

# Bonezzi Switzer Murphy Polito & Hupp Co. L.P.A



## The Phoenix

William D. Bonezzi, Managing Partner, refers to the Firm as the Phoenix (a mythical bird who is reborn from the fire).



William D. Bonezzi

*"BSMPH has obtained 103 defense verdicts for its clients during its first ten years in existence."*



Directors left to right: William D. Bonezzi, Patrick J. Murphy, Donald H. Switzer, John S. Polito & Steven J. Hupp

## How We Began

BSMPH proudly celebrated our ten year anniversary in 2008. One usually considers ten years to be a long period of time. However, the years since 1998 seem to have evaporated with amazing speed. At least two factors account for this: dynamic growth of the Firm since 1998 and the energy level which is almost tangible everyday in the office.

The Firm opened its doors in January, 1998. The founding partners had less than three weeks to conceive the idea of a new firm and to move forward rapidly in designing the Firm's structure, locating office space, securing furniture and other vital equipment, hiring an office staff and renting trucks to handle part of the move themselves in order to save money. When BSMPH opened its doors in the

Leader Building, there were eight attorneys and a seven member support staff. Business was slow for a year or two, but as a direct result of the growth in business the number of attorneys has increased to seventeen and the support staff has increased to twenty-three.

When the Firm began its practice, it essentially had two clients plus over two hundred active medical malpractice files that the attorneys had been previously defending for PIE insured physicians. When PIE Mutual Insurance Company was placed into receivership by the Ohio Department of Insurance, the Ohio Insurance Guarantee Association (OIGA) requested the attorneys to move their files with them and to maintain these files until the stay order on lawsuits involving PIE was

lifted. Within several months the OIGA changed its position and ordered that these files be reassigned to three other law firms within the city of Cleveland. The physician defendants in these cases requested that BSMPH continue to defend the lawsuits, but ultimately the OIGA prevailed and on a Saturday morning all of these files were picked up by three other law firms. A large volume of business was suddenly gone.

BSMPH was essentially left with two clients. A significant amount of time was spent by all attorneys in the firm trying to develop business during the first two years of operation. It soon became apparent that changing law firms or adding new law firms was not a priority for medical liability insurance companies and hospitals who

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## OHCA/OCAL Annual Convention

BSMPH is pleased to announce that several of our attorneys will be attending the 2009 OHCA/OCAL Convention and Exposition, "Passport to World Class Excellence," which will be held at the Columbus Convention Center in Columbus, Ohio. This event will take place May 4<sup>th</sup> through May 7<sup>th</sup>.

Bret C. Perry, Esq. will present: **The Amazing Race: Protecting Your Quality Assurance, Risk Management and Peer Review Documents; Learning Outcomes.**

A cocktail reception will be held May 5, 2009, for clients and friends. Pick up your invitation at the firm's booth #354.

## A New Year and New Changes in Employment Law

All employers should be aware of new changes that have been made in various aspects of employment law and that more changes in 2009 are expected. Some of the recent changes are briefly addressed below:

**New FMLA Regulations:** On January 16, 2009, new regulations went into effect and in-

clude the following: New benefits for military personnel and their families; imposing penalties for failure to designate FMLA leave; determination that light duty work does not count against an employee's FMLA entitlement; determination that FMLA leave can be taken concurrently with other paid leave and that an employer can re-

quire the use of accrued paid leave; employer notice obligations changed to five business days and requirement of additional notice, regardless if no employees qualify for FMLA leave in the form of posters, notice of eligibility, notice of rights and responsibilities and notice of FMLA designation; finding that employees who

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## How We Began cont.

already had long established relationships with other law firms. Nevertheless, BSMPH worked diligently to market the talents and reputations of its attorneys and gradually clients began to respond. When a new client relationship was begun, BSMPH made sure that all of the client's needs were met to prove to the client that they had made the right decision.

Our practice areas have expanded from medical and as-

bestos defense to include the defense of employment law cases, nursing home cases, workers' compensation appeals and domestic relations matters. BSMPH is now looking to apply the trial skills of its attorneys to other types of litigation.

Increased business, growth in size, expansion of office space and office moves are nice attributes for a law firm but they only become meaningful when excellent results are provided

for the firm's clients. BSMPH has obtained 103 defense verdicts for its clients during its first ten years in existence. Through hard, diligent work its goal is to obtain even more wins for our clients during the next ten years.



By Patrick J. Murphy, Esq.

## A New Year and New Changes in Employment Law cont.

take FMLA unexpectedly must follow the employer's usual call in or notification procedures for reporting an absence unless unusual circumstances exist; new medical certification process and requirement of fitness for duty certification. Employers should update their FMLA policies and employee handbooks to incorporate these changes.

**Form 1-9 Revisions:** Effective April 3, 2009, all employers will be required to use the new Form I-9 to verify employment. Failure to use the revised form exposes employers to monetary penalties. This new form is used only for new employees and if re-verification is required. The new I-9 form can be found at [www.uscis.gov](http://www.uscis.gov).

