Skidmore Script

A legal newsletter presented to you by ... Skidmore & Associates
A Legal Professional Association

Spring & Summer 2003

How to Win Denial of Health Benefit Litigation

By: Eric E. Skidmore, Esq.

PART I: Appreciate the Burden – It is on You.

We are fortunate in Northeast Ohio to have access to some of the finest health care providers and facilities in the world. The receipt of quality health care is not a problem, however, the payment of expenses is problematic to the patient, spouses and anyone responsible for the health care of another. If you do not have health insurance, your personal assets and income are at risk when there are unexpected health issues. If you do have health insurance, you may have to fight to enforce your heath benefit rights. When a claim is denied without justification, the insurer is profiting at the expense of your health.

Some employers provide health insurance coverage as a fringe benefit to their employees and their dependents. This helps the patient pay for quality health care they could not ordinarily afford. Most of us can afford to pay routine medical expenses albeit even mundane tasks or products cost hundreds of dollars. However, once health concerns become more severe, the cost can proliferate to tens of thousands of dollars. This creates an inherent friction between the patient receiving quality health care services and the insurer's responsibility to pay. What happens if you or your dependents need critical health care services and the plan administrator denies the claim? Health could deteriorate while the claim is being administered or denied. In some instances, the enforcement of health benefits has become a life or death issue.[1]

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The topic of how to win denial of health benefit litigation is presented in two parts. Part I, presented in this issue of *Skidmore Script*, provides a candid review of the burden placed upon participants to enforce health benefits and claims governed by the Employee Retirement Income Security Act of 1974 ("ERISA").[2] It also sets forth the burden in claim denial litigation through the interpretive cases of the United States Sixth Circuit Court of Appeals (the "Sixth Circuit Court"). You must understand the burden before you can assume it.

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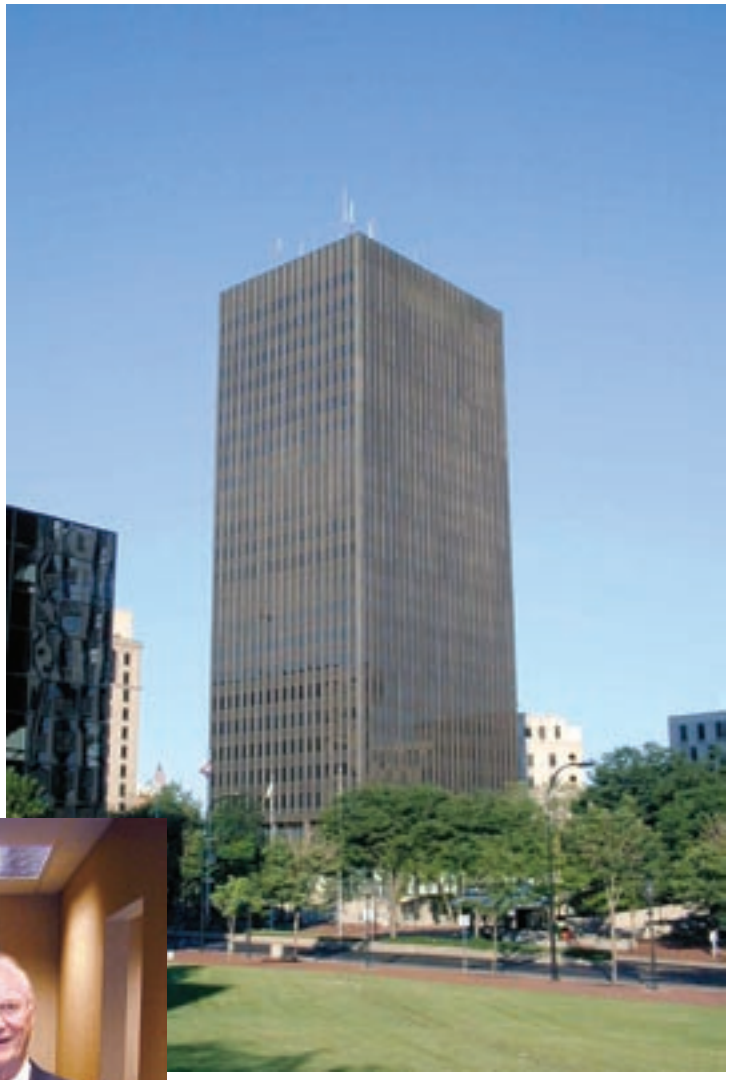
From Key to NCB: S&A Relocates after 38 Years

The law firm of Skidmore & Associates relocated its office from the Key Building to the National City Center (Cascade One) on Friday, May 10, 2003. It was a move of family and firm. "Of my nearly fifty years of practice I spent over thirty-five years in the Key Building. I have many fond memories," said Archie W. Skidmore.

Archie W. Skidmore first came to the Key Building in the late 1960's (then the Centran Building) as a partner in the law firm of Schwab, Sager, Grossenbaugh, Skidmore, Nukes & Rothal Co., L.P.A. At that time, the law offices were located on the 8th floor. The firm moved its offices to the 11th floor in the late 1970's (then the Society Building) where it remained until recently. The new offices are located across the street on the 12th floor of the National City Center where the space has been newly refurbished from floor to ceiling. The new address of Skidmore & Associates is National City Center, One Cascade Plaza, 12th Floor, Akron, Ohio 44308. ■



Our new location at National City Center, One Cascade Plaza, 12th Floor, Akron, Ohio 44308 (above).

From left to right: Brian K. Skidmore and Archie W. Skidmore survey the offices under construction (above) and upon completion (right).

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Denial of Health Benefit (cont.)

Part II entitled "Assume the Burden – Turn the Tide" shall provide some practical guidelines to assume the burden of enforcing health benefit rights and satisfying the burden during denial litigation. It shall also provide explanations and examples of how you can generate and cultivate evidentiary materials at the administrative phase of benefit enforcement so it can be strategically used to reverse the denial of health benefits during the litigation phase. This shall be presented in Part II, which can be found in the next edition of *Skidmore Script*, Fall 2003.

