

SPECIAL SECTION

Hot Issues Alerts/Financial and Economic Crisis

HIGHLIGHTS

Law Firms

Proxy Access Is Coming – Steps To Take Now Interview: Joseph L. Johnson III GOODWIN PROCTER LLP Page 24

2010 Open Enrollment Alert – Under GINA No Good Deed Goes Unpunished Marlene P. Frank, Sarah Heck Griffin and Mary M. Reil JONES DAY* Page 25

Department Of Energy Announces Loan Guarantees For Commercial Technology Renewable Energy Generation Projects Arthur W. Adelberg, Gregory J. Blasi and Michael A. Stosser DAY PITNEY* Page 26

Putting Teeth Into “Pay-To-Play” Interview: David E. Frulla KELLEY DRYE & WARREN LLP* Page 27

Federal District Court In Mark Cuban Case Issues Decision On Misappropriation Theory Of Insider Trading Tariq Mundiya and Todd Cosenza WILLKIE FARR & GALLAGHER LLP* Page 28

Executive Compensation Under Fire Stephen M. Plotnick STERN & KILCULLEN LLC Page 29

Insurance Coverage During The Economic Crisis: Key Policyholder Considerations, Part 1: Typical Claims And Avenues For Coverage Marc Rosenthal and Bianca Chapman PROSKAUER ROSE LLP* Page 30

Curbing Misclassification Pitfalls: Challenges In Today’s Economic Environment Michael C. Schmidt COZEN O’CONNOR Page 32

Recent Developments In Defending Hostile Work Environment Claims David J. Meiselman and Jeffrey I. Carton MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C. Page 33

Responding To Employee Requests For Extended Disability Leave And Heeding EEOC’s Stand Against “Inflexible” Policies Jonathan E. Sokotch WEIL, GOTSHAL & MANGES LLP* Page 34

Continual Change Affecting ERISA Litigation Interview: Howard Shapiro PROSKAUER ROSE LLP* Page 36

Supreme Court Rejects “Mixed-Motive” Burden-Shifting Under The ADEA Daniel J. Venditti WEIL, GOTSHAL & MANGES LLP* Page 37

The Place Of Private Equity In The Investment World Interview: Sean Hill PROSKAUER ROSE LLP* Page 42

Service Providers

Fraud Risk Management Takes Center Stage Paul Sachs and Robert Hirth Jr. PROTIVITI Page 31

Some Of The Above Partner With Corporate Counsel By Providing Us With Financial And Editorial Support.

* Supporting Law Firms

Tort Reform Is Key To Health Reform

Tiger Joyce

AMERICAN TORT REFORM ASSOCIATION (ATRA)

Though common-sense Americans repeatedly raised the issue of tort reform while discussing health care legislation with members of Congress during town hall meetings this past summer, too many lawmakers and analysts still stubbornly insist that medical liability lawsuits do not contribute significantly to rising health care costs. These lawmakers and analysts are wrong.

A 2006 Harvard School of Public Health study found that four out of every 10 medical malpractice lawsuits filed in America each year are groundless, and that the “overhead costs of malpractice litigation are exorbitant.” These costs, of course, are imposed on doctors, hospitals and insurers, and then ultimately passed on to health care consumers.

Beyond the obvious costs of litigation, more subtle costs related to the practice of “defensive medicine” are contributing to runaway health care inflation.

How much? In a Massachusetts Medical Society survey published last November, 83 percent of Bay State physicians cited the fear of being sued in their decisions to practice defensive medicine.

According to the 900 doctors anonymously surveyed, on average, 18 percent to 28 percent of tests, procedures, referrals and consultations and 13 percent of hospitalizations were ordered to avoid lawsuits. All of this adds at least \$1.4 billion to annual health care costs in Massachusetts alone, and national estimates range as high as \$200 billion.

So, as Mississippi Governor Haley Barbour asks, “If we are trying to make health care more affordable, how can we leave out tort reform?”

Physicians Wanted

Another longer-term concern about leaving tort reform out of comprehensive health care legislation revolves around what is and will remain a growing need for more primary care physicians.

President Obama’s stated desire to emphasize preventive medicine as a means to lower overall health care costs will, with a growing and aging population, require a greater number of doctors. Yet the Association of American

Tiger Joyce is President, American Tort Reform Association, based in Washington, DC. He can be reached at (202) 682-1163 or through the organization’s primary website, www.atra.org.



Tiger Joyce

Medical Colleges predicts that the overall shortage of doctors practicing both primary care and high-risk specialties may grow to nearly 125,000 by 2025.

Surely medical schools will find it easier to persuade bright young men and women to pursue careers in medicine if the costly threat of medical liability lawsuits is reined in. The experience of states that have enacted tort reforms bears this out.

In an August column appearing in the *San Francisco Examiner*, Texas Governor Rick Perry wrote: “Just six years ago, Texas was mired in a health care crisis. Our doctors were leaving the state, or abandoning the profession entirely, because of frivolous lawsuits and the steadily increasing medical malpractice insurance premiums that resulted.”

