultramarathons as completely baffling, but her story is one of pure courage and inspiration.

Palmiero-Winters has been a runner since age eight, when she crossed her first finish line. In high school, she ran track and cross-county. However, in 1994, her left foot was crushed in a motorcycle accident, challenging her ability to ever walk – let alone run – again. Although doctors wanted to amputate her foot, she wanted to keep her leg, enduring twenty-five surgeries over the next three years. Though ever effort was made, her ankle began to fuse, leaving her foot barely functional. Her final viable option was the amputation she had declined years earlier.

Following the amputation, Palmiero-Winters was fitted with a walking prosthesis and resumed competing in half-marathons, marathons, and triathlons. She did well despite not having a prosthetic leg for running. After hearing about Erik Schaffer, owner of A Step Ahead Prosthetics, she decided to quit her job as a welder and move to Long Island, NY to become a member of Team A Step Ahead, a group of elite amputee athletes, and began working full time for A Step Ahead as the company's sports program director.

Palmiero-Winters has a truly incredible resume, competing in some of the world's most grueling ultramarathon races. On January 1, 2010, she won the "Run to the Future," a twenty-four-hours race in Glendale, AZ, by running 130.4 miles. This performance earned her the distinction of being the first amputee to qualify for the U.S. National Track and Field Team. She was named to the US ultrarunning team for the International Association of Ultrarunners (IAU) 24-Hour World Championships in Brive, France. It was the first time an amputee has been named to a United States able-bodies championship team. On May 17, 2010, she finished 18th in the female division, running 123.99 miles and helping the U.S. women finish fourth. In June 2010, she competed in the Western State Endurance Run, a 100-mile race through the Sierra Nevada's. She became the first amputee to ever finish and was awarded a bronze belt buckle, given to finishers who finish in in less than thirty hours.

In April 2010, she received the Amateur Athletic Union's (AAU) James E. Sullivan Award, recognizing her as the top amateur athlete in the U.S. In July 2010, she received the ESPN Espy Award for the top female athlete with a disability. Also in 2010, she received the Women's Sports Foundation's Wilma Rudolph Courage Award, the Challenges Athletes Foundation Sempra Energy Trailblazer Award, the Huffington Post Ultimate Games Changers Award, and the Strength's USA.com National Athlete of the Month. She was named as one of the Washington Post's Top 10 Runners of the decade.

In 2011, Amy was the first amputee to run the Reyjavik, Iceland Marathon, where she was honored with the 2011 Ossur Ultimate Athlete Awarded. She competed in the Ultramarathon World Championships, which consists of a 6.2 mile swim, 271 mile bike, and 52.4 mile run. Amy became the first amputee to finish in the Badwater Ultramarthon, described as "the world's toughest foot race." It is a 135-mile course starting at 282 feet below sea level in the Badwater Basin in California's Death Valley and ending at an elevation of 8,360 feet at Whitney Portal. She competed in this race again in 2012, beating her time by almost five hours.

Amy Palmiero-Winters found herself in the position of being a role model, especially for young people with disabilities. She soon found herself working extensively with children, introducing them to sports and athletics as a way of helping them overcome their physical limitations. After several years, Amy founded the One Step Ahead Foundation in order to provide even more opportunities for children with physical disabilities. To learn more about Amy's One Step Ahead Foundation, you can visit her website: www.onestepaheadfoundation.org.

She is not simply a runner; she is a mother of two (Carson 7, Madilynn 5), mentor, coach, and a compassionate individual who uses her talent to give back to others. She gives motivational speeches and runs marathons pushing wheelchair-bound children, trying to inspire them to push beyond their obstacles as she has. Her tragic story turned triumphant gives hope to people – both able-bodies and amputees – and proves that nothing is impossible.

