

Delaware High Court Rejects Effort to Target Defense IME Physician

Doctor, You're (NOT) a Fraud!

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In *Adams v. Gelman*, three insurance claimants jointly filed a lawsuit against a Delaware physician, claiming that his work for insurance companies over decades, and perceived bias in favor of those companies, amounted to fraud, breach of fiduciary duty, battery, racketeering, and conspiracy. The trial court dismissed the case, determining not only that the physician's actions were protected by the legal principle of witness immunity, but also that none of these claims were legally valid. Plaintiffs appealed on the issue of fraud only and the Delaware Supreme Court affirmed, agreeing with the lower court that the physician's actions did not amount to fraud.

Every day, doctors across the country perform examinations of injured claimants at the request of insurance companies. Insurance adjusters and attorneys alike request these exams, known as Independent Medical Exams (IMEs) or Defense Medical Exams (DMEs), when there is a dispute about the extent of a person's injury or what caused it. The physician has no say about which insurance benefits the injured person should receive or the amount of those benefits. Rather, the physician provides a medical opinion as to the nature and extent of the injury, which the insurance company relies on to determine which benefits it will provide.

Doctors who frequently perform this work are often labeled as "the insurance company doctor" or referred to as a "hired gun," alluding, not-so-subtly, to perceived bias. Of course, both sides participate in this dance, and plaintiffs' lawyers routinely send their clients to be examined by physicians—often the injured person's treating doctor—with whom the plaintiff has an existing relationship—or to a physician who is perceived to be "plaintiff-friendly."

The plaintiffs in *Adams* had all been denied auto accident or workers' compensation insurance benefits, based at least in part on the expert opinion of the same orthopedic surgeon who had challenged the cause or extent of their injuries after a record review and/or medical examination requested by an insurance company. Their lawsuit essentially targeted one frequently used defense examiner as a scapegoat for what they claimed was a rigged system. First, the Delaware Superior Court and then the Delaware Supreme Court rejected that claim.

In both courts, the physician argued that as a witness in litigation he was protected from suits by absolute witness immunity. This well-established legal principle bars lawsuits against individuals involved in the judicial process, which in turn prevents witness intimidation and promotes free flow of information in litigation.

Historically, witness immunity has been limited to suits for defamation or related torts, but the lower court in *Adams* held, without explanation, that immunity protected the IME/DME physician from the claims which were before the court – fraud, battery, breach of fiduciary duty, etc. The lower court decided that as long as the examinations and reports were reasonably germane to the litigation, the IME/DME physician was immune from suit. The Delaware Supreme Court did not address immunity and so this ruling remains good law in Delaware.

FRAUD

The Delaware Supreme Court affirmed the lower court's ruling that an IME physician's alleged bias (even if established) does not constitute fraud. A claim for fraud requires: a false representation that the speaker knows or believes is false, an intent to make the listener do something in reliance on that representation, the listener's justifiable reliance on that representation, and damages to the listener as a result. In this case, the plaintiffs did not allege that the physician said anything to them to make them believe he was fair and unbiased. Rather, they claimed that he was required to disclose his alleged bias to them and he did not.

The court disagreed. The court held that *even if the IME/DME physician was biased in favor of his payor*, the insurance company, *he had no obligation to disclose that bias to his examinees* because there was no fiduciary relationship (and no legally recognizable relationship at all for that matter) between the claimant and the physician. Furthermore, the examinees were aware that the physician had been hired by the insurance company, thus exposing potential bias in advance of the examinations, such that it would have been unreasonable to rely on the physician's silence as indicating lack of bias.

BREACH OF FIDUCIARY DUTY

The court also found that an IME/DME physician does not have a fiduciary duty to his examinee. On this issue, as a matter of first impression, Delaware sided with the majority of other states in holding that an IME/DME does not even create physician-patient privilege, much less a fiduciary duty. To be a relationship involving a fiduciary duty, one party must act solely in the interest of the other party and the interests of both parties must be "perfectly aligned." In an IME/DME examination context, a fiduciary relationship cannot exist because the job of the physician is to provide an examination that is independent of the examinee's interests.

BATTERY

An IME/DME physician does not commit battery when he touches an examinee in the context of the examination, the court also found. Battery is a non-consensual offensive touching. In this case, the court determined that the examinees consented to the examination, so provided that the physician did not exceed the scope of the originally consented to examination, there could be no battery.

While the Delaware Supreme Court did not address every possible scenario under which an IME/DME physician could be sued, this ruling affords protection for perhaps the most likely kinds of lawsuits against physicians who conduct examinations or record reviews and render opinions for litigation. This case was the first time a court in Delaware has addressed these issues, either as individual claims or under the defense of witness immunity, and the result is one which protects expert physician witnesses from lawsuits in Delaware.

John Balaguer and Lindsey Imbrogno represented the defendant in this case before the trial court and the Supreme Court of Delaware. If you have questions or would like additional information about an IME/DME physician's duties and obligations under the law, please contact John Balaguer (balaguerj@whiteandwilliams.com; 302.467.4501) or Lindsey Imbrogno (imbrogno@whiteandwilliams.com; 302.467.4508).

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