NEW JERSEY DEFENSE

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President's Message

Gregory F. McGroarty, Esq.

I am honored be the 50th President of the New Jersey Defense Association and promise that this will be an exciting year for all members from the Northern most part of the state to the Southern most part. We will start this year off with three regional cocktail hours to allow current members and prospective members the opportunity to network, join committees and become active members of this organization. These cocktail hours will take place in New Brunswick, Hackensack and Mt. Laurel. Members of the Board of Directors and members of committees will be at these events to answer any questions you may have and to gather feedback as to what our members want most out of this organization. Every defense attorney in this State should know the benefits, tangible and intangible, that this organization offers its members.

Over the last few years I have worked with Past Presidents Michele Haas and Mario Delano to increase membership, increase committee activity and increase our exposure by updating our website and utilizing social media. We now have Facebook, LinkedIn and Twitter accounts to keep up to date with all of the NJDA happenings. These social media accounts are live and active so please like, join or follow these accounts. You can also find a list of events on the homepage of our website. Please keep an eye out for our new website this Fall.

We have some great seminars coming up this year including the Women and the Law on November 11, 2015, the Auto Seminar on November 24th and our Trial College. These seminars have great speakers and are well attended each year. In addition, our committees will have other seminars throughout the year that will present speaking opportunities for members of those committees. Please check our website frequently for newly added seminars.

Lastly, in June of 2016 we will have our 50th Annual Convention in Newport, Rhode Island. Come explore the historic town of Newport, get some CLE credits, share a few cocktails and cap off the weekend with the 50th Anniversary President's Gala, which I ensure will be a memorable occasion to celebrate the 50th Anniversary of the New Jersey Defense Association.

I hope to see you at all of our events.

In This Issue

New Jersey Defense Association

2015 - 2016

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How To Bar A Federal Health Insurance Lien: The Difference Between The Federal Employees Health Benefits Act And The Employee Retirement Income And Security Act

Thaddeus J. Hubert, IV, Esq.*

The Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. § 8901 et seq., "establishes a comprehensive program of health insurance for federal employees." Empire HealthChoice Assur., Inc. v. McVeigh, 547 U.S. 677, 682 (2006). The Federal Government contracts with health insurance carriers to provide government employees with various health insurance plans. Historically, FEHBA has best been understood as the public sector counterpart to the Employee Retirement Income and Security Act (ERISA). Therefore many Courts have found FEHBA's preemption clause to be coextensive with ERISA going so far as to rely on ERISA cases to analyze FEHBA preemption questions. "We agree with the majority [Federal case law] view that FEHBA and ERISA preemption provisions are coextensive and thus consider ERISA cases in deciding this appeal." See Aybar v. New Jersey Transit Bus Operations, Inc., 305 N.J. Super. 32, 34 n.1 (App. Div. 1997) (holding FEHBA preempted the anti-subrogation provision of the New Jersey Tort Claims Act by reasoning FEHBA's preemption provision was similar to ERISA and observed the purpose and scope of each are coextensive).

Lumping FEHBA's preemption clause with ERISA, has made it difficult for Defendants to assert New Jersey's Collateral Source Rule N.J.S.A. 2A:15-97 to bar health insurance liens of Federal employees since it is well established ERISA plans preempt New Jersey's anti-subrogation laws. However since McVeigh, Courts should no longer view FEHBA's preemption scheme as being identical to ERISA. McVeigh explained FEHBA's preemption clause is a unique anomaly as it purports to have the contract terms between a health insurer and plan beneficiary preempt state law rather than have Federal law preempt State law. FEHBA's text does not permit recovery of the lien against the third-party tortfeasor, only the contract terms do. Therefore, FEHBA preemption does not apply to third-party tort recoveries because the tortfeasor is not a party to the contract.

The FEHBA preemption clause states:

> the terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payment with respect to benefits) shall supersede and preempt any state or local law, or any regulation issued thereunder, which relates to health insurance plans to the extent that such law or regulation is inconsistent with such contractual provisions.
>
> [5 U.S.C.A. 8902 (m)(1). (Emphasis added).]

Thus, FEHBA permits contract terms between the health insurer and health beneficiary to preempt State law if the contract terms relate to (1) health insurance coverage or benefits and (2) the State laws relates to health insurance plans. "Two independent conditions must be satisfied in order to trigger preemption under § 8902(m)(1). First, preemption only occurs when the FEHBA contract terms at issue 'relate to the nature, provision, or extent of coverage or benefits.' 5 U.S.C. § 8902(m)(1). Second, federal law may only preempt state or local laws if those laws "relate[] to health insurance or plans."). See Empire Health Choice Assur., Inc. v. McVeigh, 396 F. 3d 136, 145 (2nd Cir. 2005), affirmed, 547 U.S. 677 (2006).

ERISA preemption is much broader than FEHBA. "The provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described [under this

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Act]." 29 U. S. C. § 1144 (a). As long as State laws relate to the provisions of ERISA (and not the plan benefit terms), ERISA will preempt state law.

McVeigh involved a health insurer's claim for reimbursement against the administrator of a health insurance beneficiary's estate. Id. at 683. The administrator of the estate filed a tort claim in state court and obtained a settlement. Ibid. "The carrier [Empire] had notice of the state-court action, but took no part in it. When the tort action terminated in a settlement, the carrier filed suit in federal court seeking reimbursement . . . ." Ibid. Empire sought to obtain part of the administrator's settlement to recoup the costs of medical treatment it paid to its plan beneficiary according to the plan's terms.

The primary issue in McVeigh was whether Empire's contract claim against its plan beneficiary for reimbursement required that the claim be brought in Federal Court. Empire argued that 28 USCS § 1331created subject matter jurisdiction since its claim arose under the laws of the United States i.e, FEHBA. The United States Supreme Court held that Empire's claim did not arise under the laws of the United States.
McVeigh reasoned that Empire's right of reimbursement was premised upon the plan terms and not the actual text of FEHBA. The Court explained contract terms relating to reimbursement and subrogation involve ordinary state law principles that did not fall under the laws of the United States. Id. at 692.

