

## Animal Law

Judith F. Goodman

In this issue, *TortSource* has the opportunity to introduce the new TIPS Animal Law Committee, established at the 2004 Fall Leadership Meeting. As soon as we heard about it, *TortSource* asked if we could highlight some key areas of animal law for TIPS members. Luckily, the answer was yes!

The chair of the Animal Law Committee, Barbara Gislason, leads off with her discussion of evolving issues in veterinary malpractice and the need for a new analytical model. David Favre addresses the complex valuation issues regarding an injured or deceased pet. Debra Bresch weighs in on the problems with breed-specific laws and ideas for change. Finally, John Stockman advises us on liability for equestrian-related torts. These features are designed to begin to educate TIPS readers about legal issues arising from relationships with and investments in animals—both emotional and economic.

This issue provides lots of other information, too. Donna Lange outlines the basics of a matter near and dear to all our hearts: legal malpractice insurance. John Buckley, our frequent “Trial Techniques” columnist, tells us the story behind his own successful career—his background and dedication are impressive. In a report on recent developments in class actions, asbestos, and malpractice reforms, Leo Jordan discusses both the state of the law and his personal experience with lawyers and lobbyists concerned with tort reform initiatives. As always, Leo’s insights are incisive, and we are privileged to have his input.

Finally, *TortSource* whets the traveler’s appetite! Scott Wolf sums up the Mid-year Meeting in Salt Lake City, and makes those of us who missed it wish we could have been there. Matt Schiff, in praising his hometown of Chicago, gives us a sneak peak at the ABA Annual Meeting and shares some of his personal favorites.

So, for those of you who own pets, think about owning pets, ride horses, or can’t stand the sound of your neighbor’s dog’s barking, read this issue and then join our new Animal Law Committee. ♦

Judith F. Goodman is editor-in-chief of *TortSource* and is a partner of Goodman & Jacobs LLP in New York City.



Illustration by Andrew O. Alcala

## How Much Is That Doggie in the Window? Valuation for a Lost Pet

David Favre

The expanding concern about harm to pets presents a unique challenge to law that governs an appropriate level of damages to an individual harmed by the wrongful conduct of another. Throughout legal history, domestic animals have been considered property, and most existed with humans in the context of agricultural provision of food and fiber. Within this culture, an animal’s value was almost entirely economic. At the same time, a legal system’s focus for reimbursement was limited strictly to economic harm. If you killed or harmed a cow, damages were the market value for the cow. If the cow was injured to the degree that the cost of veterinary care and recovery would exceed the animal’s market value, the animal most often was “put down”: killed. Then as now, it made little economic sense to invest more to repair than replace a piece of property.

continued on page 4

## Veterinary Malpractice Leading the Evolution of Animal Law

Barbara J. Gislason

Veterinary malpractice is arguably the most rapidly evolving area in animal law and is considered by many to be the fulcrum for what will happen elsewhere. As in most areas of animal law, a dearth of state and federal statutes presently address veterinary malpractice. As societal values change, however, and animals increasingly are treated as family members, the courts must follow old common law, find good faith reasons to modify it, or wait for legislative enactments. Consequently, veterinary malpractice is attracting the attention of practicing attorneys. It is the subject of intense interest from professors and scholars, as reflected in challenging articles by Richard L. Cupp & Amber E. Dean, *Vets in the Doghouse: Are Pet Suits Economically Viable?* 31 THE BRIEF, Spring 2002, at 42; Christopher Green, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 ANIMAL L. 163 (2004); and Rebecca J. Huss, *Valuation in Veterinary Malpractice*, 35 LOY. U. CHI. L.J. 479 (2004).

The only two models that permeate discussions about veterinary malpractice are based upon strained definitions of property (e.g., animate, constitutive, sentimental, sentient) or personhood (like a ship or corporation), yet animals—as logic would dictate—are neither property nor persons. Can talented legal minds bring all interests to the table and develop model statutory definitions for the word *animals*, beginning in the veterinary malpractice context? What would this change in nomenclature mean, in practical terms? Are

continued on page 6

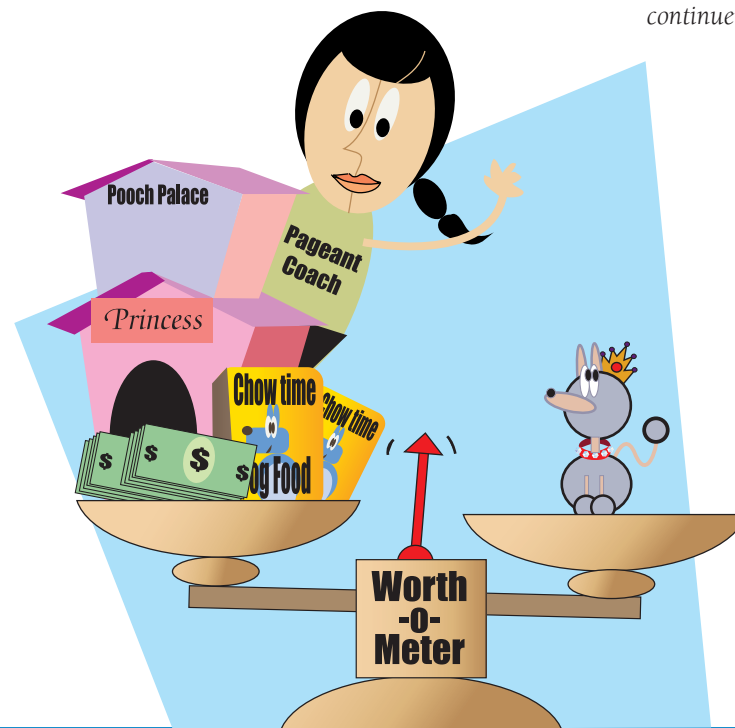


Illustration by Andrew O. Alcala

## Meeting Round-Up Midyear Meeting in Salt Lake City

Scott R. Wolf

The second TIPS meeting of the year concluded after a great time in one of the most picturesque cities in the country, Salt Lake City, February 10-13, 2005, at the Marriott City Center. Few cities in the United States can compare to Salt Lake, and residents rightly take great pride in their home, nestled below the magnificent Wasatch mountain range. I strongly encourage you to visit in the future.

The fun started a few days early for some attendees, with the "SkiLE" seminar at the Canyon Resort in Park City. This seminar, sponsored by TIPS and the Young Lawyers Division (YLD), was a great success, and the location gave us the opportunity to ski some fantastic slopes during our spare time. Thanks to all of those TIPS and YLD members who helped organize this event.

The meeting got into full swing on Friday, with various committee meetings and a great CLE program, "The Do's and Don'ts of Electronic Filing," sponsored by the Litigation Section of the Utah State Bar. The highlight of the evening was the TIPS Welcome Reception, which featured an extraordinary view of the Salt Lake Valley from the 23rd floor of the Wells Fargo Center. TIPS receptions remain a great place to meet new TIPS members and catch up with those you may not have seen for a while (plus indulge in the chocolate fountain at the reception).



ABA President Robert Grey, Staff Director Susan Nolte, and Chair Jim Carroll enjoy the Welcome Reception at the Wells Fargo Center.

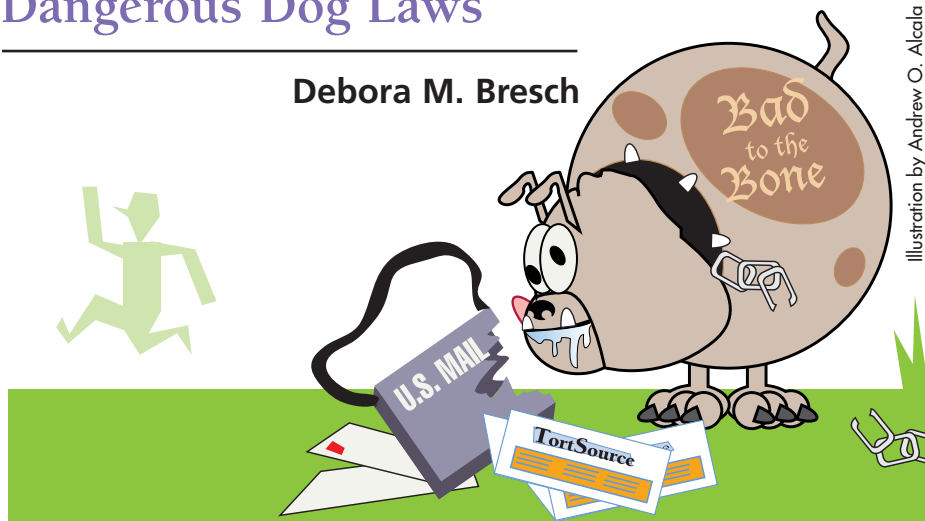
My personal highlight was Saturday's snowfall, which may sound somewhat silly, but not for a Louisianan like me, who doesn't get to see a lot of it. Saturday evening culminated with the fantastic Leadership Dinner at the Utah Olympic Park. A pre-dinner tour took us through the ski jumping, bobsled, and luge sites from the 2002 Winter Olympics, after which the Junior Olympic team treated us to their awesome ski-jumping skills at the National Sports Foundation Junior Ski Jump Show. Many of these youngsters may very well end up on the U.S. Olympic team in a few years.

All in all, the Midyear meeting was a great success. A sincere thanks to all those whose planning made it so enjoyable, and we look forward to welcoming you to Louisiana for the TIPS Spring Meeting in New Orleans, April 28-May 1, 2005. ♦

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## Pit Bullies: Deed Not Breed Dangerous Dog Laws

Debora M. Bresch



Last year, the *New York Daily News* ran a canine Horatio Alger story involving an errant mutt who hopped onto the subway (even changing trains at one point), ran smack into the "long arm of the law," and was poised for adoption by one of her saviors in blue. Both the stray dog's intrepid nature and the possibility of a happy ending made this tale notable, of course. Striking, however, was the author's failure to mention this "playful and charming mutt's" pit bull features, which were strikingly evident in an accompanying photo. Journalistic accounts of alleged pit bull attacks rarely, if ever, omit mention of the breed and the specific injuries the pit bull inflicted. In fact, in its study of human fatalities resulting from dog bites, the U.S. Centers for Disease Control (CDC) cited the unreliability of news reports, and the dog

bite data derived from them, to argue against laws that regulate dogs based on breed, not deed. See Jeffrey Sacks, Leslie Sinclair, Julie Gilchrist, Gail Golab, & Randall Lockwood, *Breeds of dogs involved in fatal human attacks in the United States between 1979 and 1998*, 217 J. AM. VET. MED. ASS'N 836 (2000).

According to the CDC, breed-specific dangerous-dog laws do not address the difficulty in identifying dog breeds (especially mixed breeds); the likelihood that those who exploit dogs by making them aggressive will turn to other unregulated breeds; and the impact of heredity, sex, early experience, reproductive status, and socialization and training on a dog's tendency toward aggression. Nevertheless, over the last 15 years, interest in breed-specific laws has surged at the municipal and state level. Indeed, nationwide,

more than 300 localities have chosen to regulate pit bulls (or ban them entirely), as well as other breeds such as rottweilers and Dobermans. Recently, an Ohio Supreme Court decision nullifying the state's dangerous-dog law muddied the status of a provision classifying pit bulls as "vicious" and imposing certain obligations, including liability insurance, on their caretakers. *State v. Cowan*, 103 Ohio St. 3d 144 (2004). However, at the beginning of the 2005 Illinois legislative session, Rep. Jerry Mitchell introduced House Bill 1128 to void a state law prohibiting local breed-specific ordinances and instead specifically authorize such measures. Fortunately, Rep. Mitchell has since agreed to amend the bill to make it breed-neutral.

The rationale for breed-specific dangerous-dog laws not only is spurious but problems caused by them also are legion. Even when there is no de jure ban, a de facto ban may exist if a law's requirements are too onerous. For example, the dearth of companies offering breed-specific liability insurance—a common mandate under such laws—has resulted in inflated and, for many, unaffordable premiums. In addition, although homeowners' insurance companies generally may not cancel or nonrenew because of an insured's breed of dog, few states prohibit companies from increasing premiums or initially refusing to issue policies on this basis. Shelters that "traffic" in certain breeds also have difficulty obtaining requisite coverage.

Further, failure to satisfy breed-specific law requirements often triggers civil and/or criminal penalties whether or not a dog has caused actual injury.

E.g., MUSKEGON, MICH., CODE §§ 6-1, 6-2, 6-15 (1998). By contrast, jurisdictions following the common law impose liability only where injury occurs and an owner has prior knowledge of a particular dog's vicious propensities, intentionally caused the dog to do harm, or negligently failed to prevent the dog from doing harm. See, e.g., *Endresen v. Allen*, 574 P2d 1219 (Wyo. 1978) (injury to motorcycle driver by dog with history of escaping yard and chasing cars was foreseeable). In the absence of a breed-specific law, actual injury must also occur before liability is imposed even in jurisdictions where strict liability laws do not require the owner's knowledge of a dog's propensities. E.g., UTAH CODE ANN. § 18-1-1 (2004). While improper confinement of a dangerous dog, for example, can also result in liability in the absence of a breed-specific law, the dog must have previously received the "dangerous" appellation by causing or threatening harm. E.g., SPOKANE, WASH., COUNTY CODE §§ 5.04.032, 5.04.033, 5.04.035 (2005).