I. What is ERISA?

ERISA governs and regulates pension plans and welfare plans.[3] Health insurance plans fall within the definition of welfare plans. This article will concentrate on the enforcement of health benefit rights under ERISA. The adjudication of pension and disability claims are similar to health insurance claims, however, they are outside the scope of this article. ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee [health] benefit plans".[4] A uniform system of regulation was needed in 1974 because health benefit claims were being administered and enforced inconsistently throughout the different states.[5] Congress intended to eliminate the problem by "federalizing" the regulatory scheme and mandating uniformity state to state. No doubt, the health insurance industry assisted in the authoring of ERISA, because the regulatory field is not level between the insurer and the insured.

ERISA is "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee [health] benefit plans".

II. Basics of ERISA

Health insurance plans are voluminous and complex. ERISA utilizes a special vocabulary to describe the roles people play in implementing health insurance plans.

A. Terminology: Persons Affiliated with Health Insurance Plans.

1. The Insured

A "participant" is the primary person the health insurance plan is to protect and benefit. ERISA defines "participant" as "…any employee or former employee…who is…eligible to receive a benefit from a [health insurance plan]…or whose beneficiaries may be eligible to receive any such benefit".[6] A "beneficiary" is a recipient of health care benefits because of their relationship or association with the participant. ERISA defines a "beneficiary" as a "person designated by a participant…who is or may become entitled to a [health] benefit…"[7] ERISA empowers a participant and/or beneficiary with standing to bring suit to enforce health benefit rights.[8]

2. The Insurer

The "plan sponsor" is usually the employer of the participant. Sometimes the plan sponsor establishes an internal committee to administer the health insurance plans. That administrative body is called a "plan administrator". The plan administrator may delegate the discretion to decide and review certain health benefit claims to a health insurance carrier (the "insurer"). The plan administrator and any delegatee or fiduciary has the "authority to control and manage the operation and administration of the plan".[9] The plan sponsor, plan administrator and all persons known to have played a role in the denial of health benefits (including the plan itself) should be considered as potential defendants in benefit denial litigation. To the extent the insurer has been delegated discretion, it too should be added as a defendant.

B. Key Documents Required by ERISA.

1. The Plan

Disclosure of information is a key element of ERISA and that burden rests upon the plan sponsor, plan administrator and insurer. ERISA requires that every employee health benefit plan establish and maintain a central comprehensive written document or "plan".[10] The plan discloses procedures for administering the plan; included and excluded health benefit coverages; procedures and claims; enrollment and appeals;

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Denial of Health Benefit (cont.)

deductibles and co-pays; and in-network and out-of-network policies. The plan is usually not distributed to participants because it is so voluminous, however, a copy can be acquired from the plan sponsor or plan administrator upon written request.

2. Summary Plan Description

ERISA requires the plan administrator to furnish each participant with a "Summary Plan Description" (SPD).[11] The SPD must be accurate and comprehensive, and written in a manner understood by the average participant.[12] The SPD is an abbreviated version of the plan. It is also the plan administrator's primary vehicle for communicating with the participants and beneficiaries.

C. Reasonable Claims Procedure Requirement.[13]

ERISA requires that each health insurance plan establish and maintain a reasonable claims procedure for the administration and review of health benefit claims submitted by or on behalf of participants and their beneficiaries.[14] This process is the administrative phase of claims review. ERISA requires a procedure for the filing of claims, written notification and appeal for denial of health benefit claims.[15] The entire administrative process is to be plainly and succinctly described in the SPD.[16] ERISA additionally requires that a health insurance plan provide a description of the procedure for informing participants of the time periods for their decisions on benefit claims and for making appeals and receiving decisions.[17] Based upon time requirements under ERISA, 210 to 420 days can expire between the initial submission of a claim and the exhaustion of the administrative appeals process. In some instances, the plan may require two levels of mandatory appeal of an adverse benefit determination. By this time, a patient's health or progress could deteriorate and in some instances, death could occur while waiting for the administration of a treatment claim.

III. The Playing Field is Not Level

A. ERISA Preempts State Law and State Law Claims that "Relate to" Employee Health Benefit Plans.

ERISA nullifies an insured's access to State law claims and remedies. ERISA's preemption clause states that it "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee [health] benefit plan".[18] The Sixth Circuit Court has repeatedly held that virtually all State law claims relating to an employee benefit plan (including health) are preempted by ERISA.[19] Breach of contract and bad faith claims arising out of a failure to provide insurance benefits are preempted.[20] Promissory estoppel claims are preempted.[21] Equitable estoppel claims are not recognized by ERISA and State law estoppel claims are preempted.[22] State law claims for wrongful death, in proper denial of benefits, medical malpractice and insurance bad faith are preempted.[23] The State law claim of negligent misrepresentation based upon denial of benefits is preempted by ERISA.[24] Recently, the U.S. Supreme Court reiterated that any State law "provid[ing] a form of ultimate relief in a judicial forum that add[s] to the judicial remedies provided by ERISA…patently violates ERISA's policy…"[25] If an insured attempts to assert State law claims and remedies in benefit denial litigation, the causes of action will invariably be dismissed.

B. There is No Right to a Jury Trial to Enforce Health Benefit Rights.

The Sixth Circuit Court has examined the issue of whether jury trials are appropriate in ERISA cases and held that there is no right to a jury, because benefit claims are equitable and not legal in nature, therefore, there is no jury entitlement.[26]

C. Consequential and Punitive Damages are not Available under ERISA.

ERISA provides that an insured may bring a private action to enforce and recover health care benefits owing under an employee health care plan.[27] However, other monetary damages are not recoverable.[28] The U.S. Supreme Court held that punitive damages are not recoverable as a result of an insured's unreasonable denial of benefits under ERISA.[29] The Sixth Circuit Court has followed the reasoning of the U.S. Supreme Court that consequential and punitive damages are not recoverable under ERISA.[30]

