

# SMS Quarterly

Shuman, McCuskey & Slicer, PLLC

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## SMS Firm News

### SMS Welcomes New Associates

On October 20, 2009, Founding Member Hon. John McCuskey will move the admission of the two newest SMS Associates to the West Virginia Bar, J.B. McCuskey and Jennifer Tampoya, both of whom recently passed the West Virginia State Bar Examination.

J.B. McCuskey is the son of Hon. John McCuskey and Anne T. McCuskey. It is both an honor and a privilege to witness and be a part of J.B.'s admission to practice law in West Virginia, commented Hon. John McCuskey. It will undoubtedly be a special occasion, and I am looking forward to practicing law with him here in our Charleston office.

Jennifer Tampoya will join SMS as an Associate in its Morgantown office. "October 20, 2009 cannot come soon enough for me," stated Member Timothy R. Linkous. "Jennifer is one of those unique lawyers who is an exceptional legal researcher and writer, and she also hones in on the key issues in cases very

quickly. We are excited to have her join our team."

J.B. McCuskey attended George Washington High School in Charleston, West Virginia, and then he earned a degree in Political Communication from The George Washington University in Washington, D.C. While working as a Regional Field Director during the presidential campaigns in 2004, he met his now wife, Wendy McCuskey. He then moved to Washington, D.C. to work in the Pentagon for both the General Counsel of the Army and the Department of Defense General Counsel. Thereafter, he returned to West Virginia where he earned his law degree from the West Virginia University College of Law in 2009.

Mrs. Tampoya is originally from Los Angeles, California, and she earned her Bachelor of Arts in English from UCLA. After college, she developed and operated a Los Angeles-based, healthcare training business. Seeking a more family-friendly environment, she

and her husband, John, closed their business and moved their family to Morgantown in 1998.

That same year, Mrs. Tampoya organized a closely-held business corporation, providing health care services to homebound patients throughout West Virginia. In 2004, she organized a new small business corporation, offering upscale, personalized fitness services in the Cheat Lake area of Morgantown. In 2006, she entered law school at the West Virginia College of Law.

During law school, she served as the Associate Editor and the Symposium Editor for the West Virginia Law Review. She has three children, Sahalie, John Conner, and Rylan, all of

On the 27<sup>th</sup> day of July 2009, the Circuit Court of Wyoming County, West Virginia entered two (2) Orders granting SMS clients summary judgment in flood litigation styled, Anita Cecil, et al. v. Bluestone Coal Corporation, et al., Wyoming County Civil Action No. 04-C-104.

On April 30, 2004, Anita Cecil, Virginia Daugherty, fifteen (15) other residents of Wyoming County and all other [persons] similarly situated@ instituted a civil action for a flood event@ occurring on May 2, 2002. There were numerous Defendants whom the lawsuit accused of wrongdoing.

Two (2) of those Defendants were Creekside Energy Development Company and

whom attend Trinity Christian School in Morgantown.

Following their admissions to the West Virginia Bar, J.B. McCuskey and Mrs. Tampoya will also be admitted to the United States Court for the Southern District of West Virginia.

## SMS Member William Slicer and Associate Christopher Negley Obtain Dismissals for Clients from Flood Litigation

Rowland Land Company, LLC. SMS Member William Slicer and Associate Christopher Negley had the privilege of representing both of those Defendants. After a period of initial discovery, Mr. Slicer and Mr. Negley filed Motions for Summary Judgment on behalf of their clients, and they supported the said Motions with affidavits.

The Honorable Gary L. Johnson, sitting by special and temporary assignment, held a hearing to address the said Motions on June 29, 2009. At the hearing, the Plaintiffs argued that the Motions were premature, but they failed to produce any evidence to rebut the arguments of Mr. Slicer and Mr. Negley.

Therefore, on July 29, 2009, the Circuit Court of Wyoming County, West Virginia entered Orders dismissing the SMS clients, with prejudice, from the litigation.

## SMS Provides Efficient Representation in Three States

While SMS is a medium size law firm by West Virginia standards, its lawyers provide representation to clients in West Virginia, Kentucky, Ohio and Virginia. SMS clients have come to appreciate the successes earned by SMS lawyers as well as enjoy the efficiency and economic representation they provide. Here are a few of the areas SMS covers:

- B Accounting Professional Liability
- B Administrative and Regulatory Law
- B Appellate Advocacy
- B Bank Operations Law
- B Cemetery and Funeral Home Law
- B Commercial Litigation
- B Complex Litigation
- B Constitutional Law
- B Construction Law
- B Contract Law
- B Debtor/Creditor Litigation
- B Deliberate Intent Litigation
- B Dental Professional Liability
- B Education Law and Litigation
- B Employment and Labor Law
- B Environmental Law

- B E&O Litigation
- B Farm and Agricultural Litigation
- B First Party Bad Faith Litigation
- B Flood Litigation
- B Health Care Law
- B Infant Summary Proceedings
- B Insurance Coverage Disputes
- B Insurance Defense
- B Legal Professional Liability
- B Legal Seminar Presentations
- B Manufactured Housing Litigation
- B Mass Tort and Class Action Litigation
- B Medical Professional Liability
- B Municipal & County Governmental Liability
- B Natural Resources Law
- B Nursing Home Negligence
- B Personal Injury Litigation
- B Predatory Lending Litigation
- B Premises Liability Litigation
- B Product Liability
- B Risk Management Assessments
- B Sexual Harassment Litigation
- B Sexual Abuse Litigation
- B Silica Litigation
- B State Governmental Liability
- B Trust Formation and Drafting
- B Trust Litigation
- B UIM and UM Litigation
- B Workers= Compensation Law
- B Wrongful Death Litigation
- B And much more.

