Skidmore Script

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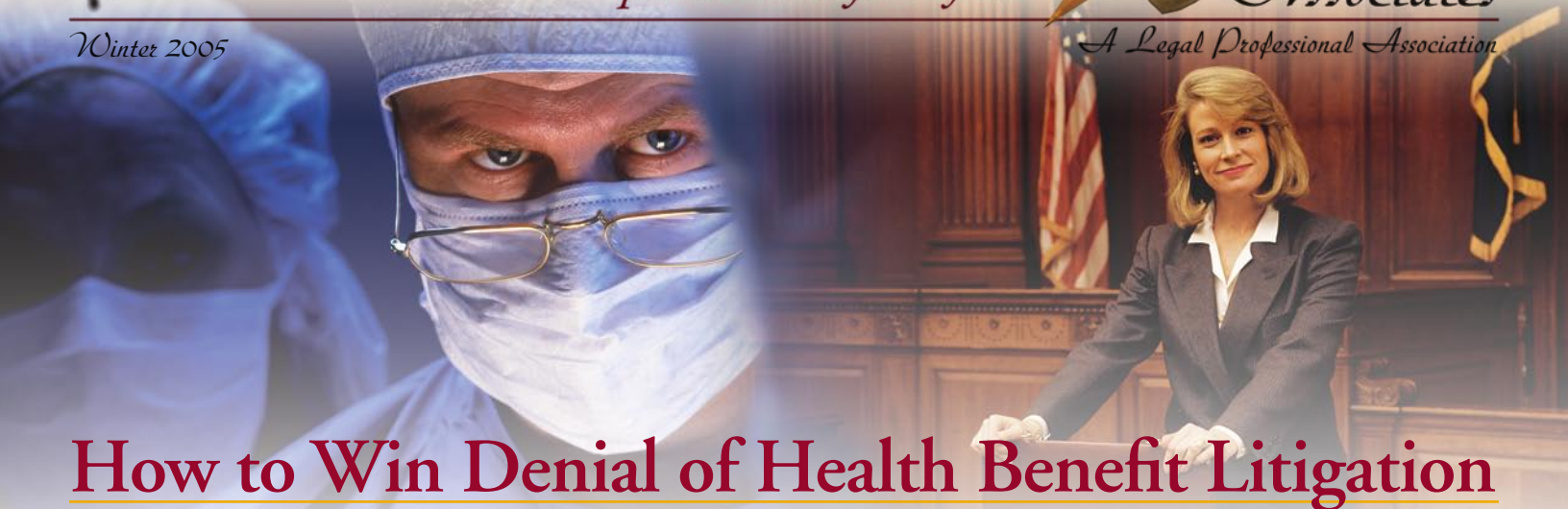


How to Win Denial of Health Benefit Litigation

By: Eric E. Skidmore, Esq.

Part II: Assume the Burden – Turn the Tide

Not all health benefit claims are insured. Some may be legitimately denied by the insurer. To the extent the claim is insured and the insurer wrongfully denies coverage, you may have to litigate to enforce your rights. The key to winning denial of health benefit litigation is to first recognize the burden and then assume it. Part I of these materials provided a candid review of the burden placed upon participants to enforce their group health care benefits governed by the Employee Retirement Income Security Act of 1974 ("ERISA") through the interpreted cases of the United States Sixth Circuit Court of Appeals.[1] The playing field is not level between insurer and insured. ERISA favors the insurer.

Part I established the administrative phase of benefit enforcement to be critical because the courts will defer to the insurer's discretion in determining benefit coverage at the litigation phase. The key to winning claim denial litigation is to create a detailed, methodical and rational evidentiary record during the administration of your claim which can be used later to persuade the court that the insurer's discretion and reasoning are flawed.

Part II shall provide some practical guidelines to gathering evidence needed to turn the tide in favor of enforcing your health benefit rights. These appeals can be very complicated and technical so you may want to retain counsel to assist. If you choose to handle your own appeal, you may want to consider the following suggestions.

I. Proper State of Mind.

The process of benefit enforcement is not for the weak and timid. You have the innate ability to determine the outcome of events, however, you must be realistic. You should not fret over the things you cannot control. You can either adopt a lethargic attitude, or an "attack mode" attitude to illness and health benefit coverage. Educate yourself so you can make informed decisions about your health or the health of a loved one. EDUCATE, EDUCATE, EDUCATE - this is what you can realistically control.