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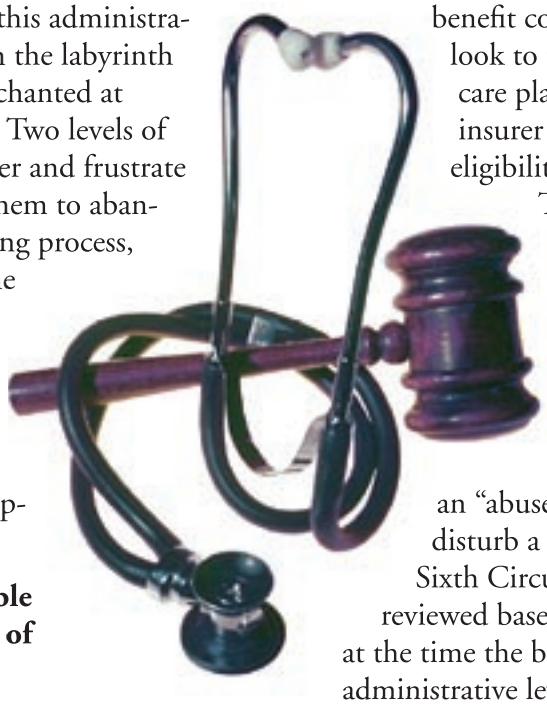
Denial of Health Benefit (cont.)

D. Insured Must Exhaust Administrative Remedies Before Filing a Lawsuit to Enforce Health Care Benefits.

The primary purpose of ERISA is to protect the interests of the insured by requiring disclosure, reporting and a notification procedure. This creates an elaborate administrative process that is well intended but inefficient. The administrative process is laborious, time intensive and complicated. The health care provider, insured and insurer communicate between one another in the implementation of this administrative process. It is easy to get lost in the labyrinth of regulation and to become disenchanted at this phase of benefit enforcement. Two levels of administrative appeals often hamper and frustrate health benefit claimants, causing them to abandon claims. Despite this painstaking process, the Sixth Circuit Court requires the exhaustion of this procedure prior to bringing a civil action.[31] If an insured fails to do so, the civil action could be dismissed (usually without prejudice) or enjoined until the administrative appeal process is completed.[32]



E. Attorney's Fees are not Recoverable during the Administrative Phase of Benefit Enforcement.

ERISA provides that a Court has discretion to award reasonable attorney's fees in benefit enforcement litigation.[33] However, the enforcement of benefit rights will be underdeveloped at the litigation phase unless favorable evidence is cultivated at the administrative phase. Legal assistance at this juncture is imperative, however, the Sixth Circuit Court has held that attorney's fees incurred during the administration of the claim are not recoverable.[34] This provides a disincentive to retain legal counsel early on to develop an evidentiary record. Although attorney's fees are discretionary at the litigation phase, the insured must prove (among other things) that the insurer acted with "bad faith" in denying a health benefit claim.[35]

F. The Standard of Review is Burdensome to the Insured.

ERISA provides an insured with an express private right of action to recover health benefits due them under the terms of their plan.[36] Most courts, including the Sixth Circuit Court, apply an "arbitrary and capricious" standard to review an insurer's decision denying health care benefits.[37] This is called the "deferential standard" because it defers to the insurer's discretion rather than the insured in determining health care benefit coverage. The Sixth Circuit Court will look to the specific language of the health care plan to determine if the plan gives the insurer discretionary authority to determine eligibility or to construe the plan's terms.[38] This deferential, "almost preferential," treatment requires the courts to follow the insurer's denial of the insured's health benefits if the decision is rational.[39] If it is possible to offer a reasoned explanation for the denial, the decision is upheld.[40] This requires the insured to show an "abuse of discretion" before a court will disturb a denial of benefits. According to the Sixth Circuit Court, the insurer's discretion is reviewed based upon the facts known and applied at the time the benefits claim decision is made at the administrative level.[41] The insured will not be permitted to introduce evidence gathered after the plan administrator denies the claim.

G. The Claim Decision Maker is Permitted to have a Potential Conflict of Interest in Administering Benefit Claims.

Any potential conflict of interest should be a factor in the review of health benefits denied by a plan administrator. Potential conflicts can arise when the employer acts as a plan administrator or coverage decisions are made by an insurer who is paying claims out of its own assets.[42] The Sixth Circuit Court does not automatically reverse a denial of benefits claim by a plan administrator when there is a perceived potential conflict of interest. A heightened level of scrutiny

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Denial of Health Benefit (cont.)

is not required and only when an insured is able to provide "significant evidence" that the insurer was motivated by self-interest will the potential conflict be reviewed.[43]

IV. Conclusion

It is plain to see that under ERISA the burden is upon the insured to establish an evidentiary record to enforce health benefit rights during the administrative level. Perhaps this is where the burden should be if you desire to have your medical expenses paid by someone else. The playing field is not level under ERISA. The plan administrator or insurer is given broad discretion to determine claim benefits and coverage. If you wait to litigate before you attempt to protect or enforce your benefit rights, you will have waited too long. The consequences are catastrophic if you do not respond immediately to a denial of health benefits.

The physical and emotional strain of poor health and confronting the claim denial process is excruciating. You must posture yourself in a manner to understand and play by the rules and regulations of ERISA. If you understand what is expected, you can direct your time and resources effectively. You must act timely, assertively, deliberately and consistently. The key is to cultivate and generate evidentiary materials to persuade the decision makers. Once you understand the burden, you can begin to build an evidentiary record. Quality of life and health are at stake – appreciate the burden of proof for it is on you. ■

