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update

Trial Counsel Beware: Expert Challenge Under 512 of Mcare Act Must be Specific

The Supreme Court addressed the expert witness requirements of the Mcare Act in Gbur v. Golio. The court was unanimous in the result, but equally divided concerning the appropriate rationale. Justice Saylor issued the opinion which held that the defendant urologist failed to preserve his argument that Plaintiff's expert, a radiologist/oncologist, did not satisfy the expert witness requirements of the Mcare Act.

The Appellant physician was a board certified urologist. In 2001 through 2002, he treated Joseph Gbur, for prostate cancer. The theory of the case centered on urologist's receipt of the bone scan results, in which the radiologist reported abnormal areas of activity in the right mandible, right ribs, lower thoracic spine and multiple foci in the pelvis consistent with osseous metastatic disease. The Gburs alleged that the physician discounted the report without consulting the radiologist; did not advise the Gburs of the result; and proceeded to embark upon an unnecessary course of treatment, including implantation of radioactive seeds in Mr. Gbur's prostate (brachytherapy), which would have been appropriate only for non-metastasized prostate cancer. As a result, Mr. Gbur did not understand that the severe pain he suffered in his jaw was due to metastasis, since he was unaware of the results of the bone scan.

The Gburs' expert Shelby Sanford, M.D., a board certified radiation oncologist opined in a report that appellant breached the standard of care by failing to evaluate the bone scan findings more thoroughly, failing to discuss the findings with Mr. Gbur, and failing to report the results to other treating physicians.

Although Mr. Gbur's ultimate death could not have been prevented (which occurred during the course of the legal proceedings), Dr. Sanford asserted the failures resulted in many unnecessary, aggressive surgical interventions and delayed appropriate palliative treatment. Prior to trial, the urologist filed a motion in limine challenging Dr. Sanford's competence to express a standard of care opinion regarding urology, invoking 512(c) of the Mcare Act.

According to the Supreme Court, at trial, the urologist focused primarily on the fact that Dr. Sanford had no specialized training, education or experience in the field of urology, thereby invoking 512(c)(2). Plaintiffs responded that Dr. Sanford was an expert in brachytherapy, and works with urologists in performing these procedures. As part of the treatment protocol for prostate cancer patients, he regularly or-

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The Third Circuit Addresses Bad Faith and Punitive Damages Issues

In Jurinko v. Medical Protective Co., Plaintiffs brought a diversity action in federal court alleging The Medical Protective Company ("MedPro") acted in bad faith in handling a medical malpractice suit that was tried in state court against MedPro's insured, Dr. Paul Marcincin. A state jury awarded $2.5 million in damages against Dr. Marcincin, $1.3 million more than his coverage. In lieu of paying the excess verdict, Dr. Marcincin assigned the Jurinkos his bad faith claim against MedPro. A federal jury found MedPro acted in bad faith and awarded $1,658,345 in compensatory damages and $6,250,000 in punitive damages. On appeal, the Third Circuit affirmed in part, but reduced the punitive damages award.

Dr. Paul Marcincin, a dermatologist, treated Mr. Jurinko for a spot on his nose. Dr. Marcincin sent a shaved biopsy to Dr. Andrew Edelman, who issued a report indicating that no cancer cells were found, but stated the sample was insufficient to rule out cancer. A portion of the skin from Jurinko's nose – the base of the epithelium – was not sent in the sample. Without it, Dr. Edelman could not conclusively rule out cancer. Dr. Marcincin interpreted the report as ruling out cancer and did not follow up on the missing portion of the sample.

Six years later, Jurinko again saw Dr. Marcincin because the spot had returned. Dr. Marcincin removed the spot, but a year later, Jurinko developed a lump on his neck. A biopsy revealed it was a lymphatic malignant tumor. Jurinko notified Dr. Marcincin, who contacted SmithKline (the pathology lab), requesting the 1993 sample be retested. After reviewing the 1993 sample, SmithKline pathologists detected cancer cells.

Jurinko filed suit against Dr. Marcincin, Dr. Edelman, and SmithKline. Drs. Edelman and Marcincin had primary coverage through MedPro. MedPro provided Dr. Marcincin with $200,000 in primary coverage, and the CAT Fund provided $1 million in excess coverage.