## Legal Developments

### New Medicare Guidelines

In recent years, the Federal Government has changed several important aspects of the Medicare system, and it has caused great confusion for many. In this edition of the SMS Quarterly, we have endeavored to provide you with a brief outline of some of the changes. SMS offers seminars to its clients to assist them with understanding this process in greater depth.

#### I. Introduction

The process by which a settlement for a Medicare beneficiary is calculated has changed. This article is designed to provide you with a brief overview of the new procedure.

The first step in the analysis is to determine whether the plaintiff is Medicare eligible, which can occur in a few ways. First, if the person is over 65 years of age, she can qualify. Second, a person can become eligible if he has been on Social Security disability for longer than twenty-four (24) consecutive months (This is a common entrance to Medicare for workers compensation plaintiffs). Finally, if the person is in, AEnd Stage Renal Disease,@ which means that she requires dialysis to live, she can qualify. If the person fits into any of these categories, you must analyze the three prongs of Medicare compliance: Conditional Lien Satisfaction, Medicare Set-Asides and Medicare Secondary Payer Mandatory Reporting Requirements.

#### II. Conditional Lien Satisfaction

There are certain times when Medicare expects to be reimbursed for payments made for the care of an eligible person which include, persons covered by workman=s compensation insurance, liability insurance, automobile insurance, or are self insured. If Medicare has paid for the care of an individual, it will expect to be reimbursed in the following situations: disputed liability, Medicare was billed directly, a primary payer is not making prompt payments and if a provider sent a bill to Medicare. If you are a primary payer (which our clients generally are) and you do not repay Medicare, it has the remedies of instituting a legal proceeding against you, taking away a claimant=s benefits, or seeking double recovery from the primary payer.

#### III. Medicare Set-Asides

ASet-Asides@ is the term used by Medicare to describe the money negotiated in a settlement to cover the future care of a plaintiff who is certain to need it, and, absent the settlement, the future care would be paid for by Medicare.

The rules are very specific with regard to Workers= Compensation. If the plaintiff is Medicare eligible and covered by Workers= Compensation insurance, a proposal must be submitted if the claimant has a reasonable expectation of Medicare entitlement within 30 months of the settlement date and the anticipated loss is greater than \$250,000. The definition of reasonable entitlement under the statute is that the claimant

has applied for SSD or has been denied SSD but is appealing the decision, or is 62 years 6 months old, or is in end stage renal failure.

To determine the set aside amount, one must perform an analysis that includes all diagnoses and prognoses with a eye towards the escalating costs of future treatment as the patient potentially worsens in condition. Secondly, one should secure a rated age, which is essentially the expected life span of the plaintiff given his health conditions, if he is below 65 year of age. If the age is below 65, one should look into creating a substandard annuity, which essentially increases the monthly payments, to compensate for the shortened life span.

#### IV. Mandatory Reporting - Section 111

Mandatory reporting was created by Medicare as a way to assign penalties to claimants who are receiving Medicare payments but who have primary payers that are not paying. It requires settlements, judgments, awards or any other payments to a Medicare eligible claimant to be reported to Medicare if certain thresholds are met. Failure to report can result in \$1,000 per day penalty, termination of benefits or double recovery by Medicare.

The thresholds for mandatory reporting vary depending on the type of primary payer you are. There is an extensive outline of all the thresholds for the four kinds of primary payers listed in section 111 of the statute, and a summary of that outline is beyond the scope of this article. Please consult the regulation and/or an SMS attorney for the precise nature of your duty under any circumstance.

SMS recommends that its clients consult 42 U.S.C 1395(y). Additionally, if you would like to learn more, SMS would be glad to offer you a seminar to assist with understanding the recent changes.

(This article was prepared by Associate J.B. McCuskey and edited by Member Timothy R. Linkous. This article is not intended to and is not a substitute for the professional legal advice of counsel. If you have questions about the information contained in this article, you are encouraged to speak directly with an SMS lawyer.)

**Quarterly Quote:** This exchange actually occurred in a recent deposition:

AQ: Is your migraine going to cause you to have difficulty answering my questions?

A: I=m a little, you know, agitated. I=m a little sick, and the lights in this room hurts my eyes. I feel a little nauseous, and your voice of course makes my head want to blow up, but you know...@

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(Timothy R. Linkous is the member responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC).