MARSHALL DENNEHEY
WARNER COLEMAN & GOGGIN

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Defense Digest

On The Pulse...

MY OLD KENTUCKY HOME

By Timothy B. Schenkel, Esq.*

Timothy B. Schenkel

To some, the word "Kentucky" generates thoughts of rolling hills, horse racing, coal mines and college basketball. To others, the Commonwealth of Kentucky means basic reparation benefits, third-party bad faith and auto/farm equipment accidents.

Bordered by seven states, Kentucky is made up of 120 counties—the third most of any state. Our Cincinnati office is strategically located to easily handle matters in the northern Kentucky counties of Boone, Kenton and Campbell, and our practice extends to the cities of Lexington and Louisville (as well as the areas along I-75, I-71 and I-64 that connect these cities/areas). With that said, the talents of our Cincinnati attorneys have lead them to represent insurance carriers, their insureds and corporate clients from as far east as the West Virginia border and south to the Tennessee State line. While traveling is sometimes necessary, the electronic age allows us to provide superior services to our clients throughout Kentucky at a reasonable cost.

As a life-long resident of Cincinnati, Ohio, I have focused my practice on handling litigation matters throughout the Commonwealth of Kentucky since I was first licensed to practice law in 1992. Since handling my first jury trial in Campbell County, Kentucky nearly two months after becoming licensed to do so, I have been privileged to handle matters in essentially every county in the Commonwealth. Whether in the field of premises liability, product liability, trucking and transportation, automobile liability, construction and/or business litigation claims, I have defended individuals, insurance companies and major corporations in complex litigation within these practice areas. In addition to being consulted for pre-litigation assessments, I am available to handle all aspects of litigation from discovery, to trial and through the appellate process in all of the state courts throughout Kentucky and in the United States District Court for the Eastern District of Kentucky.

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STEADY GUIDANCE IN A CHANGING LANDSCAPE: A PROFILE OF CONSUMER FINANCIAL SERVICES LITIGATION AND COMPLIANCE PRACTICE GROUP

By Joseph A. Hess, Esq.*

Joseph A. Hess

For more than fifteen years, Marshall Dennehey's Consumer Financial Services Litigation & Compliance Practice Group has provided value-driven guidance in an ever-evolving area of the law. We focus on defending individual and class action lawsuits arising from claims brought under the Fair Credit Reporting Act (FCRA), the Fair Debt Collection Practices Act (FDCPA), the Telephone Consumer Protection Act (TCPA), the Equal Credit Opportunity Act (ECOA), the Electronic Fund Transfer Act (EFTA) and state consumer statutes.

A FOCUS ON LITIGATION

Grounded in Marshall Dennehey's storied civil defense background and litigation experience, the Consumer Financial Services Litigation & Compliance Practice Group represents financial institutions, creditors, debt collectors, debt servicers, debt buyers, auto finance companies, student loan lenders and servicers, telecommunication providers, collection attorneys, mortgage lenders and credit reporting agencies from claims under myriad consumer statutes. With attorneys experienced in motion practice, trial work, appellate advocacy and class action matters, this group is well positioned to represent our clients in every phase of litigation.

We represent our clients in state and federal actions brought by increasingly sophisticated consumer plaintiffs throughout Pennsylvania, New Jersey, New York, Delaware, Maryland, Florida and the District of Columbia. With more than 500 lawyers working in more than 20 offices throughout the East Coast, we possess a geographic reach and a valuable support network designed to efficiently assist with complex and unique consumer financial services litigation and compliance needs.

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A MESSAGE from the EXECUTIVE COMMITTEE

By G. Mark Thompson, Esq.
Member, Executive Committee

"Changes in latitude
Changes in attitude
Nothing remains quite the same"
– Jimmy Buffett

It is a Sunday in mid-summer as I begin writing this message. My wife is in Florida for the week visiting old friends and checking on our two sons in college. After church this morning, I decided if there was work to be done (and there always is) I'd work aboard my boat while anchored off the coast of Ocean City, New Jersey.

Boating reminds me of home. I spent 52 years in Florida before defying conventional wisdom and moving north in my later years. It is amazing how our life has changed, but Stacey and I have come to embrace Philadelphia and fallen in love with the Jersey shore.

Today the shore is loving me back. The sun is bright and warm. The seas are calm, and as I unwrap a sandwich from Wawa, it's impossible not to smile as I think of the person most responsible for my change in latitude.

That person is Tom Brophy, and this January I'll undertake the enormous task of succeeding him as President and CEO of Marshall Dennehey.

As I watch a boat rigged for parasailing pull a laughing family high into the air, it strikes me as the perfect metaphor to describe the way Tom lives his life. He helps people rise.

He chose at a young age to become a teacher and never abandoned the calling. Tom simply moved his classroom from schoolhouse to law firm. Within the annals of Marshall Dennehey are hundreds of current and former attorneys, paralegals, support staff and administrators who credit their professional ascent, economic security and job satisfaction to the opportunities, encouragement and coaching they received from Tom.

Count me among them.

When I first joined the firm in 2001,Tom was the only person I knew. I had met him through a network of outside counsel Anheuser-Busch would bring together for Best Practices meetings. I approached him at one of those meetings in San Diego concerning rumors his firm was looking to move into Florida. Tom, being himself, invited me for a drink, and during the course of that evening, the Orlando office of Marshall Dennehey was conceived over a couple of Budweisers.

For the next 13 years, Tom presided over a group of wonderful mentors who invested in me and guided my career. I was a lateral hire, working out of an office a thousand miles from headquarters, but never disadvantaged.

Marshall Dennehey provided me access to outstanding clients and all the resources with which to defend those clients in high-profile, interesting and complex litigation. I went from managing a single regional office to providing regional management to all four of our Florida offices. I began working with each of the firm's practice groups, all its administrative departments and on firmwide initiatives, like developing our lateral integration program and determining associate compensation. I got to know lawyers and staff, and in 2008, my fellow shareholders elected me to serve on the firm's nine-member Board of Directors. As a Board member, surrounded by wise counsel, I spent years studying the issues facing the firm and played a role in addressing many of them.

You might think, given all that experience, I was qualified to take the helm. I wasn't even close.

In 2014, I ascended to the three-person Executive Committee, responsible for the day-to-day management and business strategy of our 500-lawyer firm. The experience was not unlike passing through the inlet this morning into the open sea. The scope of responsibility and breadth of issues I now confronted were vast.

It was Tom, more than anyone else, who showed me the ropes. He put me out front as we acquired a 30-lawyer firm and doubled our size in New York. He handed over to me his former role as relationship partner for one of our largest clients. He placed in me responsibility for the management of our 19 regional offices and entrusted in me the task of restructuring, negotiating and each year procuring the firm's health plan. Tom taught me how to represent the firm at audits, develop alternative fee agreements and work with clients on an institutional level to reduce exceptions to our bills. He allowed me to reorganize components of our billing, accounting and finance departments, and time and again, he helped me navigate the multi-dimensional challenges that confront a firm our size.

This past year, with the transition growing closer, Tom intensified what was already rigorous training. Our meetings became more frequent. He stretched me, challenged me, rebuked me and at times annoyed the heck out of me. I say that with a smile because he's the greatest coach anyone could ask for. I love the guy, cherish his friendship and can never repay all he has done for me.

I expect almost everyone at Marshall Dennehey and a number of our clients feel the same.

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MY OLD KENTUCKY HOME

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My emphasis on handling litigation in Kentucky was no accident. After graduating from the Salmon P. Chase College of Law on the campus of Northern Kentucky University in 1992, I took the Kentucky bar after accepting a position with a general litigation firm in northern Kentucky. Since that time, I have used my talents and experience with the Kentucky courts to begin and expand the geographic reach of my former defense litigation firm, as well as the reach of Marshall Dennehey Warner Coleman & Goggin, into the Commonwealth of Kentucky. I am often to be found in a deposition, hearing or mediation anywhere from Maysville to Lexington to Louisville to Russell County, Kentucky, on a weekly basis, in addition to my practice in southwest Ohio.

If you have any specific questions concerning the nuances of the law in the Commonwealth of Kentucky, or would like additional information concerning the services that Marshall Dennehey Warner Coleman & Goggin can provide you, please contact me at tbschenkel@mdwcg.com or (513) 372-6812. ■

STEADY GUIDANCE IN A CHANGING LANDSCAPE

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We aggressively defend claims in litigation, but we understand the value of cost-effective, thoughtful and practical representation of our clients. We begin by communicating with you openly and frankly to identify your particular goals and expectations with respect to a given matter. Equipped with our extensive knowledge of the law, our primary focus is to help you understand the potential exposure in each unique situation and to tailor a defense strategy to the needs of the particular case.

Among the many services our group provides are:

- Defense of individual and class action lawsuits arising from claims under the FCRA, FDCPA, TCPA, ECOA, EFTA and state consumer statutes;
- Representation in administrative investigations, as well as compliance and enforcement matters involving state agencies and other regulatory authorities; and
- Advice to clients on compliance issues attending the consumer finance marketplace.

A VALUABLE SOURCE FOR COMPLIANCE

A main focus of Marshall Dennehey's Consumer Financial Services Litigation & Compliance Practice Group is advising clients on compliance matters in order to minimize lawsuits and to mitigate loss. This includes advising clients on managing compliance with respect to the Consumer Financial Protection Bureau (CFPB) and its regulations.

Attorneys in this practice group have represented and counseled clients in this area since 2001. This history of committed and successful practice allows us to guide clients in a way that only experienced counselors can. Our knowledge of the evolution of the consumer financial industry, combined with our understanding of the emerging trends in case law, litigation and defense of relevant claims, allows us to anticipate issues and provide value-based advice on technical compliance issues. Our practice group is available to review letters, recordings and recovery practices, and we are also available to give presentations or to conduct training seminars.

A CHANGING LANDSCAPE

The last decade has seen unprecedented changes in the area of consumer financial protection law, and the future is uncertain. For decades, the ever-evolving construction of such laws as the FDCPA, TCPA, ECOA and EFTA have guided the industry and the players within it. In the wake of the financial crisis of 2007-2008, Congress established the CFPB. Prior to its creation, the authority for a multitude of rules and orders came from consumer protection statutes that were divided among seven federal agencies. Under its broad discretion, the CFPB is tasked with deterring risk, protecting consumers from "abusive" practices, conducting investigations, enforcing the consumer financial laws, and interpreting and creating new regulation. Armed with good intentions, the CFPB has, nonetheless, created a shifting regulatory atmosphere not easily navigated by collection professionals.

Presently, the future of the industry is in flux. Recently, the constitutionality of the CFPB has been challenged, and potential reform to the CFPB is imminent. Similarly, inconsistent circuit court and district court interpretations of the relevant laws and regulations has made compliance difficult for collections professionals, especially those operating in multiple jurisdictions. However, our thoughtful representation and guidance can help you mitigate future potential losses and help you stay compliant with, and knowledgeable with respect to, the shifting law in this field.

Our attorneys maintain active memberships in industry-leading organizations and keep abreast of the evolving regulatory environment impacting our clients. While federal and state consumer laws are fluid, you can feel confident that Marshall Dennehey's Consumer Financial Services Litigation & Compliance Practice Group is on the cutting edge of emerging trends in case law, litigation and defense of claims. Our practice group is available to assist you with your litigation and compliance requirements. We are also available to give presentations or to conduct training seminars. ■

Federal—Class Action

NO-INJURY CLASS ACTION PLAINTIFFS SUFFER CONCRETE HARM IN SUPREME COURT'S DECISION ON THE REQUIREMENTS FOR ARTICLE III STANDING

By David J. Oberly, Esq.*

KEY POINTS:

- Mere violation of statutory right insufficient to confer Article III standing.
- For standing under Article III, injuries must be "concrete" or "real."

David J. Oberly

WHY IT MATTERS

In *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), the United States Supreme Court held that a mere violation of a statutory right—without more—is insufficient to confer Article III standing because such "injuries" do not satisfy the injury-in-fact element of standing, which requires the harm to be "concrete," or "real, and not abstract." The decision is a significant win for companies and corporate defendants who have faced a significant threat of class action litigation that has proliferated in recent years. Conversely, *Spokeo* dealt a noteworthy blow to statutory-damages, no injury class action plaintiffs, as these claimants must now demonstrate a "concrete" injury in the form of harm that "actually exists" above and beyond a mere statutory "injury-in-law" to establish a sufficient injury-in-fact to confer Article III standing.

FACTUAL & PROCEDURAL BACKGROUND

Spokeo, a consumer reporting agency, runs a "people search engine" that searches a wide spectrum of databases to gather and provide personal information about individuals to a variety of users. Upon finding that Spokeo provided the world with inaccurate information about him, Thomas Robins filed a federal class action lawsuit against Spokeo, claiming the company willfully failed to comply with the requirements of the Fair Credit Reporting Act, which mandates that consumer reporting agencies adhere to reasonable procedures to ensure maximum possible accuracy of consumer reports.