1. Dardinger v. Anthem Blue Cross, 98 Ohio St. 3d 77 (2002).
2. 29 U.S.C. § 1001.
3. 29 U.S.C. §§ 1002(1), 1002(2)(A) and 1002 (3).
4. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983).
5. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987).
6. 29 U.S.C. § 1002(7).
7. 29 U.S.C. § 1002(8).
8. 29 U.S.C. §§ 1132(a)(1)(B); 1132(a)(9). Tegardener v. Republic-Franklin, Inc. Pension Plan, 909 F. 2d 947, 951 (6th Cir. 1990).
9. ERISA § 402(a).
10. 27 U.S.C. § 1102(a)(1).
11. 29 U.S.C. § 1024(b)(1).
12. 29 U.S.C. § 1022(a)(1).
13. On November 21, 2000, the U.S. Department of Labor promulgated revised regulations concerning minimum requirements for health benefit claims procedures. C.F.R. § 2560.503-1 will apply to new group health claims for plan years beginning on or after July 1, 2002 but in no event later than January 1, 2003. Some of these revisions will be covered in the next edition of *Skidmore Script*.
14. 29 U.S.C. § 1133.
15. 29 C.F.R. § 2560.503-1(b)(1)(i).
16. 29 C.F.R. § 2560.503-1(b)(1)(ii).
17. 29 C.F.R. § 2560.503-1(b)(1)(iv).
18. 29 U.S.C. § 1144(a). Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987).
19. Cromwell v. Equicor-Equitable HCA Corp., 944 F. 2d 1272 (6th Cir. 1991); Ruble v. UNUM Life Ins. Co., 913 F. 2d 295 (6th Cir. 1990); Davis v. Kentucky Finance Cos. Retirement Plan, 887 F. 2d 689 (6th Cir. 1989), *cert. denied*, 495 U.S. 905 (1990); McMahan v. New England Mut. Life Ins. Co., 888 F. 2d 426 (6th Cir. 1989); Firestone Tire & Rubber Co. v. Neusser, 810 F. 2d 550 (6th Cir. 1987).
20. Pilot Life, 481 U.S. at 41.
21. Daniel v. Eaton Corp., 839 F. 2d 263 (6th Cir.), *cert. denied*, 488 U.S. 826 (1988).
22. Davis, 887 F. 2d at 689.
23. Tolton v. American Biodyne, Inc., 48 F. 3d 937, 942 (6th Cir. 1995).
24. Cromwell, 944 F. 2d at 1276.
25. Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 379 (2002).
26. Bair v. General Motors Corp., 895 F. 2d 1094 (6th Cir. 1990).
27. ERISA § 502(a)(1)(B).
28. Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 144-48 (1985).
29. Russell, 473 U.S. 147-48.
30. Farrell v. Automobile Club of Michigan, 870 F. 2d 1129 (6th Cir. 1989).
31. Miller v. Metropolitan Life Ins. Co., 925 F. 2d 979 (6th Cir. 1991).
32. Fallick v. Nationwide Mutual Insurance Company, 162 F. 3d 410 (6th Cir. 1998).
33. 29 U.S.C. § 1132(g)(1).
34. Anderson v. Proctor & Gamble Company, 220 F. 3d 449 (6th Cir. 2000).
35. Tiemeyer v. Community Mutual Ins. Co., 8 F. 3d 1094 (5th Cir. 1993), *cert. denied*, 511 U.S. 1005 (1994).
36. 29 U.S.C. § 1132(a)(1)(B).
37. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); University Hosps. of Cleveland v. Emerson Elec. Co., 202 F. 3d 839, 845 (6th Cir. 2000).
38. Marquette General Hospital v. Goodman Forest Industries, 315 F. 3d 629 (6th Cir. 2003).
39. University Hosps. of Cleveland, 202 F. 3d at 846 (quoting Yeager v. Reliance Standard of Life Ins. Co., 88 F. 3d 376, 381 (6th Cir. 1996)).
40. Davis, 887 F. 2d at 693.
41. Yeager, 88 F. 3d at 376.
42. Varity Corp. v. Howe, 516 U.S. 489 (1996).
43. Wages v. Sandler O'Neill & Partners, L.P., 2002 WL 339221 (6th Cir. 2002); Peruzzi v. Summa Medical Plan, 137 F. 3d 431, 433 (6th Cir. 1998); University Hospitals, 202 F. 3d at 846.

Recent Cases:

Secular laws are made by judicially determined precedent and legislative enactment. Each issue of Skidmore 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 Tracy L. Maciel at 330.253.1550 or tlm@skidmorelaw.com.

BUSINESS ORGANIZATIONS – Piercing Corporate Veil. Consumer ordered carpet from a carpet store and paid a $1,000 deposit. Soon after, a judgment was placed against the carpet store and the carpet store, in effect, went out of business without delivering consumer's carpet. Consumer brought a small claims action against the carpet store and the store's president. The court held that consumer could not pierce the corporate veil to make the store's president personally liable for the consumer's deposit. Generally, shareholders, officers and directors are not liable for a corporation's debts. However, individual shareholders may be held personally liable for corporate misdeeds when (1) control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will or existence of its own; (2) control over the corporation by those to be held liable is exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and (3) injury or unjust loss resulted to the plaintiff from such control or wrong. The court reasoned that there was insufficient evidence of the necessary elements to pierce the corporate veil in this case. The store's president testified that he did not know the judgment was placed against the store and the store had been operating as it always had until placement of the judgment. Therefore, there was no way for the store's president to know the store was going out of business before he accepted consumer's deposit check. A contrary result would lead to all shareholders, officers and directors of a closely held corporation to be held personally liable for the corporation's debts, which is not intended by Ohio law. *Falkiewicz v. Blackburn*, 151 Ohio App. 3d 562 (2nd Dist. 2003).

COMMERCIAL LAW – Liens: The homeowner contracted with the general contractor for a new home. The general contractor started construction and then while the home was still under construction, the general contractor went out of business. By this time, monies had been paid to the general contractor, but the subcontractor, who installed the flooring, had not been paid for any of the flooring it had installed. The subcontractor filed a mechanic's lien and the homeowner's then found a new general contractor to complete their home. The subcontractor that filed the mechanic's lien refused to finish the flooring because it had not been paid for the work already completed. Subsequently, the subcontractor filed a complaint seeking the amount they were due and the homeowner's filed a counterclaim seeking a declaration that the mechanic's lien was void and seeking damages related to the lien. The trial court found in favor of the homeowners, finding that the subcontractor's contract had been with the general contractor, not with the homeowners. The subcontractor should have been paid by the general contractor. The magistrate further found that the homeowners were protected from having to pay twice for services received from a subcontractor where they have already paid the general contractor the full contract price and that the homeowners, in fact, had paid more than the original contract price to complete the house. The magistrate also awarded attorney's fees to the homeowners. The matter was taken to the court of appeals and they affirmed the magistrate's finding and found that the property owners were not subject to the mechanic's lien; that the evidence supported the trial court's finding that the property owners contracted with the contractor for construction of home rather than with the subcontractor; and that the property owners were not unjustly enriched under the facts of this matter. *Brookville Floor Coverings Unlimited v. Fleming*, 151 Ohio App. 3d 456 (2nd Dist. 2003).