**ADA Amendments:** On January 1, 2009, Americans with Disability Act was amended by the ADA Amendments Act (ADAAA). The amendments set forth a broader definition of "disability" and extend protection under the Act to job applicants and employees. Originally, ADA defined an individual with a disability as "an impairment that prevents or severely restricts major life activities."

ADAA addresses major life activities and includes, activities not previously addressed, such as caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, thinking, communicating, working along with major bodily functions such as normal cell growth, digestive, bowel, bladder, brain, respiratory, circulatory, endocrine and reproduction functions. The issue then becomes what type of accommodation is needed to address these expanded impairments and whether such accommodation is reasonable.

ADAA also now requires that job applicants notify the prospective employer of a disability and the need for a reasonable accommodation.

**Lilly Ledbetter Fair Pay Act:** President Obama's first signed legislation was this Act which addresses wage discrimination and effectively overturned a 2007 U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) which narrowly construed the time period in

which a claim of pay discrimination can be made. Ledbetter did not make her claims of discrimination in pay for nearly two decades. The U.S. Supreme Court held that a claim must be made within 180 days after the alleged unlawful employment practice has occurred or within the 300 day time frame for states that operate equal employment agencies. This new Act broadens this time period as a means to enforcing the right to equal pay. Under this new legislation, there is an open time frame in that each time a discrimination act is performed, the time frame of 180/300 days renews each time an employee receives compensation that is based on a discriminatory decision. This Act broadens, extends and creates an indefinite statute of limitations for claims of wage discrimination.

**Change in COBRA coverage:** The American Recovery & Reinvestment Act was signed on February 17, 2009, by President Obama and provides for a government subsidy of COBRA premiums for up to nine months after an employee's involuntary termination of em-

ployment and a special COBRA election for employees who lost coverage due to an involuntary termination on or after September 1, 2008. Employers must notify individuals eligible for the subsidy or special COBRA election. Employers should also make sure that the subsidy is properly reflected on future COBRA premium statements to ensure that the subsidy is offset against payroll taxes as under this Act an employer is eligible for a credit against payroll taxes.

**Ohio Workers' Compensation:** On November 18, 2008, Judge Richard McMonagle of the Cuyahoga County Court of Common Pleas issued a preliminary injunction against the Ohio Bureau of Workers' Compensation mandating that the BWC change its group rating system currently in place for state funded employers. The Plaintiffs are a group of employers who are challenging the current system which provides substantial premium discounts to "group" employers and requiring "non-group" employers to subsidize those discounts by paying increased premiums. As a result of the Court's ruling,

## A New Year and New Changes in Employment Law cont.

the BWC is restrained from enacting its current prospective group rating plan for the policy year that begins July 1, 2009. As a result of this Court ruling, the BWC has approved a change that will cap premium rate increases for state funded employers effective July 1, 2009, to no more than 100% per year. This cap was put in place to eliminate huge rate increases when an employer is determined not to be eligible for group rating and returns to the "non-group" system.

Finally, BWC introduced a new state funded deductible program. The prior "medical only" deductible program started at \$500 per claim to \$15,000 per claim. Employers could pick which claims they wanted under the deductible program and stop participation in the program at any time. The new deductible program provides that once an employer chooses a program, this is the program that will stay in place for the entire policy year. Once a deductible program is chosen, the

employer will get an immediate percentage of premium reduction.

The only thing certain is that there will continue to be change in the area of employment law in 2009 and an increase of EEOC claims and employment litigation to address these changes.



By Cathryn R. Ensign, Esq.

## CMS and Its New Set of Teeth

In 2007, then President George W. Bush signed into law the Medicare, Medicaid and SCHIP Extension Act (SSMEA). This legislation added additional requirements to the long-existing Medicare Secondary Payer Statute. New for 2009 is Section 111 of the SSMEA which adds a new set of teeth especially for those of us defending, insuring or providing long term care.

In a nutshell, Section 111 will require providers of liability insurance, including self-insurance, to determine the Medicare entitlement of all claimants and report certain information about those claims to the federal government. Our government has decided that this "reporting requirement" is necessary to ensure that Medicare is ALWAYS treated as the payer of last resort. Penalties? Yes, those have been added too. The penalty for non-compliance has its own additional set of teeth and they are razor sharp. \$1,000 per day for each day of non-compliance is the initial penalty. On top of that is the potential for the "double damages plus interest"

fine that is often feared and seldom imposed.

These new rules will apply to settlements on or after July 1, 2009. If you are a "mandatory reporter" you must register with CMS by June 30, 2009.

In order to be in compliance, if you are an insurer of a long-term care facility, a TPA of such an entity or are self-insured you must determine whether a claimant, including those claimants for whom a claim remains unresolved, is entitled to Medicare benefits. If a claimant is so entitled certain information MUST be submitted to the Secretary of Health and Human Services.

