SIDEBAR

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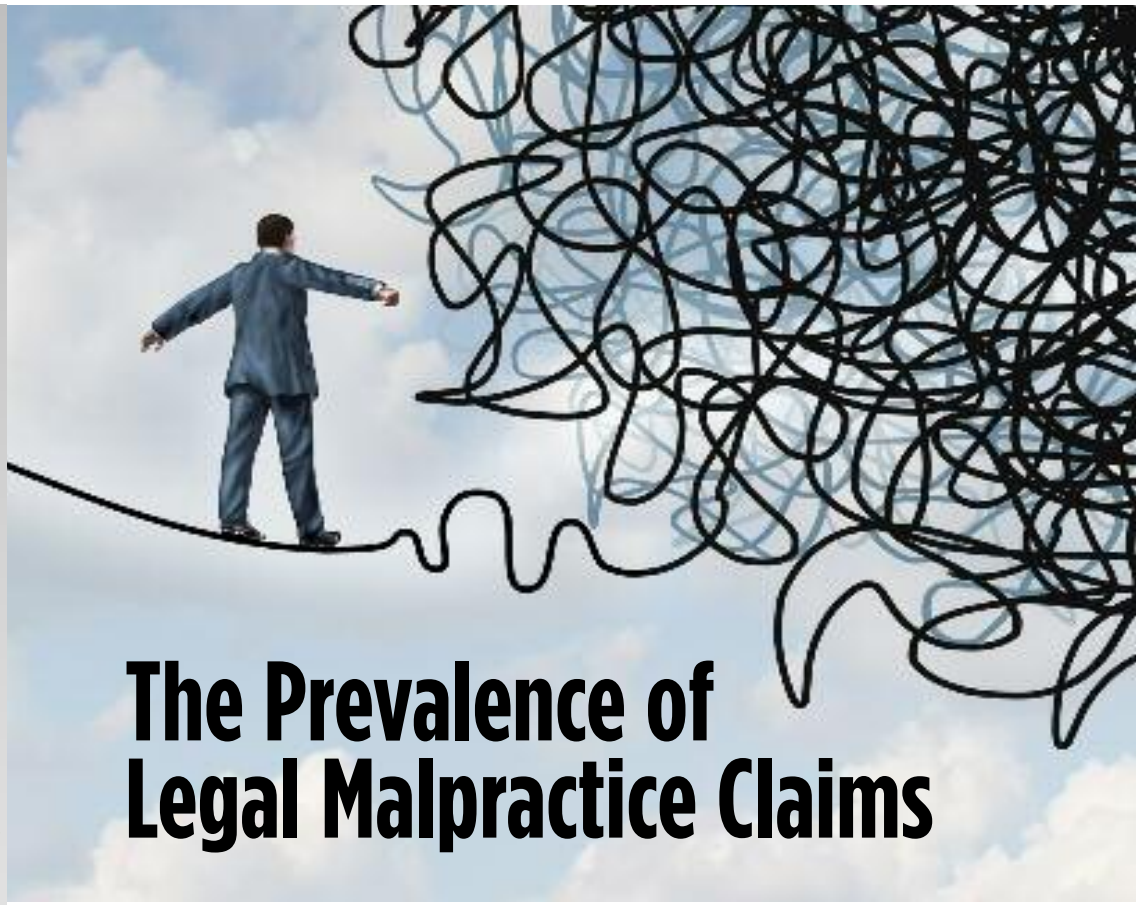
In This Issue...



The Prevalence of Legal Malpractice Claims

By Josh J.T. Byrne, Esq.

All attorneys understand the possibility of a legal malpractice claim exists in the abstract. However, as a general rule, attorneys have little appreciation of the scale of the issue. In part, this may be due to our industry's historic lack of attention to the statistical details regarding legal malpractice claims. The medical industry has become very adapt over the years at analyzing the percentage of patients whose care results in medical malpractice claims. The legal industry has not followed suit.