THE LAW

Standing stems from Article III of the United States Constitution, which limits the powers of the federal judiciary to the resolution of "cases and controversies." To demonstrate standing in federal court, a plaintiff must satisfy a three-part test and is required to show: (1) an injury-in-fact; (2) sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. Most importantly, a plaintiff must establish the injury-in-fact element of standing by showing an injury that is concrete and particularized and actual or imminent, not conjectural or hypothetical.

UNITED STATES SUPREME COURT DECISION

Before reaching the Supreme Court, the Ninth Circuit had held that Robins alleged a sufficient injury-in-fact as required by Article III based on the combination of Robins' allegation that "Spokeo violated his statutory rights" and the fact that Robins' "personal interests in the handling of his credit information are *individualized*." Spokeo appealed, and the Supreme Court granted certiorari on the following question:

> Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute?

The Court held that for a plaintiff to establish a sufficient injury-in-fact to fulfill Article III's standing requirement, the plaintiff must plead an injury that is both concrete *and* particularized. Thus, the Court found that the Ninth Circuit's analysis of the issue of injury-in-fact was flawed because it only went halfway, in that the appellate court focused exclusively on particularization, but completely disregarded concreteness.

In rendering its decision, the Court provided litigants on both sides of the class action table guidance as to what constitutes a "concrete" injury. For an injury to be "concrete," "it must actually exist," that is, be "real" and not "abstract." Importantly, the Court noted that while intangible harm may be sufficiently concrete where it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit" at common law, a bare procedural violation, "divorced from any concrete harm," is inadequate as a matter of law to confer Article III standing. Rather, Article III requires concrete harm "even in the context of a statutory violation," mandating that plaintiffs plead concrete harm apart from a "bare procedural violation."

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Federal—Consumer Financial Services Litigation and Compliance

PLAINTIFF'S UNSUPPORTED RECOLLECTION CAN MEAN NO GENUINE ISSUE OF MATERIAL FACT EXISTS IN FDCPA CLAIM

By Michael E. Fitzgerald, Esq.*

KEY POINTS:

- FDCPA makes it unlawful to harass, oppress or abuse a person in connection with collection of a debt.
- Plaintiff's unsupported recollections of quantity and frequency of calls are insufficient to salvage case from summary judgment in face of contemporaneous documentary evidence from cell carrier.

Michael E. Fitzgerald

District Courts in the Third Circuit have determined that no genuine issue of material fact exists where a plaintiff's unsupported recollections differ from the evidence presented by the defendant. Self-serving testimony cannot salvage a plaintiff's case on summary judgment in a case arising under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., (FDCPA).

In *Chisholm v. AFNI*, 2016 U.S. Dist. LEXIS 162303 (D.N.J. Nov. 22, 2016), the plaintiff brought an action against AFNI, alleging violations of FDCPA arising from the volume and frequency of telephone calls placed in connection with AFNI's efforts to collect a consumer debt. Chisholm was unable to present any evidence that disputed AFNI's evidence. AFNI's account notes showed 18 calls to the plaintiff's cell phone over a two-week period. AFNI also presented evidence that the plaintiff provided his cell phone number to the original creditor and that AFNI ceased communication upon request. AFNI's evidence was corroborated by the plaintiff's cell phone records produced by his carrier. Despite this, the plaintiff's recollection differed, maintaining that he received calls from AFNI "that were not recorded in its records." The court granted summary judgment for AFNI on the FDCPA claims, explaining that "[t]he standard for deciding when conduct is harassing, oppressive, or abusive is an objective one, turning on the 'natural consequences' of a debt collector's conduct" and not on how the collector's actions made the consumer feel. In drawing this conclusion, the court recognized that self-serving testimony does not create a question of fact, precluding summary judgment.

In *Turner v. McCarthy*, *Burgess & Wolf*, 2016 U.S. Dist. LEXIS 179295 (W.D. Pa. Dec. 27, 2016), the defendant prevailed on a motion for summary judgment. Turner argued that MBW violated the FDCPA by contacting her continuously and repeatedly, on an average of four to five times a day, from December 2014 through May 2015. She also alleged that MBW called her after she made a cease request and that she disputed the debt. Finally, she alleged that she received threats of wage garnishment and legal action.

Turner was unable to present any evidence to create a genuine issue of material fact. The account was not placed with MBW until May of 2015. MBW's records showed only that four calls were made to the plaintiff. The plaintiff did not know the employer of the two individuals with whom she spoke, and she was unable to secure her cell phone records. She testified that a male collector threatened to garnish her wages, but she did not know who his employer was. MBW produced an affidavit demonstrating that no male collector called her. The court, citing *Chisholm v. AFNI*, held, "Plaintiff's vague post-hoc recollections raise only a metaphysical doubt as to the number of calls placed by defendants, which is simply not enough to create a genuine issue of material fact."

Finally, *Reed v. IC Sys*., 2017 U.S. Dist. LEXIS 3239 (W.D. Pa. Jan. 10, 2017) drew the same conclusion. The plaintiff brought an action similar to the *Turner* facts. The defendant's account notes reflected that it attempted to call the plaintiff's cell phone 125 times over a span of 135 days, with multiple calls on 38 of those days. Neither side produced evidence that the defendant communicated directly with the plaintiff. On a motion for summary judgment, the court noted that, although the volume of calls seemed relatively high, the plaintiff failed to produce evidence of the defendant's egregious conduct, including evidence that she disputed the debt or that she made a request to cease contact. Accordingly, the court determined that, because the plaintiff failed to produce such evidence, she failed "[t]o raise a triable issue of fact regarding defendant's intent to 'annoy, abuse, or harass.'" In other words, aside from the plaintiff's self-serving testimony, there was no event that triggered liability under Sections 1692d and 1692d(5) of the FDCPA and that call volume alone was not sufficient to overcome the motion for summary judgment. ■

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Federal—Employment Law

BENDING THE RULES: THE EEOC'S TAKE ON LEAVE AS A REASONABLE ACCOMMODATION

By David J. Oberly, Esq.*

KEY POINTS:

- Even when a worker has exhausted all of his or her leave under the FMLA, the worker may still be entitled to leave as an accommodation under the ADA.
- Employers should avoid adherence to any type of "one-size-fits-all" leave or reasonable accommodation policies.
- While the EEOC's position on leave may seem boundless, employers are not required to allow indefinite leaves of absence, and employers can obtain durational assurances from employees that they will be able to perform their job duties in the "near future."

David J. Oberly

With disability claims having reached an all-time high in recent years, the EEOC's recently released resource document on the issue of leave as a reasonable accommodation under the Americans with Disabilities Act—which is intended to provide information to employers regarding when and how leave must be granted for reasons related to a worker's disability in order to promote voluntary compliance with the ADA—is a noteworthy guide for employers looking to steer clear of this burgeoning type of discrimination claim. Employers are well advised to review the resource document in detail and evaluate the impact of the new rules on existing company policies and procedures, as the guidance provides critical insights on employers' leave obligations under the ADA and affords a glimpse into the EEOC's current interpretation of the ADA as it relates to leave as a reasonable accommodation.

In particular, there are several key takeaways for employers in connection with the EEOC's newest articulation of its position on employee leave. First, employers must ensure that they are cognizant of the intricate interplay between the FLMA and ADA when evaluating leave requests. While the FMLA imposes certain requirements that must be satisfied in order to be entitled to leave, the ADA maintains no similar eligibility requirements. As a result, when an employee requests leave for a medical-related issue, the company must evaluate the employee's right to leave under both the ADA and FMLA, providing the employee with the "greater right" applicable under the circumstances. For example, even if a worker has exhausted all of his or her allotted FMLA leave, he or she may still be entitled to additional leave in the event that it would constitute a disability-related reasonable accommodation and not an undue hardship on the employer.

Second, while the EEOC's leave guidance provides wide protections to employees attempting to utilize leave as an ADA reasonable accommodation, the EEOC did lay out some outer limits for an employer's leave obligations. In this respect, employers are not required to allow indefinite leaves of absence as indefinite leave has been delineated as constituting a *per se* undue hardship by the EEOC. Thus, employees must provide an estimated return-to-work date when the employee can be expected to return to the jobsite. In addition, employers can seek durational assurances from the employee that he or she will be able to perform his or her essential job duties in the "near future."

Third, employers should ensure that all leave requests are analyzed by engaging in the interactive process with employees. Even when workers are not eligible for medical leave under other policies or law, employers are nonetheless still required to engage in the interactive process to ascertain whether leave can be provided as a reasonable accommodation without causing an undue hardship.

Fourth, employers should steer clear of any one-size-fits-all policies pertaining to leave and reasonable accommodations. In this regard, employers should take a close look at any existing "automatic termination" policies to ensure they do not run afoul of the new EEOC guidelines. While this type of policy is not automatically unlawful across the board, many policies of this type may now be unlawful under the EEOC's current position regarding leave. Moreover, when an employee is nearing the end of a leave period, the employer should notify the employee that if he or she feels that additional unpaid leave is needed, the employee should request such additional leave as soon as possible in order to allow the company to consider whether it can

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Federal—Product Liability

BACK TO THE FUTURE: RECENT SUPREME COURT DECISIONS REAFFIRM STANDARDS FOR EXERCISING GENERAL AND PERSONAL JURISDICTION

By Robert W. Stanko, Esq.*

KEY POINTS:

- Challenges to jurisdiction present difficulties for large, corporate defendants.
- U.S. Supreme Court has recently provided guidance relating to standards for exercising general and specific personal jurisdiction.

Robert W. Stanko

The geographical footprint of a large, corporate defendant can often undermine a challenge to jurisdiction. Fortunately, however, the United States Supreme Court has in the last several years issued a series of decisions that have resurrected and reaffirmed the previously eroding standards for exercising general and specific personal jurisdiction.

The trend began in early 2014 in the form of *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), where the Supreme Court clarified the standard relative to the exercise of general jurisdiction. The *Daimler* decision reaffirmed that the traditional paradigms of general jurisdiction over a foreign corporation are the place of incorporation and principal place of business, and the Court made clear that general jurisdiction may only be asserted "[w]hen their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state." This determination requires a focus on the "[c]orporation's activities in their entirety, nationwide and worldwide." The Court cautioned that without a detailed analysis of such considerations, corporations operating on a national or international scale would theoretically be subject to general jurisdiction in all fifty states, but soundly rejected such an anomaly.

Shortly thereafter, the Court issued its decision in *Walden v. Fiore*, 134 S.Ct. 1115 (2014) where it set forth the standard necessary to give rise to specific jurisdiction. While the conduct of a corporate defendant was not at issue in *Walden*, the Court's analysis applies just the same. For instance, the Court reiterated that specific jurisdiction "[f]ocuses on the relationship among the defendant, the forum, and the litigation." Indeed, "[t]he defendant's suit-related conduct must create a substantial connection with the forum State."

The *Daimler* and *Walden* decisions provided a fresh framework to attack jurisdiction on behalf of a large corporate defendant. For instance, we recently secured dismissal of a claim based almost entirely on *Daimler* and *Walden*.

The *DeLuca v. Hyatt Hotels Corporation, et al*. case was filed in Pennsylvania state court against Hyatt Hotels Corporation and one of its subsidiaries relative to an incident that occurred at a Hyatt-branded hotel in Aruba. After removing the case to the District Court for the Eastern District of Pennsylvania based on diversity, we moved to dismiss on the basis that the court lacked jurisdiction over a Pennsylvania citizen's claims against a company headquartered in Illinois and incorporated in Delaware involving an incident that occurred in Aruba.

Citing *Daimler*, and taking judicial notice that Hyatt is one of the United States' larger hotel chains, the court dismissed for lack of general jurisdiction. The court concluded that the "[e]xercise of general jurisdiction over Hyatt for an event occurring in Aruba would offend due process under *Daimler*." The court likewise declined to exercise specific jurisdiction under *Walden*, finding that the only link to the forum state was the plaintiffs themselves.

The logic and perspective underlying the court's reasoning in *DeLuca* demonstrates a refreshing reluctance to exercise personal jurisdiction over a corporate defendant regardless of its significant presence within the forum state. For instance, despite acknowledging that Hyatt has numerous locations in Pennsylvania (and perhaps implying that defending a case here would not be administratively difficult), the *DeLuca* court declined to find jurisdiction, reasoning that if it "[a]llowed general jurisdiction, Hyatt would be subject to general jurisdiction in nearly every state for causes of actions occurring around the world."