Breed-specific laws have landed us in a legal and insurance quagmire. Escape will require the effective enforcement of breed-neutral laws targeting aggressive dogs and irresponsible owners. ♦

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# Practicing Horse Sense

## A Primer on Equine Law

John F. Stockman

**H**orse racing and jousting were once sports for kings, knights, and noblemen who did not have to worry about tortfeasance. Today, horse enthusiasts are legally responsible for injuries, even those resulting from the simple fact of ownership. Whether an equine pet is kept at home or placed in a professional stable makes no difference. Although primary responsibility may shift, it can never be eliminated for the owner. Business counsel and defense counsel must impress upon their clients that ownership or professional caregiving includes the duty to provide a secure facility that is separated from casual contact with humans and offers a safe environment for equine activities.

Drivers and pedestrians easily understand the concepts of basic liability, but horse owners and stable operators are a different breed. My lectures at veterinarian schools, agricultural extension courses, and horse expositions—where I hear howls of “that can’t be right!”—have convinced me that animal lawyers must promote an understanding of equine liability problems and their appraisal and prevention.

As with all tort disputes, a determination of the existence of a duty is primary. The “reasonably prudent person” standard prevails, obligating those in positions of responsibility to take steps to protect humans and horses alike. *See Pike v. Nessel*, C7-02-1882, 2003 Minn. App. LEXIS 578 (May 13, 2003) (unpublished) (trainer in position of authority had duty to use due care to prevent injury). The standard of care necessary hinges on the person’s skill and knowledge. The owner of mares and geldings that are stabled far from town is held to one standard while another applies to the owner-operator of a commercial training barn. The practice of the reasonably prudent person within a given discipline, profession, or experience establishes the standard of care.

### Taking Precautions

A child escapes supervision and wanders into a paddock. What issues challenge the defender against injury claims? Could the reasonably prudent owner foresee that a child might want to pet the pretty horses? *See Pullen v. Steinmetz*, 16 P.3d 1245 (Utah 2001) (plaintiff failed to demonstrate that the stable owner knew or had reason to know that children were likely to trespass). A duty of care exists if the injury was reasonably foreseeable. *See Oswald by Thies v. Law*, 445 N.W.2d 840, 842 (Minn. Ct. App. 1989). Of course, stables with outside visitors should have at least minimal precautions in place. Requiring that adults always accompany children is effective, as are posted signs warning of the dangers, with verbal warnings to visitors that horses, even when friendly, can be dangerous.

Most people with experience around stallions recognize a special duty of care. Stallions are by nature aggressive and have a dangerous propensity to cause harm. Thus, stallion owners generally stable these creatures in high, solid enclosures. Those with responsibility for Shetland ponies that bite, playful colts, or high-strung park horses also have an elevated duty to prevent trouble. *See Harris v. Breezy Point Lodge, Inc.*, 56 N.W.2d 655, 658 (Minn. 1953). An owner who neglects to act is liable if he or she had knowledge that an animal has dangerous or vicious tendencies that would put a reasonable person on guard. *Hagerty v. Radle*, 37 N.W.2d 819, 828 (Minn. 1949). For owners who rent horses for riding lessons or trail rides, special care begins with a conscientious effort to match rider and horse.

How can an owner ensure that all reasonably prudent precautions are in place? Holding regular inspections of the facilities, and all equipment and tack accessible to visitors, and keeping written records of the inspections, findings, and repairs is essential. The record will show potential problems were considered and reasonable efforts were made to avoid injury. Instruct your clients to imagine and warn against any risks that could occur in their particular setting—but also keep in mind that

the level of responsibility is directly related to the experience of the visitor. For example, professional breeders would be expected to know the dangers associated with a stallion, but riders on their first trail rides would neither understand the dangers nor take precautions. Similarly, individuals under the influence of alcohol or chemicals, experienced or not, cannot be held to their customary level of knowledge if an accident does occur. Without enforced procedures, signs, announcements, evaluations of riders’ abilities, and well-

maintained equipment, the exposure to liability claims is extensive.

### Shifting Responsibility

Owners who board out their horses may partially shift responsibilities to the stable operator. The stable owner can satisfy the minimal requirements for both the owner and stable by applying high standards of care and feeding of the horses and care for the facilities.

But the shift of responsibility may not be effective. If the horse owner fails to inform the stable of a horse’s dangerous habits or selects a facility with inadequate protection, the owner may still be held responsible for injuries. Where the owner does not recognize inadequate precautions at the stable and fails to relocate the horse as a result, both the stable and horse owner may be held responsible for injuries.

Waivers are seen as mighty and fearsome, and may ensure a successful defense (*see Beehner v. Cragun Corp.*, 636 N.W.2d 821 (Minn. Ct. App. 2001) (exculpatory agreement enforceable where applicable to ordinary negligence)), but they frequently prove inadequate against claims for injuries. Waivers are customarily signed before competitions or as part of a boarding agreement but they are unenforceable in many jurisdictions. In theory, an individual can waive a claim in advance only where there is understanding of the risks. Waivers best support the defense of a plaintiff’s assumption-of-risk. *See Andren v. White-Rodgers Co.* 465 N.W.2d 104, 104-05 (Minn. Ct. App. 1991), *review denied* (Minn. Mar. 27, 1991).

Because of the need for understanding risks, the conventional waiver is weak protection in cases where the injured party is a child, novice adult, or intoxicated. Parents who encourage their children to ride but have no experience with horses themselves also do not sufficiently understand the risks involved to provide a knowledgeable release. These same concerns apply to stables that lease schooling horses to novices or provide trail rides to any stranger able to pay the fare. Also note that waivers will not protect against the results of reckless or intentional acts. *See supra Beehner*. Even so, waivers are clearly the most effective first line of defense, forcing the plaintiff to explain why the waiver should be ignored. ♦

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Illustration by Andrew O. Alcalá



A Publication of the Tort Trial and Insurance Practice Section

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ISSN # 1521-9445.  
TortSource is published quarterly by the Tort Trial and Insurance Practice Section of the American Bar Association and is generously funded by West.

American Bar Association  
321 N. Clark St., Chicago, IL 60610

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## How Much Is That Doggie in the Window: Valuation for a Lost Pet

continued from page 1

Issues of harm and damages to many animals have not changed much from how they were resolved 100 years ago. But the issue of harm to pets has prompted reconsideration of old limitations. Pets have replaced farm animals as the primary source of animal-human interaction. Pet ownership now is widespread, with more than 100 million dogs and cats residing in U.S. homes. Some humans undoubtedly have had special relationships with domestic animals ever since they were brought into human households, but it is just in the past decade that the world of science has confirmed the real, noneconomic value of pets as companions. (General discussions of this issue are available at [www.animallaw.info/topics/spuspetsdamages.htm](http://www.animallaw.info/topics/spuspetsdamages.htm).)

For most people the relationship between a human and a pet is not based on economic considerations. Indeed, like children, pets cost money that can never be expected to be recovered. Although some pets win awards and command high-dollar breeding and offspring fees, the vast majority of pets are just members of the family. The bond between humans and pets is not imaginary and can contribute significantly to individual well-being. One objective measure of a pet's value to a person is the amount of money an owner is willing to spend for veterinary care. A cat with little or no market value may require surgery that can cost hundreds or thousands of dollars, and many owners are willing to pay such amounts.