The Court then looked to determine if FEHBA's preemption provision 5 U.S.C. § 8902(m)(1) itself could be used to create federal subject matter jurisdiction. Id. at 697. Empire argued that its reimbursement claim related to "coverage" or "benefits" while the administrator of the estate argued that reimbursement arises long after "coverage" or "benefit" issues have been decided. Ibid. The Court stated either construction of § 8902(m)(1) was plausible, but did not decide between those two interpretations because even if it agreed with Empire, § 8902(m)(1) did not confer subject matter jurisdiction because Congress did not make that intention clear. Id. at 698. And again the Court relied on the fact that contract terms were seeking to preempt State law to decide federal subject matter jurisdiction was not appropriate. Ibid. The Court also explained § 8902(m)(1) does not "contain [a] provision addressing the subrogation or reimbursement rights of carriers." McVeigh, supra, 677 U.S. at 683. Because no Federal law controlled Empire's reimbursement claim, State law applied. While explaining this principle, the Court also articulated that if Empire sought subrogation against a third-party tortfeasor, its claims would be governed by State law and FEHBA preemption would not apply. The Court stated:

> As earlier observed, the . . . Plan's statement of benefits links together the carrier's right to reimbursement from the insured and its right to subrogation. Empire's subrogation right allows the carrier, once it has paid an insured's medical expenses, to recover directly from a third party responsible for the insured's injury or illness. Had Empire taken that course, no access to a federal forum could have been predicated on the . . . contract right. The tortfeasors' liability, whether to the insured or the insurer, would be governed not by an agreement to which the tortfeasors are strangers, but by state law, and § 8902(m)(1) would have no sway.
>
> In sum, the presentations before us fail to establish that § 8902(m)(1) leaves no room for any state law potentially bearing on federal employee-benefit plans in general, or carrier-reimbursement claims in particular. Accordingly, we extract from § 8902(m)(1) no prescription for federal-court jurisdiction.
>
> [Id. at 698-99. (Emphasis added). (Internal citations omitted).]

(Continued on page 5)

McVeigh clearly articulated that a health insurer's subrogation right against a tortfeasor depends upon State law. This is because no Federal law allows for a right of subrogation. Only the contract between the insurer and plan beneficiary allows for such a claim, but the tortfeasor is not a party to the contract making § 8902(m)(1) irrelevant. In the wake of McVeigh, Defendants may now argue that State law governs a FEHBA lien and that New Jersey law bars recovery of the lien under the Collateral Source Rule.

To successfully bar the lien, Defendants must be aware that Plaintiff and/or the health insurer will likely cite to Aybar as it is the only published New Jersey case discussing FEHBA. Aybar involved a Federal employee plaintiff who was injured while riding a New Jersey transit bus. Id. at 35. Plaintiff received over $39,000 from her health insurer in medical expenses. Ibid. Plaintiff settled with the State under the provision that Plaintiff file a Declaratory Judgment against the insurer to determine the validity of the lien. Id. at 36. The State agreed to indemnify Plaintiff for the medical expenses if the health insurer prevailed. Ibid. The issue was whether "the anti-subrogation provision of the New Jersey Tort Claims Act …, N.J.S.A. 59:9-2e 1, does not 'relate to' health insurance or plans" as stated in FEHBA's preemption clause § 8902(m)(1). Id. at 34 (the Court did recognize that the "issue, potentially, is much broader and that is whether the Legislature's 'collateral source' rule, applicable not only to tort claims against the State and State employees, N.J.S.A. 59:9-2(e), but all other litigation as well, N.J.S.A. 2A:15-97, is preempted by [FEHBA]", but limited its holding to the Tort Claims Act.) Ibid. The Court held that the anti-subrogation provision did relate to insurance and found FEHBA preempted the Tort Claims Act.

In finding that that the Tort Claims Act anti-subrogation provision related to insurance, the Court first decided that ERISA precedent was sufficient to answer this question. Id. at 34. The Court cited to various Federal case law and determined FEHBA's preemption provision was coextensive with ERISA. Although Aybar found ERISA and FEHBA to be interchangeable, it did so only in the context of whether subrogation provisions relate to insurance. On this issue, FEHBA and ERISA are similar as they both require a State law to "relate" to health insurance to trigger preemption. But this context has nothing to do with whether contract terms between an insurer and plan beneficiary can preempt State law binding a third-party tortfeasor to a contract it did not enter into. Defendants should make this limitation of Aybar clear.

Further, Aybar explicitly discussed the narrowness of its decision, and hinted, rather strongly, that it doubted whether the insurer had a right to recovery against the plaintiff and/or State. "The State, however, has not contended that [the health insurer] has no exercisable subrogation rights and does not, therefore, argue that the 'anti -subrogation' provision of N.J.S.A. 59:9-2(e) is not inconsistent with the particular plan provisions. Rather, its focus on appeal is the broadly stated proposition that an anti-subrogation provision does not 'relate to' a FEHBA plan within the meaning of 5 U.S.C. § 8902(m)(1). That is the sole issue we, therefore, decide." Id. at 38-39.

Had the State argued basic principles of subrogation that the health insurer could only recover if Plaintiff could recover against the State, the outcome would likely have been that preemption did not apply. This is because the plaintiff cannot invoke FEHBA's preemption provision against the tortfeasor since there is no contract between the plaintiff and tortfeasor. McVeigh found FEHBA to be quite different and rather extraordinary in this regard as it sought to have contract terms preempt state law rather than Federal law. It is this uniqueness that distinguishes FEHBA from ERISA. Aybar therefore should not be interpreted as support for FEHBA preemption, but as an opinion that had the forethought to predict the shortcomings of FEHBA's preemption clause almost a decade before the United States Supreme Court actually did. Further, even if Aybar is construed as a case that supports FEHBA preemption it can no longer be valid law as McVeigh makes clear such an analysis is incorrect.