The standard set forth in *Daimler* was just recently reaffirmed and further clarified by the United States Supreme Court in *BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 810 (2017). Again, as in *Daimler*, the Court explained the importance of an all-encompassing analysis of a corporation's activities, cautioning that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." In *Tyrrell*, the Court found that the plaintiffs failed to satisfy the burden required to establish the kind of "exceptional" circumstances that would allow a forum state to exercise jurisdiction over a corporation that was neither headquartered nor incorporated within its borders.

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Delaware—General Liability

FURTHER LIMITING THE COLLATERAL SOURCE RULE IN DELAWARE

By Bradley J. Goewert, Esq.*

KEY POINTS:

- Collateral source rule does not allow entire amount of medical bill to be submitted to jury in personal injury action when bill was paid by Medicare.
- *Stayton* rationale extended to apply to Medicare Advantage (Part C) and Medicaid.
- *Stayton* rationale limits recovery of medical expenses to actual amount paid by Medicaid. However, Medicaid cannot be used to reduce future medical expenses as it is a voluntary program and beneficiaries can move out of the program.

Bradley J. Goewert

In the September 2015 issue of *Defense Digest*, Armand Della Porta, Esq., a shareholder in our Wilmington, Delaware office, wrote about the decision in *Stayton v. Del. Health Corp*., 117 A.3d 521 (Del. 2015), in which the Delaware Supreme Court held that the collateral source rule did not allow the entire amount of a medical bill to be submitted to the jury in a personal injury action when the plaintiff's medical bill was paid by Medicare. This rationale has now been extended to Medicare Advantage (Part C) and Medicaid.

Before the *Stayton* decision, plaintiffs in a personal injury action were allowed to recover the amount of charged medical services reflected on their bill before any write-downs or insurance payments. Often medical bills are reduced to the negotiated rates of various private insurers, as well as Medicare and Medicaid. The general rule in Delaware is that write-downs by medical providers and payments from insurance companies are not known to the jury; only the amount billed. This is called the collateral source rule.

However, in *Stayton*, the Delaware Supreme Court reviewed the rationale behind the collateral source rule and held that it did not apply to public sources of payment, including Medicare. It was the court's rationale that the collateral source payment of Medicare is not a bargained-for benefit of the plaintiff. Therefore, the plaintiff should not receive a benefit. In Medicare, the plaintiff receives the benefit of a bargain that is made by the buying power of all taxpayers. It would be an improper windfall if a plaintiff were allowed to recover an amount that was never paid and for which the plaintiff did not bargain.

The court has since extended the decision of *Stayton* to apply to Medicare Advantage (Part C) and Medicaid. In *Honey v. Bayhealth*, 2015 Del. Super. (Del.Super. July 28, 2105) I, along with Lorenza Wolhar, Esq., of our Wilmington office, successfully argued that the *Stayton* rationale applies to health care plans under Medicare Advantage, or Part C. Under Medicare Advantage, private insurance companies can provide Medicare benefits to individuals with the same coverage rules as Medicare and payment for the coverage coming from the federal government. In *Honey*, the plaintiff argued that the rationale in *Stayton* should not apply because the insurer was private, not the government. With this argument, the plaintiff argued that she should be entitled to recover the entire amount of her medical bills, not just the amount paid by the insurer.

The Superior Court reviewed Medicare Advantage and found it more akin to Medicare then a private insurer. Insurers providing coverage under Medicare Advantage are "[f]ederal contractors providing federal benefits, established by the federal government, to federal constituents." The rationale of *Stayton* was further discussed, and it was explained that a windfall to the plaintiff would be improper if she was allowed to recover the entire amount of a medical bill when she did not bargain for the insurance coverage. Accordingly, in cases of Medicare Advantage, only the amount paid by the insurer is recoverable.

The Delaware Supreme Court further extended the limit of the collateral source rule in cases of Medicaid in the decision of *Smith v. Mahoney*, 150 A.3d 1200 (Del. 2016). The court used the *Stayton* rationale to limit the recovery of medical expenses to the actual amount paid by Medicaid. However, the court also held that Medicaid could not be used to reduce future medical expenses because Medicaid is a voluntary program and beneficiaries can move out of the program.

There is no requirement that a medical provider accept Medicaid, and there is no requirement that if they do accept Medicaid that they actually submit the bills to Medicaid for payment. Plaintiffs can be treated by medical providers who do not accept Medicaid or can fail to submit their medical bills to Medicaid for payment. Under both scenarios, no medical payments are paid by Medicaid and no write-downs are being made by the medical providers, so plaintiffs can recover the entirety of the medical bill. ■

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Florida—Property Litigation

SCOPE! SCOPE! SCOPE!: *DIAZ v. FLORIDA PENINSULA INSURANCE COMPANY* AND ITS EFFECT ON THE INSURER'S OPTION TO REPAIR

By Corey K. Setterlund, Esq.*

KEY POINTS:

- Insurers may not be able to avoid litigation when invoking the Option to Repair if the insured disputes the scope of repairs to be performed.
- If the insured disputes the scope of repairs, it may be in the insurer's best interest to work with the insured and compromise on the scope.
- The Florida Supreme Court has accepted jurisdiction over the insured's right to dispute scope after the Option to Repair is invoked.

Corey K. Setterlund

Historically, the provision within every homeowner's insurance policy that permits the insurer to repair the damaged property instead of paying money to the insured—commonly referred to as the Option to Repair—was very rarely utilized by insurance companies. In recent years, with the substantial increase in property damage claims and lawsuits against insurance companies, especially throughout Florida, more and more insurance companies have instituted managed repair programs and have begun to invoke the Option to Repair provision in their policies. These efforts have been put into place to gain more control over the costs of claims and to try to stem the explosion in first party property lawsuits.

In response to this strategy by insurance companies, public adjusters and policy holder attorneys have deployed many countermeasures to defeat this contractual right of the carriers. One such tactic has been to dispute the scope of repairs. Until recently, however, this strategy has failed due to the prevailing rule of law in Florida that the insurer had the right to make the repairs, and once completed, the insured could claim either the repairs were performed inadequately or the insurer failed to repair all of the damage covered by the subject loss. In June 2016, this changed when the Fourth District Court of Appeals ruled that a homeowner could dispute the scope of repairs *before* the insurer performed the repairs.

Specifically, Raymond and Surey Diaz suffered damage from an air conditioning leak. After they reported the loss, their insurer chose to invoke the policy's Option to Repair provision instead of making a cash payment. Florida Peninsula Insurance Company provided their contractor's proposed scope of repairs. In return, the Diazes hired a public adjuster who disputed Florida Peninsula's contractor's scope of repairs. Florida Peninsula ended up denying the claim due to the Diazes' failure to sign the work authorization to allow the repairs to be completed. The Diazes filed a breach of contract claim as well as a petition for declaratory judgment. The Diazes claimed Florida Peninsula breached the policy by refusing to repair all of the damage caused by the leak and then denying the claim. The insurer responded with a motion to abate and to compel the Diazes to comply with its right to repair.

The trial court granted the abatement, and the Diazes appealed. The Fourth District Court of Appeals concluded that abatement "[c]ompletely precludes Diaz from obtaining a determination as to whether Florida Peninsula Insurance Company properly exercised the right to repair clause and, if so, what the parties' rights and obligations are under that clause." Most importantly, the court found that "[a] homeowner is entitled to dispute the scope of repairs before the repairs are completed." As a result, the court reversed the trial court and quashed the abatement.

Since this ruling, trial courts in the counties included within the Fourth District of Appeals (Palm Beach, Broward, St. Lucie, Martin, Indian River and Okeechobee) and some judges in Miami-Dade County have consistently denied motions to abate, based on *Diaz*, when the insured alleges a dispute as to scope. When abatement is denied in these circumstances, it frustrates the intent of the Option to Repair provisions in homeowner policies. The result is a monetary settlement or costly and lengthy litigation with an unknown result, which could also end in a pecuniary award of damages, effectively voiding the Option to Repair provision. Additionally, under Florida law, insureds may be entitled to recover attorneys' fees and costs depending on the outcome of trial. Given the uncertainty of the issues to be litigated, it is equally unknown what would constitute a "win" triggering an insured's entitlement to attorneys' fees and costs.

The purpose of the Option to Repair provision is to expeditiously return damaged property to its pre-loss condition while providing the insurer with cost control and certainty. The result of the *Diaz* decision creates industry-wide uncertainty and opens the door to allow public adjusters and policy holders to create litigation and generate fees where none should exist.

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A MESSAGE FROM THE EXECUTIVE COMMITTEE

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None of us are eager for Tom to step aside, and no one is forcing it. His determination to do so after 12 years as President and CEO—like the zeal with which he's trained his successor—is a reflection of his character. Tom believes fervently in stewardship and has only ever done what he's convinced is best for the firm. On this point, in particular, he has earned our trust and with this decision, our respect.

Tom's role for more than a decade has been demanding, time consuming and impossible to perform without the support and sacrifice of his family. On behalf of a grateful firm, I thank Anne and their five daughters for sharing him with us.

The good news is Tom is not walking out the door. In the last act of a great CEO, he has agreed to remain at the firm at least a couple of years as President Emeritus, available to share his hard won insight with those of us who follow.

And there are many of us. One of the firm's greatest strengths is that it's never been about just one person. I'll serve as President and CEO alongside Chris Dougherty, our Chairman of the Board, and Howard Dwoskin, who'll become the third member of the Executive Committee. The three of us will be backed by a Board of Directors, over 10% of our attorneys who serve in some form of middle management, and a superb team of administrative directors and managers.

This well-equipped crew is ready. And as I weigh anchor and put the boat in gear I'm certain, because of Tom, I am too. ■

NO-INJURY CLASS ACTION PLAINTIFFS

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Turning to the dispute between Spokeo and Robins, the Court found that Robins could not simply allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III, as deprivation of a procedural right without some concrete interest affected by the deprivation is insufficient by itself as a matter of law to create Article III standing. Because the Ninth Circuit did not address whether the particular procedural violations alleged by Robins entailed a degree of risk sufficient to meet the concreteness requirement, the Supreme Court vacated the judgment of the Ninth District, remanding the case to evaluate whether Robins adequately alleged an injury that was sufficient to satisfy the concreteness element of Article III's injury-in-fact requirement.

TAKEAWAYS

Importantly, the Court answered the question it was tasked with resolving—whether a class action claimant can sue based solely on a statutory "injury-in-law"—with a resounding "no." In doing so, the *Spokeo* Court drew a clear line in the sand—consequential statutory violations that encompass a "real" *impact* are sufficient to demonstrate standing, while breaches of purely technical, procedural rights fall short of satisfying a cognizable injury-in-fact sufficient to confer Article III standing.

As a result, *Spokeo* will likely aid in pumping the brakes on the litany of no-injury class actions that have rapidly expanded in scope and value in recent years. In particular, the *Spokeo* ruling will likely dissuade and temper the current wave of data breach and consumer class action litigation seeking multi-million dollar damages awards for mere statutory violations. The decision is particularly noteworthy for federal data breach defendants, where many cases involve plaintiffs and putative class members that have not suffered any actual harm as a result of the purported breach. Critically, violations of data breach statutes, by themselves, will no longer suffice to demonstrate standing.

Moving forward, class action plaintiffs will have to demonstrate a "concrete" injury—one that is "real, not abstract," and "actually exists"—to satisfy the requirements of standing. Taken together, *Spokeo* has laid down a significant challenge to class action plaintiffs who often face robust motions to dismiss from their counterparts at the outset of litigation on the issue of standing. In the absence of a particularized, concrete injury, federal jurisdiction cannot be obtained by plaintiffs alleging statutory damages for technical violations. In this regard, *Spokeo* will serve as a valuable weapon in defending the increasing number of actions involving mere technical violations of federal statutes providing for statutory damages, and it can be wielded to cut down no-injury class actions before they gain steam by bolstering arguments for the dismissal of statutory-violation class actions at the outset of litigation. ■

On The Pulse…

IMPORTANT & INTERESTING LITIGATION ACHIEVEMENTS*…

We Are Proud Of Our Attorneys For Their Recent Victories

CASUALTY DEPARTMENT

Samuel Casolari (Cincinnati, OH) obtained summary judgment in the Butler County Court of Common Pleas in favor of our client, an international retailer. The plaintiff was sitting on a pallet in the self-service aisle when a boxed sofa fell on her. The plaintiff claimed soft tissue injuries to her neck and back, as well as post concussive syndrome. The court granted summary judgment on the basis that the plaintiff failed to present any evidence that our client knew of a hazard that might harm a customer.

Laurianne Falcone (Philadelphia, PA) obtained a defense verdict at a binding arbitration hearing in Philadelphia. The plaintiff claimed that he slipped and fell on ice at a condominium complex and suffered a severe ankle fracture. We represented the association and the property manager. The arbitrator found in favor of all defendants due to the plaintiff's own negligence. The arbitrator also found that our clients and their snow removal contractors were able to prove that they were on site and doing everything they could do to ensure the safety of the property, considering the weather conditions.