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DEFEATING AN ERISA LIEN WITH THE STATUTE OF LIMITATIONS

By: Prof. Roger M. Baron[1] and Anthony P. Lamb[2]

Consider this question: "An ERISA plan paid $50,000 worth of medical bills for our client. We secured a tort recovery and set aside $50,000 in our trust fund to deal with a possible ERISA lien assertion. It has been 5 years. Nothing has been filed. When can we safely disburse the money?"

In our work dealing with ERISA lien assertions, we frequently receive inquiries of this nature. This article is intended to provide guidance for these situations.

It is important to stress that "waiting for the statute of limitations to expire" is not a recommended strategy for dealing with lien assertions. The preferred approach is to address the lien assertion early on. In particular, the earlier one addresses the lien issue, the greater the likelihood for a favorable result. This is especially true if the lien issue is resolved *prior to* releasing the tortfeasor and taking receipt funds.[3]

Nonetheless, many tort recoveries are in fact secured with the tortfeasor(s) being released prior to the resolution of a potential ERISA lien assertion. Thus, the statute of limitations inquiry becomes relevant. The question is simple – "What is the statute of limitations for an ERISA reimbursement claim?" The answer, however, is rarely found with ease and certainty. The proper analysis required to determine the answer is a bit complicated. And, that analysis tends to produce results that lie in the gray areas as opposed to providing "black and white" determinations.

ERISA and Statutes of Limitations (In General)

The general topic of statutes of limitations as they arise in the context of ERISA litigation is broad, encompassing many scenarios.[4] For example, the "limitations issue" may arise in connection with the following situations: 1) action for penalties; 2) claim for benefits due under the ERISA plan; 3) equitable action to enforce plan provisions; 4) retaliation actions; and 5) claims against employers for delinquent contributions.[5]

It should be noted that ERISA does contain at least one limitations provision in connection actions for breach of a fiduciary duty.[6] This provision has never been seriously considered as being applicable to reimbursement or subrogation claims.[7]

The focus of this article is restricted solely to the matter of ERISA reimbursement or subrogation claims. In that regard, it should be noted that there is no federal statute of limitations in ERISA or otherwise which applies to actions for reimbursement or subrogation.

Limited Case Law

We have found only three reported opinions from the federal courts of appeal dealing specifically deal with this issue. These opinions are from the Eighth, Ninth and Eleventh Circuits. Our analysis will be guided primarily by this very limited body of law. Of the three opinions, only one produces a result favorable for the ERISA participant or beneficiary. The other two opinions address the same question but

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[2] Anthony P. Lamb, a third-year law student at the University of South Dakota, serves as Prof. Baron's Research Assistant and has assisted on ERISA matters as an ERISA Paralegal. He has a B.A. in Criminal Justice from Grand View University and was a police officer in Lincoln, Nebraska prior to law school. Anthony may be contacted at Anthony.Lamb@usd.edu.

[3] The strategies and advantages of this approach is addressed at some length in Professor Baron's Webinar Presentation, Roger M. Baron, *Leveraging the Pressure Points*, ERISA with Professor Baron (2010), http://erisawithprofessorbaron.com/audio-and-video/webinar-leveraging-the-pressure-points/.

[4] *See eg.,* George Lee Flint, Jr., *ERISA: Fumbling the Limitations Period*, 84 Neb. L. Rev. 313, (2005), spanning 55 pages with 310 footnotes.

[5] *Id.* at 316-17.

[6] ERISA 29 U.S.C. § 1113.

[7] This was discussed in *Blue Cross & Blue Shield of Alabama v. Sanders* as follows,

> No relevant limitations period is found in 29 U.S.C. § 1132, see *Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1551 n. 12 (11th Cir.1990) (stating that 29 U.S.C. § 1132 does not specify a limitations period), or in any other ERISA provision, *cf.* 29 U.S.C. § 1113 (providing limitations periods for suits brought "under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part"); *Trustees of Wyo. Laborers Health and Welfare Plan v. Morgen & Oswood Constr. Co., Inc. of Wyo.*, 850 F.2d 613, 618 n. 8 (10th Cir.1988) ("The statute of limitations contained in 29 U.S.C. § 1113 applies only to actions brought to redress a fiduciary's breach of its obligations to enforce the provisions of ERISA.").

