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## Plaintiff Comp Lawyers in Solidarity Against Aggressive Medicare Liens

Pursuing multifront defense to protect clients' recoveries and their own

By Henry Gottlieb

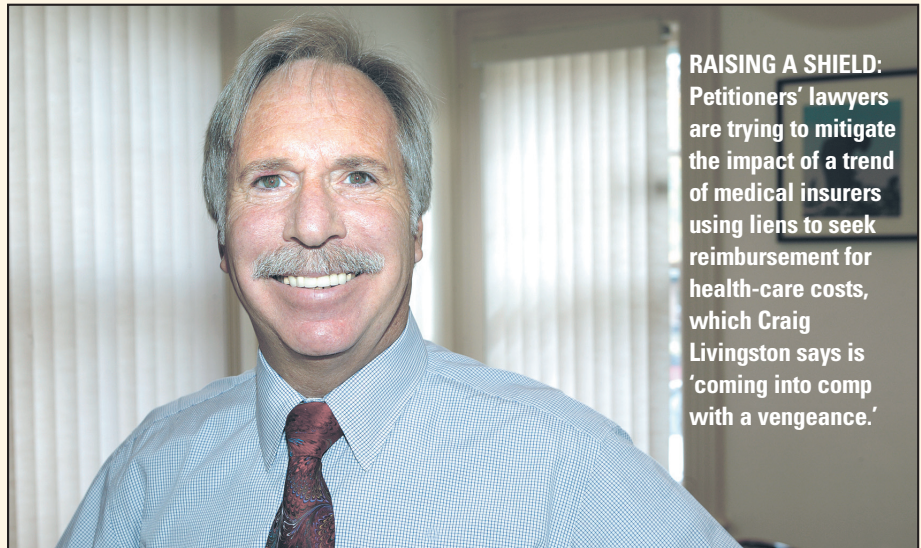
**N**ew Jersey lawyers for injured workers are pushing a broad legislative, political and litigation agenda this autumn, demonstrating how a specialty bar can advance its interests if members band together and spend some money.

The workers' compensation lawyers have contributed to legislative candidates in next week's election. They are lobbying in Trenton and Washington for worker-friendly laws. They are filing amicus briefs in the Appellate Division. They are identifying potential new workers' comp judges and pushing them on the McGreevey administration.

And they are trying to mitigate the impact of what Craig Livingston of Nutley's Ball Livingston calls "the major crisis brewing in workers' compensation." That's the conflict between the workers' comp industry and a Medicare system getting tough to stop its dwindling funds from being used for treatment of comp-covered workers.

"Medicare has a \$10 billion debt, nationally, and they want the money back," says Jon Gelman, who heads a practice in Wayne.

The petitioners' bar is not trying to get Medicare to be lax about seek-



**RAISING A SHIELD:** Petitioners' lawyers are trying to mitigate the impact of a trend of medical insurers using liens to seek reimbursement for health-care costs, which Craig Livingston says is 'coming into comp with a vengeance.'

PHOTOS BY CARMEN NATALE

ing reimbursement. It just wants the program's administrators to go about the process efficiently and not to hurt lawyers, Gelman and Livingston suggest.

A leading vehicle for these efforts is the New Jersey Advisory Council on Safety and Health, a neutral-sounding title for what is really a specialty bar association for workers' comp lawyers on the petitioners' side. Doctors these lawyers employ regularly are also in the council, which charges a hefty \$1,200-a-year dues, says Livingston, the group's president.

Gelman's association, the New Jersey chapter of the Workplace Injury Litigation Group, a national organization affiliated with the American Trial Lawyers Association, is also active in advancing petitioners' interests.

Such groups seem particularly useful because the State Bar Association's committees, including the Workers'

Compensation Section, are big tents covering lawyers whose clients oppose each other. Lacking solidarity, they can lack common agendas beyond, say, advocacy for full funding and competent judges for whatever court they all practice in.

What can lawyers in lock step do?

First, they can fund friendly candidates.

Livingston says the council is giving \$5,000 to Paul Sarlo, a Democratic state senator from Bergen County who is in a too-close-to-call re-election battle with former Republican Assemblyman Paul Kelly.

The race could decide which party controls the next Senate, so it has attracted PAC money on both sides. Livingston says Sarlo has a record of support for workers' inter-

ests. He also is a member of the state Senate Judiciary Committee, which passes judgment on candidates for the Division of Workers' Compensation.

Livingston says the association gave \$3,500 to one of the state Senate's most powerful Republicans, Robert Littel of Sussex County, co-chair of the budget and appropriations committee, and \$3,500 to Sussex Assemblywoman Alison Littel McHose, the senator's daughter.