One of the difficulties in analyzing the prevalence of legal malpractice claims is the data we do have generally comes from insurance companies. The data from insurance companies is inadequate in a number of respects. Most obviously, the data from insurance companies does not include claims made against attorneys who do not maintain professional liability insurance. Although Pennsylvania Rule of Professional Conduct 1.4(c) requires attorneys to inform clients if they do not maintain at least $100,000 of insurance per incident and $300,000 per year, it does not require attorneys to maintain professional liability insurance. It is estimated that twenty to twenty-five percent of attorneys in Pennsylvania are uninsured. Uninsured attorneys are predominantly solo and small firm attorneys, and claims against them are not reflected in the data kept by insurance companies. On the other end of the spectrum, most large companies have exceptionally high

Cont. next page

deductibles or self retentions which also causes claims to frequently fail to appear in insurance company data.

Another issue in tracking legal malpractice claims is the differences between "incident," "claim," and "action." These are three levels of issues attorneys face. An incident is an issue which occurs during representation which may adversely impact the litigation. A claim arises when a client is damaged by an incident and seeks compensation. An action is the commencement of a legal action for damage allegedly caused by an incident. Many incidents and claims are resolved by attorneys and their firms before insurance companies ever become involved. These incidents and claims also never make it into statistics regarding legal malpractice claims. Other claims are repaired after they are reported to an insurance company, and may or may not be included in industry statistics.

Taking all of these deficiencies into account, the numbers we do know are quite frightening. On its website, the American Bar Association asserts: "It is estimated that five to six percent of all private attorneys face legal malpractice charges each year." This estimation comes from the ABA Standing Committee on Lawyers' Professional Liability which releases a summary report on legal malpractice every four years. A 2015 working paper from Duke Law School faculty (Herbert M. Kritzer & Neil Vidmar, When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and their Resolution (July 7, 2015)) reviewed a number of sources which showed rates of issues (not all of the sources were clear as to whether "incidents" and "claims" were included as well as "actions") which ranged from under one percent to nearly ten percent. Other sources have frequently asserted "On average, attorney's can expect three malpractice claims against them during their careers." (Katerina P. Lewinbuk, What Goes Around Comes Around: Lawsuits Against Lawyers and the 'Professional Responsibility' of Law Schools to Face that Reality, Southwestern Law Review, Vol. 42 at 550).

We can also look at the issue anecdotally. Searching the phrase "legal malpractice" in Lexis for Pennsylvania and related federal courts brings up ten cases in the month of August 2016 alone. Another six cases appear for September to date. Not all of these cases are actually legal malpractice cases, but of the legal malpractice cases, at least five of them include some level of pro se complaint regarding the attorney's conduct. To date this year, according to Lexis, forty-nine Pennsylvania and related federal court cases have included some discussion of legal malpractice. An additional 21 cases included reference to the Dragonetti Act or wrongful use of civil proceedings. These, of course are only the cases where some type of opinion has been filed. In addition to legal malpractice and Dragonetti actions, the Disciplinary Board of the Supreme Court of Pennsylvania has reported sixty-six negative disciplinary actions (not including reinstatements) to date this year.

Of course, none of this addresses the legitimacy or value of the legal malpractice claims asserted against attorneys. Many claims have little or no merit or value. However, as any attorney who has faced a legal malpractice claim will tell you, the lack of merit of a claim is cold comfort for the attorney who has to defend against an accusation of legal malpractice. Legal malpractice claims necessarily involve an attack on an attorney's professional reputation. Even the most meritless claims will require time, effort, and money from the attorney defending against them.

All this being said, there is value in understanding the prevalence of legal malpractice claims. Being aware of the risks reminds us of the necessity of vigilance, and importance of using "best practices." Attorneys should not practice in constant overwhelming fear of malpractice claims, but knowing of their prevalence can be a healthy motivator in taking appropriate steps to avoid them.

Josh Byrne is a partner in the firm's Philadelphia office and is a member of the Professional Liability Group.