Health benefit enforcement should not be the sole responsibility of the person who is ill. The patient's attention should be focused on getting psychologically and physically prepared. Someone very close to the patient (i.e., parent, spouse, or adult sibling) should assume a supportive role of heading the "attack mode" to benefit enforcement. This "someone" should have a sincere and personal interest in the health of the patient. They will have the primary responsibility of getting the patient the proper health care and coordinating the claim coverage issues.

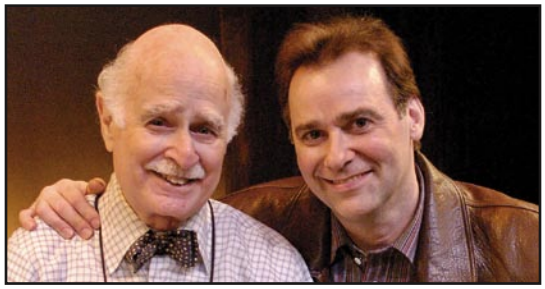
(Cont. Pg. 3)

1. Part I: Appreciate the Burden – It's On You, Spring/Summer '03 Skidmore Script, "News" section of www.skidmorelaw.com

S&A Raising ALS Awareness

A Walk to D'Feet ALS – On Sunday, October 2, 2004, the ALS Association Northern Ohio Chapter, hosted its 5th Annual "Walk to D'Feet ALS" on the serene and picturesque eastern campus of the Cuyahoga Community College. ALS stands for Amyotrophic Lateral Sclerosis, which is commonly referred to as Lou Gehrig's Disease. ALS is a fatal neuromuscular disease, characterized by progressive muscle weakness resulting in paralysis. "I volunteered as a Lou Gehrig look-a-like to greet nearly 1,500 participants at the event," said Eric Skidmore. "Any time that I can be mistaken for a 38 year old baseball Hall of Famer ... I am going to answer that call," he kidded. Dozens of families banded together to pay homage to their deceased loved ones and those afflicted with ALS, raising nearly $164,000.00. The proceeds will help support the Chapter's fight against ALS and contribute to the national research portfolio. Any one seeking information about Lou Gehrig's Disease can contact the ALS Association Northern Ohio Chapter at www.alsaohio.org or 216.592.2572.

An ALS Evening at the Cleveland Play House – On January 25, 2005, there was a special performance at the Cleveland Play House for the Hospice of the Western Reserve and the ALS Association Northern Ohio Chapter of "Tuesdays with Morrie". It is the stage adaptation of the best-selling book by Mitch Albom. Mr. Albom writes of his efforts to reacquaint himself with his collegiate mentor and professor, Morrie Schwartz, who is in the final stages of Lou Gehrig's Disease. Realizing that time is precious, Mr. Albom meets Morrie every Tuesday, providing a final set of sessions on how to live life. "My wife and I attended this special performance as guests of the ALS Chapter ... which was so generous of them ... the performance was as realistic and riveting as the Brian Piccolo Story," said Eric Skidmore. The Cleveland Play House did a wonderful job of hosting this elegant event. The performances by Charles Kartali (as Mr. Albom) and Bernie Passeltines (as Morrie) were dignified tributes to those afflicted with Lou Gehrig's Disease and the people who know how special they are. ■



Tuesdays with Morrie actors Bernie Passeltines (left) and Charles Kartali (right).

Photo compliments of Cleveland Play House.

Attorney Profile

Spiros Vasilatos, Jr.

Since he began practicing law in 1984, will preparation and probate estates have always been a substantial part of Spiros' caseload. He decided to specialize in those areas because he finds that people are glad that they can make plans for the future. "While people generally find the idea of mortality unpleasant, I have found over the years that there is a sense of relief when things are taken care of in advance. I'm glad that I can help people in that way," said Spiros.

Various areas within estate planning have changed over the years. Living wills, which used to be unusual, have become more popular. "I've noticed that more people want to plan for the possibility of their becoming disabled," said Spiros, adding, "They tend to fear guardianships; they've heard of horror stories from other people and want to make sure something similar doesn't happen to them." Other considerations would be a durable or health care power of attorney, as well as making arrangements regarding finances and/or taxes.

Spiros was involved with the will preparation workshop for Children's Hospital employees in May of last year and he also participated in the Akron Bar Association's project to draft wills for military personnel who were called up as a result of September 11th. Spiros found it very satisfying when working with the young men of the military, saying, "You want to help them in any way that you can - these people are so young - most were in their 20's and they were having to face the possibility of dying. Most people that age are worried about things like finding a job or buying a car. In spite of their age, the maturity they showed during this process was impressive."