Finally, even if the lien is successfully barred a settlement may be difficult to achieve since Plaintiff will potentially still be on the hook for any medical expenses paid by the health insurer. It is here that both defendant and plaintiff should work together by asserting Plaintiff's various arguments against preemption. Obviously, plaintiff cannot argue it is not bound by the contract terms like the third-party tortfeasor can. Thus, on § 8902(m)

(Continued from page 5)

(1)'s face it appears plaintiff's contract terms preempt State law requiring reimbursement to the health insurer. However, several arguments can be made to bar the health insurer's recovery.

First, it should be argued that reimbursement does not relate to "coverage" or "benefits" as found in the text of § 8902(m)(1). Even though McVeigh did not decide which interpretation of § 8902(m)(1) was correct the Court did eventually state that §8902 (m)(1) does not apply to reimbursement/subrogation issues and thus those issues do not preempt state law. Id. at 698. Since McVeigh several Federal Courts have held that subrogation and/or reimbursement is different than "coverage" or "benefits" based upon McVeigh's analysis. See Blue Cross Blue Shield of Illinois v. Cruz, 495 F.3d 510, 513, 514 (7th Cir. 2007) (explaining McVeigh distinguished reimbursement from coverage and benefits and finding the two concepts were different because "when 'benefits' are understood to include every financial incident of an illness or injury, national uniformity is unattainable without a federal takeover of the entire tort system."); see also Van Horn v. Ark. Blue Cross & Blue Shield, 629 F. Supp. 2d 905, 912 (E.D. AK 2007); Haw. Disability Rights Ctr. v. Cheung, 513 F. Supp. 2d 1185, 1196 n.6 (D. Haw. 2007).

Second, it should be argued that § 8902(m)(1) is unconstitutional because it renders contract terms preemptive over State law. FEHBA therefore runs afoul of the Supremacy Clause of the U.S. Constitution. "The Supremacy Clause provides a clear rule that federal law 'shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Art. VI, cl. 2. Under this principle, Congress has the power to preempt state law." Arizona v. United States, 132 S. Ct. 2492, 2500 (2012). The Second Circuit's McVeigh opinion noted "there is no constitutional basis for making the terms of contracts with private parties similarly 'supreme' over state law" and actually changed § 8902(m)(1) to prevent it from being unconstitutional. See McVeigh, supra, 396 F. 3d at 144.

To save §8902(m)(1) from being unconstitutional, the Court changed the statute:

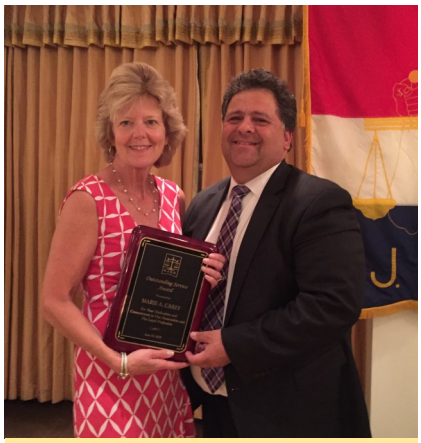
> from:
> the terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payment with respect to benefits) **shall** supersede and preempt any state or local law" to
>
> to:
> the terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payment with respect to benefits), **federal law** shall supersede and preempt any state or local law
> [Ibid. (differences between the statute highlighted in bold).]

FEHBA itself does not address reimbursement or subrogation, only the contracts documents allow for those rights. So if the preemption clause is changed to be constitutional, no Federal law exists to preempt New Jersey's Collateral Source Rule.

In light of McVeigh Defendants are well equipped to bar plaintiff's medical liens who are federal employees. Defendants also have the opportunity to work with Plaintiffs to bar the lien when appropriate. Hopefully, the New Jersey Appellate Division or Supreme Court will be given a chance to clarify McVeigh's impact on New Jersey law.

*** Thaddeus is an associate at Hoagland Longo Moran Dunst & Doukas. He is a member of the firm's General liability and Automobile Liability Department.**

Outstanding Service Award Given To Marie Carey



Marie Carey and Mario Delano

Marie A. Carey received the Outstanding Service Award from the New Jersey Defense Association at its annual meeting held June 25-28, 2015 at the Omni Bedford Springs Resort in Bedford Springs, PA.

The Outstanding Service Award is presented to members or former members who have had a significant impact on the Association. The Award has only been presented 14 times in 32 years.

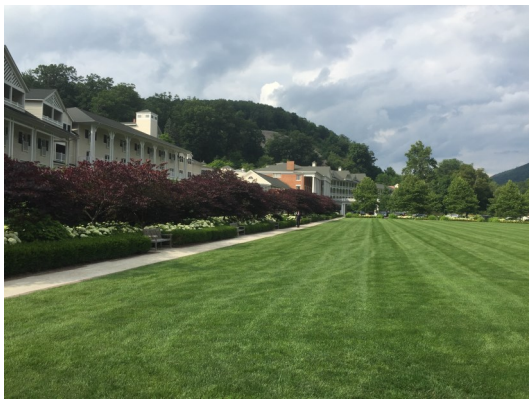
Marie has been a key member of the New Jersey Defense Association for over 25 years. She has served as President, Chairperson of the Board, Director and Committee Chair of many important committees. Marie originated the NJDA Trial College for the Association, which instructs young NJ lawyers in the art of trying cases. In 2003, Marie received a special recognition award from the Association for 10 years of service in the training of young lawyers and continues to serve as Chair of this annual seminar. In 2010, Marie originated the NJDA Women and the Law Seminar, which has become one of the Association's most successful annual seminars, bringing together judges, lawyers and businesswomen for an informative and topical seminar.