138 F.3d 1347, 1356 n.8 (11th Cir. 1998); *See also Wang Laboratories, Inc. v. Kagan,* 992 F.2d 1126, 1128 n.2 (9th Cir. 2002).

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DEFEATING AN ERISA LIEN *...(Continued from Page 12)*

produce a result favorable to the ERISA plan. First, we will provide a brief summary of each of these three cases.

***Admin. Comm. of Wal-Mart Stores, Inc. v. Soles ex rel. estate of Hollander*,**
336 F.3d 780, 781 (8th Cir. 2003)

The ERISA Plan, asserting a lien of $48,837.99, was notified of a $100,000 tort recovery on January 16, 1997. It agreed to receive a partial payment of $10,000 on its lien at that time. Subsequently, the plan became aware of an additional tort recovery on April 8, 2000. Although offered payment of an additional $10,000 to resolve the lien, the Plan rejected the offer and insisted on payment in full. The plan participant lived in South Carolina and the tort occurred in South Carolina. Litigation over the lien was instituted on March 2, 2002, in U.S. District Court in Arkansas, where the plan was administered. The ERISA Plan brought its § 502(a)(3)(B)[8] claim for reimbursement.

> ***It is important to stress that "waiting for the statute of limitations to expire" is not a recommended strategy for dealing with lien assertions. The preferred approach is to address the lien assertion early on. In particular, the earlier one addresses the lien issue, the greater the likelihood for a favorable result.***

Since there is no federal statute of limitations for reimbursement claims, the Eighth Circuit followed the standard approach which is to "borrow the most analogous state statute of limitations." [9] In the context of this litigation, there were two possible provisions which could have been applicable: the Arkansas three (3) year statute of limitations for actions "founded on any contract or liability, express or implied liability" or the Arkansas five (5) year statute of limitations for the "enforcement of written obligations." [10] The trial court applied the 3 year statute of limitations and granted summary judgment for the defendant. [11]

On appeal the ERISA Plan argued that the claim accrued on April 8, 2000, when it was notified of the 2nd tort recovery and that the action was timely, having been filed with two (2) years of when the cause of action accrued. The Eighth Circuit Court of Appeals rejected this argument, holding that claim accrued on January 16, 1997 when the ERISA Plan received notice of the 1st tort recovery and that, "under either the three – or five – year statute of limitations, the claim is barred because more than five years have passed since this cause of action accrued."[12]

As to the determination of *when a claim accrues*, this opinion invokes the "discovery rule" stating, "Generally, this court applies the discovery rule to determine when a claim accrues.

The discovery rule provides that 'a plaintiff's cause of action accrues when he discovers, or with due diligence should have discovered, the injury that is the basis of the litigation.'" [13]

In summary, the 8th Circuit *Soles* decision *borrowed* the *forum's* (Arkansas') statutes of limitations relating to *contract* actions, holding that the ERISA Plan's claim for reimbursement was time-barred.

***Blue Cross & Blue Shield of Alabama v. Sanders*,**
138 F.3d 1347 (11th Cir. 1998)

The ERISA plan paid $12,678.69 for medical bills related to an automobile accident in March, 1991. The tort action was filed in November, 1991, and a default judgment in the amount of $200,000 was entered against the tortfeasors. The judgment was paid (satisfied) in October, 1992. The ERISA Plan brought its § 502(a)(3)(B)[14] claim for reimbursement in U.S. District Court for Alabama in April, 1996 – some 3 ½ years later. The trial court granted summary judgment for the ERISA Plan.[15]

On appeal, the ERISA participants argued, *inter alia*, that suit was barred by Alabama's two (2) year statute of limitations relating to "claims for wages and claims for discharge in retaliation for seeking worker's compensation."[16] The Court's discussion of the statute of limitations issue is relatively brief, with the Court stating,