Sussex County figures into the council's plans when it comes to filling the next vacancy on the Workers' Compensation bench.

The council is lobbying for Kathleen O'Brien, a Sussex Republican, to be nominated to the next vacancy. O'Brien is a deputy attorney general in the Tort Claims/Workers' Compensation section of the Division of Law, giving her the kind of experience workers' compensation lawyers on both sides prefer in a judge.

"We are deeply committed to judges who are knowledgeable going in," Livingston says. In the past, Superior Court candidates with plenty of political backing but not enough gravitas were occasionally shunted to the workers' compensation court and Livingston says, "we're going to try to put a stop to it."

"We don't want this to be a dumping ground," he says. "It is much too sophisticated a practice to have people who can't make it on the Superior Court." O'Brien did not return a call on Thursday.

#### Medicare Lien as Sword

Compensation lawyers' largest concern right now is the relationship between their clients' recoveries from carriers and payments from Medicare.

Many medical insurers seeking reimbursement for health-care costs have been aggressive about filing liens on personal injury awards. "Now it's coming into comp with a vengeance," says Livingston, and Medicare is doing the pushing.

The Centers for Medicare and Medicaid Services (CMS), which

administers the programs on a federal level, has promulgated regulations that require workers' comp lawyers to notify the agency of pending cases in which a petitioner with a claim might owe Medicare a reimbursement.

"Some of the liens are legitimate," says Matthew Vance, a Ball Livingston associate who is executive director of the Advisory Council on Safety and Health.

The problem is that CMS hasn't developed good procedures to help petitioners and their lawyers know who owes what. CMS, for example, is notoriously late in responding to lawyers' notices, making it difficult for petitioners' lawyers to know how much to set aside for a Medicare reimbursement, Vance says.

The council has turned to New Jersey's senior U.S. senator, Democrat Jon Corzine, to help convince CMS to speed up its response rate. Corzine's spokesman, David Wald, says "these claims do need to be expedited" and he says CMS has promised the senator it will have a better coordination plan in effect sometime next year.

In Trenton, the council has hired lobbyist Peter Guzzo, who represents a host of labor and health groups and has been involved in some past battles, including a successful effort to give workers' comp judges pension benefits similar to those of Superior Court judges.

Right now, the lawyers' primary goal is passage of a bill providing for an increase of up to 40 percent in benefits to the deceased claimants' dependents.

The bill also would mitigate the effect of two state Supreme Court decisions that don't sit well with petitioners. The bill would ease the notice requirements on workers with claims against former employers, mitigating the effect of *Brock v. PSE&G*, 149 N.J. 378 (1997).

The legislation also would give asbestos-related claimants a wider choice of deep pockets, eroding *Bond v. Rose Ribbon*, 42 N.J. 308 (1964), which limits such claims to a former workers' last employer.

In March, the Senate voted 39-0 to

adopt its version of the bill, *S-1522*, after sponsors deleted a provision hated by the New Jersey Business and Industry Association: a cost of living increase for some payments that would have cost employers and their leading carrier, New Jersey Manufacturers Insurance Company, millions of dollars.

When it comes to legislation on such issues, "NJM is the 800-pound gorilla," Livingston says.

But the Assembly version, *A-1927*, sponsored by Joseph Egan, D-Middlesex, retains the cost-of-living proposal. When the Legislature comes back after the election, the Assembly should knock out that provision and adopt the Senate version in the interest of salvage, Livingston says.

"It's not going to happen," Livingston says of the COLA provision. "We need to get the rest of the bill passed."

#### Going Amicus

On the litigation front, the council is about to draft petitions for amicus status in two cases, one to preserve a workers' compensation judge's decision and another to overturn a ruling by the Board of Review, the Labor Department's final arbiter of claims.

The petitioner's bar wants the Appellate Division to affirm Judge Lawrence Moncher's Sept. 2002 decision in *Rosales v. New Jersey*, C.P. 99-7099. Moncher rejected the state's attempt to cancel its worker's comp obligations to a former Ocean County employee who also was receiving an ordinary disability pension from the Public Employees Retirement System.

The state's goal was apparently to prevent the kind of double dipping that is driving the growth in health-insurance liens, but the judge ruled that there was no legislative support for what the state was trying to do.

The advisory council is seeking amicus status in the other case, *In the matter of Kerri Cardona*, BR Docket 03-B-01557, because the Board of Review found there was a duplication of workers' compensation and unemployment benefits. ■