In a case involving a trip and fall on the grounds of a university, **Robert Faller** and **Jennifer Roberts** (Melville, NY) obtained summary judgment in favor of the firm's client. The plaintiff was an employee of the university bookstore, which was operated by our client pursuant to a contract with the university. The plaintiff tripped on a metal grate in a loading dock area that was regularly used by bookstore employees as a means of ingress and egress. The plaintiff sued the university, which brought a third-party action for indemnification against our client. Robert and Jennifer argued that our client's contract with the university required indemnification only for activities involving operation of the bookstore and that the plaintiff's entrance into the building to begin her workday did not constitute such activities. We further argued that, inasmuch as the university was responsible for maintenance and repair of the loading dock area, any defect in the ramp's condition would have been due to the university's own negligence, as to which it was not entitled to indemnification. The court granted summary judgment dismissing the third-party action.

In another case handled by **Robert Faller** and **Jennifer Roberts** (Melville, NY), they obtained summary judgment in favor of our client in a case involving an alleged fall on snow and ice in a parking lot at an airport. Our client was a snow removal company hired to remove snow in various locations at the airport. The plaintiff alleged that our client failed to perform snow removal properly, as a result of which, ice was allowed to form, on which the plaintiff slipped. In a 19-page decision, the court granted summary judgment to our client. Following case law, the court found that our client: (1) did not cause or create a condition so as to become an instrument of harm; (2) as a third-party contractor, did not perform services upon which the plaintiff relied; and (3) did not assume such control over the parking lot so as to displace the owner with respect to a responsibility to third parties.

Ray Freudiger and **David Oberly** (Cincinnati, OH) received an Ohio 4th District decision upholding the jury's defense verdict in a wrongful death case. The plaintiff was the estate of an 18-year-old woman who was struck and killed by a commercial truck as it was backing up an access ramp to deliver product at a grain receiving facility at the same time the plaintiff traversed onto the ramp. Ray and David represented the driver of the commercial vehicle, as well as the vehicle's owner. Midway through the four-day jury trial, the court entered a directed verdict in favor of the owner of the commercial vehicle. At the conclusion of this lengthy trial, the jury returned a defense verdict in favor of the vehicle's driver. Accordingly, the Fourth District affirmed the proceedings at the trial court level in their entirety, upholding the jury's verdict that the decedent—and not Ray and David's client—was wholly responsible for her injuries and resulting death.

In another matter handled by **David Oberly** (Cincinnati, OH), he obtained summary judgment on behalf of a hotel chain in a premises liability slip-and-fall action. A guest staying at the

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Cincinnati-area hotel sued the hotel after he allegedly slipped and fell while walking over a wet carpet mat situated in a hallway leading to the main lobby area of the hotel. Based upon favorable testimony elicited during the plaintiff's deposition, David moved for summary judgment, arguing that our client was entitled to judgment as a matter of law because: (1) the plaintiff could not present any facts to establish that his fall resulted from the existence of a hazardous condition on the hotel's premises; (2) the plaintiff could not identify the cause of his fall or the source of the water that allegedly caused the mat to become wet and hazardous; and (3) the hotel had neither actual nor constructive notice of the allegedly "wet" mat condition that served as the basis for the plaintiff's fall. At the conclusion of oral argument, the judge ruled from the bench on the dispositive motion, granting summary judgment in favor of David and his client.

Patrick Furlong (Philadelphia, PA) successfully obtained summary judgment on a contested motion filed in the Philadelphia Court of Common Pleas. The plaintiff alleged she fell on droplets of water in a bathroom at the office building where she worked. The droplets were on the floor between the sink and paper towel dispenser and appeared to be from someone who had washed their hands. She did not know how long the droplets had been on the floor, had not previously complained about water on the bathroom floor, and there was no evidence of prior complaints. The motion, granted by Judge Daniel Anders, had argued that there was no evidence of actual or constructive notice from which the plaintiff could establish liability against the defendants.

Based on lack of jurisdiction over a truck manufacturer, **Keith Heinold** and **Mike Salvati** (Philadelphia, PA) prevailed on preliminary objections in Philadelphia County. The case was originally filed in the federal court, but jurisdiction was found to be improper. If a party is an LLC, citizenship for diversity purposes is determined by the citizenship of the members of the LLC. Our client's sole member was a Pennsylvania citizen and, therefore, not diverse with a Pennsylvania plaintiff. The case was dismissed and subsequently refiled in Philadelphia County. Mike identified the issue of whether the tests for general jurisdiction and diversity jurisdiction were necessarily the same. The question became whether a company who is a citizen of Pennsylvania for diversity jurisdiction purposes could, nevertheless, argue it was not "at home" in Pennsylvania under the *Daimler v. Bauman* decision in the U.S. Supreme Court, and, thus, the plaintiff lacked jurisdiction over that company on general jurisdiction grounds. Mike's research revealed cases from which we could argue that the test for jurisdiction for an LLC did not involve the citizenship issues present in diversity jurisdiction analysis. Rather, the court should look to the state in which the LLC was formed and its principal place of business. Our client was neither formed in Pennsylvania nor had its principal place of business in Pennsylvania, therefore, no general jurisdiction existed. Nor was there specific jurisdiction. The Philadelphia Court of Common Pleas agreed and dismissed the case.

After a two-week jury trial before Judge M. Teresa Sarmina, **Christopher Santoro**, **Kevin Hexstall**, **John Hare**, **Christine Dower** and **Shane Haselbarth** (Philadelphia, PA) obtained a defense verdict. The 64-year-old plaintiff contended that he developed asbestosis, which required him to use oxygen 24 hours a day, as a result of working with welding rods manufactured by the two defendants while working as a welder throughout his career. The defense presented evidence that welding rods do not release free respirable asbestos fibers and that working with welding rods does not expose the welder to asbestos. Additionally, the defense contended that the plaintiff did not have asbestosis because all of the plaintiff's treating physicians diagnosed him with idiopathic pulmonary fibrosis. The only physicians who diagnosed asbestosis were the plaintiff's experts. After two hours of deliberations, the jury returned a defense verdict and found the plaintiff did not have asbestosis.

HEALTH CARE DEPARTMENT

Bradley Blystone and **Chanel Mosley** (Orlando, FL) obtained a final summary judgment on behalf of an optometrist in a medical malpractice case. The plaintiff alleged she was neither informed of the elevated pressures in her eyes nor referred for a glaucoma evaluation by our client. She was later diagnosed with glaucoma and sought damages for permanent eye injuries, asserting that our client deviated from the professional standard of care. The court granted summary judgment on the basis that the plaintiff was unable to meet her burden of proof on causation as there was no evidence that the optometrist, who did in fact recommend a referral to a glaucoma specialist, caused or contributed to the diagnosis or progression of the plaintiff's glaucoma.

After a four-week trial in Bergen County, New Jersey, **Rosalind Herschthal** and **Heather LaBombardi** (Roseland, NJ) obtained a defense verdict in a medical malpractice action that

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alleged negligence and lack of informed consent. The plaintiff alleged that our client, an internist, negligently prescribed an iron infusion to a 52-year-old man with severe anemia (from newly diagnosed colon cancer). During the test dose of the iron, the decedent had a reaction that was unobserved by the nurse. The allergic reaction continued until the decedent had a cardiac arrest. He was resuscitated, but he died a day later. The defendant asserted that the only treatment for the severe anemia was an iron infusion and that it was properly ordered—a test dose and observation by the nurse for an hour before the full dose is administered. Unfortunately, the patient did have a reaction, but the nurse was not around for 25 minutes of that hour. The doctor also asserted that he explained the treatment plan and alternatives to the patient before ordering the medication.

Victoria Scanlon and **Robert Aldrich** (Scranton, PA) were successful in obtaining dismissal of a case involving a health care center. The court concluded that dismissal was appropriate due to the lack of subject matter jurisdiction and lack of diversity. The decedent, a long-time resident of Florida living at a skilled nursing facility in Florida, was transferred to the defendant/long-term care facility located in Wilkes-Barre, Pennsylvania. She died 11 days later. The plaintiff claimed the decedent was a citizen of Florida at the time of her death. We filed a motion to dismiss the complaint based on lack of diversity, arguing that the decedent intended to make Pennsylvania her state of domicile and to reside there indefinitely. We argued that the Middle District of Pennsylvania did not have subject matter jurisdiction because the decedent and the long-term care facility are both considered citizens of Pennsylvania. We submitted documents from the decedent's resident record, demonstrating that she intended to make Pennsylvania her state of domicile upon her admission. The court agreed, reasoning that the defendant submitted sufficient evidence to support that the decedent intended to make Pennsylvania her state of domicile and citizenship prior to her death and, therefore, was a citizen of Pennsylvania at the time of her death. The court granted the defendant's motion and dismissed the complaint, noting that the plaintiff must file the complaint in a court with proper jurisdiction.

PROFESSIONAL LIABILITY DEPARTMENT

Patrick Boland and **Mark Kozlowski** (Scranton, PA) obtained summary judgment on behalf of their client, a police officer, in a civil rights action. The plaintiff had complained to the police about her ex-husband violating a protection from abuse order. After investigating, the police determined that no protection from abuse order was in effect, and they arrested the plaintiff instead of her former husband and charged her with: (1) tampering with public records or information; (2) false reports to law enforcement authorities; and (3) unsworn falsification to authorities. Following a preliminary hearing, the court dismissed the charges against the plaintiff. She then sued the police department and several individual officers, including our client, seeking damages for First Amendment retaliation, malicious prosecution and abuse of power. Following the close of discovery, the parties each filed a motion for summary judgment. The court granted the defense motion filed on behalf of our client, finding that probable cause existed for the plaintiff's arrest and that the plaintiff could not establish the elements necessary to support her claims. Judgment was entered in favor of the police officer on all claims against him.

In a breach of contract/quantum meruit action in Chester County, Pennsylvania, **Jeffrey Chomko** (Philadelphia, PA) obtained a defense verdict on all claims. The matter involved a dispute between a premium financing company and a Managing General Agent (MGA) concerning the financing of an insurance policy for the A&E client of a retail agent (who defaulted under the agreement). Jeff successfully argued that there was no privity and that no contract existed between the premium finance company and the MGA. Thus, there was no legal basis for the contract claim to proceed against the MGA.

Christopher Conrad and **Lara Dellegrotti** (Harrisburg, PA) successfully defended an Adams County real estate broker who represented the seller in a residential real estate transaction. The homeowner plaintiffs claimed that the seller and our client failed to disclose certain material defects in the property prior to closing. The plaintiffs' complaint consisted of claims against our client for negligent misrepresentation and alleged violations of Pennsylvania's Unfair Trade Practice and Consumer Protection Law (UTPCPL) and Real Estate Sellers Disclosure Law (RESDL). In preliminary objections, Chris and Lara argued that the plaintiffs' claims should fail as a matter of law because the complaint did not allege that our client had actual knowledge of any material defects or that our client made any misrepresentations concerning the property. The plaintiffs' UTPCPL claim was premised primarily upon the Seller's Property Disclosure Statement, which the court agreed did not apply to our client as our client did not prepare

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or sign the document, and because our client was not identified in the document as a source of any information about the property. The court also dismissed the RESDL claim on similar grounds, holding that the Disclosure Statement failed to identify any misrepresentation made by our client. Furthermore, the court emphasized the clear language in the RESDL, which provides that a seller's agent shall not be liable for any violation of the RESDL unless the agent had actual knowledge of a material defect, which, again, the plaintiffs failed to allege.

Christopher Conrad and **Nicole Ehrhart** (Harrisburg, PA) successfully defended the board of directors of a condominium association in a binding arbitration. The plaintiff is the owner of a unit in a cluster of five townhomes located in the condominium development. The association is comprised of the owners of 55 total units clustered throughout the development. Each cluster is serviced by its own system of wooden railings and walkways. In 2014, the board completed an improvement project that included replacing the wooden railings that serviced the plaintiff's unit and the other four homes in his cluster. The board assessed the plaintiff and the other four owners equally for the replacement cost. The plaintiff disputed the assessment, arguing the replacement cost should have been shared equally by all 55 owners in the development rather than by the five owners in his cluster only. The plaintiff sought relief under the Declaratory Judgment Act. After the court denied both parties' summary judgment motions, the parties agreed to submit the matter to binding arbitration. The arbitrator agreed with the board that the cost to replace the railings was a common expense benefitting fewer than all of the units in the development, and, therefore, the board's decision to assess the plaintiff and the other four unit owners only was correct and consistent with both the Condominium Act and the association's governing documents. The arbitrator directed the plaintiff to pay the assessment, plus interest.