> ERISA does not specify a limitations period for a fiduciary's suit against a participant under 29 U.S.C. § 1132(a)(3) to enforce a reimbursement provision of a plan. In an ERISA action with no congressionally mandated limitations period, the district court

[8] Codified at 29 U.S.C. § 1132 (a)(3)(B).
[9] "Because ERISA does not contain a statute of limitations, the court 'borrow [s] the most analogous state statute of limitations.'" *Admin. Comm. of Wal-Mart Stores, Inc. v. Soles ex rel. estate of Hollander*, 336 F.3d 780, 785 (8th Cir. 2003).
[10] *Id.* at 785 nn.8-9.
[11] The trial court also granted summary judgment on the alternative basis that the ERISA plan's claims were meritless. *Id.* at 781.
[12] *Id.* at 786.
[13] *Id.*
[14] Codified at 29 U.S.C. § 1132 (a)(3)(B).
[15] *Blue Cross & Blue Shield v. Sanders*, 138 F. 3d 1347, 1351 (11th Cir 1998).
[16] *Id.* at 1351, n.10.

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> "must define the essential nature of the ERISA action and apply the forum state's statute of limitations for the most closely analogous action." *Byrd v. MacPapers*, 961 F.2d 157, 159 (11th Cir.1992); *see also Wilson v. Garcia*, 471 U.S. 261, 266-67, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254 (1985) (stating that when Congress has not established a time limitation for a federal cause of action, courts should adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so).[17]

In seeking the "most closely analogous" cause of action and adopting the corresponding statute of limitations, the Court said,

> We therefore look to Alabama law for the relevant limitations period. As a matter of first impression for this court, we hold that a fiduciary's action to enforce a reimbursement provision pursuant to 29 U.S.C. § 1132(a)(3) is most closely analogous to a simple contract action brought under Alabama law. Accordingly, we apply Alabama's six-year statute of limitations for simple contract actions, *see* Ala.Code § 6-2-34(9), and reject the [appellants'] proposed two-year limitations period.[18]

In summary, the 11th Circuit's *Sanders* decision *borrowed* the *forum's* (Alabama's) statute of limitations for *simple contract actions*, holding that the ERISA Plan's claim for reimbursement was not time-barred.

***Wang Laboratories, Inc. v. Kagan*,**
992 F.2d 1126 (9th Cir. 2002)

This ERISA Plan was headquartered in Massachusetts. The ERISA participant resided in California and suffered injuries in an automobile accident in California on July 1, 1984. The ERISA Plan paid about $20,000 for medical bills related to the accident and requested reimbursement from the tort recovery of $50,000. The ERISA Plan filed suit in U.S. District Court for the Central District of California on January 13, 1989.

The Massachusetts statute of limitations for "breach of contract" was six (6) years. The California statute of limitations for "breach of contract" was four (4) years. The ERISA participant urged the application of the California four (4) year statute of limitations, asserting that the claim was thereby barred. The ERISA plan relied, however, on a provision in its plan document that provided that,

> [T]he rights and obligations of the parties were to be "governed by the law of Massachusetts, and all questions pertaining to the validity and construction of such rights and obligations shall be determined in accordance with such law."[19]

The trial court granted summary judgment for the ERISA Plan. On appeal, the Ninth Circuit Court of Appeals held that *federal law* controlled the resolution of *which state statute of limitations* was applicable.[20] In furtherance of its analysis, the Court stated,

> The parties' choice of limitations period in an insurance contract is generally enforced under federal law unless it is "unreasonable or fundamentally unfair." *Dempsey v. Norwegian Cruise Line*, 972 F.2d 998, 999 (9th Cir.1992). In an ERISA case, we ordinarily borrow the forum state's statute of limitations so long as application of the state statute's time period would not impede effectuation of federal policy. *Pierce County Hotel Employees et al. v. Elks Lodge*, 1450, 827 F.2d 1324, 1328 (9th Cir.1987). In *Pierce County* no contractual choice of law provision was at issue. Where a choice of law is made by an ERISA contract, it should be followed, if not unreasonable or fundamentally unfair.[21]