Before damages for a person's pain and suffering for loss of or injury to a pet are allowed, a number of difficult questions must be resolved. Although many humans do seriously believe that a pet is a family member, the law has not gone quite this far. A pet is still property—living, special property, but property nonetheless. But pets give rise to a number of public policy questions: How can the system evaluate whether an individual suffered emotional trauma from injury to or death of a pet—particularly if the person was not present during the incident? How do we measure the degree of loss? How do we handle the risk of turning this emotional issue over to a jury that may see tears on one side and deep insurance pockets on the other?

### The Cases

In 1981 the Supreme Court of Hawaii, in *Campbell v. Animal Quarantine Station*, 632 P.2d 1066 (Haw. 1981), set a precedent for a new interpretation in “pet law” by upholding an award for mental distress to five members of a family whose dog was killed while being transported to a private hospital by a state agency. The dog had been kept in an unventilated van in the hot sun and died of heat prostration after arriving at the hospital. The court upheld the \$1,000 award even though family members had not watched the animal die or seen its body; they learned of its death in a phone call, and no member found it necessary to seek psychiatric or medical assistance. Public policy discussion was not really present in the case. It seems the court was unaware of the sweeping changes its opinion represented.

The Wisconsin Supreme Court in *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001), was faced with this fact pattern: a woman watched as a neighbor police officer shot and killed her dog. Although the court recognized the bond between owner and pet, it said that public policy prevented recovery based upon either negligent infliction of emotional distress to a bystander or negligent damage to her property. The court noted that under certain circumstances a person could recover for intentional infliction of emotional distress for harm to a pet, but it also stated:

We are particularly concerned that were such a claim to go forward, the law would proceed upon a course that had no just stopping point. Humans have an enormous capacity to form bonds with dogs, cats, birds and an infinite number of other beings that are non-human. Were we to recognize a claim for damages for the negligent loss of a dog, we can find little basis for rationally distinguishing other categories of animal companion.

In *Pickford v. Mason*, 98 P.3d 1232 (Wash. 2004), the plaintiff's dog was mauled by the defendants' dogs and sustained permanent injuries. The trial court granted summary judgment against the plaintiff's claims of negligent and malicious infliction of emotional distress. The court of appeals affirmed the grant of partial summary judgment and further held that the destruction of the companion relationship could not

be extended to dogs: “Such an extension of duty and liability is more appropriately made by the legislature.”

### Continuing Need for Change

Even though the courts have shown a reluctance to make new law regarding this issue, it will not go away anytime soon. The emotional harm is real, and actions against animals are often too egregious to be ignored; it seems unfair that the risk to a wrongdoer is limited

simply to the market value of a harmed pet. Although recovery for human pain and suffering is all well and good, it does not address the real harm, the harm to the animal. The best response of the legal system to a wrongdoer who harms an animal should be on behalf of the animal harmed, directly, by allowing the animal to recover for that harm and be made whole again. At the very least, a wrongdoer should be liable for all reasonable veterinary costs necessary for the animal to recover from the inflicted injury or harm.

Given that the courts currently represent a dead end for damages resolution, the obvious alternative is the legislature. Indeed, legislative change has begun. Kentucky, Connecticut, and Illinois have adopted laws allowing pet owners limited windows of opportunity to recover for losses arising out of harm to a pet. Maryland does not allow collection for pain and suffering but clarifies that actual damage in excess of market value for the pet may be charged, up to \$5,000 for veterinarian care. MD. CODE ANN. CTS. & JUD. PROC. § 11-110 (2002).

By the end of this decade, a significant number of states likely will have adopted laws that make some provision for enhancement of damages, beyond mere market value, for intentional and negligent harm to pets. ❖

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## Legal Malpractice Insurance Basics

continued from back page

**If I leave a firm to start my own practice, do I need to purchase full “prior acts” coverage, or should I rely on “former lawyer” coverage on the old firm's policy?** Consider whether you want to rely on the continued existence of the former firm—and on its continuing to insure with a carrier that provides coverage for former attorneys.

### Financial Considerations

**What limits of liability should I carry?** One of the best ways to determine this limit is to review the files in your office—both open files and recently closed files. Determine the maximum value of the file, i.e., if the work is transactional, determine the amount of the transaction and add items such as potential interest. If the case is a personal injury matter, evaluate the maximum damages. Remember to consider the number of lawyers in the firm because all of these lawyers share the limits on the policy. Keep in mind that you will also have an “aggregate limit” of coverage, which is the maximum amount available to pay all claims that arise within that policy year. One claim could exhaust not only your per-claim limit but also your aggregate limit for that policy year, leaving you at risk for personal exposure should another claims arise during the same policy year.

**How do I determine an appropriate deductible figure?** Decide what you can afford to pay in the event a claim is made against you. The difference in premium for a lower deductible generally is not significant. Remember that even a frivolous claim can generate defense costs. Also inquire about a “loss only” deductible, which will apply only if your defense is unsuccessful and a payment is made to the claimant.

**What is the definition of “defense within limits”?** This term means that amounts spent on defense will decrease the indemnity limits. Therefore it is important to consider the defense costs that might be incurred when you are trying to determine the policy limits for your practice. ❖

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# Legislative Update

Leo J. Jordan

## Class Actions, Asbestos, and Malpractice Reform

For the past several Januarys, I have attended a Washington, D.C., conference on “the state of American business” jointly sponsored by the U.S. Chamber of Commerce and *Congressional Quarterly*. The highlight of this year’s meeting was the opportunity to hear the Hon. Andrew H. Card, Jr., White House chief of staff, speak about five of the administration’s legislative priorities for the new term: Social Security reform; tax reform; legal reform; fiscal responsibilities; and health care, with emphasis on health savings accounts. The President’s travel schedule suggests that Social Security has become a top priority.

Regarding legal reform, Card stated that the tort system is a burden on our economy, and he did not specify the internal tort reform priorities. Nonetheless, it was clear that this administration would be more involved in tort and insurance issues than it had been during President Bush’s first term.

Thomas J. Donahue, president and CEO of the U.S. Chamber of Commerce, spelled out the chamber’s 2005 legal reform agenda: to enact class action reform and pass legislation to solve the asbestos litigation crisis, to limit small-business liability, to pass medical liability and bankruptcy reform, and to improve the legal environment in states and problem jurisdictions.

### Class Actions

As I spoke with lawyers and lobbyists representing the business community, it was patently obvious the foremost priority of the business community is class action reform. One reason for this is that class action litigation is spread broadly across almost the entire business community, impacting large and small business operations in service and manufacturing industries. Health care reform and asbestos-related legislative efforts, on the other hand, have comparatively fewer business supporters outside the relevant interests.