As in any area of law, there are some of the difficulties involved in will preparation and estate planning. At the time the initial documents are prepared, there can be some concern about competency of the client. The process of probating a will can be difficult because of dissatisfaction - among the people named in it. "Years ago, I had beneficiaries of a will arguing over a vase. It wasn't even expensive - but they couldn't agree on who should have it," Spiros said. While some people may think these areas of law are very routine, Spiros doesn't see it that way. "It's not static - everyday there's a different problem. I look forward to either anticipating those problems or helping people solve them. That's probably one of the most important things I do." ■

Health Benefit Litigation (cont.)

II. Understand the Illness(es).

Educate yourself and the patient as to the symptoms, causes and treatments for the illness. Resist the natural tendency of becoming preoccupied with illness. This is normal, however, it is important to get past the emotions of fear and uncertainty to take care of the business at hand. Do not dwell on "why me?", instead face the realities by thinking "why not me?" Once you face the affliction, the quicker you can transition to doing something about it.

A. Research Medical Literature.

You must investigate and research the illness. Access reliable on-line internet Web sites to study the illness. Many medical schools and hospitals host Web sites with free access to archives and libraries. You will find additional materials at your local library and the libraries of medical schools and hospitals. Many medical associations post their studies and journals on the internet. Also use medical dictionaries to develop a working vocabulary for the diagnosis, causes and treatment of an illness. This will foster better communication with health care providers.

Do not dwell on "Why me?", instead face the realities by thinking, "Why not me?"

B. Communicate with Health Care Providers.

Develop good communication with the patient's health care providers. Obtain their names, addresses, phone numbers, fax numbers and e-mail addresses. Get to know the staff members, secretaries and nurses of your doctor and specialists. Whenever you visit your health care providers, medical records are generated. You should obtain copies of the relevant medical records. If you have any questions as to the content of the records, you should submit your questions to the proper health care provider. If you do not understand the terminology, look the words up in medical dictionaries. Your health care providers will often times be your best ally in the enforcement of your rights.

Prepare a calendar solely attributed to scheduling and tracking appointments with health care providers. Educate yourself as to the purpose and object of each appointment - what is to be accomplished? Prepare questions to ask during the appointment, note documents that are generated and do not leave without a full understanding of what is expected next. Keep track of when medical reports and imaging will be available and which health care provider will review and render a responsive opinion. Keep detailed notes of all visits, appointments, phone calls and procedures. If the insurer denies your claim and appeal, your health care providers could be utilized as fact and expert witnesses later.

III. Understand Your Insurance Coverage.

You should obtain an understanding of your health care coverage at the time you become employed. You should immediately obtain a summary plan description ("SPD") which is an abbreviated version of the plan of health care benefits provided by the employer, plan administrator or insurer. Do not wait until you are ill before you acquaint yourself with coverage. The coverage decisions you make at the outset can greatly affect coverage issues that develop later. Make sure there are no coverage inconsistencies between the terms in the plan and the SPD.

Knowing medical and insurance terminology will assist you in the claim denial-appeal process. If you have any question as to coverage, utilize the toll-free numbers to ask the insurer questions. Do not accept anyone else's explanation of medical coverage except your own reasonable interpretation. You must educate yourself as to the internal structure of the insurer and determine who makes the decisions, how claims should be presented, to whom claims should be presented and the time line in which claims should be presented. Also discuss coverage issues with the employer's health services department.

IV. What Do You Do When You Receive a Rejection Letter?

A. The Rejection Letter.

When claims are rejected, the insurer will issue a letter stating the reasons for the denial. Reasons may include the following: not medically necessary, pre-existing condition, not a covered benefit, termination of coverage, failure to seek pre-approval, out-of-network provider, un-

(Cont. Pg. 4)

Health Benefit Litigation (cont.)

timely filing and experimental treatment. The appeal time commences from the time the rejection letter is issued. You should immediately organize and prepare the appeal.

B. Seek Assistance from Your Health Care Providers.

In preparing your appeal, immediately seek help from your health care providers. They know you and your condition. Provide them with a copy of the rejection letter. Request them to respond by stating reasons why you need the treatment, service or drug and include these in your appeal. If needed, provide your doctor with the applicable SPD and plan provisions. If the denial presumes certain factual assertions or conclusions that are inaccurate, request that the health care provider respond to them.

