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Merit Selection of Judges—It Ain't Broke But Prop. 115 Will Break It

— Ted A. Schmidt

In 1974, Arizona voters passed an amendment to the Arizona Constitution adopting merit selection of appellate and trial judges in Maricopa and Pima County. Since that time, this amendment has become the envy of the country, with some two thirds of our states adopting a similar proposal. **It is expected that in the next 10 years, 90% or more states in America will adopt merit selection, and Arizona's system will serve as a template.**

Since 1974, the quality of judges on Arizona courts increased dramatically, while the politicization of choosing judges drastically declined. Those best suited to judge are more inclined to apply knowing they will be judged on their merit and not their ability to raise campaign contributions and mug for the camera.

In contrast, in those states where judges still run for election, it is not unusual for seats on the state supreme court to require millions of dollars in campaign contributions. This creates the appearance, if not reality, the companies making these enormous contributions receive more favorable treatment before the court. Claims of "justice for sale" become rampant.

So why is Arizona's current system of merit selection so attractive across the country? Because it works beautifully. In the last 37 years, Arizona assembled the most knowledgeable, bright and fair-minded judiciary in the country, and they are not

beholden to anyone. They do justice without regard to how popular their decisions might be.

This being the case, why would the Arizona State Senate propose to amend the Constitution in such a way as to drastically politicize the process, and how did they get the Arizona State Bar and Judge's Association to support it? The answer is simple. The state legislature does not want an independent judiciary. **They want the governor and senate to have more control over the process to assure the candidate best suiting their political agenda will be appointed rather than the person most qualified.** The judges already sitting on the bench and state bar capitulated on the issue because they were told that if they did not, the legislature would propose doing away with merit selection altogether.

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Presently, the merit commission contains 16 members. **It is made up of five lawyers, the chief justice, and 10 public members.** All the public members are selected solely by the governor. The lawyer members are first chosen by the state bar, which sends at least three names for each seat to the governor. Then, the governor ultimately selects the lawyers to sit on the merit commission

Whenever a judgeship in Pima or Maricopa becomes open, the merit commission wades through numerous applications and evaluates the candidates' education, work history, community involvement, experience handling challenging cases, and reputation in the

Quantity and politics will substitute for quality.

community. Then, from this list, it selects the three or more most qualified candidates. By providing three names to the governor, the merit commission ensures that the governor considers only qualified candidates.

The amendment would change who sits on the merit commission and how many judges it must send to the governor for consideration. First, the amendment would change how the members of the merit commission are selected by allowing the state bar to only recommend one of the five lawyers. The governor would be free to select the other four for purely political reasons.

More damaging, the amendment would require the commission to

send up eight names to the governor. I presently sit on the commission. The last time we chose three applicants to go to the governor for the Court of Appeals, we did not even have eight applicants. The most recent list of applicants for the Supreme Court was eleven.

If this amendment passes, to satisfy the mandate that eight names be provided to the governor, the commission will be forced to send unqualified applicants to the governor, who could then make the selection based on purely political reasons. Quantity and politics will substitute for quality. The best system in the country for selecting judges will be watered down to be essentially meaningless. For the good of Arizona's system of justice I urge you to vote no on proposition 115.

KSS Resolves Hospital Malpractice Case for \$5,000,000

— Jim Campbell

Oro Valley Hospital paid \$5,000,000 to resolve our client's hospital negligence claims. **This resolution comes 18 months after a Pima County jury, in a bifurcated trial, found the hospital 100% at fault and responsible for our client's paraplegia injuries.** Dev Sethi led the trial team.

After the verdict was announced, the hospital launched an all out attempt to overturn the verdict. Both the Court of Appeals and Arizona Supreme Court rejected its attempts to dodge responsibility. Central to their failed appeal was the argument the trial judge erred in allowing the jury to consider the hospital's own safety policy that, if it had been followed, would have prevented our client's injuries.

Our client, a Marine veteran and married father of two young boys, arrived at the Oro Valley Hospital emergency room around midnight on a cold December night, the week before Christmas. The hospital was quiet; he was one of only two patients in the ER. The medical staff appropriately diagnosed him with kidney stones and administered morphine for pain control. He was set to be discharged around 3:00 am.

The hospital's safety policy, which was trial exhibit 1 and was endorsed by both nursing witnesses that the hospital called to testify, required an escort for our client at discharge. The reason for the safety policy was that

discharging patients under the influence of morphine without an escort was dangerous.

At discharge, our client walked out of the hospital doors, not before nearly falling through a glass panel, and into the dark night. Just outside of the hospital, he attempted to cross Tangerine Road in an effort to look for his wife, who was driving to the hospital to pick him up. Unfortunately, in the darkness he could not recognize he was on a bridge, and as he attempted to cross he fell to the wash floor where he remained until he was found, hours later, by a jogger.

Oro Valley Hospital denied responsibility throughout this case. **The hospital's final pre-trial offer to settle was \$50,000. Even after the jury found it responsible, the hospital worked to distance itself from any accountability.** The case eventually resolved just days before a damages trial to determine the value of our client's claims.