Congressional Republicans and the business community moved quickly on class action reform legislation. The Senate passed the *Class Action Fairness Act of 2005*, Public Law 109-2 (S 5), on February 10; the House passed the bill on February 17; and President Bush signed the measure on February 18, 2005, significantly expanding federal jurisdiction over certain class action cases. According to the March 2005 *ABA Washington Letter*, the legislation allows a class action to be filed in or removed to a federal court if the total amount in controversy is \$5 million or more and if any plaintiff class members and any defendants are citizens of different states.

The *Letter* also reported that Congress incorporated some of the principles recommended by the TIPS-led ABA Task Force on Class Actions. The final legislation permits a larger aggregate amount in controversy than that allowed by earlier versions of the bill. It also attempts to strike a balance between legitimate state court interests and federal court jurisdictional benefits by expanding the exception from federal court jurisdiction to include cases in which at least two-thirds of the class members and the primary defendants are citizens of the state where the action is brought.

It will take some time for federal courts to adapt to the new class action responsibilities. What remains to be seen is the anticipated impact on both defense and plaintiffs’ class action practitioners. Fewer firms may decide to concentrate in this area within the next few years, and the field may be left to only a handful of megadefense and plaintiffs’ class action specialists.

### Asbestos Legislation

Senator Arlen Specter (R-PA) is the new chair of the Senate Judiciary Committee and has worked closely with asbestos reform supporters to find a way to resolve the asbestos crisis. Sen. Specter’s efforts and the able assistance of Edward R. Becker, former chief judge of the U.S. Court of Appeals for the Third Circuit, have focused the legislative effort on a national trust fund to compensate asbestos victims.

Judge Becker also has been assigned the role of mediator and commissioned to work out among stakeholders an agreed approach to the trust fund concept. The diverse stakeholders include defendant manufacturers, labor representatives, insurance companies, and defense and plaintiffs’ counsel. Although agreement appears to have been reached on the basic elements of the trust fund, the real issue is “show me the money.” How much money will it take to resolve present and future claims—especially when no one is able to predict accurately the number of claims outstanding?

Although the Congress is looking to defendant manufacturers and their insurers to fund the program (estimated at \$140 billion plus), whether the necessary funding is available is highly uncertain. As Judge Becker pointed out recently, “I don’t think we are going to get labor and business to agree on a dollar amount.” (*Washington Post*, Jan. 12, 2005). Nor do I. I continue to maintain one party is missing at the bargaining table: the federal government. The government has contributed mightily to the asbestos problem, primarily by subjecting government employees to danger in both shipyards and other military facilities. A role for a federal contribution surely exists, through either direct appropriations to the trust fund or relaxed current government requirements affecting collateral sources, subrogation, and related matters impacting net recovery to claimants.

### Medical Liability Reform

All of us will long remember President Bush’s blistering attack on “trial lawyers” during the 2004 presidential campaign. We should also be aware of the great pressure on this administration to bring about a major reduction in the cost of medical malpractice insurance, evident in the well-staged visit by the President to Madison County, Illinois, in January 2005. How can any of us forget the imposing image of white-robed physicians crowding the stage in Collinsville?

The President is, I sense for the first time, willing to spend political capital on medical liability reform—and many House and Senate members are eager to help. For physicians and other health care providers, help has come in the form of legislation designed to cap medical malpractice awards. Opponents, primarily Democrats, argue that imposing caps on noneconomic damages is harmful to injured patients. Relief for health care providers is only one part of the overall effort to enact medical liability reform. An equally important part of the reform package provides, according to the January 10, 2005, issue of *CQ Weekly*, “significant legal protections for drug makers, medical device manufacturers and a host of other health providers.”

Again according to *CQ Weekly*, Republican leaders intend to introduce legislation similar to that passed by the House in 2003. This bill would cap damages for pain and suffering at \$250,000 in lawsuits filed against physicians, hospitals, HMOs, and nursing homes. The cap would also cover manufacturers and distributors of drugs, medical devices, and other products approved by the Federal Drug Administration. An added provision would prohibit punitive damages against drug and medical device manufacturers, although punitive damages against physicians might be awarded in extreme circumstances.

Despite the confidence of medical liability reform supporters following the November 2004 election, Washington insiders suggest that recent controversial events within the prescription drug industry have thrown a few obstacles in the path to legislative enactment. To be continued . . . ♦

Leo J. Jordan is chair of the TIPS Governmental Affairs Committee.



## Mark Your Calendar

### Insurance Litigation Seminar

June 9–10, 2005  
Chicago, IL  
(312-988-5708)

### ABA Annual Meeting

August 4–8, 2005  
Chicago, IL  
(312-988-5672)

### TIPS Section Fall Meeting

October 27–30, 2005  
San Francisco, CA  
(312-988-5672)

### Aviation Litigation

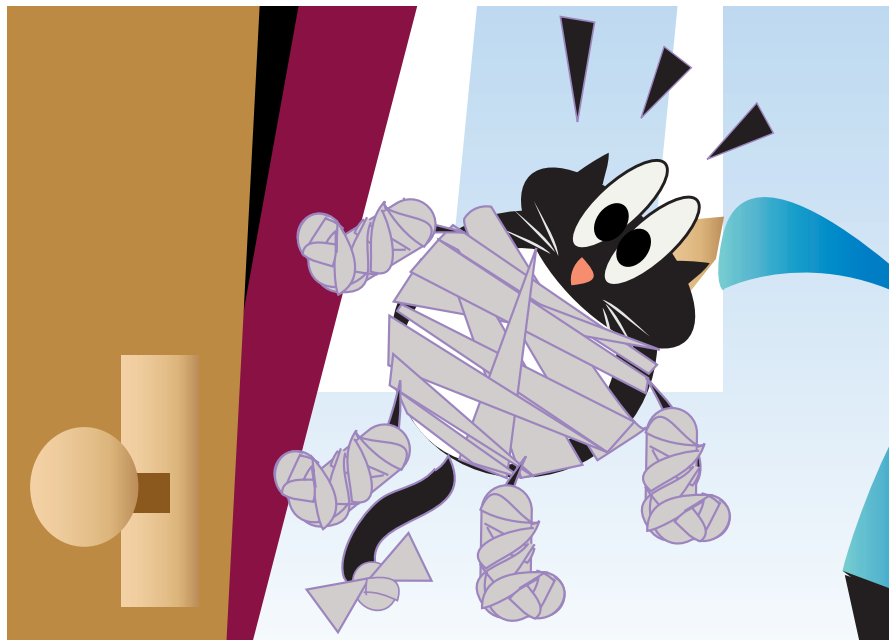
November 9–11, 2005  
Washington, D.C.  
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### Class Action Litigation

November 9–11, 2005  
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### U.S. Supreme Court Admissions Ceremony

December 10–12, 2005  
Washington, D.C.  
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we up to the challenge? This article explores these and other questions and problems for those who litigate or who will litigate veterinary malpractice cases.