And

> The parties' contractual choice of law requires that Massachusetts' six-year statute of limitations applies. Since it was not unreasonable or fundamentally unfair, the court is bound by it. Under the Massachusetts statute, [the ERISA Plan's] claims were timely.[22]

In summary, the 9th Circuit's *Kagan* decision would have *borrowed* the *forum*'s (California's) statute of limitations but, due to a *choice of law* provision in the ERISA plan document, it applied the Massachusetts statute of limitations

[17] *Id.* at 1356-57.
[18] *Id.* at 1357.
[19] *Wang Laboratories, Inc. v. Kagan*, 992 F.2d 1126, 1128 (9th Cir. 2002).
[20] "We decide as a matter of federal law which state statute of limitations is appropriate." *Id.* at 1128.
[21] *Id.* at 1128-29.
[22] *Id.* at 1129.

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DEFEATING AN ERISA LIEN ...(Continued from Page 14)

for *breach of written contract actions*,[23] holding that the ERISA Plan's claim for reimbursement was not time-barred.

Guiding Principles Which Emerge

From a study of these cases, we can set forth guiding principles. First, it is recognized that reimbursement claims are not without some kind of time limitation. No court has suggested this. Indeed reimbursement claims are governed by a *statute of limitations*. But, determining the *applicable statute* is a worthy task.

It appears to be a universal consensus that courts should look to the "most analogous"[24] or "most closely analogous"[25] state law cause of action and borrow the corresponding state statute of limitations. This is likely to be the state's statute of limitations relating to *breach of contract*. [26]

Similarly, as set forth in the existing case law, the federal courts have uniformly recognized that presumptively the *forum's* statute of limitations is to be borrowed.[27] An ERISA plan can, however, provide otherwise with a *choice of law* provision in its plan document and that choice will be upheld so long as it is not unreasonable or fundamentally unfair.[28]

Conclusion

One should keep in mind that conventional wisdom suggests that a potential ERISA lien should be addressed and resolved early on, *prior to* releasing the tortfeasor(s) and receiving settlement funds.[29] If one is contemplating avoidance of a lien through a *statute of limitations* defense, the vagaries associated with such a defense tend to undermine its usefulness. [30]

Nonetheless, it is possible to defeat an ERISA lien assertion with a *statute of limitations* defense. Such claims are not without time constraints. Determining the *applicable* statute of limitations can be problematic. From the limited case law available, it appears that a federal court will look to the *forum's* statute of limitations for the *most analogous cause of action*. And, the most analogous cause of action is likely to be an *action based upon contract.*[31] It is also possible that *choice of law provision* in the plan document may trigger the application of the law of a state which is not the forum. Please keep in mind that these conclusions are based upon a minimal amount of case law. Other principles or rules may be developed by unique situations and creative lawyering.

[23] "The limitations period applicable to ERISA claims is the one for breach of written contract." *Id.* at 1128.
[24] *Soles ex rel. estate of Hollander*, 336 F.3d at785.
[25] *Sanders*, 138 F. 3d at 1356-57.
[26] This statement is supported by the result in each of the three cases analyzed. In the *Soles* case, the 8th Circuit held the action untimely under either the Arkansas three (3) year statute of limitations for actions "founded on any contract or liability, express or implied liability" or the Arkansas five (5) year statute of limitations for the "enforcement of written obligations." In the *Sanders* case, the 11th Circuit applied the Alabama 6 year statute of limitations for a simple contract action. In the *Kagan* case, the 9th Circuit applied the Massachusetts 6 year statute of limitations for breach of contract claims.
[27] "In an ERISA case, we ordinarily borrow the forum state's statute of limitations so long as application of the state statute's time period would not impede effectuation of federal policy." *Kagan*, 992 F.2d at1128. The *Kagan* decision ultimately applied the Massachusetts' statute of limitations, not the forum's (California's) statute of limitations as a result of the *choice of law* provision in the ERISA plan document.
The Alabama federal court in *Sanders* applied Alabama's 6 year statute of limitations for a simple contract action.
The Arkansas federal court in *Soles* was applying the Arkansas statutes of limitations.
[28] "The parties' contractual choice of law requires that Massachusetts' six-year statute of limitations applies. Since it was not unreasonable or fundamentally unfair, the court is bound by it." *Kagan*, 992 F.2d at 1129.
[29] *See* note 3, *supra,* and accompanying text.
[30] Vagaries are found in the following: 1) pinning down the applicable statute of limitations (the *forum state's* statute or *another state's* statute); 2) the possibility of forum shopping by the ERISA Plan which may opt to select a forum with a longer statute from alternative available venues; 3) determining the *most analogous* state law cause of action; and 4) in dealing with related issues such as *when did the reimbursement claim accrue?*
[31] Keep in mind that in the *Soles* case, there were differing provisions relating to a *contract* action: the Arkansas three (3) year statute of limitations for actions "founded on any contract or liability, express or implied liability" or the Arkansas five (5) year statute of limitations for the "enforcement of written obligations." *Soles*, 336 F.3d at 785 nn.8-9.

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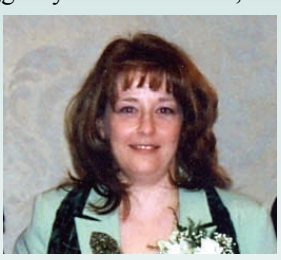
Terri Lash

By: John A. Caputo, Esq.

Terri gave birth to her daughter Morgan in 2008 and her son Drake in 2009. She worked in the disability independent living field for 11 years till her branch office was closed last summer 2011. Now she is working on a speaking career focused on better patient care and a book about her life. These are two things she has always thought about doing and now life is affording or pushing her to the opportunity. Plus, Rocky Bleier suggested she do the book and if someone like him who has inspired so many suggest you write a book, it's a smart thing to do.



Each year, WPTLA sponsors a Scholarship Essay Contest for high school seniors in the Western Disctrict of PA. Three essays are chosen from a committee as the best. These winners are invited to attend the Annual Judiciary Dinner, where they are presented with a certificate of their achievement, along with a $1,000 scholarship award. Below is the third of last year's three winning essays.

The following essay was prepared by Alyssa Luke, from Northwestern Senior High School in Albion, PA

As citizens of the United States of America, we have rights. The United States Constitution carefully lists these precious freedoms, and they must be protected. One of these rights, detailed by the Fourth Amendment of the Constitution, is protection from unreasonable searches and seizures. In Scholar Township, located in Pennsylvania, this constitutional right is being violated. In order to purchase tickets to attend the prom, students in Scholar Township schools must submit to random drug and alcohol testing. This policy, "Operation Safe Prom," violates the constitution and does not belong in the Scholar Township District.

The controversial issue of school-mandated drug testing sparked a heated debate across the country. Few argue that the illegal abuse of alcohol and controlled substances by minors is not problematic. However, finding a solution to this situation raises problems of its own. Requiring random drug and alcohol testing infringes upon the students' rights. The issue at hand is protecting the rights of American citizens, specifically the right to not be subjected to unreasonable searches and seizures, listed under the Fourth Amendment of the United States Constitution.

Angered students and parents from school districts that link drug testing to activity involvement are bringing their concerns to court. Courts are setting precedents regarding the use of drug testing in schools for students to receive parking permits or participate in competitive extracurricular activities. The Pennsylvania Supreme Court has held in earlier cases that such policies would be considered constitutional only if school districts could show a specific need for such policies and could explain how the policies would attend to this need. Therefore, required tests for substance abuse are not in violation of the Fourth Amendment if they are reasonable. The key question in the case of "Operation Safe Prom" is whether or not this policy is reasonable – it is not.