Marie is the Executive Director and Managing Trial Attorney for the New Jersey Law Offices of Kevin McGowen. Since 1987 she has concentrated her practice in the area of civil trial litigation on behalf of USAA and has tried multiple cases to conclusion. She is a member of Union County's Civil Arbitration Advisory Committee, the Women Lawyers Committee and the Civil Bench and Bar Committee. She has served as a Barrister in the Richard Hughes American Inns of Court Program, and has been a member of the statewide Model Civil Jury Charge Committee since 2006. In 2008, she was named as the Chairperson of the Union County Arbitration Advisory Board, and she often is a lecturer for the Institute of Continuing Legal Education. She is also an avid runner and is a two time finisher in the New York City Marathon as well as being a multiple finisher at the Philadelphia Half Marathon. In 2009, Marie received a Doctorate in Medical Humanities from Drew University in Madison, New Jersey.

2015 NJDA Annual Convention Recap

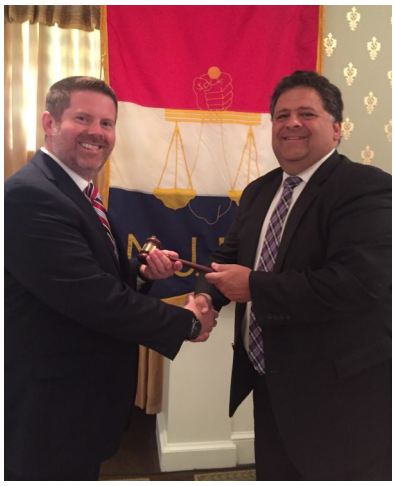
The New Jersey Defense Association's Annual Convention was held on June 25-28, 2015 at the Omni New Bedford in Bedford Springs, Pennsylvania. This historical resort provided a bucolic backdrop for the many events and activities scheduled. A variety of CLE courses were offered to kick off the convention and convention sponsors were showcased throughout the weekend.

The rainy weather may have shifted the schedule, but did not dampen spirits. We enjoyed golf on the Donald Ross/A.W. Tillinghaust-designed course, one of the oldest golf courses in the country. On Friday night, a cocktail reception was held fireside in the outdoor patio. The hotel offered many activities for entertainment, including spa sessions, afternoon tea, and swimming in the spring-fed indoor pool. There was even a library stocked with books and handcrafted jigsaw puzzles to enjoy.



The President's Reception was held on Saturday night. It featured outgoing president Mario Delano passing the torch to incoming president Greg McGroarty. In addition, Marie A. Carey was honored with the Outstanding Service Award for her valuable contributions. Jeff Bartolino was awarded Attorney of the Year and Ryan Richman was awarded Young Lawyer of the Year. The weekend provided a great chance to connect with colleagues and grow our community.

