

OAJ July '17 Quarterly Article Insurance Chair-Traska

We always complain about the weather, but we never do anything about it.
-Groucho

When I graduated law school in 2002, it was the height of the frenzy that was *Scott-Pontzer*.ⁱ Ohio was *the* hothouse for uninsured/underinsured motorist coverage issues and litigation. Being at a large plaintiffs' firm, my task was to keep pulling together the hundreds of fast-flowing court decisions on each of the dozens of moving target issues that were being litigated in Ohio like they never had been in any other jurisdiction. Each brief filed by every side was accompanied by a stack of supportive unreported cases. If that stack was less than two inches thick, well, you'd lose the weight of authority argument.

It was clear I had died and gone to hell. Insurance law was so far through the looking glass in Ohio that even the UM/UIM statute had been amended *five times* in the preceding ten years! What in the world was going on? Then it hit me.

Politics. With apologies to Flo, car insurance is not sexy. The carriers know that well, which is why they pitch their products with charming little reptiles, or Jake in khakis, or even Shaq. Dennis Haysbert yes, Kate Upton, not so much. The only thing sexy about insurance is the annual flow of tens of millions of dollars in Ohio alone. And money might have something to do with politics.

Not only has Ohio has been ground zero for insurance coverage litigation, but Ohio is arguably the most important state in the Union for American electoral politics. *Pontzer* was an absurdity,ⁱⁱ and in hindsight, it's difficult to look at its rationale as anything other than a judicial comeuppance directed at a foible in the fine print. Most insurance policies consist of a few lines describing the coverage, followed by thirty pages of limitations and exclusions, but even still. I

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can't help but wonder: are our clients paying the tab in 2017 for the pendulum having swung so far in 1999?

We the trial lawyers are out-gunned in the State house, and targeted by federal legislation too.ⁱⁱⁱ Back in 2011, OAJ compiled and published the statutes and case law that implemented tort “reform” in Ohio in just the preceding decade. The bound volume stacked up higher than all those unreported authorities from the old days... but they apply to *all* claims, *all* of our clients, and *all* Ohioans. It's been a storm to rival Jupiter's red spot in size, duration, and fury. And we always complain about it, but what do we do? What can we do?

Two things, broadly speaking: talk, and write checks. Personally, I'm not fond of the rules of political speech as they concern money these days, but that doesn't matter. What does matter is that two seats on the Ohio Supreme Court will change hands next year. Ohio will elect a new Governor next year. And every single seat in both the U.S. and Ohio Houses of Representatives will have an occupant elected, next year. Most certainly, candidates who embrace Ohio's inviolate^{iv} right to trial by jury face stiff headwinds. Standing against the systematic devaluation of the rights of consumers, of nursing home patients, and of injured persons has a distinct “cavalry vs. tanks” feeling that we know well.

Which brings us to talk. The “cavalry vs. tanks” myth many of us know hides another lesson we can't learn often enough. Beginning with the fact that it did not happen,^v the lesson is messaging. The charge at Krojanty was over in a day, but the propaganda lives forever. Communication, with clients, with adversaries, with juries, it's our livelihood. Yet we're being out-messaged. Sight unseen, your incoming Insurance Section Chair^{vi} is comfortable referring the reader to numerous other pieces in this Quarterly alone that will lay out OAJ's long game to meet the realities of political spending. But the short game belongs to all of us.

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One might say talk is cheap, but I prefer to think of it as being affordable. As plaintiffs' lawyers, we shoulder the solemn responsibility of explaining to persons who have been wronged why their wrong may not be actionable. Whether or not damage caps discourage lawsuits, it falls to us to explain to catastrophically injured persons why their elected officials have chosen "to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured ...".^{vii} Neither the legislators nor justices who uphold such laws have to deliver that message to the individuals whose pain and suffering is devalued, but we do. Those are the most difficult conversations. But what we must do is make them just a little larger. Talking to clients, talking to legislators, having clients talk to legislators, the new broadcast medium of social media, it all matters. "All [we]'ve got is a red guitar, three chords, and the truth."^{viii}

Whether messaging can match money remains to be seen. But the issues are sobering. Regulatory capture^{ix} is nothing new under the sun, but the flow of dollars in American politics is. No example is more alarming than the current federal RICO case determining just how much State Farm had to do with the election of a Justice of the Supreme Court of Illinois.^x While the free market is loathe to have the government "pick winners and losers," with State Farm and other big spenders, picking winners and losers is the whole point.

Earlier this year, the Ohio Department of Insurance announced that "Ohioans pay among the lowest for insurance."^{xi} On the surface, that's great for consumers. As trial lawyers though, let's remind our clients of a fact well known to the insurance lobby: You get what you pay for.

ⁱ *Scott-Pontzer vs. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660 (1999)(off-duty employee in personal motor vehicle was covered under employer's business auto UM coverage unless corporate UM policy clearly stated a scope of employment limitation—no, seriously).

ⁱⁱ Martin Kuz, "Absurd at Any Speed," *Cleveland Scene*, Mar. 12, 2003, <https://www.clevescene.com/cleveland/absurd-at-any-speed/Content?oid=1481862>

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ⁱⁱⁱ Kimberly Kindy, "House GOP Quietly Advances Key Elements of Tort Reform," Washington Post, Mar. 9, 2017,

https://www.washingtonpost.com/news/to-your-health/wp/2016/12/30/top-republicans-say-theres-a-medical-malpractice-crisis-experts-say-there-isnt/?utm_term=.81f7637845e5

^{iv} Ohio Const. Art. I, § 5: The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by concurrence of not less than three-fourths of the jury.

^v Wikipedia, *Charge at Krojanty*, https://en.wikipedia.org/wiki/Charge_at_Krojanty

^{vi} me

^{vii} *Morris v. Savoy*, 61 Ohio St. 3d 684, 688-691 576 N.E.2d 765 (1991), quoting *Nervo v. Pritchard*, Stark App. No. CA-6560, unreported (June 10, 1985), at 8.

^{viii} Attributable to Dylan, Hendrix, Bono, et al. N.B., while the red guitar may seem metaphorical, Mark Kittrick assures me it's not, and that it belongs to him.

^{ix} See generally, Timothy v. Lee, *Entangling the Web*, New York Times, Aug. 3, 2006,

<http://www.nytimes.com/2006/08/03/opinion/03lee.html>

^x See *Hale, et al. vs. State Farm Mut. Auto. Ins. Co.*, U.S. Dist. Court, S.D. Illinois case No. 3:12cv660; see also <https://www.bloomberg.com/news/articles/2016-09-19/state-farm-faces-group-suit-over-claims-it-bankrolled-judge>

^{xi} Press release, Ohio Department of Insurance, Jan. 19, 2017,

<http://insurance.ohio.gov/Newsroom/Pages/01192017OhioLowestPremiums.aspx>