After an eight-week trial in Sarasota, Florida in this construction defect/defective design claim, **Michael DeCandio** and **Amanda Ingersoll** (Jacksonville, FL) obtained a defense verdict. The plaintiff purchased a new residence on Sarasota Bay for approximately $19 million from the original owner the week the Certificate of Occupancy was issued. He then began remodeling the 21,000-square foot home, which grew to a $19 million remediation claim. Of an original claim against 18 defendants, all but six settled. In a lesson on trial strategy, the six remaining defendants made an agreement to defend together and refrain from pointing fingers. The jury deliberated for three and one-half days. Three of the six co-defendants had verdicts against them, but our client and two others were completely exonerated.

Paul Krepps, **April Cressler** and **Tim Stienstraw** (Pittsburgh, PA) obtained summary judgment and dismissal of the plaintiff's entire complaint in a complex police civil rights case. The plaintiff, a mentally-challenged individual, was alleged to have pushed off of a wall another resident of the personal care home where they both lived. The victim later died of his injuries. Our client, a detective, was assigned the investigation of this event. The plaintiff was charged with homicide after this investigation, which included an interview of the plaintiff, who confessed to pushing the victim off of the wall. At the preliminary hearing, criminal defense counsel alleged that the "confession" was coerced and that the plaintiff did not have the mental capacity to appreciate his constitutional rights. He was referred for a mental capacity evaluation to determine if he was competent to stand trial. After more than nine years in some form of custody, his criminal defense counsel moved to have the criminal charges *nolle prossed*, which was unopposed by the Commonwealth. The state court granted the motion, but without prejudice. Thereafter, the plaintiff brought suit against several defendants, including the detective. The court's Memorandum Opinion found that probable cause existed for the plaintiff's arrest and dismissed the false arrest and false imprisonment claims. The claim of intentional infliction of emotional distress was dismissed for lack of evidence of harm caused by the detective, and the court found that all causes of action were barred by the statute of limitations. The key to achieving summary judgment was the ability of April and Tim, relying upon their backgrounds as former prosecutors, to interpret many years of criminal court activity in order to demonstrate the cause for the plaintiff's lengthy detention.

In a case filed against an insurance company, **James McGovern** (Pittsburgh, PA) obtained a defense verdict in the Court of Common Pleas of Fayette County, Pennsylvania. The plaintiff was the beneficiary of a term life insurance policy issued to his fiancé by the defendant. The fiancé denied any prior history of health and medical issues on the recorded telephonic policy application and on the written application. She died of cardiac arrest, coronary artery disease and diabetes mellitus four months after the policy was issued. Our client investigated the claim and rescinded the policy based

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upon false statements on the application. The beneficiary sued, alleging that our client wrongfully rescinded the policy, and made a demand of the full amount of the death benefits. The panel of three arbitrators unanimously ruled in favor of our client after a deliberation of approximately five minutes.

In another case handled by **James McGovern** (Pittsburgh, PA), he received a defense decision in a Financial Industry Regulatory Authority binding arbitration proceeding. The 78-year-old investor sued her financial advisor for breach of contract and breach of fiduciary duty, alleging that he failed to properly invest the cash in her IRA account, resulting in a rate of return that was much lower than allegedly promised by the advisor. The claimant sought a return of the advisory fees paid to the firm, the difference between the amount the account actually earned compared to the amount she thought it should have earned, interest, attorney's fees and punitive damages. After considering the pleadings, testimony and evidence presented at the hearing, the arbitrator denied the investor's claims in their entirety and entered an award in favor of the financial advisor.

Aaron Moore (Philadelphia, PA) obtained judgment on the pleadings on behalf of our attorney client in a legal malpractice action. The plaintiff alleged that the attorney failed to sue all entities that could have been liable to it under a breach of oral contract theory. In the underlying action, the attorney obtained a verdict at trial for the full amount due his client. However, the plaintiff alleged that the judgment was worthless and that the attorney should have sued others who could have been held liable and able to pay a judgment. In its opinion dismissing the claims, the trial court held that the plaintiff's claims were barred by the applicable statutes of limitation because he failed to file a timely reply to new matter contradicting the attorney's factual new matter averments. The trial court further held that, even if it were to accept the plaintiff's untimely reply to new matter, its general denials to the factual averments in new matter were deemed admissions.

In an interesting case involving privity issues, **Aaron Moore** and **Stephen Keim** (Philadelphia, PA) successfully obtained dismissal of our attorney client by way of preliminary objections. In the underlying matter, the attorney represented the mother of an individual who was alleged to have been wrongfully shot and killed by a Philadelphia police officer. The mother served as the administrator of her son's estate and claimed to be its primary beneficiary. Our client attorney settled the case for a substantial sum that was distributed to the mother/administrator, who thereafter shared the proceeds with her two other sons. Subsequently, the mother of the decedent's two young children brought a malpractice and conversion action against the attorney, claiming that he knew or should have known that the decedent was the father of her children and that the attorney failed to protect her children's interests as the sole heirs to the decedent's estate. We filed preliminary objections, contending that neither the plaintiff nor her children had standing to bring a malpractice suit against the attorney because they had not retained the attorney to provide legal services. We further pointed out that the attorney could not have converted assets that never belonged to the plaintiffs. Initially, the Philadelphia Court of Common Please denied our preliminary objections without an opinion. A motion for reconsideration, however, resulted in our client's dismissal.

Edwin Schwartz and **Nicole Ehrhart** (Harrisburg, PA) successfully defended an attorney in his individual capacity and in his capacity as executor of an estate. The plaintiff (the decedent's son) had a verbal agreement to move into the decedent's (his father's) home and provide him with care. In exchange, the decedent agreed to leave his entire estate to the plaintiff, and he did so in a Will executed in 2010. After a deteriorating relationship, in May 2013, the decedent executed a new Will that essentially left the plaintiff with nothing. Clearly unhappy with the distribution scheme in his late father's Will, the plaintiff filed a civil action in Dauphin County against our client. We filed preliminary objections challenging every claim, as well as standing. The court agreed that the plaintiff could not maintain any civil action against our client in his individual capacity or in his capacity as executor of the estate. As such, the entire complaint was dismissed, with prejudice.

WORKERS' COMPENSATION DEPARTMENT

Ross Carrozza (Scranton, PA) successfully prosecuted a workers' compensation termination petition. The claimant had his leg run over by a garbage truck while at work. After the recovery period, he contended that he could not perform his pre-injury job or go back to work and that he needed further treatment for Complex Regional Pain Syndrome. Ross was able to successfully prosecute the petition to terminate benefits before the Workers' Compensation Judge, who found that

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the claimant had fully and completely recovered from his work-related injuries and was able to return to work without restriction.

Tony Natale (Philadelphia, PA) successfully prosecuted a termination petition and defended both a petition to review and a petition to reinstate on behalf of a Berks County canning, mushroom and food processing distribution facility. In 2013, the claimant had injured her bi-lateral upper extremities doing assembly line work. She underwent bi-lateral upper extremity surgery and returned to work, only to abandon the job one year later. Subsequently, an extremely sedentary-duty job was offered to her (visually examining mushrooms), which was refused. After litigation, indemnity benefits were suspended based upon the claimant's unjustified refusal of available employment. The claimant then alleged that her condition severely worsened to such a degree that she was incapable of performing the job she had previously refused. Tony offered evidence to support the fact that the claimant's injuries had fully recovered and that her work injuries (even if they allegedly worsened) did not prevent her from viewing mushrooms in a sedentary capacity. The claimant responded, arguing that her upper extremity injuries had "moved" into her shoulders bi-laterally and disabled her totally from employment. The Workers' Compensation Judge reviewed the medical evidence presented by the parties and found the claimant to be fully recovered from her work injury, while further finding the claimant did not sustain any additional injuries or disabilities.

Michele Punturi (Philadelphia, PA) successfully litigated a termination petition on behalf of a retailer. The claimant sustained a work-related hand injury, for which he underwent surgery. Michele presented substantial, competent and credible evidence via the defense medical expert, who reviewed all the claimant's medical records and diagnostic study films and performed two comprehensive physical examinations. The doctor ultimately concluded upon the second exam that the claimant was fully recovered. His testimony was accepted by the Workers' Compensation Judge, and the termination petition was granted.

Andrea Cicero Rock (Philadelphia, PA) successfully defended a claim petition in which the claimant alleged that he sustained a work-related heart attack while lifting plywood in the course of his employment. Andrea offered evidence to support the fact that the claimant's heart attack did not occur as a result of his work activities as a delivery driver but, rather, were symptoms that he had been having for some time. The Workers' Compensation Judge was particularly persuaded by the testimony of the employer's medical expert, that the claimant continued to work for three days after the alleged heart attack in his full-duty capacity before going to the Emergency Room. Based on the medical evidence, the judge found the claimant failed to met his burden of proof, and benefits were denied.

Lori Strauss (Philadelphia, PA) successfully defended a claim and penalty petition filed by the claimant, alleging that he sustained Charcot foot and specific loss of three toes as a result of an injury that occurred at work. Lori offered testimony from three employer fact witnesses. Additionally, there was testimony from medical experts regarding the serious nature of injury and causality. During cross examination, Lori was able to obtain an admission from the treating doctor that an incident that occurred while the claimant was on vacation was a substantial, contributing factor to the claimant's need for surgical procedures. Ultimately, the Workers' Compensation Judge found the employer's fact witnesses and medical expert to be more credible than the claimant and his doctor. There was a significant lien, which the employer would have also been responsible for had the claim been found to be related. However, both petitions were dismissed, and no appeal was filed by the claimant.

Ashley Talley (Philadelphia, PA) was successful in defending against a claim petition and penalty petition for right shoulder injuries the claimant alleged were caused by repetitive, cumulative trauma at work. The claimant was employed as an assembly line worker for the insured, a thermometer manufacturer. Her specific job was to assemble various thermometer parts. During testimony, the claimant described her job as a very physical and high-volume position. However, Ashley was able to undermine these allegations by presenting witness testimony, as well as a live demonstration of the claimant's pre-injury duties, to demonstrate how little physical exertion was actually required. This made a lasting impression on the Workers' Compensation Judge, who also found testimony from the employer's orthopedic expert to be more credible than that of the claimant's well-recognized, vetted shoulder expert. The judge issued a complete denial of the claim and penalty petitions. ■

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On The Pulse…

MARSHALL DENNEHEY IS HAPPY TO CELEBRATE OUR RECENT APPELLATE VICTORIES*

In an important victory, **Terry Sachs** (Philadelphia, PA) persuaded the Superior Court to reverse a $38 million punitive damages award against our client. Terry represented a company that provided security services to a Kraft bakery facility where the co-defendant, a suspended worker, shot and killed two co-workers and wounded another. The Superior Court agreed that the trial court had erred by allowing an amendment of the complaint to introduce a claim for punitive damages, particularly after this claim had been previously withdrawn. The court reasoned that this improperly added a new cause of action after the expiration of the statute of limitations. The court also observed that it was an abuse of discretion to permit the punitive damages claim to be added in the middle of the trial. *Wilson v. U.S. Sec. Assocs.*, 2017 Pa. Super. LEXIS 537 (Pa.Super. July 18, 2017).

In another significant win, **Terry** convinced the Philadelphia Court of Common Pleas to grant a substantial remittitur in a case where the plaintiff sustained a partial finger amputation by a defective hydraulic shear. Terry stepped in and worked with trial counsel at the post-trial motion stage. The trial judge agreed to reduce the $15 million verdict to $7.5 million. *Reyes v. Cincinnati, Inc.*, (C.C.P. Phila., July Term, 2014, No. 3744). ■

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OTHER NOTABLE ACHIEVEMENTS*

RECOGNITION

Niki Ingram (Philadelphia, PA), shareholder, director of the Workers' Compensation Department and member of the firm's Board of Directors, has been named the 2017 recipient of the Martha Hampton Award from the Philadelphia Bar Association's Workers' Compensation section. The award was established in memory of Martha Hampton, a highly accomplished attorney who was deeply committed to the practice of workers' compensation law. Each year a bar association committee reviews nominations of an attorney or judge who best exemplifies Martha's unique compassion, dedication, professionalism, scholarship and good will.

John Hare (Philadelphia, PA), chair of the Appellate Advocacy and Post-Trial Practice Group, was inducted as a Fellow into the American Academy of Appellate Lawyers (AAAL) at the Academy's 2017 Spring Meeting, held in Boston. The AAAL was founded in 1990 to recognize outstanding appellate lawyers and to promote the improvement of appellate advocacy and the administration of the appellate courts. Membership is limited to 500 lawyers in the United States and is reserved for accomplished appellate advocates who have demonstrated the highest levels of skill and integrity.