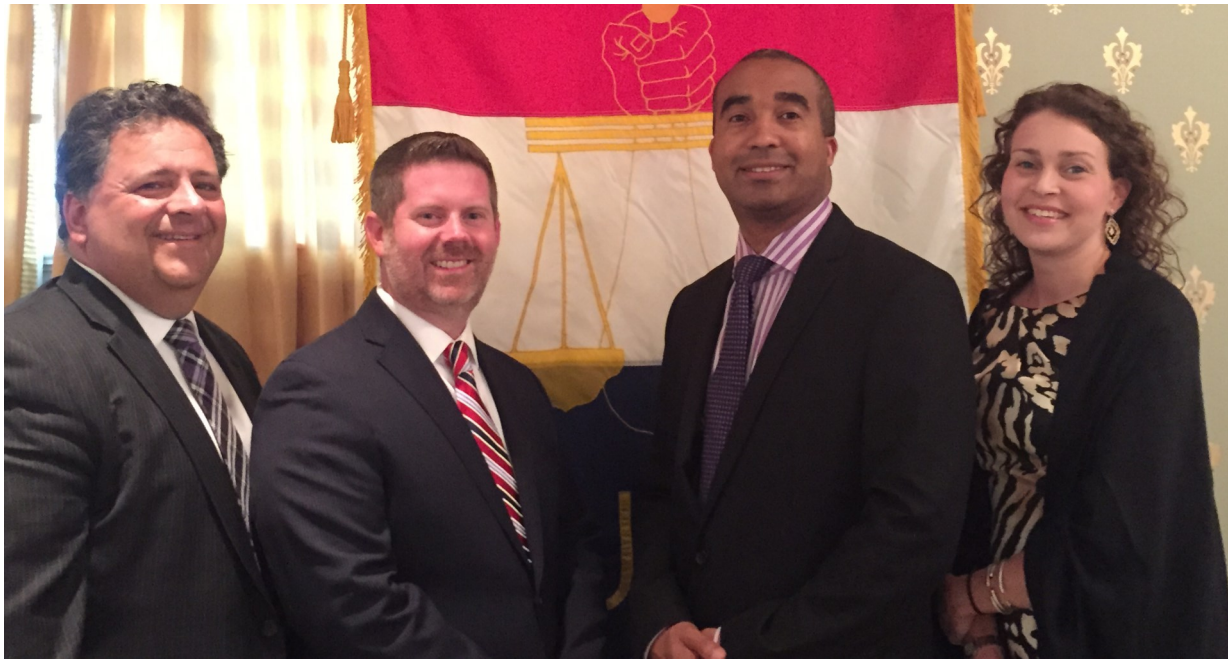
2015 Convention Memories



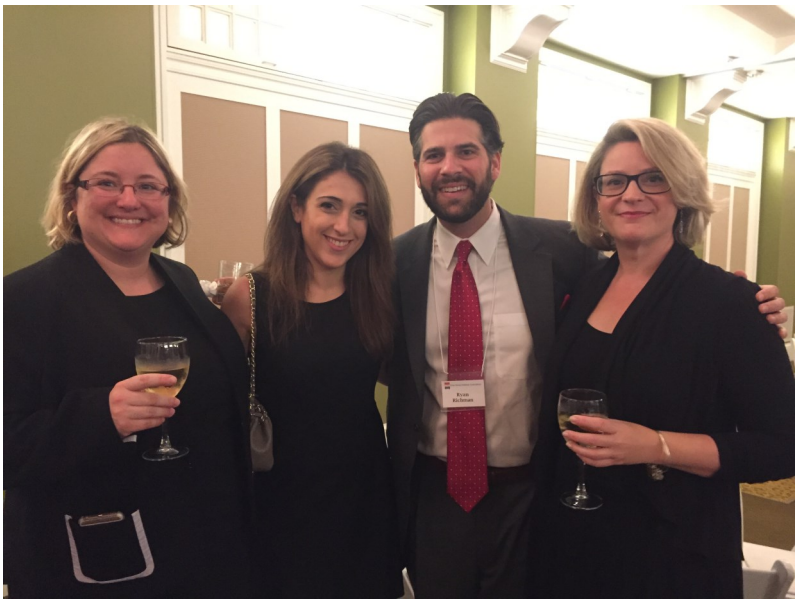
President Gregory McGroarty receiving the gavel from Chairman of the Board Mario Delano

Mario Delano receiving NJDA Distinguished Service Award from outgoing Chairman of the Board Michele Haas

Chairman of the Board Mario Delano, President Greogry McGroarty, President-Elect Chad Moore, Secretary/Treasurer Natalie Mantell

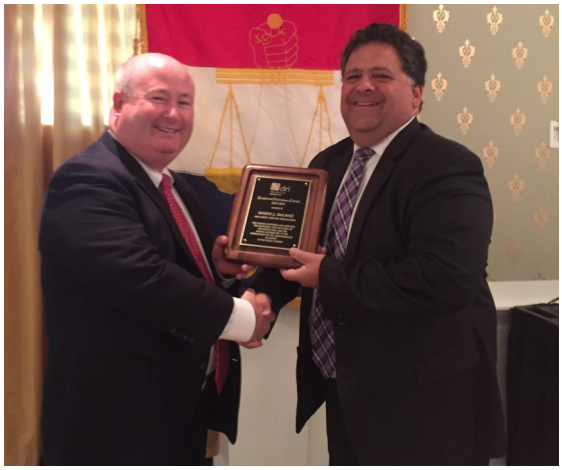


2015 Convention Memories

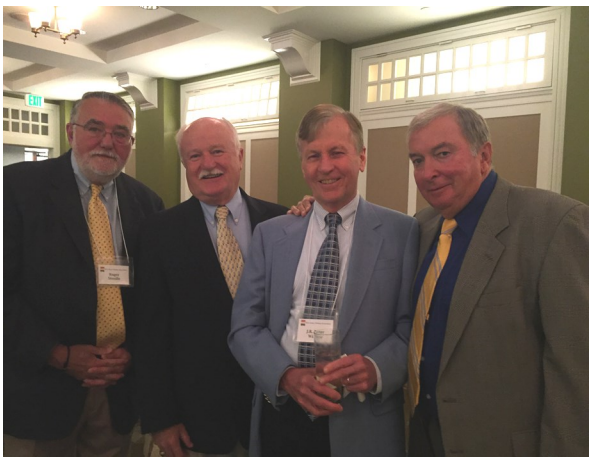


Natalie Watson, Anastasio Latsos, Ryan Richman, Joanne Vos

DRI Exceptional Performance Citation being awarded to Mario Delano by DRI Atlantic Regional Director Michael Leegan



Roger Steedle, William Powers, Peter Wilson, Brian O'Toole



2015 Convention Memories

Chad Moore, Michele Haas

Natalie Mantell, Ryan Richman – Young Lawyer of the Year, Jeffrey Bartolino – Attorney of the Year, Marie Carey

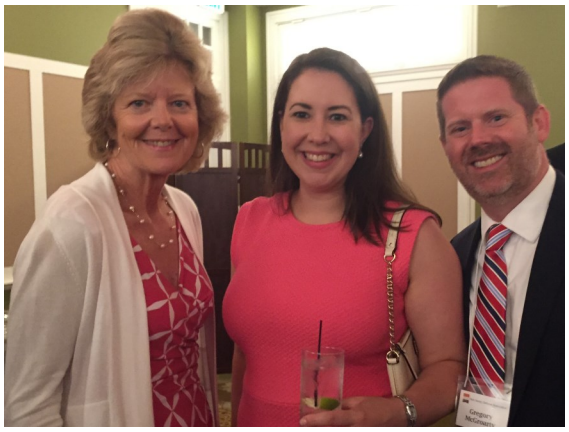
Past Presidents – William Powers, Peter Wilson, Brian O'Toole, Stephen Foley, Jr., Michael Leegan, Roger Steedle, Marie Carey, Thomas Hight, Michele Haas, Joanne Vos, Mario Delano

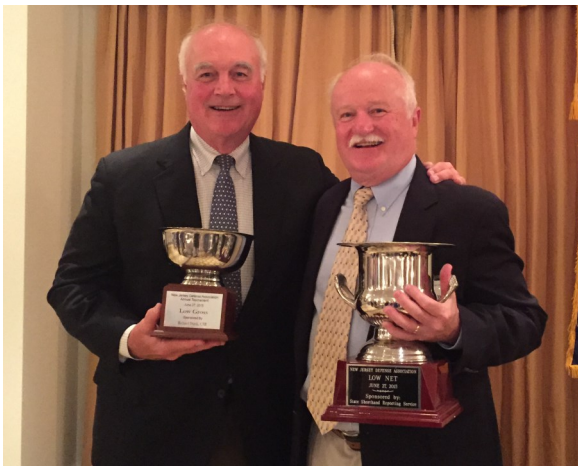
2015 Convention Memories

Mario Delano, Michelle Delano, Stephen Foley, Jr.,

Betsy Kaplan, Patricia Adams, Robert Adams

Marie Carey, Shannon McGroarty, Gregory McGroarty





Harry Norton and William Powers – Low Gross and Low Net Winners

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Let It Snow! Let It Snow! Let It Snow! There Is No Bad Weather Exception To The Coming And Going Rule For NJ Workers' Compensation