This settlement will help our client lead the best life he can under the circumstances. It's unfortunate that it took the hospital so long to accept this measure of responsibility, but the result will allow him to move on with his life.

Unlike most pre-trial resolutions, facts and outcome of this case are not confidential. And our clients look forward to publicly advocating for increased patient safety awareness.

In pure darkness, our client fell from this bridge while under the influence of morphine.





Is Medicare Moving Toward Requiring Self-Payment of Future Medical Care?

— Dev Sethi

Medical care liens – obligations to repay a health insurer, including Medicare, for payments made out of a personal injury settlement – remain one of the most difficult to explain and predict aspects of the law. **Difficult to explain because the concept of a health insurance company being repaid for care it promised to pay in exchange for premium payments doesn't make any sense.** For example, if a patient breaks her leg skiing, Medicare will pay her bills and everyone will go on about their lives. If the same woman breaks her leg in a car crash and collects money from the at fault driver, Medicare will still – probably – pay her bills. But she will have to repay Medicare out of the settlement she receives. After a lifetime of paying into the Medicare system for the ability to use the benefit when needed, the idea that repayment is required takes some getting used to.

The concept is difficult to predict because the law is ever-changing, unclear and still developing. In general, health insurance organized and provided by an employer, under a federal law called the Employee Retirement Income Security Act (ERISA) can assert a right to be repaid benefits provided out of a personal injury settlement. In your policies it may be under a provision called “Indemnification”, “Subrogation” or “Right of Repayment.” The contractual language of the policy largely determines whether or not such a right exists.

Medicare has a similar, but much more powerful right to be reimbursed. Medicare's rights come directly from federal statutes and regulations. Failure to protect Medicare's interests can have serious consequences.

Recently Medicare began requiring people resolving Worker's Compensation cases to create a Medical Set Aside (MSA) account to pay for any future medical care related to the initial injury. A person hurt on the job, who settled his claim but

likely needed a back surgery in the future, would have to create a special account and segregate enough settlement funds to pay for that care. The MSA became a significant impediment to injured workers. But that creature was limited to worker's compensation cases and did not impact liability cases – where a person is hurt by the bad acts of another.

That appears to be in danger of changing.

Medicare has taken its first steps toward requiring MSA in all personal injury cases. Over the summer it posted a request for public comment on rules it proposes for a potential liability based MSA program. Comment is requested for potential changes to 42 CFR Parts 405 and 411 and is titled, “Medicare Program: Medicare Secondary Payer and Future Medicals.”

This request does not mean that MSAs will become mandatory, but it certainly signals the direction it wants to go. MSAs in the liability context, though, could be disastrous for our clients.

They are exceptionally expensive to prepare and administer. The backlog in getting them approved, as required, is currently 9 months – on top of the normal case litigation process. A MSA, in all but the most catastrophic cases, will be the tail wagging the dog. **It will make bringing a claim, and holding a wrongdoer responsible practically impossible.** In the end, then, Medicare's over-reaching will hurt the program. If cases become too difficult to bring, it will see the end of the steady flow of repayment of past benefits that currently fill its accounts.

We will be submitting a comment to the record, and you can let your elected officials know that set asides in liability cases are not a wise way to go.

After a lifetime of paying into the Medicare system for the ability to use the benefit when needed, the idea that repayment is required takes some getting used to.

To learn more:

<http://www.tinyurl.com/msacomment>

To contact your elected officials:

<http://www.contactingthecongress.org>

Four New Laws to Know.

As of August 1, 2012, over 360 new laws, passed by the legislature and signed by Gov. Jan Brewer, clicked into effect. They cover a wide range of issues, some real...others imagined. But they are now the law of the land.

Here are four that might impact you:

1. Give the Kids a Boost: Arizona joins 46 other states in requiring that young children, under 8 years old and under 4'9", must ride in a booster seat. These special seats allow kids to sit a bit higher, so the seatbelt fits their small bodies properly. Health and safety experts have long advocated for this law. Police have announced they will be on the lookout for children who are not in booster seats. Offenders will be fined \$50, which will be waived upon proof that the driver has a booster for the child. Many local agencies are providing free booster seats to needy families.

3. Growler to Go: Local microbreweries continue to pop up around Arizona. We have some of the best homegrown beer in the country right here. And now you can take home a liter or two, straight from the source. Under a new law, consumers can bring their own container to a craft brewery, fill it up, cap it and enjoy a fresh, cold beer at home. The Arizona Liquor Department praised this development as a win for consumers and the economy.

2. "Driver's License and iPhone, please?": Arizona becomes only the third state in the nation to allow proof of insurance on their smartphone or other electronic device. The law was designed to make life a little easier for police, drivers and insurance companies, and it's a rare example of government keeping up with technology. Beware, you can't just show the police a photograph that you snapped of your insurance card. Instead, carriers are developing approved apps that will display verified proof of insurance. Get in touch with your carrier to find out more.