#### The Medical Malpractice Model

The medical malpractice model begins with a predictable sequence of proofs: establish duty, breach of duty, proximate cause, and damages, utilizing an appropriate medical expert to establish the appropriate standard of care. The verdict should represent equitable compensation for the injured party and further the societal goal, or economic efficiency, of preventing future injuries to others.

#### Comparison with Veterinary Malpractice Model

Superficially, the models and tort objectives for veterinary and medical malpractice would be identical, although counsel in a veterinary malpractice case would employ a veterinary expert rather than a medical expert. See *McGee v. Smith*, 107 S.W.3d 725 (Tex. App. 2003). Exploring the detailed application of these models, however, and examining whether they achieve tort objectives reveals them to be divergent.

Consider economic damages. In medical malpractice, compensatory damages address monetary losses that range from lost wages and rehabilitation expenses to medical expenses, as well as other out-of-pocket losses resulting from the injury. See Raymond C. King, *Medical Malpractice and Tort Reform*, 6 TORTSOURCE, Spring 2004, at 1. In sharp contrast, economic damages for loss or injury to small animals usually are limited to their fair market value or replacement cost, although a few courts will allow for compensation for out-of-pocket investments in the animal. See *Hohenstein v. Dodds*, 10 N.W.2d 236 (Minn. 1943).

Some judgments reflect the “unique value” of a dog to the owner. In a recent case, a resident of Orange County, California, was awarded \$30,000 for his mixed breed dog and \$9,000 for veterinary bills. Laura Parker, *When pets die at the vet, grieving owners call lawyers*, USA TODAY, Mar. 15, 2005, at A.1. See also *McDonald v. Ohio State Univ. Veterinary Hosp.*, 644 N.E.2d 750, 752 (Ohio Ct. Cl. 1994) (owner received \$5,000 when his German Shepard was paralyzed due to “exceptional circumstances”). But see *Petco Animal Supplies, Inc., v. Schuster*, 144 S.W.3d 554, 563 (Tex. App. 2004) (owner not able to recover for “intrinsic value”).

Damage awards for noneconomic losses in medical malpractice cases may include amounts for pain and suffering, disfigurement, and loss of consortium, and can be expensive and unpredictable. In veterinary malpractice cases, compensation for noneconomic losses is rare. *Oberschlake v. Veterinary Assocs. Animal Hosp.* 785 N.E.2d 811 (Ohio Ct. App. 2003); *Daughen v. Fox, D.V.M.*, 539 A.2d 858 (Pa. Super. Ct. 1988). But see *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (Misc.2d 1979) (court found that a pet “occupies a special place somewhere in between a person and a piece of personal property”). Awards for noneconomic losses may grow, however, given that a number of states have been, or will be, considering new legislation. See Katie J. L. Scott, *Bailment and Veterinary Malpractice: Doctrinal Exclusivity, or Not?* 55 HASTINGS L.J. 1009 (2004).

Confusion abounds and stems partly from the concept that the human is the client and the animal patient is only property. The courts also are addressing whose suffering should be compensated: the animal’s or the human’s. See *Oberschlake, supra*, and

*Daughen, supra*. See also *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996). In legal, veterinary, and legislative arenas, other models of compensation are being discussed to bypass these hurdles, including one based upon “companionship loss.” See Green, *supra*.

#### Obstacles to the Claim

**Standards.** The first obstacle in a veterinary malpractice case is determining whether the state where the action is brought holds veterinarians to a professional standard commensurate with the standards in medical malpractice. *Downing v. Gully, D.V.M., P.C.* 915 S.W.2d 181 (Tex. App. 1996); *Ladnier v. Norwood, D.V.M.*, 781 F.2d 490 (5th Cir. 1986). An excellent starting point for research is [www.animallaw.info](http://www.animallaw.info), which lists malpractice cases (and many other animal law cases) from many states and well-researched articles by many authors.

**Basis of claim.** Do not assume you have a veterinary malpractice case. Common law evolved in an agrarian society where actions against veterinarians varied and included claims for conversion, breach of bailment, misrepresentation and fraud, strict products liability, and breach of contract.

Because societal values, including those held by judges, are changing, practicing attorneys must be sensitive to judicial views that common law standards are outmoded. A good example can be found in *Price v. Brown*, 680 A.2d 1149 (Pa. 1996), a case where an English bulldog died after it was not monitored properly following a surgical procedure to correct a prolapsed urethra. The appellate court found that professional negligence, rather than bailment theory, extends to veterinary medicine. But the dissenting judge advocated the bailment approach, in which “the personalty shall be redelivered to the person who delivered it in the same or an agreed to altered form.” *Id.* at 1155 (Castille, J., dissenting). See also *Williamson v. Prida*, 89 Cal. Rptr. 2d 868 (Ct. App. 1999) (court found that medical malpractice standards apply to veterinary malpractice).

**Statutes of Limitations.** The cause of action recognized by the courts, which can be far from certain in cases involving veterinarians (as illustrated in *Price, supra*), governs the statute of limitations. See also *Southall v. Gabel*, 277 N.E.2d 230 (Ohio Ct. App. 1971), where the court concluded, “Until the Supreme Court speaks, veterinarians are not included in the definition of Malpractice.” *Id.* at 299. Accordingly, any negligent act by a veterinarian was not subject to the one-year statute of limitations.

Determine whether a special malpractice period has been established by state statute. If the development of malpractice liability in the state is based on common law rather than statute, consider that a personal injury statute of limitations may apply. Also consider the possibility of a statute of limitations for injury to personal property. Counsel who believe a possible statute of limitations passed before litigation began would be wise to make a written disclosure to their client.

**Experts.** If the claim is a true veterinary malpractice case—where the negligence is related to the veterinarian’s professional services—an expert is needed unless the doctrine of *res ipsa loquitur* applies. The expert’s role, as in medical malpractice cases, is to establish the applicable professional standard. In the past, experts usually were classified as “in local” or from “similar communities”; current discussion has focused on whether, given modern technology and data distribution, standards should be based on the larger context of the veterinarian’s specialty. Both standards were codified in Louisiana, as discussed in *Ladnier, supra*. Unless a statute pertains, plaintiffs’ attorneys should assert a standard commensurate with available experts, and defense counsel should seek the greatest possible restrictions on the expert pool.

#### Conclusion

Problems with the application of the medical malpractice model to veterinary medicine invite both lawyers and judges to rethink how well our common law works in the context of changing societal values. Should we propose a legal standard based on a new legal term, “animals,” and then do the hard work of creating workable model laws?

A host of questions arises: Should we welcome the expansion of economic and noneconomic losses in animal cases to increase the awards to satisfy tort equity and economic efficiency objectives? Are we comfortable with terms like “sentimental property,” in which animals are considered analogous to wedding rings or family heirlooms? Or do we prefer newer property terminology like “companion constitutive chattel”? Do we treat our pet like a family member and bring our considerable pocketbooks into veterinary offices, to be told in the end that our animal was only property? The price is high: the American Medical Veterinary Association reports that Americans spent \$17 billion for veterinary care for cats and dogs in 2004. See U.S. PET OWNERSHIP AND DEMOGRAPHICS SOURCEBOOK 32, 35 (AVMA 2002).

