

Your Court, Mr. Holcomb

Dr. Henry Greenspan

Re: “Jim Holcomb: Whitmer’s effort to change state’s drug law misguised,” Lansing State Journal, May 19, 2009.*

Jim Holcomb hates lying, and so do I. He also apparently hates Senator Gretchen Whitmer whom he alternately describes as a schemer and a dupe. Mr. Holcomb also hates trial lawyers and anyone else who wants to rescind Michigan’s odious drug industry immunity law. That would be the majority of the Michigan House. And, according to polls, at least 70% of Michigan citizens. Surely, they are not all trial lawyers or have ties to Senator Whitmer.

I have no such ties and, unlike Mr. Holcomb, I am not a lawyer. But I am against our drug company shield law. And I also detest not telling the truth. So here are some truths.

1. Mr. Holcomb writes that repealing the immunity law threatens doctors and pharmacists. But the immunity law has nothing whatsoever to do with doctors and pharmacists. It only concerns drug companies.
2. Mr. Holcomb writes that repealing immunity in Michigan threatens those drug companies. But since they can be sued by the citizens of every other state—not to mention by people in countries around the globe—they are protected not a whit by taking away the rights of Michiganders.
3. Mr. Holcomb writes that “ten other states have similar laws.” No, they do not. Michigan remains the only state that completely shields drug companies from liability. Even Texas, which has a law closest to Michigan’s, contains exceptions absent in our law. The truth is that Michigan is on its own legal planet.
4. Mr. Holcomb writes that Michigan citizens can somehow “appeal to FDA” if they wish a day in court. This is the kind of recurring hokum for which we should have particular contempt. It is a notion that has been explicitly rejected by the United States. Solicitor General, the Department of Justice, the Department of Health and Human Services, and the FDA itself. Mr. Holcomb surely knows that. He’s a lawyer. Even I know it. And I am not a lawyer.
5. As a lawyer, he would also know that the doctrine underlying our immunity law—that FDA-approval and product liability are incompatible—was recently rejected by the entire Supreme Court. All nine Justices. Thus, even the dissent in the recent Levine case, which turned on this question, asserted: “To be sure, state tort suits can peacefully coexist with the FDA’s labeling regime, and they have done so for decades.”

That is Justice Alito writing for himself, Justice Scalia, and Chief Justice Roberts. The other six Justices affirmed what the FDA’s own Chief Counsel said years earlier: That FDA product approval and state tort liability each provide “a significant, yet distinct, layer of consumer protection.” Michigan’s drug industry immunity simply takes one of those layers and throws it away.

Mr. Holcomb and his allies like to call our drug industry immunity law an “FDA defense law.” Clearly, misrepresenting the FDA is not a useful way to defend it.

6. Mr. Holcomb makes much of the fact that Merck decided to include a certain number of Michigan plaintiffs in the Vioxx settlement. If you were Merck, would you want it reported, in the wake of the largest drug disaster in history, “The company finally offered a settlement...except to anyone from Michigan”? The reality is that these Michigan plaintiffs are a drop in the bucket. The much larger reality is that Michigan citizens have been locked out of court for thirteen years. That is the truth. And every Michigan lawyer, including Mr. Holcomb, knows it.

Still, there is one thing that I would say in Mr. Holcomb’s favor. He is at least willing to open the issue to public debate. His allies in the State Senate are not interested in any debate whatsoever on drug industry immunity. Majority Leader Bishop recently announced the Senate would not consider it. There would be no hearings. There would be no vote. There would be nothing at all. Except killing the bill that was for a second time passed by the Michigan House.

So, indeed, let us move beyond point-counterpoint on editorial pages. I invite Mr. Holcomb and the Senators who agree with him to debate this issue face-to-face. Indeed, let’s have several debates—in every district north and south, east and west, represented by a Senator who favors drug industry immunity.

Michigan citizens remain shut out of court. But the ball is now in Mr. Holcomb’s court.

What do you say, Mr. Holcomb? Are you and the Senators who support drug industry immunity willing to respond to Michigan citizens face-to-face, in public debate

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*May 19, 2009

Jim Holcomb: Whitmer's effort to change state's drug law misguided

Jobs are risked in quest to aid trial lawyers

It seems Sen. Gretchen Whitmer has come down with a serious case of hyperbole. But if she and her powerful lobby of personal injury lawyers have their way, it's the rest of us in Michigan who will find ourselves in need of treatment.

In the senator's quest to raise her own profile, Whitmer is willing to jeopardize an economic engine for Michigan that pours nearly \$10 billion into our badly beaten economy. She's willing to sell out the practices of Michigan doctors and the stores of local pharmacists, putting more of our neighborhood cornerstones out of business. This is so her personal injury lawyer friends can file frivolous lawsuits against medical care providers who follow U.S. Food and Drug Administration rules.

What Sen. Whitmer is not willing to do is tell you the truth.

The senator's proposal to repeal Michigan's FDA defense law doesn't protect the health of Michigan families. What it does is discourage doctors and pharmacists who play by the rules - who face a new onslaught of lawsuits under Whitmer's proposal - from prescribing potentially life-saving medicine to their patients.

And it discourages scientists in places like East Lansing, Ann Arbor, Detroit, Kalamazoo and Grand Rapids from starting companies in Michigan based on discoveries that could change our lives for the better. These are the scientists who, despite a recession, have been hiring workers to battle diseases like cancer, diabetes and heart disease. Theirs and other pharmaceutical businesses accounted for nearly 100,000 Michigan jobs, \$9.34 billion in revenue and \$463 million in state taxes in 2006, according to a University of Michigan study released earlier this year. This is a sector Gov. Granholm and others have targeted to help Michigan grow.

Whitmer would have you believe these people - whose work saves millions of lives - are villains. They are not. And Michigan is not alone in seeking to protect its doctors, pharmacists and medicine makers from unjustified attacks.

Ten other states have similar laws to reign in costly and frivolous drug lawsuits and ensure important medications remain available to patients. Legislatures in Georgia and Oklahoma are looking at their own versions. These states, like Michigan, are balancing a need to keep medical care accessible and advance new medical technologies with a system to allow those few who may be harmed by faulty treatments to seek recourse.

Despite what Whitmer claims, existing law does not stop Michigan residents from appealing to the FDA or from suing drug makers.

Take, for example, the case of Leslie Richter, whom Whitmer frequently tows with her before media cameras. Richter and nearly 1,400 Michigan residents have settlements pending in a New Jersey court in a major industry lawsuit.

That hardly sounds like a blanket ban against legal action.

Sen. Whitmer has been blinded by a powerful lobby in her misguided quest to repeal Michigan's FDA defense law.

Her inflammatory attack on Michigan's medical care community may sound like good medicine to trial lawyers, but it isn't healthy for the rest of us.

Jim Holcomb is vice president of business advocacy and general counsel for the Michigan Chamber of Commerce.