First Stayton, Now Smith:
A Look into the Collateral Source Rule when Medicaid Pays for a Plaintiff's Past Medical Expenses

By Shae Chasanov, Esquire

The Delaware Supreme Court issued its ruling in Smith v. Mahoney on November 3, 2016. Justices Valihura, Vaughn and Seitz presided to determine that the collateral source rule would not be extended to past medical expenses paid by Medicaid. This means that an injured party may not board those medical expenses written off by Medicaid, and may only admit those expenses actually paid by Medicaid.

In Smith, the appellant, Jennifer L. Smith, sought compensation for personal injuries sustained in two car collisions. Smith was a Medicaid recipient. Her physician initially sought to recover his $22,911 bill from the proceeds of any personal injury settlement obtained by Smith, but he later opted to bill Medicaid for his charges. Medicaid paid Smith's physician $5,197.71 and asserted a lien in that amount against any proceeds recovered by Smith in a settlement or lawsuit. However, during the Superior Court trial, Smith presented medical evidence to reflect the physician's $22,911 charge, in addition to other medical expenses. The jury issued an award to Smith that included the recovery of the physician's $22,911 charge, and not the $5,197.71 amount actually paid by Medicaid. Post-trial motions were brought on the admissibility of the physician's charge, and the Superior Court had to consider the impact of Stayton v. Delaware Health Corp., 117 A.3d 521 (Del. 2015), which dealt with this issue, yet with expenses paid by Medicare. The Superior Court, in finding that the Medicaid write-offs are not payments made to or benefits conferred on the injured party, refused to apply the collateral source rule, reducing Smith's medical expenses to $5,197.71.

Smith appealed the decision to the Supreme Court, drawing distinctions between the Medicare and Medicaid programs. Such distinctions included Medicare's mandatory enrollment versus Medicaid's optional enrollment. Counsel for Smith made several other arguments on appeal. For example, Smith argued that such a reduction of boardable expenses before a jury would unconstitutionally burden an injured party's access to the courts, as there would be less financial incentives for an attorney to take on such a case.

The Court relied upon "essentially the same reasons expressed in Stayton" and refused to extend the collateral source rule when Medicaid paid the plaintiff's past medical expenses.

What are these reasons? First, the Court held that the difference between the amount of medical expenses paid by Medicaid and the amount written off and unpaid is unnecessary to make the injured party whole, because the difference is paid by no one. Once a provider seeks payment from either Medicare or Medicaid (with limited exceptions), the patient can no longer by billed the physician's standard charge, and the provider must bill the government according to the government's fee schedule.

The injured party does not incur that expense, and no one has to pay it. Second, as with Medicare, the reduced charges required by Medicaid directly benefit federal and state taxpayers -- not the plaintiff. Third, the amount paid by Medicaid "is conclusive of the reasonable value of the injured party's past medical expenses."

Why does Smith matter? This holding prevents a plaintiff from pursuing a double recovery of expenses, particularly for expenses he/she never incurred in the first place. While the amount actually paid by Medicaid may be presented to a jury, any amounts written off by the provider under the government's fee schedule are now inadmissible.

It is worth mentioning that an injured party's right to future expenses is untouched, however. Because a Medicaid recipient may opt out of the government program for a variety of reasons, the Court held that an injured party's right to future medical expenses should not be reduced by any amounts that could be covered under Medicaid, as that would be entirely speculative.

The Stayton and Smith decisions have challenged the collateral source rule, which has largely remained untouched in Delaware for many years. They are incredibly important decisions that will undoubtedly affect the value of an injured party's claim when Medicare and Medicaid payments have been made.

Shae Chasanov is an associate in our Wilmington, DE office.

SIDEBAR

A New Look at the Uninsured Employers' Guaranty Fund

By Sharon McGrail-Szabo, Esq.