The following are a list of pertinent "take-away" points:

- Those who are included in these mandatory reporting requirements must report where there has been a settlement, judgment or other award or payment.
- One time payments are reportable.
- Report must be made re-

gardless of an admission or denial, or determination of liability.

- Total obligation must be reported regardless of allocation.
- There is no *de minimis* exception.
- Report must be made where there is a settlement, award, judgment or other payment in which medicals are claimed and/or released regardless of allocation or a determination of "no medicals" by a court.
- Each new payment obligation must be reported as a separate settlement.

For those of us involved in these cases, teamwork and vigilance must be our mantra. Otherwise, we may well feel the impact of this new set of teeth.



By Leslie M. Jenny, Esq.

### Educational Seminar

The Firm will begin hosting educational seminars for clients. The first seminar is titled, "Changing Law". Speakers will include John S. Polito, Jeffrey W. Van Wagner and Leslie M. Jenny. This seminar will be held Wednesday, June 17, at the Crowne Plaza Hotel from 3:30 p.m. to 5:30 p.m. and will be followed by a reception.

Please contact Angela M. Bambrick at [abambrick@bsmph.com](mailto:abambrick@bsmph.com) for more information and if you are interested in attending.

## Property Division: When is the Marriage Over?

In this unpredictable economy, the valuation date the court uses to value assets such as real estate, retirement benefits, stock and brokerage accounts, etc. can be critical when parties are divorcing. Therefore, it is imperative to argue all the various factors which the court may consider when determining the termination date of a marriage.

### 1. Equitable Division of Marital Property

Marriage is an economic partnership. When a husband and wife are divorced, they stand as equals before the court. Ohio Rev. Code 3105.17(C)(2) provides that each party must be considered to have contributed equally to the production and acquisition of marital assets. The court's responsibility is then to equitably divide the assets of the parties. The overriding presumption in a property division is the division should be equal, unless equal is unfair.

### 2. What is Marital Property

"During the marriage" is the term of utmost importance in the division of property. The term of the marriage allows the court to determine what constitutes separate property, what constitutes marital property and the relevant dates for valuation of the property.

Accordingly, the parties and the court must specify the date when the marriage commenced and the

termination date of the marriage. The statutory presumption is that a marriage commences on the date of the marriage ceremony and terminates on the date of the final divorce hearing. (Ohio Rev. Code 3105.171 (A) (2)).

### 3. "De Facto" Termination Date

For the purposes of dividing marital property, the trial court can find a "de facto" termination of marriage which means the marriage terminated on a date other than the final divorce hearing when it would be inequitable to use the date of final hearing as the termination date.

The courts have considered the following factors to be indicia of a de facto termination of marriage:

- 1) Permanent separation;
- 2) Separate residences;
- 3) Mutual agreement to separate or end the marriage;
- 4) Bilateral actions to terminate the marriage;
- 5) Dating others;
- 6) Minimal or no reconciliation attempts;
- 7) The parties terminate sexual relations;
- 8) The parties take separate vacations with persons of the opposite sex;
- 9) One or both spouses live with others of the opposite sex;
- 10) Counsel is hired and intervenes to terminate the marriage;
- 11) The parties express and demonstrate an intent to terminate the marriage;
- 12) The parties enter into settlement agreements;
- 13) The parties conduct separate financial

lives (i.e. investments, bank accounts, credit cards, etc.); 14) The parties file separate tax returns; 15) The parties no longer function or hold themselves out to the community as husband and wife. No one factor is dispositive; rather, the trial court must determine the relative equities on a case-by-case basis.

### 4. Dill v. Dill (October 14, 2008), 179 Ohio App. 3d 14

The issue of when a marriage was terminated was recently heard by the Third District Court of Appeals in Dill v. Dill. In Dill, the trial court rejected husband's argument that a de facto termination of marriage occurred at the time the parties separated which was ten years before the final divorce hearing. The trial court found the marriage terminated as of the date of final hearing. In support of their decision, the trial court emphasized several factors: 1) Wife desired to continue the marriage; 2) Husband and wife had weekly activities involving the children; 3) Husband spent time on Christmas Day at the marital residence; 4) Husband obtained a home equity line on the marital residence which remained titled in both parties names and; 5) The parties continued to have joint bank accounts and credit cards.

Husband appealed the trial court's decision that the marriage terminated on the date of

final hearing. The appellate court reversed the trial court's determination of the termination date and remanded the case for a determination of an equitable de facto termination of the marriage date and a recalculation of the property division and spousal support. The appellate court found that the trial court failed to look at the following additional factors that supported a de facto termination date: 1) Both parties engaged in extramarital relations; 2) Husband was living with another woman; 3) The parties made minimal efforts at reconciliation; 4) Husband had been paying support to wife without a court order and; 5) Both parties purchased vehicles without the other parties consent and without financial contribution from the other, all which supported a finding that a de facto termination of marriage occurred sometime between the date the parties separated and the date of the final divorce hearing.



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