But Texas has since joined 24 other states by enacting reforms that include a reasonable limit on non-economic damages for pain and suffering of up to \$750,000 per incident. This essential reform does not limit compensatory awards for calculable lost wages and medical expenses, but it does balance the interests of patients and care providers while helping to ensure access to necessary care.

Now, according to Governor Perry,

doctors’ insurance rates have declined by an average of 27 percent while the “number of doctors applying to practice medicine in Texas has skyrocketed by 57 percent. In . . . just the first five years after reforms passed, 14,498 doctors either returned to practice in Texas or began practicing here for the first time.”

Clearly then, President Obama should reconsider his opposition to limiting non-economic damages in medical liability litigation. The President and Congress should also consider additional liability reforms, such as health courts, administrative compensation programs, “early offers” and “safe harbors” for physicians who practice in compliance with evidenced-based clinical guidelines.

Reduce Groundless Lawsuits and Medical Errors

But the powerful personal injury bar, which exerts extraordinary influence at both ends of Pennsylvania Avenue here in Washington, as well as most state capitals, is determined to keep liability reforms out of pending health care legislation by trying desperately to change the subject.

Willfully ignoring the Harvard study

Please turn to page 33

Recent Developments In Defending Hostile Work Environment Claims

David J. Meiselman
and Jeffrey I. Carton

MEISELMAN, DENLEA, PACKMAN,
CARTON & EBERZ P.C.

Two recent federal decisions this past summer illustrate the significant hurdles that an employee will have to surmount in order to sustain a claim of hostile work environment beyond an employer's summary judgment challenge. In each case, the court concluded as a matter of law that the employee's charge of a hostile work environment was not predicated upon a factual showing sufficient to demonstrate a severe and pervasive environment that altered the conditions of the plaintiff's work. Employers should take heed that defending a claim of a hostile work

David J. Meiselman and Jeffrey I. Carton are Senior Litigation Partners in the White Plains firm of Meiselman, Denlea, Packman, Carton & Eberz P.C. Jill C. Owens contributed to the article. The firm represents plaintiffs and defendants in state and federal courts throughout the country. Messrs. Meiselman and Carton have been selected by their peers for inclusion in "Best Lawyers" and "Super Lawyers" and were noted in 2009 to be amongst the top 25 New York Metro area attorneys in the Westchester area of Business Law.

Please email the authors at dmeiselman@mdpcelaw.com or jcarton@mdpcelaw.com with questions about this interview.

Tort Reform

Continued from page 23

mentioned above and several more recent analyses of litigation's impact on health care costs by the Congressional Budget Office, the Manhattan Institute and the Pacific Research Institute, litigation industry lobbyists would now rather have us focus on a flawed 10-year-old study that misdirects the debate away from costly lawsuits and toward an alleged "epidemic" of medical errors. As though anyone supports shoddy medicine and medical errors.

The truth is that, with the exception of notable reductions within the field of anesthesiology, medical error rates in the U.S. haven't changed substantively for many decades. And though we should never be complacent about medical errors, it's reasonable to conclude that, as long as medicine is practiced by imperfect human beings, we'll never eliminate them altogether – regardless of how many groundless lawsuits trial lawyers impose on our health care system.

Interestingly enough, tort reform advocates are perfectly willing to stipulate that medical errors and even negligence do occasionally result in patient injuries and that the law should work to minimize those errors while promptly and fairly compensating the injured. So why aren't trial lawyers willing to stipulate that groundless lawsuits occur and that the law should work to minimize such lawsuits and their obvious and unnecessary costs?

environment can often turn on the ability to demonstrate that the allegedly offensive conduct about which an employee complains was too sporadic or incidental to non-offensive behavior, such that the work environment is not permeated by hostility.

In *Byrne v. Telesector Resources Group, Inc.*, No. 08-0101-cv, 2009 U.S. App. LEXIS 15493 (2d Cir. July 14, 2009), the plaintiff alleged that she was subjected to gender discrimination, a hostile work environment, and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as well as discrimination under the Equal Pay Act and the New York Human Rights law. Specifically, the plaintiff alleged that she received pay unequal to that of two comparable male employees; that she was discriminatorily passed over for promotion, that her manager retaliated against her by withdrawing a job posting after she applied for it and by transferring her position from Buffalo, New York to Syracuse, New York; and that she was subjected to sexual harassment rising to the level of a hostile work environment.

With respect to her claim of a hostile work environment, the plaintiff submitted evidence that a male co-worker told her that a colleague gave out his work fax number as "25penis," that her supervisor invited a former manager who had been accused of sex discrimination to

the holiday party, and that on multiple occasions she heard male co-workers making inappropriate sexual references in conversation. The Second Circuit affirmed the trial court's dismissal of the hostile work environment claim and held that such allegations did not rise to the level for establishing workplace sexual harassment, which requires an environment "permeated with discriminatory intimidation that [is] sufficiently severe or pervasive to alter the conditions of [the] work environment." *Petrosino v. Bell Atl.*, 385 F.3d 210, 221 (2d Cir. 2004). The Second Circuit reaffirmed that "offhand comments or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment." *Id.* at 223. The court reviewed the plaintiff's evidence and concluded it was not "sufficiently severe" to constitute an actionable hostile work environment claim.