Robert J. Fitzgerald, Esq.*

The New Jersey Appellate Division has determined that there is no "bad weather" exception to compensability in New Jersey workers' compensation in the case of Adi Kotler v. DCH Motors, LLC v. Safety National Casualty Corp., 2014 N.J.Super. Unpub. LEXIS 1363 (App. Div. June 11, 2014). The essential facts of the case were undisputed. On December 26, 2010, Adi Kotler, a car salesman, suffered serious injuries in a motor vehicle accident as he was driving home from his place of employment, a car dealership. Kotler and his manager, Thomas Chrusciel, were the only witnesses.

In December 2010, Kotler was a new employee who had only been working for about five weeks. Kotler did not work on Sundays, when the dealership was closed. On Saturday evening, December 25, 2010, Chrusciel called Kotler and asked him to come to the dealership the following day to move cars due to a pending snowstorm. Kotler testified he felt obligated because he was a new employee and wanted to impress his employer. Although moving cars was not part of Kotler's normal job duties, the dealership's employees helped to clear the lot of cars when it snowed.

Kotler arrived at the dealership at 8:00 AM on Sunday. Kotler and Chrusciel were moving cars when snow began falling at about 10:00 AM. Kotler told Chrusciel that his car did not handle well in the snow and asked to leave. Chrusciel told Kotler to go home. When Kotler left, the roads were covered with about one inch of snow. Kotler took his normal route home. After about fifteen minutes into his drive time, his car slid and crashed into a guardrail.

The Workers' Compensation Judge ruled that Kotler's injuries were compensable. Although not precisely stated, the judge seemed to conclude that the accident occurred during the commission of a "special mission" for the employer. The judge stated that "the day and dangerous weather conditions during that commute were not normal." The judge concluded that, because the employer had called Kotler to work when it was not part of his normal duties, and on a day when he would otherwise not have driven to or from work, the accident occurred as part of Kotler's work duties.

On appeal, the target respondent, Safety National, contended that Kotler's claim did not arise from work-related compensable injuries because the accident occurred while he was traveling home from his normal workplace. Kotler countered that the injuries were compensable because the accident occurred during a task that Kotler felt compelled to perform for the benefit of the employer, analogizing the circumstances of this case to the "special mission" exception to the normal rule that compensable injuries are those that occur at the employee's work site. In response, Safety National argued that the special mission exception was inapplicable to extra job duties at the normal place of employment.

In the first part of its analysis, the Superior Court looked at the plain language of Section 36 and the premises rule. That section of the New Jersey Workers' Compensation Act states:

> Employment shall be deemed to commence when an employee arrives at the employer's place of employment to report for work and shall terminate when the employee leaves the employer's place of employment, excluding areas not under the control of the employer.
> *N.J.S.A. 34:15-36*

(Continued on page 12)

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The court noted that the legislature amended the Workers' Compensation Act in 1979 and eliminated many of the judicially-created exceptions by defining "employment" more restrictively. Here, since Kotler's injuries did not occur on the employer's premises, the court noted that compensability was precluded unless an exception to the premises rule, namely the "special mission" exception, was applicable.

The special mission exception is also found in Section 36 of the Workers' Compensation Act and allows for compensability of off-premises injuries if an employee is: (1) "required by the employer to be away from the employer's place of employment," and (2) the employee is "engaged in the direct performance of duties assigned or directed by the employer." *N.J.S.A. 34:15-36*; Zelasko v. Refrigerated Food Express, 608 A.2d 231, 234 (N.J. 1992). Although Kotler went to his regular place of employment, he made a novel argument—the hazardous conditions of the commute on that day rendered the task "sufficiently substantial to be viewed as an integral part of the service itself," and, therefore, compensable under the special mission exception.

The Appellate Division, in rejecting this expansion of the special mission exception, noted that, while pre-1979 case law permitted compensation for injuries suffered away from the work site while the employee was engaged in a special mission, the legislature intended to remove many of the exceptions to the going and coming rule and to define restrictively the retained exceptions. Therefore, since the plain language of Section 36 allows the special mission exception to be applied only to travel to and from off-premises locations for the benefit of the employer, the injuries Kotler sustained were not compensable. Kotler also made other minor arguments regarding his feeling of "compulsion" to perform the work, as well as the right to safe egress. The court dismissed these arguments, without much fanfare, as inapplicable.

The Appellate Division, thus, reversed the finding of compensability, concluding that the premises rule had not been applied correctly. The deviation from a normal work schedule does not alter the basic restrictions of Section 36 regarding injuries that occur while the employee is at his place of employment or while away from the place of employment on a "special mission" on behalf of the employer. Further, injuries that occur while the employee is on a normal commute, even in bad weather, are not compensable as work-related injuries.

The court's decision confirms the longstanding principles behind both the premises rule and the special mission exception to that rule. This case also illustrates that the coming and going rule continues to be one of the most litigated issues in workers' compensation. Employers should be aware of the many rules and exceptions that surround a compensability determination, as a few simple words or instructions from an employer to an employee on when to arrive, where to park, what exit to take, etc., can have a huge impact on their workers' compensation exposure. If you have questions about your how your employee policies can effect a workers' compensation claim, please contact your counsel before an incident occurs.

