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FROM THE LAW OFFICES OF GARAN LUCOW MILLER, P.C.

# LAW FAX

MICHIGAN LAW - BLUE | INDIANA LAW - RED

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From the Co-Editors  
James L. Borin & Simeon R. Orłowski

## UPDATE: MEDICARE SET-ASIDES IN LIABILITY CASES

CONTRIBUTOR - M. SEAN FOSMIRE<sup>1</sup>

In the April 15, 2009 issue of *LawFax*, we published an article entitled "Medicare Set-Asides in Liability Cases?", responding to inquiries that we had received from carriers who had been told that the Centers for Medicare and Medicaid Services (CMS) had adopted or was going to adopt new regulations requiring the use of Medicare set-aside arrangements (MSAs) in liability cases. The points that we made then, and which we have continued to make in other venues since that time, are:

- CMS does not mandate the use of MSAs in liability cases and has not adopted any regulations regarding MSAs in liability cases
- A voluntary MSA might be a very good idea when settling large-dollar liability cases

<sup>1</sup>Mr. Fosmire is a Partner in the Firm's Marquette Office and can be reached at (906)226-2524 or [sfosmire@garanlucow.com](mailto:sfosmire@garanlucow.com)

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- The impetus for an MSA in a liability case that is settled is most likely to come from the attorney for the plaintiff, not from the defense, since the greater risk is on the plaintiff
- If an MSA is not used in connection with the settlement of a liability case, it is very unlikely based on the current state of affairs (as of March 2010) that CMS would try to "surcharge" a defendant or its insurer based on that fact alone
- We, therefore, do not see a reason for the defense to insist on a set-aside as a condition of settling a liability case

We noted in passing in the April 2009 article that a specific dollar allocation between various elements that go into a liability claim – past medical, past wage loss, future medical, etc. – is unusual in settling liability cases, but is commonly made in a jury verdict.

We want to refine our recommendations on this issue by adding one more bullet-point item to the list above:

- When a liability case goes to trial and results in a verdict that includes an award for future medical expenses, the defense may find it prudent to ask the court to require an MSA be set up in post-verdict proceedings

CMS is on record as saying that it will only try to assert a right of repayment in a settlement agreement if that agreement makes a specific allocation for medical expenses, but it also has said that it does not consider itself bound by the parties' agreement on this point. CMS has also said that it will accept the value determination made by a jury when a verdict is rendered.

When money is paid in satisfaction of a jury verdict that incorporates an award for future medical expenses, the calculus of risk is different. The attorney representing the defendant, in consultation with the insurer, may determine that that part of the award that represents future medical expenses should be preserved, using an MSA, since the jury verdict has defined a specific sum that is awarded for that element of damages.

There are several factors that complicate the analysis and which should be carefully considered in trial planning and in post-verdict proceedings and negotiations:

1. Under Michigan law, a jury's gross verdict for each year that future medical expenses are awarded is reduced to present cash value, using a statutory discount rate of 5% per year.
2. CMS takes the position that provisions of state law cannot defeat its rights to reimbursement under the Medicare Secondary Payer program. It could theoretically assert that its reimbursement rights should apply to the gross verdict, before reduction to present cash value, although that would be an extreme position.
3. It is very common that insurance coverage for a particular defendant in a particular claim is insufficient to satisfy the entirety of the jury's verdict. In that event, resolution of the case moves from satisfaction of judgment to a negotiated settlement, but with a dollar figure now attached to the value of future medical expenses.
4. Since Medicare does not cover everything that goes into "medical expenses" as defined for the jury in the court's instructions, counsel may wish to modify the jury verdict form to differentiate between kinds of "medical expenses".

The best approach in general is to treat CMS like a half-awake bear. Plan your steps, walk carefully but confidently, and don't do anything to provoke or antagonize it.

**Addendum:** Please also note that CMS has extended the date on which MMSEA reporting is to start on January 1, 2011. This is an eight month extension from the previous April 1, 2010 start date.

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## Indiana Supreme Court limits challenge to “medical necessity”

**CONTRIBUTOR - DAVID A. WILSON<sup>2</sup>**

On March 4, 2010, the Indiana Supreme Court handed down a decision in [Sibbing v Cave, --- N.E.2d ----, 2010 WL 744928 \(Ind. March 04, 2010\)](#) which prohibits defendants in applicable situations from disputing the necessity of medical care. The decision now seemingly allows medical providers from rendering charges, or amounts of treatment, with impunity at trial.