The recent trial court decision in *Gallimore v. City University of New York Bronx Community College*, No. 04 Civ. 8236 (RJS), 2009 U.S. Dist. LEXIS 56449 (S.D.N.Y. July 2, 2009), is of a like accord. In *Gallimore*, the trial court granted summary judgment dismissing the plaintiff's hostile environment claims, despite the plaintiff's allegations that her supervisor would peek out of the office at her, would roll her eyes and "suck her teeth" at the plaintiff, and would brush close to the plaintiff in an

intimidating manner. The plaintiff also alleged that she was the recipient of numerous hang-up phone calls and that her car was vandalized.

The trial court found the plaintiff's hostile work environment evidence insufficient as a matter of law, to survive summary judgment, noting the Second Circuit's admonition regarding the severity and frequency of offensive conduct that must be present in order to sustain a hostile work environment claim. The trial court concluded that the harassing comments and conduct the plaintiff alleged were episodic and not sufficiently continuous and concerted, and therefore failed to rise to the level of severe or pervasive conduct necessary to sustain her claim.

As these recent decisions reflect, employers faced with claims of hostile workplace environment should vigorously defend such claims, particularly where the employee cannot demonstrate that the allegedly offensive and inappropriate behavior is either pervasive or severe enough to satisfy the high evidentiary bar necessary to survive summary judgment. Absent a detailed factual record that the allegedly offensive behavior permeated the workplace and altered the conditions of the employee's work environment, employers can take comfort that claims of hostile work environment are unlikely to survive summary judgment.

Stubbornly self-interested personal injury lawyers respond by insisting that their litigation has practically no impact on health costs. But their argument defies common sense, especially in light of a related issue they would rather none of us discuss.

Drugs, Medical Devices and Technologies

An even more significant means to slowing the growth of health care spending would be to rein in speculative state lawsuits that often unfairly target the makers of federally regulated prescription drugs and medical devices and technologies.

Virtually every health care economist agrees that the costs of these life-saving and life-enhancing products have been among the biggest drivers of overall U.S. health care costs during the past few decades. And litigation that too often accrues primarily to the benefit of trial lawyers has, in turn, helped drive those costs, all of which are ultimately passed on to patients.

Mass torts and class-action lawsuits, which by virtue of their size alone pressure defendants into expensive settlements, can include tens or hundreds of thousands of plaintiffs, with only a tiny fraction of them alleging an actual injury. But rather than consider legislation that would require all plaintiffs to demonstrate such injuries, for example, Congress is instead looking, incredibly, to overturn an 8-1 Supreme Court decision (*Riegel v. Medtronic*, 2008) with the Medical Device Safety Act, which would further increase manufacturers' liability and consumers' costs.

President Obama has more than once quipped that his administration can "walk and chew gum at the same time" — and surely it and the Congress can. So why can't thoughtful health care legislation reduce both the rate of medical errors and groundless lawsuits?

The obvious answer is that reasonable, bipartisan health care reform can and should do both. By reducing the number of groundless lawsuits against health care providers and the makers of life-saving products, health care spending could be reduced by at least several

hundred billion dollars each year. Even in Washington, that's still considered a lot of money — money that would go a long way in providing health insurance coverage for those without it.

Thus if comprehensive health care reforms are to succeed, they must include meaningful medical liability reform. Certainly real victims of negligence must be fairly compensated, but public policy must discourage litigation that abuses our civil justice system and makes health care less accessible and more expensive.

Partners Notes

Stradley Ronon Partner Presents At Women In The Profession Summit

Stradley Ronon partner Danielle Banks presented at the Second Annual Women in the Profession Summit, "Women in the Profession: Then, Now and Where Do We Go from Here?" The summit was presented by the Pennsylvania Bar Institute and the Women in the Profession Committee of the Philadelphia Bar Association.

As a partner in the firm's litigation practice group, Banks represents companies and individuals in employment law matters, including claims brought under Title VII, Section 1981, the Americans with Disabilities Act, the Family Medical Leave Act and the Pennsylvania Human Relations Act. She also defends clients in Section 1983, Title VI and Fair Housing Act matters. Additionally, her practice includes First Amendment and products liability litigation as

well as other complex commercial litigation.

Stradley Ronon partner Kevin R. Casey was appointed to the American Arbitration Association's (AAA) combined Technology/IP Advisory Committee. As one of four committee members, Casey will advise AAA on such issues as rules, forms, processes and procedures directed to the resolution of complex technology and intellectual property (IP) law cases.

As chair of the firm's IP Practice Group and co-chair of its ADR Practice Group, Casey has counseled clients for almost a quarter-century in all aspects of the IP field, encompassing patent, trademark, copyright, trade secret and related matters and including resolution of IP disputes.