COMMERCIAL LAW – Receivers: In January 1999, TPSS Acquisition Corporation ("debtor") purchased assets and assumed the liabilities of Toledo Pickling and Steel Sales, Inc. One of these liabilities was a three million dollar debt to U.S. Steel Group ("creditor"). Debtor and creditor entered into an agreement where creditor agreed to cancel the existing debt in exchange for a combination of common stock, a promissory note and a cash payment. Debtor later defaulted on the promissory note. In August 1999, Campbell Investors filed suit against debtor alleging that debtor had defaulted on a lease and various loans. They also filed a motion for the appointment of a receiver to take control over debtor's property in order to prevent waste of the corporate assets. A receiver was appointed and in June 2001, he filed a motion for the authority to sue debtor. He alleged that debtor had fraudulently transferred funds to its parent company, Consolidated Capital of North America, Inc. Receiver was granted his motion to file suit and later requested an order for an assignment agreement. In the assignment, receiver would obtain creditors' claims against debtor, which would allow him to combine various other claims including fraud, securities law violations and misrepresentation in a federal suit. The trial court granted the assignment and determined that it would benefit all the claimants involved. Debtor appealed. The court of appeals determined that in receivership actions, an appellate court would not disturb the lower court's ruling unless it is unreasonable, arbitrary or unconscionable. It concluded that the trial court had not erred in approving the assignment agreement and affirmed the judgment. *Campbell Investors v. TPSS Acquisition,* 152 Ohio App. 3d 218 (6th Dist. 2003).

COMMERCIAL LAW – Warranties: Mr. Bobb ("owner") intended to build and operate a sawmill to be located in Belmont County, Ohio. Owner needed to purchase sawmill equipment to initially start operations. Mr. McCormick ("dealer") approached owner to sell him a sawmill manufactured by Morbark ("manufacturer"). Based upon sales brochures, promotional videotapes and the assurances of dealer, owner decided to purchase sawmill equipment from manufacturer. Dealer contracted with local suppliers to make some of the equipment according to manufacturer's designs rather than installing manufacturer's own equip-

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Recent Cases (cont.)

ment. Once installed, owner immediately began experiencing problems with the saw. After repeated efforts to fix the problems, the mill kept cutting the lumber improperly and owner was getting complaints from his customers. Owner eventually shut down operations and closed the mill. Owner was forced to auction the sawmill equipment at a loss and owner owed the financing company interest and principal on the remaining debt. Owner sued manufacturer for breach of express and implied warranties and a jury returned a verdict in favor of owner for $1 million. Manufacturer appealed contending that owner could not recover interest expenses and losses on the sale because manufacturer did not know that owner would incur such expenses in reliance upon the contract to build the sawmill. The court of appeals affirmed concluding that it is reasonable to infer that manufacturer would have reason to know that owner would be financing the purchase of the sawmill equipment, that it was a startup business and that a serious defect in the sawmill could drive owner out of business. Therefore, owner could recover his interest expenses and losses on the sale of the sawmill equipment. Affirmed. *Bobb Forest Products v. Morbark Industries, Inc.*, 151 Ohio App. 3d (7th Dist. 2002).

GOVERNMENT – Immunity: The issue in this case is whether the City of Youngstown ("city") is immune from liability for conversion of property of another. Allied Erecting & Dismantling Co., Inc. ("Allied") is in the business of industry dismantling and scrap salvaging. The Pittsburg & Lake Erie Railroad Company ("railroad company") decided to sell its main rail line, which ran along the Mahoning River. Allied entered into a series of agreements with the railroad company to purchase some real property upon which the rail line ran. Allied also obtained a first right of refusal to purchase rail, ties and salvageable ballast upon real property used for the main line that was not going to be purchased by Allied. Railroad company sold the real property to city subject to Allied's first right of refusal. Allied exercised its first right of refusal to the salvageable materials; however, city began to remove the items from their real property. Allied attempted to intervene and the city threatened Allied with criminal charges. City sold Allied's salvage materials to a third party. Allied sued city for conversion. The matter went to trial and Allied was awarded a $2 million jury verdict against the city. However, the trial court granted a judgment notwithstanding the verdict concluding the city was protected by sovereign immunity and therefore, owed nothing to Allied. Allied appealed arguing that the city engaged in a proprietary function, which was not subject to sovereign immunity. The court of appeals agreed with Allied stating that the city was performing a proprietary function (as opposed to a governmental function) by preventing Allied from removing the salvageable materials and then selling the same to a third party. The court of appeals reinstated the jury verdict against city. Reversed. *Allied Erecting & Dismantling v. Youngstown,* 151 Ohio App. 3d 16 (7th Dist. 2002).

GOVERNMENT – Public Records: In 2002, an employer began negotiating with the Port of Greater Cincinnati Development Authority ("port authority") regarding the location, preservation or expansion of its business within Hamilton County ("county"). Employer and port authority signed a confidentiality agreement. At a meeting, the port authority shared some information provided by the employer with senior staff personnel of the county. Documents provided to the county were returned at the end of the meeting. A reporter of *The Cincinnati Enquirer ("The Enquirer")* requested that the port authority produce the documents, which was refused. *The Enquirer* filed a writ of mandamus to compel the disclosure. The public records law (O.R.C. 149.43) mandates that all public records be made available for inspection to any person upon request. Financial and proprietary information submitted by an employer to a port authority in connection with a development is excluded from disclosure pursuant to O.R.C. 4582.58. *The Enquirer* argued that once the county received the documents in its meeting the port authority waived its right to invoke the exemption and the records became public. The court of appeals disagreed. It concluded that the information was never disclosed to the public and that the county revealed the records not to the public, but only to county officials in one meeting. Writ denied. *State Ex Rel. Cincinnati Enquirer v. Sharp*, 151 Ohio App. 3d 756 (1st Dist. 2003).