In *Sibbing*, a rear-ended plaintiff brought suit, and at trial, the defendant admitted causing the accident, but denied the reasonableness and medical necessity of much of the medical treatment. Plaintiff's treatment included treatment from a medical clinic and approximately 40 visits from Castleton Chiropractic in Indianapolis. Her treatment included a “nerve conduction study” ordered by a physician at the clinic. The defense retained Dr. Paul Kern, who opined that the NCV was not a valuable diagnostic tool, that the passive care after four weeks was ineffective and medically unnecessary, and that the charges for the medical treatment were unreasonable.

The trial court granted Plaintiff's Motion in Limine barring these portions of Dr. Kern's testimony, which was reversed by the Indiana Court of Appeals.

In *Sibbing*, the Court observed that while plenty of prior decisions had addressed the “reasonableness” component of the “reasonable and necessary” component to medical damages, there had been very few decisions analyzing the necessity requirement. The Court then reversed the Court of Appeals, relying on a prior Indiana Court of Appeals decision in *Whitaker v. Kruse*, 495 N.E.2d 223 (Ind. Ct.App 1986). *Whitaker* involved a claim where plaintiff's physical complaints were argued to be the result not of the underlying accident, but rather, from several post-accident surgeries. The Court of Appeals held that “an injured party may recover for injuries

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<sup>2</sup>Mr. Wilson is a Partner in the Firm's Indiana Office and can be reached at (219)756-7901 or [dwilson@garanlucow.com](mailto:dwilson@garanlucow.com)

caused by the original tort-feasor's negligent conduct and for any aggravation of those injuries caused by a physician's improper diagnosis and unnecessary treatment or proper diagnosis and negligent treatment. In order to recover under this rule, the plaintiff need only show he exercised reasonable care in choosing the physician." The rationale for the *Whitaker* holding was that a contrary rule would place the injured party "in the unenviable position of second-guessing his physicians in order to determine whether the doctor properly diagnosed the injury and chose the correct treatment." *Whitaker*, 495 N.E.2d at 226.

The Court rejected the argument by the defense that the decision would mean that a defendant would never be able to refute a plaintiff's claim that medical bills were reasonable and necessary, holding instead that an injured party can only recover the damages *caused* by a defendant. Leaving this element of the causation requirement for damages, the Court reaffirmed that a plaintiff cannot recover damages "wholly unrelated" to the defendant's wrongful conduct. The decision is not clear as to whether defendant can challenge the necessity of claimed "future" medical treatment, since a plaintiff would not yet have incurred those charges.

The decision, while limiting challenges to unnecessary medical treatment, does not limit a defendant's ability to challenge the reasonableness of the charges for the treatment, citing its prior decision in *Stanley v. Walker*, 906 N.E.2d 852 (Ind.2009). In response, one can argue that *Sibbing* does not preclude a defendant's opportunity "to test in the presence of the jury the opinions of [plaintiff's doctors]" *Reliable Development Corp. v. Berrier*, 851 N.E.2d 983, 989 (Ind.Ct.App. 2006). Specifically, counsel can argue that if a provider's judgment is so poor as to render clearly unnecessary treatment, his opinions are equally capable of resulting from poor judgment or decision-making.

Overall, the decision is not favorable to defendants faced with clearly unnecessary medical treatment. In those instances where physicians and chiropractors are rendering unnecessary treatment, whether from poor medical decision-making, or worse, where providers are clearly motivated by financial benefit from unnecessary treatment, defendants are now seemingly precluded from challenging those unnecessary treatments.

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## **TROY BUSINESS LAW SEMINAR**

**March 23, 2010 – Troy Marriott**

**200 W. Big Beaver, Troy**

8:00 - 8:20 am	REGISTRATION/CONTINENTAL BREAKFAST
8:20 - 8:30 am	WELCOME AND INTRODUCTION <b>Speaker: Karen Libertiny Ludden</b>

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|------------------|---|
| 8:30 - 8:45 am   | CHOICE OF ENTITY AND YOUR BUSINESS: HOW TO CHOOSE THE RIGHT ENTITY<br><b>Speaker: Rachel A. Bissett</b>                                   |
| 8:45 - 9:00 am   | CONTRACTS AND YOUR BUSINESS: HOW TO AVOID LITIGATION OVER CONTRACTS<br><b>Speaker: Karen Libertiny Ludden</b>                             |
| 9:00 - 9:15 am   | DOING BUSINESS IN A DOWN ECONOMY: WHAT TO DO WHEN THE CUSTOMER DOESN'T PAY<br><b>Speaker: Thomas P. Christy</b>                           |
| 9:15 - 9:30 am   | THE FRUITS OF YOUR LABOR: REALIZING AND PROTECTING BUSINESS INTELLECTUAL PROPERTY<br><b>Speaker: Robert D. Goldstein</b>                  |
| 9:30 - 9:45 am   | EMPLOYEES: HIRING & FIRING (WITHOUT MEETING A LAWYER ON THE WAY)<br><b>Speaker: Thomas P. Paxton</b>                                      |
| 9:45 - 10:00 am  | BUSINESS SUCCESSION AND YOUR COMPANY: WHAT WILL HAPPEN TO YOUR COMPANY IF SOMETHING HAPPENS TO YOU?<br><b>Speaker: Suzanne P. Fanning</b> |
| 10:00 - 10:20 am | PANEL DISCUSSION<br><b>Moderator: Thomas P. Christy</b>   |
| 10:20 - 10:30 am | CLOSING REMARKS<br><b>Speaker: Thomas P. Christy</b>  |