The Uninsured Employers' Guaranty Fund ("UEGF," or "the Fund") was created by the legislature in 2006. The Fund is designed to pay claims for injured workers whose employers have not, in violation of the law in Pennsylvania, obtained workers' compensation insurance to cover claims. The Fund, however, does not simply pay all claims that are presented. If there is any other potential party against which liability might be assessed, the Fund will (and must, under the Act) struggle mightily to not pay that claim. There are also requirements that claimants have to follow in order for the Fund to consider payment of their claim, even when there is an absence of other, potentially liable parties. One of these requirements is the requirement that the claimant provide adequate notice of a claim. Section 1603(b) of the Workers' Compensation Act (77 P.S. §2703(b), requires that a claimant provide notice of a claim to the Fund "within 45 days after the worker knew that the employer was uninsured." Thus, claimants are not punished if an employer misleads them into believing that they have insurance for a period of time after the claim. It is only when they actually become aware (not the "knew or should have known" standard) that the employer does not have insurance that the notice requirement is triggered.

In the last year, two (2) very important cases have been decided by the Commonwealth Court which address the issue of notice to the Fund. In the first case, decided on August 15, 2015, Lozado v. WCAB (Dependable Concrete Work and Uninsured Employers Guaranty Fund), 123 A.3d 365 a.Cmwlth. 2015), the relevant issue presented was whether a claimant' failure to provide notice to the Fund within 45 days was a complete bar to benefits, or whether it simply barred Claimant from receiving benefits until such time as notice was given.

In the Lozado case, Claimant received a letter from the Bureau of Workers' Compensation on April 28, 2009, advising him that his employer did not have workers' compensation insurance. Yet he did not file his notice of claim to the Fund until January 2010, nearly eight (8) months later. As such, the Workers' Compensation Judge who heard the case found as fact that the claimant clearly failed to provide notice of his claim within the required 45 day period. The Board affirmed, as did the Commonwealth Court. The Court then moved to determine what the effect of Claimant's late notice to the Fund would be. Specifically, the Court was asked to decide whether this late notice would be a complete bar to benefits or if benefits would merely be delayed until the date notice was given.

The Court looked at the statutory language of Section 1603(b), which states that "[a]n injured worker shall notify the fund within 45 days after the worker knew that his employer was uninsured." That language alone, with the imperative "shall," seems to bar benefits completely if the notice provision is not met. That language, however, is followed in the statute by "[n]o compensation shall be paid from the fund until notice is given." The Court noted specifically that the statutes does not say that "no compensation shall be paid unless notice is given" within 45 days.

The Lozado court discussed how the Board likened this scenario to that in Section 311 of the Act (77 P.S. §631), where a claimant who provides notice within the required 21 day notice period will receive benefits retroactive to the date of the injury, but a claimant who reports his injury after the required 21 day notice period has expired, but within 120 days, shall receive compensation, but only from the date he gave notice, not from the date of the injury. The Court agreed with this analogy, and found that failure of a claimant to comply with the 45 day notice requirement to the Fund does not bar compensation permanently, but only bars compensation that may otherwise have been due up to the date that notice is finally given.

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The second case, decided on May 9, 2016, Commonwealth Department of Labor and Industry v. WCAB (Kendrickand Timberlline Landscaping LLC), 2016 Pa. Cmwlth. LEXIS 214, further clarified the Fund's obligation to pay benefits to a claimant who failed to meet the required 45 day notice requirement. The issue in this case centered around the definition of "compensation." Specifically, the issue was whether a claimant's failure to meet the 45 day notice requirement barred him from receiving wage loss and medical benefits prior to the date notice is given, or if the bar only applied to wage loss benefits, such that the Fund should have to pay medical expenses that were incurred prior to the notice.

The parties in the Kendrick case stipulated to most of the facts, including the fact that Claimant learned on December 11, 2011 at a hearing that his employer was uninsured, and that he failed to file his claim with the Fund until February 8, 2012, more than 45 days later. The parties stipulated that Claimant was entitled to compensation, but could not agree to the commencement date of such compensation. The Fund argued that Claimant should not be entitled until the date he provided notice. Claimant argued that his compensation should commence as of the date of the injury. The Court spent some considerable time discussing its findings regarding the 45 day notice requirement in the prior Lozado case, and then proceeded to a discussion of the definition of compensation.