SPECIAL APPOINTMENTS

Matthew Keris (Scranton, PA) has been appointed as the Pennsylvania State Representative to the Defense Research Institute by the Pennsylvania Defense Institute. In this capacity, he will act as the official liaison between the two defense litigation organizations.

Elizabeth Ferguson (Jacksonville, FL) has been named co-vice chair of the Florida Bar Association's Construction Law Certification Review Course Committee and a member of the Florida Bar's Real Property, Probate and Trust Law Section

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Executive Council.

David Bear (Orlando, FL) was appointed to the Florida Judicial Nominating Commission for the 18th Circuit of Florida. He and the JNC panel will be responsible for investigating, interviewing, and evaluating applicants for open circuit and county court judge seats. After their investigation, the panel recommends three to six applicants to the governor from which he makes a judicial appointment.

Patrice Turenne (Philadelphia, PA) was elected to the Executive Board of the Montgomery American Inn of Court, a local chapter of the American Inns of Court. She will serve as Board Secretary for the 2017-2018 term.

Brooks Foland (Harrisburg, PA) has been elected to the Board of Directors of Tree 4 Hope, Inc., a non-profit organization that provides services to children and the elderly in Guatemala and around the world. He serves as board secretary. Located in Harrisburg, Tree 4 Hope implements projects focused on education, health and mental wellness that empower communities, promote cultural exchange and inspire youth. The organization is currently fundraising to build a bilingual girls' school in Guatemala.

Sandy Caiazzo, office manager of the King of Prussia office, has been appointed as vice president for the Independence Chapter of the Association of Legal Administrators for 2017.

SPEAKING ENGAGEMENTS

Chanel Mosley (Orlando, FL) presented "*Daubert*, Dead or Alive?" to the Central Florida Medical Malpractice Claims Council. Chanel, along with Florida House Representative Larry Metz (District 32), discussed the impact of the Florida Supreme Court's recent opinion that refused to adopt the *Daubert* standard and what it means for the continued application of *Daubert* in Florida.

Michele Punturi (Philadelphia, PA) spoke at the 2017 CLM & Business Insurance Workers' Compensation Conference in Chicago. Michele joined a panel of industry professionals to discuss "Today's 'Medical Only' Claim Is Tomorrow's 'Indemnity Claim.'" The conference was attended by more than 200 risk management and claims professionals.

Tony Natale (Philadelphia, PA) presented at Pennsylvania's 2017 Insurance Fraud Conference. The conference was jointly hosted by the Pennsylvania Insurance Fraud Prevention Authority and the Delaware Valley and Greater Pittsburgh Chapters of the International Association of Special Investigation Units. In "If You See Something, Say Something—Detecting Workers' Compensation Fraud," Tony discussed the red flags for fraud unique to workers' compensation cases and suggested techniques to report, combat and prosecute fraudulent claims.

Cristin Cavanaugh (Philadelphia, PA) spoke at the PAMIC 2017 Claims Summit on "Property Law: A Year in Review."

Niki Ingram (Philadelphia, PA) was a speaker at the 2017 Smith College Women's Leadership Conference. In "Shifting a Male-Dominated Work Culture," Niki shared strategies for thriving and excelling in today's business culture. Drawing from career experiences, she discussed how communication, behavior and leadership are the keys for women to succeed in the modern workplace.

Niki also presented "Analytics Overload! How Much Is Too Much?" at the National Council of Self Insurers annual conference in San Diego. Niki discussed how analytics impact a self-insured's relationship with defense counsel.

Jeffrey Chomko (Philadelphia, PA) recently presented at the 11th Annual E&O Liability Insurance Conference (ExecuSummit) in Connecticut. Jeff spoke about the twisting of life insurance policies and the claims that arise, including those under the Pennsylvania Unfair Trade Practices and Consumer Protection Statute.

Jim Cole (Philadelphia, PA) spoke at the 2017 Pennsylvania Insurance Fraud Conference, hosted by the Pennsylvania Insurance Fraud Prevention Authority (IFPA) and the Delaware Valley and Greater Pittsburgh Chapters of the International Association of Special Investigation Units (IASIU). Together with investigators and members of the attorney general's, office as well as the Philadelphia District attorney's office, he jointly presented on the topic "Cooperative Investigations: The Necessities and Pitfalls of Information Sharing."

Michelle Moses (Philadelphia, PA) was a presenter at the Health Care Compliance Association's 21st Annual Compliance Institute. In "MIPS, APMS, QRUR, and CMS Data. How Do Your Physicians Compare?," Michelle and her co-presenter from HPIX discussed how members of the compliance community can best help their physicians in light of the wealth of information available today. Physicians may not be aware of the extensive online profile they now have, thanks to CMS. The course explained how to alert doctors to

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review—and if needed, challenge—performance data. Also, with the implementation of MIPS and APMS, even more data is available to the public and for CMS review. Michelle discussed how to teach doctors to navigate the quality minefield in order to present the best image and earn the best reimbursement.

SPECIAL NEWS

The **Maritime Litigation Practice Group** in our New York City office has been recognized among the top national maritime practices in the 2017 edition of *Chambers USA: America's Leading Lawyers for Business*. Recognized in the Nationwide: Transportation: Shipping: Litigation (New York) category, the firm was called out for its experience in "handling a range of matters…involving insurance disputes, cargo loss and vessel damage." Additionally, the firm was acknowledged for its increasing activity in personal injury defense cases, "particularly those occurring in the marine construction sector." Daniel G. McDermott, co-chair of the firm's maritime practice, and Edward C. Radzik, shareholder within the group, were cited as "notable practitioners" in the Chambers ranking. While both attorneys have received Chambers recognition in this area several times before, this year Mr. McDermott was specifically cited for "his abilities in handling contentious issues in the maritime space, particularly those involving personal injury and insurance disputes." Mr. Radzik was noted as a "master of using technical expertise to get his point across subtly."

For the fifth year running, the *Philadelphia Business Journal* has named Marshall Dennehey Warner Coleman & Goggin one of the Philadelphia region's "Best Places to Work." The award recognizes the company's achievements in creating a positive work environment that attracts and retains employees through a combination of benefits, working conditions and company culture. We are proud to have earned this annual recognition since 2013. Hundreds of companies submitted nominations to the program, which ranks the top employers according to scores given to the companies by their own workers. The firm's Delaware Valley locations, including our Philadelphia headquarters and offices in King of Prussia, Doylestown and Mount Laurel, were included in the survey. "I always like to tell people that this is a firm that really cares about its employees, and being selected for this award for the fifth year in a row validates that our employees think this is a great place to work," said President and CEO, Thomas A. Brophy. "We take great pride in our company culture and values, and will continue to do whatever we can to maintain and improve the working environment so that all of our employees, from attorneys to support staff, are engaged and have the opportunity to succeed."

SUPER LAWYERS

Eight attorneys from our Florida offices have been selected to the **2017 edition of *Florida Super Lawyers*** magazine. A Thomson Reuters business, Super Lawyers is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Each year, no more than five percent of the lawyers in each state are selected by Super Lawyers and no more than 2.5 percent are selected for the Florida Rising Stars list. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. *A description of the selection methodology can be found at* http://www.superlawyers.com/about/selection_process.html. Our attorneys selected to the 2017 Florida Super Lawyers list include Michael J. DeCandio, Construction Litigation.

Our attorneys selected to the 2017 Florida Rising Stars list include:

- David R. Bear – Personal Injury, Medical Malpractice Defense.
- Ryan D. Burns – Personal Injury Defense.
- Elizabeth B. Ferguson – Construction Litigation.
- Lindsay G. McCormick – Construction Litigation.
- Chanel A. Mosley – Health Care.
- Alan C. "A.C." Nash – Civil Litigation Defense.
- Amanda J. Podlucky – Personal Injury Defense.

Seventy attorneys from our Pennsylvania offices have been selected to the **2017 edition of *Pennsylvania Super Lawyers*** magazine. *Pennsylvania Super Lawyers*, a Thomson Reuters business, is a rating service of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Each year, no more than five percent of the lawyers in the state are selected for this honor. The selection process is multi-phased and includes independent research, peer nominations and peer evaluations. A description of the

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selection methodology can be found at http://www.super-lawyers.com/about/selection_process.html.

Receiving special recognition for the eleventh consecutive year is Daniel J. Sherry, senior counsel in the firm's King of Prussia office, who has been named to the "Top 100 Attorneys in Pennsylvania" and the "Top 100 Attorneys in Philadelphia" Super Lawyer lists. Mr. Sherry focuses his practice in complex health care liability matters including brain injury litigation and medical malpractice defense.

Our 2017 Pennsylvania Super Lawyers include:

- Allentown: Candy Barr Heimbach, Paul Laughlin
- Harrisburg: Brooks Foland, Timothy McMahon, Edwin Schwartz, Craig Stone
- King of Prussia: Christopher Boyle, Kevin Fitz-Patrick, Chandler Hosmer, Edward McGinn, Daniel Sherry
- Philadelphia: William Banton, Ralph Bocchino, Kimberly Boyer-Cohen, Thomas Brophy, Butler Buchanan, Christopher Dougherty, Howard Dwoskin, William Foster, Scott Gemberling, Tiffany Giangiulio, Norman Haase, John Hare, Keith Heinold, Kevin Hexstall, Niki Ingram, Kathleen Kramer, Arthur Lefco, Bruce McKissock, Ronald Metcho, R. Bruce Morrison, Ronda O'Donnell, Bradley Remick, Frederic Roller, Daniel Ryan, Teresa Ficken Sachs, Joseph Santarone, Lori Strauss, Vlada Tasich, Thomas Wagner, Eric Weiss, David Wolf
- Pittsburgh: Terry Cavanaugh, John Deasy, Steven Forry, Michael Karaffa
- Scranton: John Aponick

Our 2017 Pennsylvania Super Lawyer Rising Stars include:

- King of Prussia: Joseph Hoynoski, III
- Philadelphia: Mohamed Bakry, Lawrence Bartel, Nicholas Bowers, Joanna Buchanico, Raphael Duran, Lee Durivage, Gregory Fox, Adam Fulginiti, Allison Bressler Goldis, Shane Haselbarth, Sang Woo Lee, Lauren Moser, Alex Norman, Angeline Panepresso, Jennie Philip, Nicolai Schurko, Robert Stanko, Daniel Tran
- Pittsburgh: Grant Hackley, Patrick Reilly
- Scranton: Leo Bohanski, Michael Connolly ■

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New Jersey—Workers' Compensation

IDIOPATHIC CONDITIONS: ARE THESE TYPES OF CLAIMS COMPENSABLE?

By Rachel A. Ramsay-Lowe, Esq.*

KEY POINTS:

- Employers are generally not responsible for a petitioner's idiopathic condition.
- However, the employer may be responsible for an injury sustained at work that was caused by the idiopathic condition.
- An employer may be responsible for the petitioner's injury even if the accident consists of uncontrollable circumstances not originating in the employment environment.

Rachel A. Ramsay-Lowe

It can be difficult to determine whether a claim is compensable when the petitioner suffers from an idiopathic condition that may have caused or contributed to the alleged injury. An idiopathic condition is a condition or trait that is unique or personal to the injured worker, is not related to the worker's employment, and exposes the injured worker to risk of injury. The New Jersey Workers' Compensation Act states that employers must "[t]ake their employees as they find them, with all of the pre-existing disease and infirmity that may exist." *N.J.S.A. § 34:15-1*. However, there is a legal standard that must be met before these claims are considered compensable.

In order for a claim to be compensable, the injury must arise out of and in the course of the petitioner's employment. An injury arises out of employment when the injury is caused by a risk that is incidental to employment. Case law clarifies the legal standard when making the determination of whether a claim is compensable.

Although an employer is not responsible for a petitioner's idiopathic condition, the employer is responsible for the effects of an injury that occurs at work even if the accident was initially caused by the idiopathic condition. In *George v. Great Eastern Food Products, Inc.*, 207 A.2d 161 (N.J. 1965), the petitioner became dizzy from an unknown cardiovascular condition and fell on the concrete floor while working. *George* states that if a fall occurs by or was the result of a disease or physical seizure and did not involve the employee's work responsibilities, it is not compensable. On the other hand, if the fall "[w]ould not have occurred but for the services rendered in the employment, it is covered by the statute."

The court found that the idiopathic incident by itself was not compensable. However, it noted that when an injury is caused by a condition of the employment, it would be compensable. In *George*, the petitioner's injury was caused when the employee's head hit the concrete floor, which the court found to be a risk of employment. The skull fracture caused the petitioner's death. Therefore, the claim was found to be compensable.