"Operation Safe Prom" was created after a tragic accident on prom night involving a carload of intoxicated Scholar Township students. The accident resulted in several injuries and one fatality. However, it is important to note that the driver of the vehicle was sober. The policy requires that all students who desire to purchase tickets to attend prom must consent to random controlled substance and alcohol testing. This allows the school to randomly collect breath, urine and blood samples. School authorities bar students who test positive from attending prom and send offenders to a "Student Assistance Team" for counseling. The consent is effective for one year and must be signed at least three months prior to prom ticket sales. Any student who does not consent to testing will not be permitted to attend prom.

Cases involving students being required to submit to drug testing in order to participate in ongoing extracurricular activities have gone to the United States Supreme Court. The court has ruled in such cases, schools are within the Constitution and are not violating the rights granted to students through the Fourth Amendment when they can prove a drug problem and are implementing a reasonable and successful solution.

The "Operation Safe Prom" policy is not reasonable in preventing and deterring student drug use. You cannot hold an entire group accountable for the actions of a few; a handful of intoxicated students on prom night is not a strong enough basis for "suspicionless" testing of the majority of the student body. The Scholar Township School District bases the substance abuse problem of their schools off of an accident in which the driver was not intoxicated. Subjecting the rest of the students to drug testing as a requirement for attending prom is not a reasonable action.

Similarly, ongoing drug testing for prom is not reasonable in the same way it could be for an ongoing activity. Prom is a one night event and is only a few hours long. The school district's desire to prevent substance abuse on this single night does not justify random "suspicionless" testing of students for the month leading up to it. These students are not signing up to participate in any ongoing extracurricular activities; they wish only to pay to attend a school-sponsored event for one night. Therefore, their drugs testing should not be ongoing. If the school district feels alcohol testing is necessary, it should be confined to the night of prom itself.

The indicated purpose of the "Operation Safe Prom" policy is, "to deter illegal drugs and alcohol use by students so that the school can fulfill its educational responsibilities and provide extracurricular opportunities such as prom in a safe environment." Requiring ordinary students to submit to random alcohol and controlled substance testing for several months does not ensure a safe environment on the night of prom. In order for the "Operation Safe Prom" policy to be constitutional, it must be made more reason

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able. If the policy were changed to require testing, through use of a breathalyzer, only on prom night to gain admittance to the prom, it would better fit within the guidelines laid out in the Fourth Amendment.

The Supreme Court has ruled that in order for a random drug testing policy to fall within the limits of the Fourth Amendment, schools must prove that such a policy is necessary. Once they have provided evidence that there is an ongoing drug and alcohol problem, they must show how the policy they have put in place will reasonably alleviate the issue. Scholar Township schools have based their policy off of one tragic yet isolated incident. This accident cannot even be said to be caused by alcohol or drugs, as the driver of the vehicle involved was sober. Also, testing students' blood and urine for drugs in the months leading up to prom will not prevent students partaking in controlled substances during or directly after prom. "Operation Safe Prom" cannot be justified as reasonable, and therefore violates the Fourth Amendment of the United States Constitution.

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...Through the Grapevine

Our deepest condolences and sympathies to **Board of Governors Member Cindy Stine**, and her family, on the recent passing of Cindy's husband, Thomas McDonough.

Congratulations and best wishes to **Board of Governors Member Eve W. Semins** and her husband, on the birth of their first child, son Oliver who was born on August 5.

Members David C. Moran and David M. Moran, of Moran & Moran, P.C., have opened a regional office in Somerset County. It is located at 204 W. Main St, Somerset, PA 15501. P: 412-355-0355. View their website at Moran-Law.com.

Congratulations to **Past President John P. Gismondi**, on being elected President of the Academy of Trial Lawyers of Allegheny County. The Academy is an invitation-only group of civil trial attorneys.