Specifically, the Kendrick Court stated that: "how the term "compensation" is defined is dependent upon where in the Act the term is used and how it is defined for purposes of the particular Section." The Court cited its findings in Lozado when it discussed how the purpose of the notice provision is to "apprise the Fund of the claim and give the opportunity to investigate the claim while the events are recent," and to "strongly compel a claimant to quickly provide the Fund with notice by imposing a consequence for delay." The Court also referred to the Supreme Court's decision in Giant Eagle, Inc. v. WCAB (Givner), 39 A.2d 287 (Pa. 2012). In that case, the Supreme Court determined that the term "compensation," as utilized in different sections of the Act, does not always include medical expenses.

Ultimately, however, the Kendrick Court determined that as far as Section 1603(b) is concerned, the plain language of the statute, which states in Section 1601 that compensation is defined as "benefits paid pursuant to Sections 306 and 307" of the Act, means that "compensation" as referenced in Section 1603(b) does, in fact, include wage loss and medical benefits, as Sections 306 and 307 also include both. Thus, the Court held that the claimant in the Kendrick case was only entitled to payment of compensation, both wage loss and medical expenses, from the date he gave notice of the claim to the Fund.

This result might seem harsh, especially in traumatic cases where the majority of the expensive medical treatment is incurred very shortly after the injury takes place. The Court may have been aware that their decision might be interpreted that way, as they made sure to note at the end of the decision that "this i nterpretation is not in conflict with the humanitarian purposes of the Act [because] employees working for uninsured employers do not assume the costs of medical treatment provided to them prior to notice being given to the Fund" and that "medical providers are prohibited from requiring injured employees to pay for work-related treatment...." Finally, lest they be seen as being unfair to the providers, the Court also noted that the provider "maintains their right to pursue a remedy outside the workers' compensation system against uninsured employers the cover the expenses incurred in the treatment of injured employees.

These two (2) recent decisions go a long way toward defining what the UEGF is required to pay, and when, when a claimant makes a claim beyond the 45 day notice requirement. For claimants' counsels and attorneys who represent the Fund, as we often do, this is important information.

Sharon McGrail-Szabo is a partner in the firm's Allentown office and is a member of the Workers' Compensation Department.

Perrin Conferences' Diversity and Inclusion Conference

By Jesse Smith, Esq.

As part of its continued emphasis on diversity, Swartz Campbell recently attended Perrin Conferences' Diversity and Inclusion Conference at the Westin Philadelphia. Attendees included attorneys from law firms from across the country, as well as in-house counsel for several well-known corporations.

As the name suggests, the conference was about the progression of diversity and inclusion in the legal community. Topics for discussion included "Understanding the Value of Emotional Intelligence;" "The Powerful Legacy of Female Leadership;" and "Turning Words into Action." Some of the highlights from the sessions included:

• Firms want to market their diversity – During the panel discussions, several speakers noted the statistics in their firms relative to diversity. One lawyer mentioned that her firm recently hired its 47th lawyer, and that the firm is 50% women on the associate and partner level.

• Sensitivity to LGBT issues is a work in progress – It was noted that while it makes sense to many that LGBT issues would be a part of any diversity discussion, these matters are fairly new discussions and have not been as fully embraced as they should be. There are no real statistics on it because it has not really been addressed before now. Additionally there is sometimes a challenge in that someone who is a member of the LGBT community will not necessarily be as easily identifiable as a woman or person of color.

• Paternity Leave and Flex Scheduling are a part of diversity – While these have generally not been common topics in discussions on diversity, the panelists talked about how this is in fact another side of diversity, and how firms who are on the progressive side of these topics are successful in attracting talent. There is a different attitude from years past about men who wish to take time off for a new baby. In addition, flex scheduling, and the question of how much face time is required in the office in this age of technology are areas in which firms may need to be do some self-evaluation.

• Millennials could be a shock to the legal system in a few years, but are a part of a conversation about diversity – The group discussed how millennials tend to not have the "Type A" personality and have a much different perspective on work/life balance. However, they are very self-aware and are more likely to take chances in life than Generation X. In the office, millennials want to see the big picture of their tasks, as opposed to just doing the task without questions.