C. The Appeal.

Take responsibility for your own appeal and either initiate or assist the health care provider in appealing your denied claim. Under no circumstances do you take a passive approach and rely solely on others to appeal the denied claim. Utilize all of the medical documentation that you have acquired during the diagnosis stage. Include these materials in your appeal to help develop the record. Developing the administrative record could level the playing field with the insurer, especially if the insurer's interpretation of coverage is contorted. Once you have gathered the responses of the health care provider(s), supporting documentation and relevant citations to the SPD and plan, you should prepare and submit your appeal package. Your appeal should include a brief summary of the diagnosis and treatment of the illness. It should recite the date when the claim was submitted and when the rejection letter was issued. You should identify your health care providers and state that it is their opinion that the claim should be accepted and the appeal approved.

Request a copy of the standards and guidelines utilized by the insurer to deny the claim. This will help you to determine whether or not the denial was flawed, biased, incorrectly applied or improperly reasoned. To the extent that the insurer does not disclose the standards and guidelines, you can indicate that their non-disclosure hinders your appeal. If the insurer discloses the standards and guidelines then use your medical records and literature to satisfy the elements and distinguish the insurer's position.

As a part of your appeal, specifically request the documents and other information offered in the rejection letter. Request reasonable access to and copies of all documents relevant to the denied claim and an explanation of the scientific and clinical judgment used in making the denial. Request applicable excerpts of the plan and SPD relied upon by the insurer to reject the claim. Keep a copy of your letter and send your appeal packed via certified mail (return receipt requested) to the address listed in your SPD. This will confirm that you timely filed the appeal in case the insurer loses or misplaces it. The SPD may require that you appeal the denial numerous times before you can litigate.

V. Litigation of Claim Denial Disputes.

By the time you litigate the claim denial, you will have already cultivated an evidentiary record at the administrative stage. Remember the court will invoke a "deferential standard" favoring the insurer as long as the denial was rational. The insurer's discretion is reviewed upon the facts known and applied at the time the denial was made, therefore you can introduce the entire administrative record. This is the only way an insured can satisfy the burden of proof that the insurer's denial was unreasonable. Attempt to show how the insurer's interpretation is inconsistent with the plain meaning of the plan. Is the plan language ambiguous and susceptible to conflicting interpretations? You may be able to turn the tide against the insurer at trial by introducing demonstrative evidence, documents, medical records, testimony of fact and expert witnesses developed at the administrative level.

"Assume the burden and use administrative records to help you turn the tide against the insurer who denies a covered health care benefit."

VII. Conclusion.

Once your insurer has denied a health benefit claim, it puts you in a difficult position to enforce your rights. Appreciate the burden because it is on you. Assume the burden and use administrative records to help you turn the tide against the insurer who denies a covered health care benefit. ■

Recent Cases:

Secular laws are made by judicially determined precedent and legislative enactment. Each issue of Scidmore Script includes summaries of recent court decisions and legislative activity that may be relevant to the areas of real estate law, construction law, corporate law, employment law, probate and estate law, litigation and alternative dispute resolution (arbitration/mediation). Members of our staff brief the cases and bills to provide a concise preview of the law and highlight areas of developing concern. If you would like to obtain the full text of these materials, please call or email Megan K. Reinhart at 330.253.1550 or mkr@skidmorelaw.com.

REAL PROPERTY – Foreclosure: Huntington National Bank ("Bank") filed an action in foreclosure against homeowner, Robert Burton ("Buyer") who later bought the property at a sheriff's sale. One month later, Buyer filed a motion to set aside the sale because the property was found to be a health hazard due to excessive mold. Bank argued that the doctrine of caveat emptor, or buyer beware, applied to the sale. The trial court concluded that the sheriff's appraisers failed to appraise the property in conformity with Ohio Revised Code 2329.17 because they never examined the interior of the house, and the interior condition had a negative impact on its value. Buyer also did not have a full and unimpeded opportunity to inspect the premises prior to his purchase and he was not advised that the sheriff's appraisal did not include an interior examination of the house. Therefore, the requirements of caveat emptor were not met. Affirmed. *Huntington National Bank v. Burch*, 157 Ohio App.3d 71 (2nd Dist. 2004).