"An ounce of prevention is worth a pound of cure."
- *Benjamin Franklin*

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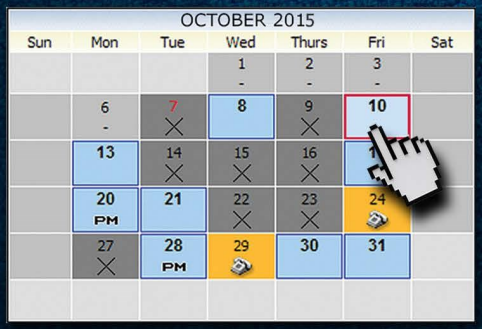

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PRESCRIBING HIGH POTENCY MEDICATION TO KNOWN DRUG ABUSER: IS THE DOCTOR LIABLE FOR RESULTING FORSEEABLE INJURIES?

Julia A. Klubenspies, Esq.*

In *Komlodi v. Picciano, et. al., 217 N.J. 387 (2014),* the question before the New Jersey Supreme Court was whether the trial court erred in instructing the jury to consider whether a patient's drug addiction and alcohol abuse were pre-existing conditions that proximately caused the injuries she suffered when she orally ingested Fentanyl, a pain medication contained in patches prescribed solely for external application to the skin. The issue at trial was whether the prescribing physician was liable for the resulting injuries.

Dr. Picciano prescribed Fentanyl skin patches to help alleviate lower back pain suffered by the (incapacitated) plaintiff, Michelle Komlodi, age 31. Dr. Picciano had treated the plaintiff for many years as a primary care physician and was aware of her patient's long-term history of substance abuse, both with alcohol and drugs. Dr. Picciano testified that she believed her patient "really had back pain" and was not drug seeking. She decided to treat her patient's back pain temporarily, knowing that Michelle had an appointment at a behavioral health clinic shortly thereafter. She further testified that she had advised her patient that she could not consume alcohol was using the Fentanyl patch.

On August 2, 2004, while drinking heavily, the plaintiff ripped open a patch with her teeth and swallowed the medication. This resulted in suppressed respiratory function and anoxic brain injury. Ms. Komlodi has been left with severe and permanent brain injury.

The plaintiff's primary liability theory was that that Dr. Picciano was negligent in prescribing the patch since, in view of the patient's history of drug and alcohol abuse, it was foreseeable that she would misuse the patch by deliberately applying the gel to her mouth or gums, or use the patch while consuming alcohol. At trial, the jury was given a Scafidi charge to consider prior alcohol abuse as a pre-existing medical condition. The jury was also given an intervening cause charge. The jury determined that the plaintiff had proven that Dr. Picciano deviated from accepted standards of family practice during her treatment of Ms. Komlodi and that Dr. Picciano's deviation increased the risk of harm posed by Michelle's pre-existing condition. However, the jury also determined that the plaintiff failed to prove that the increased risk was a substantial factor in producing the ultimate harm or injury suffered by Michelle. Thus, the jury returned with a verdict in favor of Dr. Picciano.

The Appellate Division reversed and remanded for a new trial. On Appeal, the plaintiff contended that the Scafidi charge was inappropriate because the defendant did not prove that a pre-existing disease or condition contributed to the patient's injury. The plaintiff further contended that the judge improperly gave the "but for" proximate cause charge. The court stated:

> Here, the evidence did not clearly establish a Scafidi case, the jury charge included both "but for" and pre-existing condition/increased risk instructions, and the charge barely mentioned the facts and theories of the parties. Those errors require that the case be remanded for a new trial….In the case before us, plaintiff expressly objected during the charge conference to the court giving a Scafidi charge. The application of the Scafidi causation standard was far from clear. Defendants did not specifically identify Michelle's preexisting condition as drug-seeking behavior, dependency on alcohol, dependency on drugs, or dependency generally. In short, defendants did not identify "the preexisting disease and its normal consequences." Fosgate v. Corona, 66 N.J. 268, 272 (1974). Having failed to do so, defendants were not entitled to a Scafidi charge.

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PRESCRIBING HIGH POTENCY MEDICATION

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The Appellate Division also found that the trial judge did not properly identify the claimed pre-existing condition to guide the jury. Instead, in the jury charge, the trial judge merely referred to Michelle's "medical condition" and "problems" without reference to any defense proofs or theories This factual issue made an intervening charge improper if the patient's biting the patch was a foreseeable action in view of her medical and mental history.

The Appellate panel has one dissenting Justice, which, therefore, permitted this case to be heard by the Supreme Court as of right.

On May 20, 2014, the New Jersey Supreme Court issued a unanimous decision. The decision of the Appellate Court was affirmed and modified. The no-cause at the trial level was vacated, and the case remanded.

If one reads the entire opinion, there is no question that this jury received a very complex and somewhat convoluted charge, one that even many lawyers would find difficult to follow. The Supreme Court agreed with the Appellate Division that the Scafidi charge was improperly given in that the trial judge never identified for the jury what the claimed "pre-existing" condition was, although the jury was told to consider whether the prescription of the Fentanyl patch increased the risk of harm to the patient and was a substantial factor in causing the patient's injuries. Further, the harm that was caused was not due to any progressive disease or disorder but, rather, by the patient's own conduct after the Fentanyl patch was prescribed. They further agreed that the superseding/ intervening cause charge was given in error in that the standard charge of "forseeability" was a sufficient charge in this factual scenario. Moreover, the Supreme Court found that the trial judge improperly failed to mold the law to the facts of this case, resulting in clear capacity to confuse the jury.

A second Komlodi case was filed after the Supreme Court opinion, and the initial complaint has been temporarily dismissed without prejudice until discovery in the second matter is completed. The two cases will then be consolidated for trial in Middlesex County.

***Julia is an associate in Marshall Dennehey Warner Coleman & Goggin's Roseland, New Jersey office. A member of the firm's Health Care Department, she concentrates her practice on medical malpractice.**

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When we were teenagers, whenever the word "yacht" was used we conjured up a picture of a huge boat, loaded with expensive equipment and a probable price tag in the many millions of dollars. Up until a couple months ago, Sunny and I had never been on a yacht, or close to one. Last May, we had the extremely good fortune to spend six glorious days on the 80-foot "Bethie Ree."