The positional-risk test gives clarification to the legal standard when determining if a claim is compensable when dealing with idiopathic conditions. The *Sexton v. County of Cumberland*, 962 A.2d 1114 (N.J.Super. App.Div. 2009) case sets forth the positional-risk test. The petitioner alleged an aggravation of her pre-existing condition, chronic obstructive pulmonary disease (COPD), when she inhaled perfume sprayed in the air by a co-worker. To apply the positional-risk test, the question is "[w]hether it is more probably true than not that the injury would have occurred during the time and place of employment rather than elsewhere."

Along with the positional-risk test, one must also consider the nature of the risk that caused the injury. There are three categories of risk that must be considered:

> (1) Those distinctly associated with the employment (Example: Employee's fingers getting caught in gears or excavations caving in);
>
> (2) Neutral risks, consisting of uncontrollable circumstances not originating in the employment environment (Example: Employee being struck by lightning or blinded by a flying beetle); and
>
> (3) Those personal to the employee, in which the employment connection with the injury is minimal and it is the personal proclivities or contacts of the employee that give rise to the harm (Example: Employee attacked while working by an enemy motivated by vengeance stemming from personal contact with the employee).

The first two types are compensable. The third is not.

In *Sexton*, the court found that the petitioner's alleged exposure arose out of her employment. The positional-risk test was satisfied because she would not have been exposed to the perfume had she not worked that day. Furthermore, the nature of the risk was neutral as the circumstances were not controllable by the employer and were not work related. The risk still existed that a co-employee might do something that could injure the petitioner.

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* *Rachel is an associate in our Roseland, New Jersey office. She can be reached at 973.618.4161 or rrlowe@mdwcg.com.*

BENDING THE RULES

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authorize an extension without causing undue hardship. Similarly, employers should scrap all policies that require employees to be "100% healed" before being able to return to work, as the EEOC has stated in clear terms that such practices are unlawful. In this regard, a policy will conflict with the ADA if it requires an employee with a disability to have no medical restrictions, or be 100% healed, in order to be allowed to return to work, so long as the employee is able to perform his or her job responsibilities with or without reasonable accommodation. Rather, companies must employ policies that allow for individualized evaluations of a worker's ability to return to work with or without a reasonable accommodation under the ADA.

Finally, employers should consider implementing the specific criteria laid out in the new guidance regarding a company's undue hardship analysis in existing policies and procedures for requested ADA-related leave. In doing so, employers will be well armed and prepared to fight any employee disputes regarding denied leave requests where the employer can demonstrate that the request would have caused an undue hardship based on the specific factors laid out by the EEOC for analyzing the issue.

Ultimately, while the EEOC's new guidance does not significantly alter the EEOC's position on leave as a reasonable accommodation, the guidance does demonstrate that the EEOC intends to continue focusing on this specific issue with extra care for the foreseeable future. With this increased emphasis on leave, employers should scrutinize their own leave and reasonable accommodation processes carefully in order to ensure that they do not run afoul of the ADA. ■

BACK TO THE FUTURE

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While *Daimler* and *Tyrrell* provide a sound basis for a corporate defendant to challenge general jurisdiction, the Supreme Court's most recent opinion in *Bristol-Myers Squibb v. Superior Court of California*, 137 S.Ct. 1773 (2017), further bolsters the standard set forth in *Walden* by delineating an equally corporation-friendly standard relative to specific jurisdiction. *Bristol-Myers Squibb* arose from a series of eight lawsuits in California involving 678 plaintiffs, 592 of whom were residents of other states, all of whom alleged they suffered various injuries as a result of a blood-thinning drug manufactured by the pharmaceutical giant. Bristol-Myers Squibb Company (BMS) argued that California lacked personal jurisdiction over the claims of the non-resident plaintiffs, citing that it was headquartered in New York, incorporated in Delaware, and that its sales of the drug at issue in California amounted to less than 1.5% of its annual revenue.

The California Supreme Court sided with the plaintiffs, noting the presence of five BMS research facilities and the fact that BMS's sales of similar drugs in California between 2006 and 2012 generated nearly $1 billion. After considering the rule announced in *Daimler*, the California court concluded that California lacked general jurisdiction under *Daimler*, but it held that the pharma company's "wide ranging" contacts within the state sufficiently established specific jurisdiction over the plaintiffs' claims.

The U.S. Supreme Court reversed by an 8-1 margin. As it did in *Daimler*, *Walden* and *Tyrrell*, the Court reiterated the basic core principles of both general and specific jurisdiction, though, in doing so, it recognized that the standard applied to the latter is "very different." The Court expressly rejected the notion that the inquiry of underlying specific jurisdiction turns on the activities of the corporation within the forum generally. On the contrary, the Court explained that specific jurisdiction requires that the lawsuit arise from the corporation's contacts within the forum. According to the Court, "[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State."

Applying that reasoning to the dispute before it, the Supreme Court found that the business BMS conducted in California coupled with the revenue generated as a result was insufficient. Because there was no factual connection between the forum state and the claims of the non-resident plaintiffs, specific jurisdiction did not vest.

This recent trend of favorable decisions renews "traditional notions of fair play and substantial justice" and reinforces the long-standing principles underlying personal jurisdiction. While such precedent is not an invitation to disregard corporate form, the burden associated with the exercise of jurisdiction over a corporate defendant seems to have reached a new height. ■

SCOPE! SCOPE! SCOPE!

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Currently, the Florida Supreme Court has accepted jurisdiction over a pending matter to determine whether homeowners will suffer irreparable harm should their homeowner carrier be permitted to make repairs without any input and/or scope agreement with the insureds. In *Fernandez-Andrew v. Florida Peninsula Insurance Company*, a motion to abate was granted, and the Third District Court of Appeal agreed with the trial court that the insured suffered no irreparable harm in allowing the repairs to be made prior to any litigation regarding scope and proper invocation of the Option to Repair provision. Until this determination is made, the Option to Repair's future as an choice for homeowners and carriers is uncertain. ■

Pennsylvania—Civil Rights

THIRD CIRCUIT REAFFIRMS RIPENESS DOCTRINE IN CIVIL RIGHTS CLAIM AND NEED TO EXHAUST STATE REMEDIES BEFORE PURSUING A FIFTH AMENDMENT TAKINGS CLAIM

By Mark J. Kozlowski, Esq.*

KEY POINTS:

- When a property owner seeks just compensation via the Fifth Amendment, courts will look to determine whether the alleged taking is facial or as-applied based on the language of the ordinance, regulation or statute.
- Claims for just compensation brought pursuant to the Fifth Amendment are subject to state-level exhaustion via an inverse-condemnation proceeding.
- If the property owner challenges the underlying validity of the taking, then the denial of just compensation is irrelevant to the existence of a ripe claim.

Mark J. Kozlowski

In the matter of *Knick v. Scott Township, et al*., 2017 U.S. App. LEXIS 12052 (3d Cir. July 6, 2017), the plaintiff commenced a civil rights action against Scott Township, located in a rural part of Lackawanna County, Pennsylvania, and its Code Enforcement Officer for violations of, *inter alia*, the Fourth and Fifth Amendments. The plaintiff based her claims on the enactment of an ordinance by Scott Township referred to as the Ordinance Relating to the Operation and Maintenance of Cemeteries and Burial Places. The ordinance permits the township's Code Enforcement Officer to enter onto private property situated within the township for the purpose of determining the existence of a cemetery or ancient burial ground on the property. The township enacted the ordinance to determine whether residents had unmaintained cemetery plots on their properties. In fact, the ordinance explicitly applies to both private and public cemeteries, and it requires cemetery "owners" to properly maintain and upkeep any cemetery.

Following enactment of the ordinance, the Code Enforcement Officer entered onto the plaintiff's property (open fields) without notice for the purpose of determining whether a cemetery plot existed on the property. After it was established that an ancient cemetery was present on the property, the plaintiff was cited, pursuant to the ordinance, for failing to maintain the cemetery area and failing to make it available and open to the public.

The plaintiff initially brought an action in the Lackawanna County Court of Common Pleas seeking to enjoin the township from enforcing the ordinance via its citation power. Following a series of procedural issues, the state court matter was stayed. Thereafter, the plaintiff commenced her federal civil rights action in which she alleged that the ordinance on its face and as applied violated her Fourth Amendment due process rights. In addition, she attempted to advance a claim for the due process rights of others similarly situated. The plaintiff also sought damages under the Fifth Amendment arguing that the ordinance created a "taking" because it required her to keep her property open to the public and required her to maintain any and all cemetery plots or ancient burial grounds on the property. The District Court granted the defense motion to dismiss, finding that the due process claim failed because the plaintiff did not demonstrate that her Fourth Amendment rights were violated or that they would be immediately violated. She, therefore, lacked standing to bring a Fourth Amendment claim. With respect to her Fifth Amendment claim, relying on *Williamson Cnty. Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the District Court found the claim was not ripe because the plaintiff had failed to first seek just compensation via available state remedies.

Following dismissal by the District Court, the plaintiff appealed to the United States Court of Appeals for the Third Circuit. In a precedential opinion, the Third Circuit affirmed the District Court decision and found *Williamson County* applicable to the plaintiff's Fifth Amendment claim. The plaintiff had, according to the Third Circuit, failed to meet the two-prong requirements

> … the finality rule requires that the government has reached a final decision regarding application of the regulation to the property at issue…. Second, the plaintiff must seek and be denied just compensation using the state's procedures, provided those procedures are adequate.

The defense argued that the plaintiff's failure to seek just compensation under the Pennsylvania Eminent Domain Code at the state-court level rendered her claims premature, i.e. not yet ripe for disposition via a federal civil rights claim. The Third Circuit agreed and affirmed the District Court's dismissal of the plaintiff's claims finding that she must first seek "just compensation" at the state court level. Failure to provide just compensation then, and only then, renders a Fifth Amendment claim ripe.

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Pennsylvania—General Liability

PARK AND CROSS AT YOUR OWN RISK

By Claire B. Ventola, Esq.*

KEY POINTS:

- Property owners and operators owe no duty to protect persons injured on an adjoining roadway.
- Property owners and operators owe no duty to guests or business invitees to provide sufficient parking.
- Prior precautions taken by property owners and operators to dissuade invitees from parking on the other side of a highway does not constitute a voluntary assumption of control over the highway so as to impose a duty of care.

Claire B. Ventola

On January 19, 2017, in *Newell v. Mont. West, Inc.*, 2017 Pa. Super. LEXIS 40, No. 281 EDA 2016 (Pa.Super. Ct. 2017), a case of first impression, the Superior Court of Pennsylvania held that a property owner or possessor of land adjacent to a roadway does not owe any legal duty to business invitees injured while they are crossing that roadway. In so holding, the court rejected the plaintiff's allegation that the defendant caused the plaintiff-decedent's accident because it did not provide adequate parking to its invitees, which created an unsafe condition on its property. The Superior Court held that a property owner or operator owes no duty to its business invitees to provide adequate parking. According to the court, to impose such a duty on property owners and operators would create a new duty that would significantly burden property owners and operators across Pennsylvania and would expose them to greatly expanded potential liabilities.

In *Newell*, the plaintiff-decedent was fatally struck by a motor vehicle while crossing Route 309 to return to his car, which was parked across Route 309 on another's property, following a concert at the defendant's nightclub. The plaintiff alleged that the nightclub owner and operator was negligent because it failed to protect is invitees from dangers on adjoining public highways, failed to provide sufficient parking for its invitees and failed to warn its business invitees of the adjacent highway's dangers, even though those dangers were known to the property owner and operator. At the trial court level, Judge Lachman granted summary judgment in favor of the property owner and operator of the nightclub, finding that the defendant owed no duty of care to the decedent at the time of his death because his accident occurred while he was crossing Route 309, not on any property owned or possessed by the defendants. On appeal, the Superior Court affirmed Judge Lachman's holding.

The *Newell* court held that, "[u]nder Pennsylvania law, state highways are the property of the Commonwealth. The Commonwealth has the exclusive duty for the maintenance and repair of state highways." (*Allen*, 625 A.2d at 1328-29.) The court cited Restatement (Second) of Torts § 349 for the proposition that a possessor of land abutting a public highway owes no duty to maintain said highway or to protect pedestrians—including business invitees—injured by alleged "hazards" or "dangerous conditions" of that highway while crossing the street. Specifically, the court stated:

> A pedestrian who walks on a public highway places himself at risk of injury from vehicles traveling on the highway. Any duty of care owed to that pedestrian must belong to those who maintain the road and those motorists who are licensed to drive safely on it. **The duty does not extend to landowners who have premises adjacent to the roadway.** (Emphasis added.)