There is a special place for TIPS in this discussion. Our Section has created an Animal Law Committee and given it the mandate to bring the best and brightest lawyers, with a variety of perspectives, to explore a possible paradigm shift in animal law. Veterinary malpractice is a good place to begin. ♦

Barbara J. Gislason is chair of the TIPS Animal Law Committee, chair of the Minnesota State Bar Association’s Animal Law Section, and adjunct professor in animal law at Hamline University School of Law in Minneapolis, Minnesota. She can be reached at [bjgislason@aol.com](mailto:bjgislason@aol.com).



# “When I Was a Young Lawyer”

**John Buckley,  
Partner, Ungaretti & Harris, Chicago, Illinois  
Chair, TIPS Trial Techniques Committee**

## What is your background, and what inspired you to become a lawyer?

My dad, James R. Buckley from Flint, Michigan, inspired me to become a lawyer. He went through 10 years of night school with four and then five children to obtain his law degree. I was 8 years old when he graduated. The entire family went to graduation, made lots of noise at the diploma presentation, and celebrated with chocolate shakes at Howard Johnson's. Dinner table conversation from that time on often revolved around the trial stories of our new trial lawyer.

## Where did you go to law school, and what did you do right after that?

I went to the University of Michigan Law School, graduating in 1985. I did a summer clerkship in Chicago, loved the city, and came back to work at a law firm in Chicago. I worked up medical malpractice cases for hospital and doctor defendants. I also took on pro bono criminal appeals and a criminal case in conjunction with the local public defender's office. My firm had little prior experience with pro bono work and figured that I had idle time on my hands. After approving my pro bono work, they increased my caseload.

## Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them/how have they helped you to become so successful?

I followed my dad's advice: be eager to learn, seek experience even if it requires working for free, and accept criticism constructively. I have sought the advice of leading lawyers regarding practice and trial technique. My pro bono experience has been invaluable, for its humbling effect and for the great practical experience in the way of trials and appellate arguments. I learned that some part of any criticism is usually true, no matter how it is delivered; the trick is to determine what part applies and then use the criticism constructively.

## Whom do you most admire?

My dad. He was a true champion of the underdog. He treated people based on their character, not their social status, and taught us to respect any person who is an honest and hard worker, no matter what their job. He had faith in his convictions and lived them every day. When he took a case, he refused to allow the sacrifice of time, the lure of money, or the obstacles of power to get in the way of representing his client. In the defining case of his career, he maintained a case through two appeals and ten years of litigation against a Fortune 50 defendant on behalf of a widow and her children. Given a low-ball offer shortly before trial, he told the defendant, quite honestly, that he had nothing to lose. Dad had mortgaged the house and emptied the bank accounts to pay the experts' fees and other out-of-pocket costs. And he was eating lunch at the local dining club because they billed monthly and he was out of cash. When the settlement offers went up, even over a million dollars, he held his ground until he got for the client what he had long before determined was fair. I miss him every day.

## What is your greatest source of professional pride?

I represent an indigent young man with no prior record who was sentenced to death on a blind guilty plea. There is no bigger bully in the world than government—especially when the government thinks it is right. I took the case in 1988. In 1993, the Illinois Supreme Court vacated the death sentence. In 1997, the trial judge questioned the reliability of the government's witnesses, found reasonable doubt about intentional murder charges, and decided that death or natural-life sentences were not appropriate. Despite those findings in our favor, he then sentenced my client to extended and consecutive terms totaling 100 years. In 2001, the Illinois Appellate Court vacated the consecutive application of the sentences, leaving my client with 70 years. The appellate court refused to vacate the extended sentence, even though the client was not admonished of its potential in this case and despite the fact that the statute requires

admonishments when an extended sentence is given based on a plea. We are now considering a habeas corpus petition. Sound familiar?

## What got you started with ABA involvement?

I went to a seminar in Monterey, California, in 2001 featuring David Ball. It was a great program, and the Trial Techniques Committee that put on the program intrigued me. So I called Neal Ellis and volunteered. The rest is history.

## What was the worst professional advice you ever received?

“If you aren't waking up in the middle of the night in a cold sweat worrying about your cases, you are not serious enough about your job.”

## What was the best professional advice you ever received?

“Be the first to arrive, the last to leave, and the one people turn to at crunch time.”

## What personality trait has served you best over the years?

A dogged determination to do my very best coupled with the fear that a case will turn on something I did or failed to do for the client. The determination comes from a firm belief, after careful consideration, that I am in the right. The fear forces me to reconsider my position continually; consider the counterpositions; and reject, modify, or reaffirm my belief. By the time the case comes to trial, I have considered every angle.

## What challenges you the most?

Dealing with unreasonable opposing counsel.

## What is the one thing you cannot stand (regarding the law/lawyers)?

Lawyers who use micrometers with the rules as they apply to you and disregard the rules as though the rules do not apply them. Law practice is not Burger King (Have it your way). The rules apply equally to both sides.

## What is your favorite type of legal work?

Trials. As my former partner Mike Coffield said, “It's the most fun you can have fully dressed.”

## What are your future ambitions?

Professionally, to maintain the respect and admiration of my clients and partners. If I can do that, I will never be short of work. Personally, to be the best husband, father, and family member I can be. If I can do that, I will keep the love necessary to sustain me.

## What can the ABA do to be a good home to young lawyers?

Provide opportunity for training and professional growth, guidelines for professional conduct, and a platform for developing a network of friends and referral sources throughout the country. ♦

## John Buckley's Advice for Young Lawyers:

- Take the high road and the high ground in all disputes.
- Reasoned responses trump emotional reactions.
- Make excellence a mandate.
- Anticipate actions, arguments, and agendas.
- Credibility is earned over time and lost in an instant; be the more reasonable lawyer always. ♦



John Buckley then and now.



## TIPS Will Cosponsor Litigation Teleconference

On August 17, 2005, at 1:00 p.m. EST the ABA Connection is presenting “Avoiding the Litigation Money Pit,” a one-hour CLE teleconference cosponsored by TIPS, the *ABA Journal*, Membership and Marketing, and the Center for Continuing Legal Education. Experts will evaluate cost-control tools and strategies, including litigation budgets, metrics for monitoring and measuring budget objectives, “decision trees” for cost estimating, and task-based billing. CLE credit has been applied for in states that accept the teleconference format. Call 800-285-2221 to register (\$9.75) or order a tape (\$50) beginning July 25, or register online by August 12 at [www.abanet.org/CLE/connection.html](http://www.abanet.org/CLE/connection.html). ♦



# Practice Management

Donna D. Lange

## Legal Malpractice Insurance Basics

In first consideration, every upstanding member of the bar might categorize malpractice or professional liability insurance on the might-be-nice-to-have-but-not-essential list. A word to the wise: think again. Carrying professional liability insurance is the responsible thing for all lawyers to do for their clients in the event the lawyer makes a mistake, and doing so also protects the financial assets of the firm.