LABOR AND EMPLOYMENT – Contracts: Seller contracted to sell his office equipment business to buyer for $135,000. One of the conditions of sale was that buyer would hire seller as a service representative. Seller also signed a covenant not to compete with buyer for a period of five years or eighteen months if he was terminated beginning on the date of termination. One year later, buyer sold his business to assignee and seller was terminated. Buyer assigned all of his rights and interests in his contract with seller to assignee. Seller then attempted to start his own business by taking away the customers he serviced while employed by buyer and by using buyer's own customer lists to build that new business. Assignee's request for a preliminary injunction was denied by the court because he was not specifically named in the original contract between buyer and seller. Assignee appealed. The court of appeals concluded that a covenant not to compete is assignable when the covenant is contained within a valid contract that includes a valid assignment clause. The assignment also must not alter the burdens placed on the parties in the original contract. Reversed. *Blakeman's Valley Office Equip., Inc. v. Bierdeman,* 152 Ohio App. 3d 86 (7th Dist. 2003).

LABOR AND EMPLOYMENT – Employer's Liability: On October 21, 1998, Mitchell Collins ("employee") was working at a construction site in Marion County, Ohio. Employee worked for Trafzer Excavating ("employer"). As employee was leaving for lunch, a truck operated by another employee struck him. The truck was being operated in reverse and pushing a lowboy trailer. Employee died as a result of the accident. The estate of employee filed a suit against employer alleging intentional tort. Employer filed a motion for summary judgment, which was granted by the trial court against the estate. The estate appealed. The court of appeals concluded that the employer knew that the truck was not equipped with a back-up alarm, which created a dangerous condition. It further concluded that employer knew harm to employee was substantially certain to occur if the employee was required to perform a dangerous task. However, employee was not required to be behind the moving truck (as a condition of his employment) at the time of the accident because employee was going to lunch. Employer did not require employee to perform a dangerous task at the time of the accident. Affirmed. *Miller v. Trafzer,* 150 Ohio App. 3d 695 (3rd Dist. 2002).

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Recent Cases (cont.)

LABOR AND EMPLOYMENT – Whistleblowing: Employer terminated employee from her position after she expressed concerns about staffing levels. She filed suit alleging violations of Ohio's whistleblower statute. Employer was granted summary judgment and employee appealed. The trial court held that the statute requires that the employee have a reasonable belief that a violation has occurred and that the violation is a criminal offense. The court of appeals affirmed, holding that employee had no reasonable belief that a violation of a criminal offense had occurred and that she could not sue under the statute for a violation of public policy. *McGuire v. Elyria United Methodist Village,* 152 Ohio App. 3d 186 (9th Dist. 2003).

LABOR AND EMPLOYMENT – Wrongful Discharge: James Celeste ("employee") was employed by Wiseco Piston ("employer"). Employee expressed concerns to individuals and management about the safety of its motorcycles. Employee complained about employer proposing modifications to motorcycle engines without adequate safety testing. Employee was terminated. Employee sued employer for a common-law tort claim for wrongful discharge in violation of public policy. A four-year statute of limitations applies to a common-law tort claim pursuant to Ohio Revised Code (O.R.C.) 2305.09(D). Employer moved to dismiss the claim alleging that employee was barred by a 180-day limitation period set forth in Ohio's Whistleblower Statute (O.R.C. 4113.52(D)). The trial court must examine the employee's claim to determine if the allegations provide for relief on "any possible theory". The trial court granted the employer's motion to dismiss. Employee appealed. The court of appeals reversed the trial court. The court of appeals reasoned that the employee could assert a common-law tort action for wrongful discharge in violation of public policy. It also concluded that the four-year statute of limitations was applicable. Reversed. *Celeste v. Wiseco Piston*, 151 Ohio App. 3d 554 (11th Dist. 2003).

REAL PROPERTY – Condominiums: A condominium unit owner slipped and fell on snow within the common areas of the complex. Unit owner sued condominium association for negligent removal of the snow based upon written provisions of the association governing documents wherein the association assumed the responsibility of snow removal. The association sued it's management firm who was responsible for snow removal. In Ohio, a landowner generally does not have a duty to remove natural accumulations of snow or ice, and therefore, is not liable for resulting injuries. However, one exception to the general rule creates a duty to remove snow when it is expressly provided in a written contract. The governing documents created a contract between the association and the unit owner. The case was tried before a jury wherein the judge instructed the jury that Ohio law imposes no duty to clear natural accumulations of snow or ice making no mention of the exception created by written contract. The jury returned a verdict in favor of the association and management firm. Unit owner appealed. The court of appeals reversed stating that the trial court committed error by failing to instruct the jury that a duty to remove snow can be created by contract. The case was remanded to the trial court to be tried before a jury with the proper instruction. Reversed and remanded. *Chatelain v. Portage View Condominiums,* 151 Ohio App. 3d (9th Dist. 2002).

REAL PROPERTY – Landlord and Tenant. Tenant was the owner of a mobile home, which she kept on landlord's mobile home rental lot. Tenant failed to make timely rental payments and landlord instituted eviction proceedings in Toledo Municipal Court. The municipal court entered judgment for the landlord. Landlord also filed for a writ of restitution, which was denied. Although tenant removed her personal property from the mobile home, she did not remove the home from the lot. Landlord then directed a contractor to remove the mobile home and destroy it. Tenant brought an action alleging landlord had "willfully and maliciously seized the trailer without permission or legal right to do so". The court held that even if the presence of the mobile home in the rental lot constituted a trespass after tenant vacated the mobile home, landlord still had a duty to refrain from willfully damaging the property and the landlord violated that duty when he ordered removal and destruction of the mobile home. The court reasoned that while the mobile home's value may be zero, this issue was not disputed and the court could not render judgment as to this issue. Landlord was held liable for destruction of the mobile home. *Eller v. Continental Invest. Partnership*, 151 Ohio App. 3d 729 (6th Dist, 2003).