REAL PROPERTY – Escrow: Lisa Hurst ("Buyer") entered into a land sale contract for a home with the Lowes ("Sellers"). Enterprise ("Agent") was retained as the escrow agent. Upon moving into the home, Buyer discovered plumbing and electrical problems and that Sellers had not complied with a local ordinance requiring a point-of-sale inspection. Buyer sued Agent alleging that exculpatory language disclaiming responsibility for compliance with local ordinances in the escrow agreement violated public policy and was therefore void. The trial court held that the exculpatory language was not against public policy. Buyer appealed. The Court of Appeals stated that generally, exculpatory language in a contract does not violate public policy and that the freedom to contract is fundamental. They considered four factors in affirming the trial court's decision: (1) whether the goods or services contracted for were necessary for a person's living needs; (2) whether the supplier assumed a quasipublic function in providing the goods or services; (3) whether the supplier had been granted a monopoly in providing a specific service; and (4) whether the limitation provision was such that the customer was in a position to assent to its terms. All of these factors weighed against Buyer. Affirmed. *Hurst v. Enterprise Title Agency, Inc.*, 157 Ohio App.3d 133 (11th Dist. 2004).

REAL PROPERTY - Zoning: Jaylin Investments ("Development Company") owned an 18 acre parcel of property in the village of Moreland Hills, in which they proposed building 29 homes on one half acre lots each. Moreland Hills ("Village") has an ordinance requiring each single family parcel of property to be at least two acres. Development Company argued that two acre development would be out of harmony with the existing older homes in the area and that building 29 homes was the minimum necessary to be cost effective. The trial court found the prohibition against Development Company's proposed use was unreasonable because it failed to substantially advance Village's health, safety, morals or welfare concerns. Village appealed. The Court of Appeals cited the test set forth in *Euclid v. Amber Realty*, and held that a zoning regulation is presumed constitutional unless determined by a court to be clearly arbitrary and unreasonable and without substantial relation to the public health, safety, morals or general welfare of the community. The Court stated that Development Company had not demonstrated beyond fair debate that Village's two acre zoning ordinance was arbitrary, unreasonable and without substantial relation to public health and safety as applied to the property at issue. Reversed. *Jaylin Investments, Inc v. Village of Moreland Hills*, 157 Ohio App.3d 277 (8th Dist. 2004).

GOVERNMENT – Elections: On March 2, 2004, a primary election was held in Erie County for the Democratic nomination for the office of judge of the Common Pleas Court. The Erie County Board of Elections ("Board") certified Tygh M. Tone ("Contestee") as the winner over Ann B. Maschari ("Contestor") by 904 votes. Contestor filed a verified election contest petition alleging that the Board had an absolute duty to challenge all cross-over voters and that the Board's no-challenge policy violated Ohio election law. Contestor alleged that more than 1,400 Republicans were allowed to "cross over" and vote in the Democratic primary. The Court granted summary judgment in favor of Contestee. The Court first stated that they would not set aside an election result unless it was contrary to the will of the electorate. The Court determined that election officials, and not the Board, had the final authority to challenge a voter's qualifications. Also, Ohio Revised Code 3513.19(A) provides that election officials have a duty to challenge the right of a person to vote "whenever [the official] doubts that another person attempting to vote at a primary election is legally entitled to vote at such election." This language gives discretion to election officials in deciding which voters should be challenged. Therefore, there was no absolute duty for election officials to challenge the party affiliation of every voter. *Maschari v. Tone*, 157 Ohio App.3d 366 (6th Dist. 2004).

PROBATE – Heirship: Lorrie L. Byrd ("Daughter") filed a petition to determine heirship in the Clark County Probate Court against the surviving heirs of Daniel Fitzgiven ("Father"), who died without a will. Daughter alleged that although her mother and Father were never married, she had established paternity through DNA. The trial court determined that she failed to establish paternity under one of the five accepted methods for purposes of obtaining the status of child under Ohio Revised Code 2105.06 and that the probate court did not have jurisdiction to hear a parentage action under Ohio Revised Code Chapter 3111. Daughter appealed, contending that the judgment denying her the right to participate in her Father's estate violated the Equal Protection Clause of the 14th Amendment. The Court stated

(Cont. Pg. 6)

Recent Cases (cont.)

that illegitimate children can only inherit from their fathers if paternity is established prior to the father's death. This happens if the father takes affirmative steps during his life, including: (1) marrying the child's mother; (2) providing for the child in a will: (3) adopting the child; (4) acknowledging the child pursuant to Ohio Revised Code 2105.18; or (5) designating the child as his heir at law. The Court further stated that Daughter could use the DNA evidence to establish paternity under the Ohio Parentage Act, but that the probate court did not have proper jurisdiction to hear that type of action. The Court reasoned that the different treatment of illegitimate children of intestate fathers as opposed to intestate mothers was necessary because a father may not always be aware of the existence of a child and by asserting a father-child relationship after the death of the father, the child deprives the father the opportunity, during life, to make a will disinheriting the child. Affirmed. *Byrd v. Trennor*, 157 Ohio App.3d 358 (2nd Dist. 2004).