• The Orchestra Study reveals the concept of "unconscious bias" – In the 1970's, those seeking to perform in orchestras had to audition in front of a group of people. But because the decision makers took into account how applicants looked and spoke, predeterminations were as to how well the applicants could play, and as a result, the orchestra was predominantly white and male. Then they began having the applicants audition behind screens, and the number of women and minority members increased notably.

• Clients and vendors take note of diversity – Several panelists noted that clients and vendors will want to give business to those firms that promote diversity. One of the speakers, representing a corporate vendor, made it a point to say that he wants to hold firms accountable for promoting diversity but not actually living up to it – i.e., firms competing for business will have promo materials with African-

American or female faces on it, yet when the business is awarded, none of those people show up on the bills.

• Firms have to increase pipelines to diverse applicants – Firms serious about diversity and inclusion should seek out relationships with local affinity groups and BLSA chapters at area law schools. Firms should also look to establish a presence in area high schools by participation in mock trial competitions, etc.

There were many others topics that were discussed, but the themes that came up most often in the conference were the concept of "unconscious bias," and the need to broaden the understanding of diversity beyond race and gender to include, inter alia, LGBT concerns, age, and the non-traditional applicant. Additionally, it was mentioned several times that any change in diversity has to come from the top leadership in the firm; the idea of diversity and inclusion has to be more than a politically correct statement, but a culture. To look at it another way, the following was suggested: look at your respective position and your personal makeup (race, gender, religion, sexual orientation, age range, etc.). If the whole firm was made of just people like you, what would the firm be missing out on?

A final thought – the concepts of diversity and inclusion are used together, sometimes interchangeably. However, they do not mean the same thing. Diversity was described as being invited to the dance; however, inclusion is actually being asked to dance. A salient quote from the conference: "there is no finish line when it comes to diversity and living with an inclusive mindset." The conference cannot be viewed as anything less than successful as people were genuinely engaged throughout the discussions and presumably left with new thoughts and ideas to share with their respective firms.

Jesse Smith is an associate in the firm's Philadelphia office. He practices in the Toxic Tort Department.

Limits on Discovery Related to Defense of Personal Jurisdiction Motions

By Beth E. Valocchi, Esq.

In 2014, the U.S. Supreme Court rejected "the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.'" In doing so, the Supreme Court held that the "paradigm" for general jurisdiction over a corporation is its place of incorporation and its principal place of business. The Court further held that in order for a corporation to be subject to general jurisdiction, its affiliations with the forum must be "so constant and pervasive 'as to render [it] essentially at home'" in that state. While the Court left open a possibility that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business" could "be so substantial and of such a nature as to render the corporation at home in that State," it emphasized that that would be the "exceptional case" Daimler A.G v Bauman, 134 S. Ct. 746,760, 761 (2014).

Thereafter, the Supreme Court of Delaware, in Genuine Parts Company v. Cepec, 137 A.3d 123 (Del. Supr. 2016) dealt with whether Delaware could exercise general jurisdiction over a foreign corporation for claims that have nothing to do with Delaware "as a price for the corporation agreeing simply to be able to do business in Delaware." In Cepec, the Court reversed the lower court and held that, in light of Daimler, Delaware's registration statute (8 Del. Code §876) ought to be read as requiring a foreign corporation to allow service of process to be made upon it, but not as a consent to general jurisdiction. The Court further noted "[i]f all of our sister states were to exercise general jurisdiction over our many corporate citizens, who often as a practical matter must operate in all fifty states and worldwide to compete, that would be inefficient and reduce legal certainty for businesses. Human experience shows that "grasping" behavior by one, can lead to grasping behavior by everyone, to the collective detriment of the common good."

Against the backdrop of the Supreme Court's decision in Daimler and prior to the Delaware Court's ruling in Cepec, we, assisted our client, an international corporation, in filing a motion to dismiss approximately 200 asbestos

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Cont. from page 7

personal injury cases filed against it by a national plaintiffs' firm. The defendant corporation is neither incorporated in Delaware nor does it have its principal place of business in Delaware. It has no office or manufacturing facility in Delaware and does not own real property in Delaware. None of the plaintiffs alleged that their injuries arose out of or related to any conduct by the defendant in Delaware.