REAL PROPERTY – Premises Liability: Wanda Huey ("pedestrian") was helping her daughter deliver newspapers when she tripped over a raised edge of sidewalk. She sued Arnold Neal ("property owner") for her severe and permanent injuries suffered as a result of the fall. Pedestrian filed an affidavit with pictures attached that showed the sidewalk elevation to be 1.25 inches. The trial court granted property owner's motion for summary judgment because pedestrian had failed to submit evidence that the variation in elevation was greater than two inches. The court of appeals affirmed the decision, citing the "two-inch" rule. Courts developed the rule that a difference in elevation between adjoining portions of sidewalk that is two inches or less in height is considered insubstantial as a matter of law. Affirmed. *Huey v. Neal,* 152 Ohio App. 3d 146 (3rd Dist. 2003).

REAL PROPERTY – Water: Board of Health sued Andrew Paxson ("property owner") seeking injunctive relief and alleging that property owner's household sewage disposal system was discharging sewage onto the ground surface. In 1992, property owner had installed a leach-bed type household sewage disposal system because he had experienced flooding in the past. Property owner then filed a third-party complaint against South-Western City Schools ("adjoining landowner") alleging that they altered the drainage pattern of the surrounding land by constructing a retention pond. The pond had a 25-inch diameter pipe that discharged water directly onto property owner's land when the pond was full beyond its capacity. After the pond's construction, property owner had continuous standing water on his land that his disposal system was unable to properly drain. The trial court granted the Board of Health's request for an injunction and ordered adjoining landowner to modify the retention pond's run-off design. After reviewing the evidence and hearing expert testimony, the court of appeals affirmed the trial court's decision that adjoining landowner unreasonably altered the flow of surface waters. *Franklin Cty. Dist. Bd. of Health v. Paxson,* 152 Ohio App. 3d 193 (10th Dist. 2003).

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S&A Contributes to Kids with Disabilities

Herberich Primary School (Bath, Ohio) provides academic and scholastic services to students from preschool through fourth grade. Students with special needs are included in the student body at Herberich. Some of these students have developmental delays attributable to autism, orthopedic handicaps, cerebral palsy, speech and language delays and sensory-integrative dysfunction.

Sarah Skidmore, four-year old granddaughter of Archie W. Skidmore, was diagnosed in 1999 with slight hypotonic cerebral palsy (muscle weakness). She is currently enrolled in preschool classes at Herberich. Sarah is benefiting from the physical, occupational and speech therapy provided by a professional and well-trained staff. In early 2003, Principal Judy A. White and Beth Kasper (Teacher of the Multiple Disabled) submitted a grant request for a special project to build a new play area that would be accessible to regular students and multiple-handicapped students. Skidmore & Associates contributed to the grant. "Donating to this cause just seemed like the natural thing to do. Other children with special needs will also benefit from the project," said Archie W. Skidmore. "I have gleefully witnessed Sarah's improved confidence, stamina, stability and ambulation, which are directly related to her experiences at Herberich…she is very proud of her new skills and displays them with enthusiasm at our family gatherings," Archie added. The donation was accepted at the Board of Education meeting on April 22, 2003. Contributions from other donors and the PTA helped fund the project, which is scheduled for completion in August 2003. ■

Herberich Primary School, Bath, Ohio

Sarah Skidmore, with brother Eric, both presently attend Herberich.

S&A Honors Employee for 10 Years of Service

Using a helpful and courteous voice, Barbara C. Clinefelter picks up the telephone and says, "Skidmore & Associates, may I help you?" Barbara has been with the law firm for ten years and juggles her receptionist and legal secretarial duties. "Barbara has been with us for some time and she is our resident expert baker serving up tasty double chocolate cakes at the firm birthday parties. I must admit I hardly ever limit myself to just one piece of her cake," said Archie W. Skidmore.

Barbara is the daughter of Barbara J. and the late James W. Clinefelter. She was born in Akron, Ohio and graduated from Firestone High School (1982). Barbara is also a graduate of Mount Union College (1986), where she studied communications and English. Prior to working for S & A, Barbara worked as a clerk, typist and receptionist for the stock brokerage firm of Butcher & Singer (now Wachovia Securities). In her spare time, Barbara likes to cross-stitch, play piano (Beethoven, Chopin, Fats Waller), garden and read mystery novels. Barbara is presently a resident of West Akron. Skidmore & Associates would like to recognize Barbara for her ten years of service. ■

Barbara C. Clinefelter

Ohio Legislative Update

The editors of Skidmore Script would like to acknowledge the use of the summaries and bill analyses prepared by the Legislative Service Commission in its presentation of the following materials. The Bill Analyses of respective bills are public records and can be obtained at www.lsc.state.oh.us/analyses.html. A copy of a specific bill can be located at www.legislature.state.oh.us/search.cfm.

I. Construction

A. H.B. 136 – Mandatory Written Safety Programs: This bill requires that an owner include, in any public improvement contract, a requirement that the contractor and any subcontractor have a written safety program that includes drug and alcohol testing. A contractor and any subcontractor shall prepare a written site safety plan applicable to public projects estimated to be longer than 2 weeks in duration or valued in excess of $50,000.00. The director of administrative services shall establish, oversee and enforce rules concerning a drug-free workplace program applicable to contractors. Introduced in House: March 25, 2003. Assigned: State Government Committee.

B. H.B. 175 – Statewide Uniform Residential Building Code: This bill requires statewide licensing of residential contractors, establishes a statewide uniform building code for residential buildings, establishes a process for granting variances from the statewide uniform residential building code and makes other changes in the laws governing residential contractors and residential construction. Introduced in House: May 7, 2003. Assigned: Homeland Security, Engineering & Architectural Design.

II. Employment

A. H.B. 138 – Small Employers Insurance: This bill permits organizations comprised of health care providers or insurance agents to sponsor small employer health care alliance programs that assist the providers or agents in obtaining health care coverage. It also requires a bargaining representative for a health care alliance to disclose any current or past financial relationship with the selling insurer. Introduced in House: March 25, 2003. Assigned: Insurance Committee. Committee Report: June 4, 2003. Passed by House: June 10, 2003. Introduced in Senate: June 11, 2003. Assigned: Insurance, Commerce & Labor Committee.