LITIGATION – Class Actions: Michael Gottlieb and others ("Landlords") sued the city of South Euclid ("City") for injunctive relief and fees paid for certificates of occupancy, which were required to be filed by ordinance for each rental unit. Cuyahoga County Court of Common Pleas granted the motion for class certification as "representatives of all landlords subject to South Euclid Ordinance 1409.02 and 1409.05" which encompassed 413 Landlords in 2001. The City appealed. The Court of Appeals stated that in order to maintain an action for recovery of taxes or assessments, Ohio Revised Code 2723.03 requires a plaintiff to allege and prove that he filed a written protest and notice of intention to sue at the time of paying the tax or assessment. The Court further stated that in 1983, the Ohio Supreme Court held that this requirement was mandatory and that failure to comply bars a later lawsuit by the taxpayer. Not all of the 413 Landlords had met this requirement, and therefore, the previous class certification was overbroad. Reversed. *Gottlieb v. City of South Euclid*, 157 Ohio App.3d 250 (8th Dist. 2004).

CONSTRUCTION – Contracts: Construction One ("Contractor") subcontracted with Masiongale ("Subcontractor") for electrical, plumbing, heating, ventilating and air-conditioning work on a construction project involving an American Eagle Outfitting store in Muncie, Indiana. Subcontractor sought payment for its completed work and Contractor sought a $7,000 reduction, claiming that Subcontractor had untimely and improperly performed its work. Subcontractor then filed a lien on the property, forcing Contractor to remove the lien by posting bond pursuant to its contract with American Eagle Outfitters. In filing the lien, Subcontractor violated a specific provision in its contract with Contractor. Subcontractor also sued Contractor in the Superior Court of Delaware County, Indiana, alleging breach of contract and seeking to foreclose on its lien. This action breached the forum-selection clause in the contract, which required all litigation to occur in Franklin County, Ohio. This action was later dismissed and refiled in the proper court. Contractor counterclaimed based on subcontractor's violations of the lien-waiver and forum-selection clauses. The trial court awarded Contractor damages for premiums paid on the bond and the attorney fees expended to defend against the suit improperly filed in Indiana. The Magistrate determined that Contractor had violated the Prompt-Payment Act by improperly withholding Subcontractor's fees and awarded Subcontractor prejudgment interest and attorney fees. Contractor appealed. The appellate court, affirming the trial court, held pursuant to Ohio Revised Code 4113.61(A)(1) that "only direct, tangible amounts relating to disputes involving alleged faulty labor, work or materials are retainable by the Contractor." The Supreme Court of Ohio affirmed, concluding that the breaches concerned disputes arising out of a construction contract, but that the lien-waiver and forum-selection provisions at issue were procedural in nature. Therefore, these breaches did not create "disputed liens or claims involving the work or labor performed or material furnished by the Subcontractor," within the meaning of the Code. Affirmed. *Masiongale Electrical-Mechanical, Inc. v. Construction One, Inc.*, 102 Ohio St.3d 1 (2004).

REAL PROPERTY – Landlord and Tenant: Fifth Third Bank ("Tenant") entered into a commercial lease with its original landlord in 1993. The term of the lease was for twelve years but gave Tenant the right to terminate the lease anytime after the first ten years as long as it met certain notice requirements. Tenant and the original landlord made two amendments to the lease. In the second amendment, Tenant agreed to lease additional space at an adjusted rate and the original landlord granted Tenant the right of first refusal on more additional space. This second amendment stated that the termination date for the lease, including the additional space, was December 31, 2005. Ducru Limited ("Landlord") subsequently bought the property and is the current landlord. In 2002, Tenant sent a notice to Landlord exercising its right to terminate. The notice was sent twelve months in advance and named a termination date of August 31, 2003. Landlord argued that the date in the amendment was the termination date and this amendment eliminated Tenant's termination right. The trial court granted summary judgment in favor of Tenant. The Court of Appeals stated that the date on the amendment was the lease's natural ending date if Tenant chose not to exercise its right of termination. Since the amendment never specifically mentioned Tenant's termination right, it remained in full force. Affirmed. *Fifth Third Bank v. Ducru Limited Partnership*, 157 Ohio App.3d 463 (1st Dist. 2004).