About three years ago we had taken a European tour and met a lovely couple who, unbeknownst to us, owned a yacht. We had dinner together several times since that trip and this May we were invited to join them on their 80-foot yacht, The Bethie Ree. What an experience!

We hooked up with our friends by flying to Nassau and meeting the boat on the dock at the Atlantis Hotel in Paradise Island. We were joined by another couple who were mutual friends. Before undertaking our cruise, we spent our first night sightseeing at the Atlantis, which appears to be about the size of Cleveland. It has its own water park, large aquarium, gigantic casino and numerous five-star restaurants. We were treated to a reggae parade, replete with a Bob Marley impersonator, reggae band and numerous circus acts. The marching orders of the day were, "Nassau mon, no problem."

When we first got on board, we were greeted by our hosts and the boat's crew that consisted of a Captain (Bruce), a stewardess (Juliette) and a chef (Alexis). There were five staterooms below, each with a private bathroom, and a huge kitchen area and living room on the first deck. The back deck had a spacious dining area where we spent most of our leisure time on board. The crews' quarters were below the back deck. Immediately adjacent to the crews' quarters was the engine room, which was so clean you could eat your dinner off the floor. The second deck housed the bridge and the storage area for the "Toys." (The 10-foot square launch and two jet skis.) The yacht also had a 35-foot Boston Whaler that was pulled behind. We soon found out that the yacht would anchor out and we would use the Whaler to transport us to the pristine island beaches we would be visiting. Some of the crew would also take the jet skis to our destinations.

Each day we had an agenda and we set sail for the Exuma Islands our first day. The trip was about six hours and I got to take the helm under Bruce's watchful eye. I was able to persuade him to let me pilot the boat because of my extensive naval training. As a Lieutenant J.G., I qualified as an "Officer of the Deck" (OOD). Actually, the real reason I got to drive is that Bruce didn't want to hear me whine anymore and there was nothing in sight for as far as the eye could see.

Exuma is a tiny island in the North Bahama chain. Other than the mooring areas and a small general store, there really is nothing. We were the farthest boat anchored out because of our size. That evening,

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when we had dinner on the back deck, the sky was pitch black and covered with a blanket of stars. The moon was almost full. I remember thinking that it seemed like we were the only people on earth. We were to be treated to several other breathtaking nights during our visit.

The next morning after breakfast the Captain announced that we were going to spend the day on Rose Island. The crew loaded up the Boston Whaler with food, drink, barbeque grills, tents and chairs for our half hour ride to a beach which literally looked like no one had ever walked on it before. The water was crystal blue and clear and was over 80 degrees. We spent the day floating in the lagoon, drinking Corona and eating extremely large cheeseburgers and sausage sandwiches. It really is true that there's nothing like a cheeseburger on a tropical Caribbean island. We literally could have filmed a Corona commercial. We got back to the boat with sufficient time to take a short nap, shower and be ready for the customary cocktail hour prior to dinner.

Our next three days followed the same course with us visiting different islands and eating and drinking lavishly. Sunny and I both got to ride the jet skis, something neither of us had ever done before! When you first start your ride you're very cautious. After a few minutes you get bolder and speed up. Luckily, I was wearing a seatbelt, otherwise, I would have been airborne.

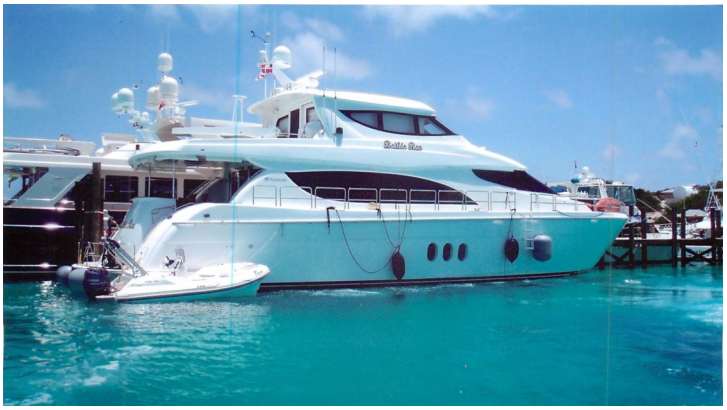
We were also treated to several local attractions, including Gilligan's Island. This is a small island that was used for filming the popular television series. Of course, after this visit I called Bruce "Skipper" and he called me "Little Buddy." Sunny wanted to be Ginger and everyone assumed a role. We never did catch sight of the Minnow, which went down in the storm.

Another island had a population of pigs only. There were over a dozen pigs who would swim out to your boat when you entered the lagoon, accustomed to being fed by the boaters. (Judging by the size of these boys, boats visited frequently!)

There was a lot of marine life, including five or six types of sharks. They ranged from sand, gray and tiger to hammer head. Although the islanders maintained that many of these local varieties would not bite, I decided not to chance it. There were quite a few people, including kids, swimming in the water right next to the sharks. While it might have presented a great photo op, I don't go skydiving, either.

There were times when we were going 15-20 knots, a school of dolphin or porpoise would fall in beside us and give us an escort for a few miles. Although the yacht was fully equipped for fishing, we really didn't have sufficient time to try this. Maybe next time.

Even though our six day tour flew by (literally), we are left with a lot of wonderful memories. Considering we had never been on a yacht before, we can now cross this off our Bucket List. I guess we're now going to have to find friends who own a cabin at the base of Mount McKinley. Any takers?



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A world of discovery awaits you - both inside the hotel doors and on Newport's vibrant streets and enticing waters. Enjoy amenities including the greatroom with a day/night bar, outdoor terrace and pool. Escape to a sanctuary of relaxation and renewal at the Spa. You are just minutes away from the Cliff Walks, Newport Mansions and the International Tennis Hall of Fame.

Celebrating 50 Years 1966-2016