The Business Law Seminar, presented by Garan Lucow Miller, P.C. will be held on March 23, 2010, at the Troy Marriott. To register, please contact Eileen Carty at [ecarty@garanlucow.com](mailto:ecarty@garanlucow.com)  
We'll see you at the event!

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**GARAN LUCOW MILLER  
GRAND RAPIDS SPRING BREAKFAST SEMINAR  
April 15, 2010 at Frederik Meijer Gardens and Sculpture Park**

The Grand Rapids office of Garan Lucow Miller P.C. is pleased to present its Annual Spring Breakfast Seminar on **April 15, 2010** at the **Frederik Meijer Gardens and Sculpture Park**, located at 1000 East

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Beltline, NE in Grand Rapids {(616) 957-1580}. Comprehensive written materials will be distributed to all who attend. After the seminar, feel free to **enjoy all of the open indoor and outdoor garden areas** as our guest, including the exciting **Butterfly Exhibit!** In addition, a membership to Frederik Meijer Gardens and Sculpture Park will be presented to two lucky seminar attendees, along with day passes to enjoy this lovely venue.

If you are able to attend this **complimentary** annual event, please register via e-mail to: [lbeatty@garanlucow.com](mailto:lbeatty@garanlucow.com) or phone Lynn Beatty at **(616) 742-5500 or (800) 494-6312** for reservations. We look forward to seeing you!

- 8:00 - 8:25 am            Registration and Continental Breakfast
- 8:25 - 8:30 am            Welcome and Introduction  
**David N. Campos**
- 8:30 - 8:40 am            **Working with Criminal Lawyers to Improve Your Case**  
Speaker: **Douglas R. Mullkoff**
- 8:40 - 9:05 am            **Probate Considerations**  
\* Requirements for Guardianship & Conservatorship Fees to be Compensable as First Party Benefits, *Heinz v ACIA* \* When to Challenge or Attach Fiduciary Fees  
\* Entitlement to Notice of Probate Hearings Re Fiduciary Fees, *Geror v Farm Bureau* \* When Should a Settlement be Approved by the Probate Court?  
Speaker: **Tara L. Velting**
- 9:05 - 9:35 am            **Medicare Update on SCHIP Extension Act Section 111 Reporting**  
\* CMS alerts 2/24/10 for Non-Group Health Plans \* New Provisions for NGHPs \* Who Must Report \* New Time Line for Reporting TPOC & ORM
- Medicare Recovery Program**  
\* Latest Trends of Medicare \* Reduction of Lien Based upon Procurement Costs 42 CFR 411.37 \* *US v Stricker* (Lien Recoupment from "Primary Payor or Person or Entity Receiving Payment from") \* *Bryant v Commission of Social Security* (Equal Access to Justice Act Attorney Fees case) \* *Merryfield v US* (Proper Notice of Admin Remedies Prior to Suspension of Benefits & Due Process  
Speaker: **Lori A. Ittner**
- 9:35 - 10:00 am            **Wage Loss Calculations and Impact of Ross v ACIA**  
\* Background of Ross \* Actual Loss Sustained versus Wages Paid  
\* When Does Ross Apply? \* Other Business Entities  
Speaker: **Mark G. Stephanic, CPA**  
                                 WALWORTH & NAYH, P.C.
- 10:00 - 10:15 am            Break
- 10:15 - 10:45 am            **Third Party Auto Tort Claims Case Law Update:**  
*Kreiner v Fischer and McCormick v Carrier*  
Speaker: **Mark R. Mueller**