4. Abused? So Sue Me: The Arizona Legislature continues its death by one thousand cuts approach to shut down individual rights at the expense of protecting corporations responsible for harming the most vulnerable Arizonans. No longer will those who neglect and abuse elderly or incompetent adults, people absolutely unable to care for themselves, be responsible for paying attorneys' fees when they are brought to justice. Instead, the vulnerable adult seeking the court's assistance in holding his abuser responsible will have to pay for his own attorney. This dramatic change in the law removes a significant and important stick that motivated good behavior on the part of those entrusted to care for others.



FDA Rolls Out Proposed Medical Device Tracking System



The Food and Drug Administration proposed that most medical devices distributed in the United States carry a unique device identifier (UDI).

A UDI system has the potential to improve the quality of information in adverse events reports, which will help the FDA identify product problems more quickly, target recalls more efficiently and improve patient safety, officials say.

A UDI acts as a key to certain basic identifying information about a device, such as the name of the manufacturer and the type of device. It also may represent certain other information about the device, such as its expiration date,

device identifier, and batch or lot number. This information will be contained in a publicly available UDI database, say FDA officials, and no identifying patient information will be stored in this device's information center.

"The safety of medical devices is a top priority for the FDA, Congress, industry and patients," said FDA Commissioner Margaret A. Hamburg, MD, in a press release. "The unique identification system will enhance the flow of information about medical devices, especially adverse events and, as a result, will advance our ability to improve patient safety."

The FDA is proposing a risk-based, phased-in approach to implementation, focusing on the highest-risk medical devices first and exempting low-risk devices from some or all of the requirements. The agency is proposing to exempt over-the-counter devices sold at retail, since these devices generally have UPC codes.

FDA officials say a UDI system could:

- Allow more accurate reporting, reviewing and analyzing of adverse event reports so problem devices can be identified and corrected more quickly.
- Reduce medical errors by enabling healthcare professionals and others to more rapidly and precisely identify a device and obtain important information concerning the characteristics of the device.
- Provide a consistent way to enter information about devices in electronic health records and clinical information systems.
- Provide a standardized identifier that will allow manufacturers, distributors and healthcare facilities to more effectively manage medical device recalls.
- Provide a foundation for a global, secure distribution chain, helping to address counterfeiting and diversion and prepare for medical emergencies.





Dev Sethi recently Co-Chaired the State Bar of Arizona's premier education event, CLE by the Sea held in Coronado, CA. This four day seminar allows Arizona lawyers to escape the July heat and get high quality, informative continuing education. This year's program focused on the intersection of technology and psychology in trial advocacy. Attendees learned about how

iPads and computers are changing the way lawyers prepare and present cases and heard from trial lawyers and juror consultants about recent research on juror trends.

Ted Schmidt was on the faculty, as well. He delivered his always popular Year in Review: Case Law Update.

Dev Sethi is busy working on two fall events.

On **October 20, 2012**, enjoy an evening at the Fox Theatre being dazzled by Mystic India, a music and dance extravaganza showcasing the color, splendor and excitement of Bollywood, Indian cinema. For more information, visit www.foxtucsontheatre.com.

Bring the kids back downtown on **October 21st**, for FAME, a Family, Arts and Music Experience at the Children's Museum Tucson. Last year over 1500 kids and their families enjoyed a free day of exploration, art and creativity.

Meanwhile, Children's Museum Tucson is gearing up for its popular Evening of Play, a grown-ups only evening at the Museum featuring a sensory experience of live performances, including Tucson's favorite band, Tesoro, and delicious food and drink from some of Tucson's most creative chefs! The party is on Friday, November 2.

For more information, visit www.eveningofplay.com



We are happy to announce that **Matt Schmidt** and his wife are expecting their first child in February. While Matt is not yet busy preparing to be a father, he has been writing a technology column for the Writ ("Techno-Law-gically Speaking") that has been a hit amongst the legal community. He is also working on "Food for Thought," a series of six lectures he will be giving to Arizona law students on practical aspects of a legal career.



Jim Campbell has been active with the Sigma Chi Fraternity at the University of Arizona. He is member of the Housing Corporation, and is instrumental in raising funds to build a new chapter house. In recognition of his long service to the Fraternity and achievements as a lawyer, Jim will be inducted into the University of Arizona Sigma Chi "Hall of Honor" during the 2012 Homecoming. The Hall of Honor is the highest honor bestowed on alumni of the University of Arizona's Sigma Chi Chapter.

Burt Kinerk, Ted Schmidt and Dev Sethi were named to "Best Lawyers in America" and Ted was selected one of 6 Arizona lawyers named best lawyers of the year.



+100
one
hundred
years

The lawyers of KSS have over 100 years combined expertise in personal injury, products liability, medical malpractice, and governmental liability cases. Most of our cases are referred to us by other attorneys, and we have paid over \$10 million in referral fees to these lawyers in the last three years alone.

We proudly welcome **Rosie Fernety** to our expert legal assistant team. Rosie previously worked under the section chief of General Pediatrics at University Medical Center and has over 17 years of civil litigation experience, especially on the defense side of serious injury and wrongful death cases. Her meticulous and creative approach to cases will fit very well with Ron Du Bois and Eileen Fernstrom's unique skill sets.



If you are not already reading Ted's new case summaries, visit our blog or email Ted at tschmidt@kss-law to join the mailing list.

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