ENERGY AND UTILITIES – Rate Caps: In January 2001, Senate Bill 3 became effective, which provides for competition in the supply of electric generation services. It requires the three major components of electric service – generation, transmission, and distribution – to be unbundled. This unbundling of service components allows customers to evaluate offers from competitive generators. It also prohibits the cost of providing distribution services to be subsidized by revenues from the generation service component. As part of electric restructuring, each electric utility was required to submit a transition plan and a schedule of rates and changes for the Public Utilities Commission of Ohio ("Commission") to approve. The transition-plan-approval proceedings resulted in line-extension tariff filings and Commission entries approving these tariffs. In October 2001, in response to an increasing number of customer complaints, the Commission began investigating past and present line-extension policies to study how they interacted with the Commission's own rule governing rural line extensions and to determine whether the postrestructuring line-extension policies and practices

(Cont. Pg. 7)

Recent Cases (cont.)

complied with Senate Bill 3. In November 2001, First Energy Corporation and the Ohio Home Builders Association filed a joint application requesting Commission approval of an agreement resolving a complaint filed by the association over line-extension charges. The Ohio Consumers' Council ("OCC") intervened in the application proceedings. After evidentiary hearings, each of the electric companies filed separate stipulations signed by all of the parties except the OCC and the cities of Maumee and Toledo ("Cities"). The Commission approved these stipulations and the OCC and the Cities both filed applications for rehearing, which were denied by the Commission. Both then filed notices of appeal. The OCC and the Cities contended that Ohio Revised Code 4928.34(A)(6) and 4928.35(A) impose a cap on line-extension charges during the market development period. The Commission and the electric companies argued that the language in the statutes that authorizes the Commission to establish line-extension charges provides exceptions to the rate-capping requirements. The Ohio Supreme Court stated that the line-extension tariffs did not contain any specific rates and that they were "at cost" tariffs. It concluded that the Commission was given the authority by the General Assembly to enforce Senate Bill 3 to encourage competition. It also acknowledged the Commission's expertise in recognizing, establishing, and modifying rates and accorded due deference to their statutory interpretations. Therefore, the Commission's interpretation of exceptions to the statutory rate cap was valid. Affirmed. *Migden – Ostrander v. Public Utilities Commission of Ohio*, 102 Ohio St.3d 451 (2004).

GOVERNMENT – Negligence: LaSharn Carrington ("Driver") was driving west on Interstate 480 in Cuyahoga County when her vehicle was struck by a road sign that had detached from its anchoring post and was blown by the wind. The sign, which was owned and maintained by the Ohio Department of Transportation ("ODOT"), damaged the front of Driver's vehicle. ODOT's records revealed that the signs had been inspected five months before the Driver's vehicle was struck. The Court of Claims stated that ODOT has a duty to maintain its highway in a reasonably safe condition for the public, but that it is not an insurer of the safety of its highways. Ordinarily, in a claim involving roadway debris, a plaintiff must either prove (1) that defendant had actual or constructive notice of the defective condition and failed to respond in a reasonable time or responded in a negligent manner, or (2) the defendant, in a general sense, maintains its highways negligently. The Court concluded that ODOT's own evidence showed that it failed to perform sign maintenance and inspections in a frequent manner. The Court stated that, "Properly maintained road signs usually do not fly from anchorages without negligence involved." Driver was awarded the cost to repair her vehicle plus the filing fee. *Carrington v. Ohio Department of Transporatation*, 128 Ohio Misc.2d 31 (2004). ■

Ohio Legislative Update

I. Real Property

A. H.B. 120- Self-Service Storage Fees: This bill permits the owner of a self-service storage facility to charge a reasonable late fee for each service period that an occupant does not pay rent in full by the third day after the due date. The bill also defines a reasonable late fee as $20 for each late rental payment, or 20% of the amount of each late rental payment, whichever is greater, or a reasonable amount specified in the rental agreement. Conditions of the late fee are required to be stated in a written rental agreement between the owner and the occupant. The owner is also permitted to charge the occupant for any reasonable expense incurred by the owner in rent collection or lien enforcement. Passed by House: June 25, 2003. Passed by Senate: January 7, 2004. Signed by Governor: February 3, 2004. Effective Date: May 4, 2004.