- 10:45 - 11:15 am     **Handling Catastrophic PIP Claims: Housing, Transportation, Attendant Care**  
 \* Case Law update since *Griffith v State Farm* and *Hoover v Michigan Mutual* \* Home & Transportation Agreements \* October 2009 MCCA Bulletin \* September 2009 MCCA Assessment Bulletin & *ACE & AIG v MCCA* Court of Appeals Cases  
 Speaker: **David N. Campos**
- 11:15 - 12:00 noon     **Michigan Auto No-Fault First Party Update**  
 Fraud and the One Year Back Rule: *Johnson v Wausau*; "Almost Any Causal Connection Will Do..." Revisited: *Scott v State Farm*; Snow-Bird Residency: *Titan v State Farm*; Ownership and §3113: *Det. Med. Ctr. v Titan*, *Fenton v Farm Bureau*, *Spectrum v Titan*; Attorney Fees: *Healthcall v State Farm*, *Bamm v Farm Bureau*, *Byers v State Farm*, *Tinnin v Farmers*; Independent Contractors and Priority: *Bristol West v Amerisure*; Written Notice/Lawfully Rendered Treatment: *Magness v Frankenmuth*  
 Speaker: **L. Ladd Culbertson**
- 12:00 noon - 12:10     Question and Answer Session

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## Upcoming Seminars

**REGISTRATION OPEN !**

Indy Seminar is scheduled for Monday, May 17th, 2010 at the Hyatt Regency in downtown Indianapolis. Agenda will follow shortly, to register, please contact Eileen Carty at [ecarty@garanlucow.com](mailto:ecarty@garanlucow.com)

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## SAVE THE DATE



**Event: Garan Lucow Miller's Annual Golf Outing**

**Date: Tuesday, August 24, 2010**



**Venue: Forest Akers West Golf Course on the campus of MSU**

Banquet dinner to be held on campus at the University Club

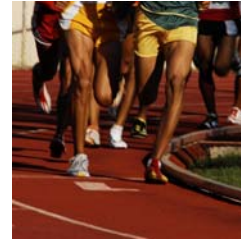
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## RACE AND REMEMBER



Garan Lucow Miller, P.C. is sponsoring a new event that will take place in downtown Detroit, specifically a 5k run (approximately 3 miles) and walk (2 miles with 1 mile option), called **Hospice of Michigan's 2010 Race and Remember**.

This event will take place on Saturday, June 12<sup>th</sup>, 2010, along the beautiful Detroit Riverfront starting at Rivard Plaza, next door to our Detroit office.

The event honors loved ones who have received hospice care and to raise money for Hospice of Michigan's Open Access Program.

If you would like to participate either by running or walking in this event, you may register online at <http://www.active.com/running/detroit-mi/race-and-remember-2010>

Garan Lucow Miller's team name is **"GARAN'S GAZELLES"**. Please register as a team member.

Once registered, please contact Eileen Carty at [ecarty@garanlucow.com](mailto:ecarty@garanlucow.com), as Garan Lucow Miller, will provide parking/refreshments to all participants.

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*Announcing Our New Indiana Office*

*Garan Lucow Miller, P.C.*

*Is Pleased To Announce*

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*Gregory M. Bokota*  
*Jennifer L. McCloskey*  
*and*  
*David A. Wilson*

*have joined the firm as Shareholders in our  
new Merrillville, Indiana office.*

**Gregory M. Bokota** was founding partner at Bokota Wilson McCloskey & Long, P.C. In 1985, Mr. Bokota earned his B.A. from the University of Chicago with honors, and in 1991, he received his J.D. from Indiana University School of Law. Mr. Bokota concentrates his practice in the areas of insurance defense litigation and appellate law. Mr. Bokota is licensed in the State of Indiana and State of Illinois.

**Jennifer L. McCloskey** was founding partner at Bokota Wilson McCloskey & Long, P.C. In 1992, Ms. McCloskey earned her B.A. from Hillsdale College, and in 1995, she received a J.D. from Valparaiso University School of Law. Ms. McCloskey concentrates her areas of practice in the field of insurance defense, criminal law and premises liability. Ms. McCloskey is licensed in the State of Indiana.

**David A. Wilson** was founding partner at Bokota Wilson McCloskey & Long, P.C. In 1990, Mr. Wilson earned his B.A. from University of Central Florida, and in 1996, he received a J.D. from Valparaiso University School of Law. Mr. Wilson concentrates his areas of practice in the field of insurance defense litigation, commercial trucking and transportation defense, and is a member in TIDA. Mr. Wilson is licensed in the State of Indiana and State of Illinois.

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Robert D. Goldstein of our Grand Blanc office, Timothy J. Jordan of our Detroit office, and Kelly M. Kluting of our Grand Rapids office, are licensed in the State of Indiana. They are also available for assignments in both the Indiana and Michigan offices.

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Garan Luow Miller, P.C., a full-service law firm since 1948, providing quality representation to a national clientele from the Great Lakes Region, is pleased to announce that it has opened an office in Merrillville, Indiana, to further facilitate your claim and litigation needs in Indiana and Illinois.

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