B. H.B. 191 – Non-Compete Requirement: This bill prohibits geographic non-compete agreements in broadcasting employment contracts. Introduced in House: May 14, 2003. Assigned: Commerce & Labor Committee.

III. Energy

A. H.B. 133 – Revisions To Power Siting Board (PSB) 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. Introduced in House: March 19, 2003. Assigned: Public Utilities Committee. Committee Report: June 25, 2003. Passed by House: June 25, 2003. Introduced in Senate: June 26, 2003.

B. S.B. 93 – Renewable Energy Use: This bill would establish an annual renewable energy requirement for electric utilities and electric services companies that provide retail electric generation service in Ohio and would authorize the Public Utilities Commission to establish a system of renewable energy credits. Introduced in Senate: May 20, 2003. Assigned: Public Utilities Committee.

IV. Government

A. S.B. 87 – Public Records: This bill requires a public office or person responsible for public records to provide copies of public records within ten days or, if requested to be provided by U.S. Mail, within fifteen days after receipt of the request. Introduced in Senate: May 13, 2003. Assigned: State & Local Government & Veterans Affairs Committee.

V. 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. Introduced in House: June 4, 2003. Assigned: Civil & Commercial Law Committee.

B. S.B. 71 – Jury Service: This bill changes the penalties for failure to attend as required by a notice for jury service and serve as a juror, changes the circumstances under and methods by which jury service may be postponed, provides protection for employees and small employers when employees are summoned for jury service, shortens the period of jury service after which a juror may be discharged and creates a fund to compensate individuals who serve as petit jurors for more than ten days. Introduced in Senate: April 17, 2003. Assigned: Judiciary-Civil Justice Committee.

VI. Real Property

A. H.B. 119 – Oil, Gas, Mineral, Coal Zoning Exemption: This bill prohibits counties or townships (except in residential areas) from using zoning to regulate activities allowed under a state permit for oil and gas drilling and coal surface mining. It forbids the use of zoning to regulate the processing or storage of coal or minerals or the distribution, gathering, storage or transportation of oil and gas. Introduced in House: March 11, 2003. Assigned: County & Township Committee.

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Ohio Legislative Update (cont.)

B. 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 written rental agreement. Conditions of the late fee are required to be stated in a written rental agreement between the owner and the occupant. Introduced in House: March 11, 2003. Assigned: Commerce & Labor Committee. Committee Report: June 11, 2003. Passed by House: June 25, 2003. Introduced in Senate: June 26, 2003.

C. H.B. 127 – Tax Delinquent Property: This bill authorizes municipal corporations to acquire real property for redevelopment without necessarily incurring the entire tax debt. Before substantial costs are incurred by the county in pursuing a tax foreclosure, the tax debt is extinguished to the extent other taxing districts waive their claim to delinquent taxes on the property. If the municipal corporation sells the property, the bill requires the net proceeds to be spent on redevelopment. Introduced in House: March 18, 2003. Assigned: Ways & Means Committee. Committee Report: May 30, 2003. Passed by House: June 10, 2003. Introduced in Senate: June 11, 2003. Assigned: Ways & Means & Economic Development Committee.

D. H.B. 135 – Changes to Ohio Condominium Law: This bill has been considered by prior General Assemblies but has failed to pass. The bill makes comprehensive revisions to nearly all provisions of the Condo Law concerning the classification of types of units, relocation of boundaries, contents of a 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 the governing documents and condominium disclosure statement. Introduced in House: March 19, 2003. Assigned: Civil & Commercial Law Committee. Committee Report: May 14, 2003. Passed by House: June 11, 2003. Introduced in Senate: June 12, 2003. Assigned: Judiciary - Civil Justice Committee.

E. H.B. 165 – County Real Property Appraisers: Requires competitive bidding of contracts for appraisers employed by the county to conduct real property appraisals for the county auditor's office and requires a county auditor to publish a notice before real property appraisals are performed. Introduced in House: April 15, 2003. Assigned: County & Township Committee.

F. H.B. 170 – County Recorder Records: This bill prohibits any person from including an individual's social security number on any documents submitted to the County Recorder for recording unless that number is otherwise required by law to be on the document. Introduced in House: May 1, 2003. Assigned: County & Township Government Committee. Committee Report: June 25, 2003. Passed by House: June 25, 2003. Introduced in Senate: June 26, 2003.

G. H.B. 208 – Retainage Percentage: This bill eliminates statutory authority allowing or requiring the practice of holding a retainage from payments to contractors in the case of public improvement projects. It also limits the use of holding a retainage to a percentage-based system in the private sector. It requires contractors who contract to perform public improvements to have a written safety program. Introduced in House: June 3, 2003. Assigned: Commerce & Labor Committee.

H. H.B. 231 – Septic System Regulations: This bill revises the definition of "household sewage treatment systems" for purposes of the regulation of those systems by boards of health, requires the Public Health Counsel to adopt rules governing those systems, creates the Household Sewage Treatment System Technical Advisory Committee to review and approve new systems, requires the transferor of real property that is served by a household sewage treatment system to provide operation and maintenance information on the system at the same time that the transferor provides a real property disclosure form and establishes other requirements governing household sewage treatment systems. Introduced in House: June 24, 2003. Assigned: Not yet assigned.

I. S.B. 83 – Property Tax Reduction: This bill requires property tax reduction factors to be adjusted to account for five years' worth of property value changes resulting from property tax complaints and specifies that real property tax complaints do not automatically continue beyond the triennial reassessment cycle. Introduced in Senate: May 6, 2003. Assigned: Ways & Means & Economic Development Committee.

J. S.B. 90 – County Engineers: This bill would eliminate the requirement that a county engineer be a registered surveyor, have a registered surveyor on county engineer's staff and require that a county engineer have a degree with a major area of study in civil engineering. Introduced in Senate: May 20, 2003. Assigned: State & Local Government & Veterans Affairs Committee.

K. S.B. 106 – Real Estate Agents: This bill modifies agency relationships between real estate licensees and customers, including disclosures made to customers, and establishes a penalty for noncompliance with disclosure requirements. Introduced in Senate: July 10, 2003. Assigned: Not yet assigned. ■

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