B. H.B. 135- Changes to Ohio Condominium Law: This bill makes comprehensive revisions to nearly all provisions of the Condo Law concerning the classification of types of units, relocation of boundaries, contents of declaration, procedures for amending and recording the declarations, preparing and certifying drawings, contents of bylaws, duties and powers of a unit owners association, maintaining records, lien rights, compliance with governing documents and condominium disclosure statement. Passed by House: June 11, 2003. Passed by Senate: March 17, 2003. Signed by Governor: April 19, 2004. Effective Date: July 20, 2004.

C. H.B. 516- Environmental Covenants: This bill would establish environmental covenants in real property generally arising under an environmental remediation or mitigation project that imposes activity and use limitations on the property, and would require the recording of such covenants, and establish other requirements regarding environmental covenants. Passed by House: December 1, 2004. Passed by Senate: December 8, 2004.

D. S.B. 106- Realtor Disclosures: This bill modifies requirements concerning written disclosures that real estate agents must give to their clients and client signature requirements. It requires that information formerly required to be disclosed on a dual agency disclosure statement instead be included on the reverse side of an agency disclosure statement. It also modifies procedures and requirements for the handling of complaints against licensees. Passed by Senate: February 4, 2004. Passed by House: May 4, 2004. Sign by Governor: August 5, 2004. Effective Date: November 5, 2004.

II. Probate and Estate Planning

A. H.B. 51- Probate Law Amendments: This bill makes comprehsive revisions to the probate law relative to election by a surviving spouse, notice of admission of a will to probate, accounts of administrators and executors, distribution of assets, presentation of creditors' claims to distributees, and dispute resolution procedures in probate court. Passed by House: April 8, 2003. Passed by Senate: December

(Cont. Pg. 8)

Legislative Update (cont.)

10, 2003. Signed by Governor: January 8, 2004. Effective Date: April 8, 2004.

B. H.B. 392- Anatomical Gifts: This bill permits an individual to make an anatomical gift by specifying it on the individual's living will. It requires a printed declaration form to include a section specifically designed for an individual to declare the individual's intent to make an anatomical gift and to include a donor registry enrollment form to send to the Bureau of Motor Vehicles. The bill also permits an individual to amend or revoke the gift. Passed by House: May 5, 2004. Passed by Senate: May 26, 2004. Signed by Governor: June 17, 2004. Effective Date: September 16, 2004.

C. H.B. 520- Inheritance Payments: This bill would require the probate court, upon application by a fiduciary or interested party, to determine the fairness of an agreement requiring a fiduciary to pay a percentage of an inheritance or a dollar amount to any person other than the beneficiary and would allow the probate court to approve, modify or invalidate the agreement. Introduced in House: June 10, 2004. Assigned: Judiciary.

D. H.B. 260- Reduce Overpayment Interest: This bill would reduce the rate at which interest accrues on estate and personal property tax overpayments and underpayments. It would change the penalty for late estate tax payments and filings. It also authorizes county auditors to waive estate tax penalties for reasonable cause. Passed in House: November 9,2004. Passed in Senate: December 8, 2004.

III. Energy

A. H.B. 133- Revisions to Power Sitting Board Statute: The PSB issues certificates of environmental compatibility and public need for major utility facilities proposed to be constructed in Ohio. The bill provides the PSB with continuing jurisdiction to enforce all certificates it issues for electric or gas utility facilities from the date of issuance to the end of the period of initial operation. The bill also provides for a waiver of application filing time requirements for "good cause shown". The bill authorizes the PSB to conduct a complaint hearing and to levy fines if the PSB has reasonable grounds to believe that an owner of a major utility facility violated certain prohibited conduct. Passed by House: June 25, 2004. Passed by Senate: December 10, 2003. Sign by Governor: January 7, 2004. Effective Date: April 7, 2004.

B. S.B. 265- State Energy Policy: This bill articulates a state policy regarding energy usage, production, and delivery in Ohio. It makes changes to the authority of various state agencies including the Department of Development, Air Quality Development Authority, Public Utilities Commission and Power Sitting Board. It also authorizes state corporation franchise tax credits for purchases of energy-efficient technology. Introduced in Senate: September 9, 2004. Assigned: Energy, Natural Resources and Environment.

IV. Litigation

A. H.B. 212- Prejudgment Interest: This bill changes the rate of interest on money due under certain contracts and on judgments, changes the computation of the period for which prejudgment interest is due in certain civil actions, precludes prejudgment interest on future damages and requires that the finder of fact in certain tort actions in which future damages are claimed specify the amount of past and future damages awarded. Passed by House: October 15, 2003. Passed by Senate: February 4, 2004. Signed by Governor: March 2, 2004. Effective Date: June 2, 2004. ■

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