Plaintiffs, in turn, sought discovery with the apparent aim of trying to show that the defendant had a relationship with its corporate parent, which is a Delaware Corporation, and that this relationship presented the "exceptional case" which would render it subject to general jurisdiction in Delaware. Plaintiffs served dozens of interrogatories and document requests and also sought 30 (b) (6) depositions of both the defendant and its corporate parent.

The defendant responded to the discovery and moved to quash the 30(b) (6) deposition. In response, Plaintiffs opposed the motion to quash and moved to compel discovery. Plaintiffs argued that the defendant's "systematic and continuous" contacts with its corporate parent present "exceptional circumstances" and for that reason Plaintiffs were entitled to complete discovery responses and a deposition of both the defendant and its corporate parent. After hearing the dispute, Master Matthew F. Boyer held that resolution of the dispute required a preliminary assessment of the plausibility of Plaintiffs' theory of general jurisdiction over the defendant, as well as whether the discovery sought might aid in the development of such a theory. Citing Daimler, Master Boyer noted that the inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some cases 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the foreign state.'" Master Boyer declined to consider the defendant's contacts with its corporate parent as Daimler focuses the inquiry on the foreign corporation's affiliations with the forum – not those it may have with an affiliated entity. Master Boyer noted that there does not appear to be any plausible argument that the defendant itself has sufficient contacts with Delaware to render it at home in that state and thus, subject to general jurisdiction. Finally, Master Boyer noted that the defendant had already provided discovery related to the relationship it had with its corporate parent and additional discovery would not add to the jurisdictional analysis of whether the defendant is at home in Delaware. As a result, the defendant's motion to quash the 30 (b) (6) deposition was granted and the cross motion to compel additional discovery was denied.

Beth Valocchi is a partner in the firm's Wilmington DE office and is a member of the Toxic Tort Group.

News & Firm Notes

Nicholas Skiles, Esq., partner with the firm in its Wilmington DE office, recently presented at the Personal Injury 101 seminar on the topic of Insurance, Liens, and Subrogation. The seminar was held in Wilmington, DE and was hosted by the National Business Institute.

Jeffrey B. McCarron, Esq., partner with the firm in the Philadelphia office, recently presented a CLE on the topic of Avoiding Legal Malpractice. The seminar was held at the Philadelphia Bar Association and was hosted by USI and the Insurance Programs Committee. Jeff also received the 2016 Distinguished Defense Counsel Award from the Pennsylvania Defense Institute (PDI) at its Annual Meeting. The award honors "a member of the civil defense bar who best exemplifies the qualities of professionalism, dedication to the practice of law and promotion of the highest ideals of justice in the community." Jeff was recognized for his handling of cases against lawyers often the subject of publicity, including his recent success in overturning the $1M sanction against Nancy Raynor.

Eli Granek, Esq., an associate with the firm in the Philadelphia office, presented at the Personal Injury Practicum CLE on the topic of Practical Insights into Premise Liability cases. The seminar was held at the Pennsylvania Convention Center on November 1, 2016 and was hosted by the Dispute Resolution Institute.

Candidus Dougherty, Esq., a partner with the firm in its Philadelphia office, presented at the Personal Injury Practicum CLE on the topic of Avoiding Legal Malpractice. The seminar was held at the Pennsylvania Convention Center on November 1, 2016 and was hosted by the Dispute Resolution Institute.

Shae Chasanov, Esq., an associate with the firm in its Wilmington DE office, joined the Board of Directors of the Delaware Chapter of Chimes as of July 1, 2016. Chimes is a not-for-profit agency based in Baltimore, Maryland, and it provides support and services to people with severe disabilities. Chimes Delaware offers several programs and services, such as statewide residential options, vocational services, day services, and school services. Shae's role is to assist the Delaware chapter in providing these services throughout the State of Delaware.

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