Moreover, the *Newell* court specifically held that a landowner does not owe any duty to provide its guests or business invitees with adequate parking. The court stated:

> A landowner may not be held liable to a business invitee for injuries that occur to the invitee on an adjoining highway or other property as a result of breach by the landowner of an alleged duty to provide sufficient parking on its own premises. **We hold that no such duty arises under Pennsylvania law that would form the basis for a negligence action in these circumstances.** (Emphasis added.)

Finally, the *Newell* court rejected the plaintiff's argument that Restatement 2d Torts § 323 creates a duty to warn where a property owner or operator has previously warned invitees about conditions of the adjacent highway. The court found that the property owner's sporadic protective conduct did not create a duty of voluntary assumption to protect its invitees from accidents on the adjacent highway. The court held that such a theory of voluntary assumption of a duty to protect patrons from highway accidents raises significant public policy concerns because highway safety is a governmental responsibility. Therefore, a property owner and operator has no duty to warn its invitees of dangers of an adjacent highway, and if a property owner or operator chooses to so warn, no duty is created. ■

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Pennsylvania—Insurance Coverage and Bad Faith

SETTING THE "TONER" TO GRANT ALLOCATUR IN *PERGOLESE v. THE STANDARD FIRE INS. CO.*

By Brooks R. Foland, Esq.*

KEY POINTS:

- The Supreme Court of Pennsylvania's decision in *Sackett II*, regarding stacking waivers, has been cited by several subsequent cases, resulting in the further complication of an already complicated issue.
- The Superior Court of Pennsylvania was recently presented with two separate cases regarding stacking waivers and entered two very different and conflicting decisions.
- If the Supreme Court of Pennsylvania grants the pending petition for allowance of appeal in *Pergolese*, it will give the court another opportunity to reaffirm its prior holding in *Sackett II* and to rectify the Superior Court's conflicting decisions.

Brooks R. Foland

The Superior Court of Pennsylvania was recently presented with two significant cases regarding automobile stacking waivers, *Toner v. Travelers Home & Marine Ins. Co*., 137 A.3d 583 (Pa.Super. 2016) and *Pergolese v. The Standard Fire Ins. Co., one of the Travelers Insurance Companies*, 2017 Pa.Super. LEXIS 243 (Pa.Super. April 11, 2017). The court's conflicting decisions in *Toner* and *Pergolese* have cast doubt as to how these matters should be handled. Particularly, is an insurer required to present the insured with additional stacking waivers when vehicles are subsequently added to an existing automobile policy? Despite the clear ruling and mandates in *Sackett II*, this question has continued to overwhelm the Pennsylvania court system for the past decade.

In *Sackett v. Nationwide Mut. Ins. Co*., 940 A.2d 329 (Pa. 2007) (*Sackett II*), the Supreme Court of Pennsylvania held that where coverage under a particular after-acquired vehicle clause continues in effect throughout the existing policy period, subject only to conditions subsequent, such as notice and the payment of premiums, the after-acquired vehicle clause is continuous in nature and no new stacking waivers are required when vehicles are later added to the policy. Litigants and lawyers throughout this Commonwealth—in both state and federal courts—continue to debate and argue the scope and breadth of the Supreme Court's holding and how it applies to varying policy language and different factual scenarios. One such case is *Toner v. Travelers Home & Marine Ins. Co*.

In *Toner*, the Superior Court found that the policy language at issue gave Toner 30 days in which to inform Travelers of the purchase of a new vehicle, thereby extending the existing coverage. The court emphasized that the 30-day "grace period" provided coverage to the newly acquired vehicle even before Travelers was informed of the acquisition. As long as the insured notified the insurer of the acquisition during that 30-day period, coverage continued uninterrupted. The court distinguished this type of policy language—i.e., continuous—from policies that provide a certain grace period but then require the insured to apply for and obtain additional coverage for the new vehicle—i.e., finite. After examining the clause contained in Travelers' policy, the court held that it was continuous and, thus, no new stacking waivers were required.

Toner appealed, and the Supreme Court of Pennsylvania granted allocatur last year, certifying the following issue of "[w]hether the Superior Court correctly determined that an insured, who signed a UM/UIM stacking waiver at the inception of a single vehicle policy, was not entitled to stack UM/UIM benefits, even though the carrier failed to obtain stacking waivers when second and third vehicles were added to the policy." However, the plaintiff in *Toner* resolved his claim prior to oral argument, and the appeal was discontinued.

On April 11, 2017—just days after *Toner* had settled—the Superior Court issued its decision in another stacking case, *Pergolese v. The Standard Fire Ins. Co*. The majority in *Pergolese* refused to enforce the stacking waivers that the plaintiffs had voluntarily executed for each of their two insurance policies with Standard Fire. Rather, the majority accepted the convoluted theory advanced by the claimants in their effort to circumvent *Sackett II* and *Toner*. Instead of examining the after-acquired vehicle language, the majority opined that the amended declarations page, showing the new vehicle, is what "added" the vehicle to the policy. The majority reasoned that this somehow rendered the after-acquired vehicle clause irrelevant and converted the addition of the vehicle into a new purchase of coverage, necessitating execution of a new stacking waiver. The majority distinguished *Toner* because "[t]he after-acquired vehicle clause [in *Toner*] was at issue." In finding that the vehicle was added by way of the amended declarations

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Pennsylvania—Public Entity & Civil Rights Litigation

SCRATCH THAT, AND REWIND IT BACK

By April L. Cressler, Esq.*

KEY POINTS:

- You *do* have the right to record police officers engaged in official activity regardless of whether your actions constitute expressive conduct.
- The First Amendment protects the right to photograph, film or otherwise record police officers conducting their official duties in public.

April L. Cressler

On July 7, 2017, the U.S. Court of Appeals for the Third Circuit threw in with the likes of the First, Fifth, Seventh, Ninth and Eleventh Circuits in finding that the First Amendment protects the recording of police officers engaged in their official duties while in public. *See Fields v. City of Phila*., 2017 U.S. App. LEXIS 12159, at *4 (3d Cir. July 7, 2017). It held that there is a First Amendment right of access to information about how our public servants operate in public.

Previously, the U.S. District Court for the Eastern District of Pennsylvania had dismissed the Section 1983 action filed against the City of Philadelphia and certain police officers, finding that there is no First Amendment right to observe and record police officers absent some other expressive conduct. *Fields v. City of Phila*., 2016 U.S. Dist. LEXIS 20840 (E.D. Pa. Feb. 19, 2016). The case revolved around two separate incidents in which Philadelphia police officers encountered, and in one cited case, two individuals who had been capturing police conduct on film, but were not commenting or questioning the police conduct at the time of the recordings.

In the first incident, Amanda Geraci, a member of a "police watchdog group," was attending a protest at the Philadelphia Convention Center in September of 2012 when she observed police officers arresting a protestor. Geraci alleged that she attempted to move to a better vantage point for purposes of recording the arrest when she was pushed by an officer and pinned against a pillar, thus preventing her from recording the arrest.

In the second incident, which occurred in September of 2013, Richard Fields, then a sophomore at Temple University, observed a group of police officers breaking up what appeared to be a party across the street, which he began to photograph with his iPhone. Fields alleged that an officer made derogatory remarks to him when he noticed that he was photographing their actions and further ordered him to leave the scene. When Fields refused, he was arrested and cited for "Obstructing Highway and Other Public Passages." His charges were later withdrawn when the officer failed to appear for the court hearing.

Both individuals later filed suit, alleging retaliation for their actions of recording police activity. In the *Fields* decision, the district court reasoned that the act of silent recording could only equate to speech sufficient to trigger the protections of the First Amendment if it constituted symbolic expression, similar to that of flag waiving or flag burning. However, Third Circuit Judges Ambro, Restrepo and Nygaard disagreed.

In their decision to remand the case, Judge Ambro acknowledged that "[w]e ask much of our police. They can be our shelter from the storm. Yet officers are public officials carrying out public functions, and the First Amendment requires them to bear bystanders recording their actions." In an age where smart phones are the new norm and allegations of police misconduct make daily appearances on such easily accessible formats as Facebook Live, such a ruling is hardly surprising. To the contrary, the recent number of high-profile police-involved shootings almost necessitated such a ruling or else risk the possibility of creating a split amongst the Circuits.

Although the Court of Appeals in *Fields* ultimately found that the First Amendment's right of access to information provides the public with the right to photograph, film or audio record the actions of police officers engaged in official activity in public areas, the right is not absolute. Thus, the act of recording could fall outside the protections of the First Amendment in situations where the recording interferes with an investigation or puts an individual's safety at risk, including the safety of the officer.

Additionally, although numerous civil rights advocates were quick to claim victory, the court found that the officers were, nevertheless, entitled to qualified immunity. Despite the existence of a City of Philadelphia Police Department official policy clearly recognizing the right of a private citizen to record police activity, the court found that such a right was not clearly established at the time of the arrests of the two individuals bringing the claims of retaliation. The court stated, "We cannot say that the state of the law at the time of our cases (2012 and 2013) gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected. Accordingly, the officers are entitled to qualified immunity."

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IDIOPATHIC CONDITIONS

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Currently, this case remains the legal standard for these types of claims and is cited in several recent cases, namely, *Pulejo v. Middlesex County Consumer Affairs*, 2016 N.J. Super. Unpub. LEXIS 1626 (N.J. Super. App.Div. July 14, 2016); *Pereira v. Oasis Foods*, 2017 N.J. Super. Unpub. LEXIS 1456 (N.J. Super. App.Div. June 13, 2017).

Overall, idiopathic conditions are not compensable. The carrier would not be responsible for treatment associated with the underlying idiopathic condition. However, any aggravation of an idiopathic condition or an injury sustained at work because of this condition might be compensable. Resolution of the issue will rely heavily on a factual analysis of the petitioner's idiopathic condition and the alleged work accident. Therefore, it is essential to obtain all the necessary information and facts of a petitioner's injury to make a proper argument against compensability with these types of claims. ■

THIRD CIRCUIT REAFFIRMS RIPENESS DOCTRINE

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The Third Circuit also considered whether facial claims are also exempt from the second prong of *Williamson County*, the exhaustion of state-law compensation remedies. The court reaffirmed its prior holding in *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 168 (3d Cir. 2006) that a facial just compensation takings claim does not relieve plaintiffs from the duty to seek, first, just compensation from the state.

A plaintiff may be excused from the first prong of *Williamson County* depending on the type of taking alleged. If the taking occurred through an exercise of discretion, the plaintiff must demonstrate that the government reached a "final decision." But if the taking occurred on the face of the statute, ordinance or regulation, that requirement does not apply. As for prong two, the plaintiff may be excused from exhausting state law remedies depending on the type of claim asserted and the form of relief appropriate for that claim.

The holding essentially reaffirms the common law doctrine that an aggrieved property owner must, in most instances, first seek "just compensation" via the appropriate state-level channels, *e.g.*, Board of Reviewers in an eminent domain action, before pursuing a Fifth Amendment takings claim in federal court. Municipalities should be cognizant of this holding when defending against Fifth Amendment actions. ■

SETTING THE "TONER" TO GRANT ALLOCATUR

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page—as opposed to the after-acquired vehicle clause—the majority did its best to circumvent both *Sackett II* and *Toner*. The Honorable Victor Stabile wrote a lengthy and strongly worded dissent.

In its petition for allowance of appeal, which was filed with the Pennsylvania Supreme Court on May 11, 2017, Standard Fire argued that the majority's analysis ignores and contradicts the Supreme Court's express holding in *Sackett II*, which was not based on the title of the document used to memorialize the addition of a new vehicle to an existing auto policy. On the contrary, the controlling factor under *Sackett II* was the *language* of the after-acquired vehicle clause, i.e., whether the clause is continuous or finite in nature. Where the language of the policy only requires the insured to ask that the after-acquired vehicle be added to an existing policy within a certain timeframe, the insurer is not required to obtain new waivers. That is precisely the type of clause in the policy in *Pergolese*—a clause that is literally *identical* to the clause at issue in *Toner*. A clause that the Superior Court had, just months prior, ruled was continuous in nature. Interestingly, the Pergoleses have recently advised the court that they do not oppose the petition.

If the appeal is granted, this case will give the Supreme Court another opportunity to address this significant issue and to harmonize *Pergolese* with *Sackett II* and *Toner*. Absent immediate clarification from the Supreme Court, this issue will likely continue to result in conflicting and contradictory decisions from our trial and intermediate appellate courts and will continue to confound claimants and insurers alike. The previous granting of allocatur in *Toner*, however, suggests that the state's highest court may be ready to revisit and reaffirm its important holding from *Sackett II*. ■

SCRATCH THAT, AND REWIND IT BACK

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This particular decision certainly presents potential issues when defending First Amendment cases relating to the right to record police activity. Moreover, the granting of qualified immunity to the officers provides a strong argument for those pending (or lingering) cases dealing with just such an issue leading, arguably, up to the date of this decision. ■

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