Even if you believe your clients would never sue you, you should be covered for the costs of defending third-party claims. And although you may never intend to make a mistake, many non-meritorious or frivolous claims are filed for which defense can be costly and time consuming. You may also be liable for the acts of other attorneys and/or staff. Although most insurers exclude criminal and fraudulent acts, coverage is provided for innocent partners of the wrongdoers who may be subject to allegations of negligent supervision.

### Claims-Made Policies

**What is a claims-made policy?** Most legal malpractice insurance policies are “claims-made” policies. A claims-made policy differs from an occurrence policy in that it covers only claims that are made against the insured while the policy is in force. In some “claims made and reported” policies, the claim must be made during the policy period, and it must be reported to the insured during the policy period. A claims-made policy covers claims that arise out of incidents only if they occur subsequent to a prior acts date. The prior acts date may be the date of policy inception or may be retroactive to your first day of practice or to your first claims-made policy. An occurrence policy covers incidents that occur during the policy year regardless of when the actual claim is made against the

insured. A claims-made policy with full prior acts coverage covers you if a claim comes in during the policy year regardless of when the act giving rise to the claim occurred. For instance, if you wrote a will two years ago and made an error that is not discovered until the will is probated, you may rely on your current policy to respond to the claim instead of having to redetermine your coverage of two years ago.

**What is prior acts coverage?** Sometimes referred to as “nose” coverage or “career” coverage, prior acts coverage is decided upon at the time you purchase a professional liability policy. It determines how far back an insurance company will cover your acts for any future claims that arise while the policy is in force. The prior acts date should be the date you began continuous claims-made professional liability insurance coverage. If you have had gaps in coverage, an insurer may not agree to cover acts prior to such gaps. If no prior acts date is shown on a claims-made policy, you have “full prior acts” coverage.

**What does prior acts coverage cost?** Your first claims-made policy will start at a lower rate because there are no prior acts to cover. As time passes, your premium will rise to a “mature” level. If an attorney who is changing from one claims-made policy to another wants to cover future claims arising from previous legal work, he or she would purchase prior acts coverage at a more mature rate level, and a higher premium, than a first-year attorney.

### ERP Endorsement

**What happens when I cancel my claims-made policy?** If you cancel your professional liability policy, coverage ceases for all acts performed subsequent to the prior acts date indicated on your policy. You may need to purchase an extended reporting period (ERP) endorsement, sometimes referred to as “tail” coverage. This endorsement extends your coverage for a specified optional period. The ERP endorsement responds only to claims arising during the specified period from incidents that occurred between the prior acts date and the cancellation date. Insurers differ in the length of ERP endorsement offered and the decision whether to reinstate the limits of liability or reduce the limit to whatever you have left on the expiring policy. To determine the length of your ERP, you will have to analyze your practice type; the statute of limitations for your type of work; and, if you are in a discovery state, how long it takes to discover a loss and make a claim for a covered incident.

*continued inside on page 4*

Matthew B. Schiff is a partner in the firm of Schiff and Hubert in Chicago. He is the TIPS Distance Learning Coordinator and the TIPS Arrangements Chair for the 2005 ABA Annual Meeting.

theater. . . . See you in August! ❖  
Cubies and the Sox, cool jazz and hot blues, and our award-winning  
facular Ferns wheel and interactive Children's Museum. And I still haven't covered the  
and textiles. Or head straight to Navy Pier for fun for the entire family, including its spec-  
and our celebrated Shedd Aquarium. The Art Institute offers premier collections and  
exhibits ranging from Impressionist paintings to Asian and African art, medieval weapons,  
which includes the Adler Planetarium, the Field Museum (home of Sue, Chicago's T. rex),  
Crawling some culture along with your fun? Explore the city's famed museum campus,  
tradition. Visit Lou Malnati's for pizza—I recommend the deep-dish version.

Chicago is famous for its ethnic neighborhoods and cuisine. Sample Greek fare at  
Costas, Mexican specialties at Frontera Grill, or delicious German food at the Berghoff.  
Lunch at the Walnut Room in the flagship Marshall Field's store on State Street is a Chicago  
Signature Room. Everest atop the Stock Exchange, or Cite near Navy Pier.  
ing, enjoy Nomi's "nouvelle" fare; or dine with a view at the John Hancock Buildings

Architecture Foundations tour is marvelous for children as well as adults.  
When all this sightseeing (and shopping) makes you hungry, Chicago will not disap-  
point. I personally recommend Charlie Trotter's and Tru; both are quite special. Excellent  
steak houses include Mortons and Gibsons. For seafood, try Catch 35; for outdoor din-

Chicago is easy to explore, but bring comfortable shoes. TIPS will offer a docent-led  
walking tour that will highlight historic LaSalle Street, the legal and banking heart of the  
city, to demonstrate how Chicago successfully combines architectural preservation and  
innovation. You can also tour the city by double-decker bus and riverboat—the Chicago

Our Leadership Dinner will take place at the Chicago Opera House, ranked among  
the world's most beautiful (dress: semi-formal). We will dine in a gilded hall decorated  
with magnificent mosaics and chandeliers and will be treated to a very special behind-  
the-scenes tour that will include the wardrobe department, the wig room, the armory  
room, and the Main Stage.

The TIPS Welcome Reception (dress: business casual), co-hosted with the Section of  
Litigation, will be held in Chicago's newest outdoor showplace, Millennium Park. We will  
dine next to Anish Kapoor's 110-ton, polished stainless steel sculpture affectionately nick-  
named "the Bean." Nearby is the Jay Pritzker Pavilion, a band shell of magnificent pro-  
portions; fixed seating and the adjacent lawn area accommodate 11,000. The innovative  
Crown Fountain, two giant LED screens perched atop 50-foot towers, projects changing  
video portraits as water cascades over them.

Chicago is "my kind of town"; it will become yours, too. Whether this is your first visit  
or your 10th, this vibrant, beautiful, historic city is sure to enchant. World-class muse-  
ums, renowned architecture, fabulous food, a Magnificent Mile of shopping, and beauti-  
ful Lake Michigan: all are within walking distance of the TIPS headquarters hotel, the  
Sheraton. Come and enjoy this friendly city, which offers the charm of the Midwest com-  
bined with sparkling sophistication.

Join Us for the ABA Annual Meeting  
August 4-8, 2005

Matthew B. Schiff

"My Chicago"



A Publication of the Tort Trial and Insurance Practice Section  
American Bar Association  
321 N. Clark Street, Chicago, IL 60610  
Vol. 7, No. 3 Spring 2005

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