MedPro appointed only one attorney to represent both physicians. The CAT Fund determined it was required to provide primary coverage for Dr. Edelman. Once the CAT Fund accepted Dr. Edelman's defense, it appointed another attorney to represent him.

Plaintiffs made numerous settlement demands, including a final pretrial demand of $1.1 million. Defendants discussed a combined settlement of $650,000, but MedPro never offered more than $50,000 on Dr. Marcincin's behalf. The jury returned a verdict exonerating Dr. Edelman, but found Dr. Marcincin liable for $2.5 million, $1.3 above his coverage.

Dr. Marcincin assigned Plaintiffs a bad faith claim against MedPro in exchange for a release. The Jurinkos sued in federal court alleging MedPro acted in bad faith by appointing only one attorney and by failing to settle the case within policy limits.

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...Bad Faith and Punitive Damages Issues, continued from previous page

At trial, the Plaintiffs presented expert testimony that there was an inherent conflict of interest because Dr. Marcincin was prevented from blaming Dr. Edelman and from filing a cross-claim against Dr. Edelman. Moreover, Plaintiffs argued MedPro was unreasonable to refuse to tender the policy or increase its offer above $50,000. The jury returned a verdict of $1.6 million in compensatory damages and $6.2 million in punitive damages.

On appeal, MedPro contended there was no demand within policy limits on the part of the Plaintiffs. The Third Circuit did not reach the issue of whether Pennsylvania imposes a "bright-line" rule because the trial court had instructed the jury that an expressed willingness to settle within the policy limits must be shown and the parties did not challenge this instruction. In dicta, the Court stated that a "bright-line" rule requiring a demand within policy limits does not appear to reflect Pennsylvania law or the realities of settlement negotiations.

The Third Circuit found sufficient evidence to support bad faith based on MedPro's claim representative's testimony, which made it clear MedPro did not have a reasonable basis for failing to settle, and MedPro's refusal to offer more than $50,000 in settlement was a "negotiating tactic." The claims representative believed that refusing to offer more money would force the CAT Fund to offer more money from Dr. Edelman's policy. This refusal breached MedPro's fiduciary duty toward Dr. Marcincin. Interestingly, MedPro presented evidence showing it believed, going into trial, that Dr. Marcincin was not liable because MedPro's expert found no connection between the cancer on Jurinko's nose and the cancer on his neck. Nevertheless, the Third Circuit held that in Pennsylvania, an insurer does not act in good faith when it refuses to settle merely because it believes that its insured is not liable.

MedPro also argued that the jury's verdict could have been based on the finding of bad faith in the legal representation of Dr. Marcincin and not on a finding of bad faith failure to settle. The Court held that while it is unclear whether an attorney conflict of interest can support a claim against an insurer under § 8371 (Pennsylvania's bad faith statute) – either as a matter of law or as a matter of fact in particular cases – but the parties proceeded through trial assuming § 8371 provides a cause of action for the conduct at issue.

MedPro contended the punitive damages award was unconstitutionally excessive. The Court applied <u>State Farm Mutual Insurance Co. v. Campbell</u>, 538 U.S. 408 (2003), which sets forth three "guideposts" to determine whether a punitive damages award is grossly excessive or arbitrary in violation of the Due Process Clause. The Third Circuit concluded that the high punitive damages award should be reduced because MedPro exhibited a moderate degree of reprehensibility, substantial compensatory damages were awarded, and there was a large disparity between the award and civil penalties allowed by the bad faith statute. The Court reduced the award to reflect a 1:1 ratio.

Update on Bowmaster: Commonwealth Court Rejects Bowmaster Analysis and Addresses DPW Liens and Recovery for Past Medical Expenses

In our January 2008 PLF update, I reported on a case called <u>Bowmaster v. Clare</u>, 933 A.2d 86 (Pa. Super. 2007). In <u>Bowmaster</u> the Superior Court reversed an order granting reimbursement to the Department of Public Welfare ("DPW") in satisfaction of DPW's subrogation lien. In that case, a minor and her parents commenced a medical malpractice suit eight years after the minor's birth, beyond the two-year statute of limitations applicable to a parental claim. DPW paid for the minor's medical expenses through the Medical Assistance ("MA") Program and asserted a right to reimbursement. The Court noted that precedent has established that a minor's injury for negligence leads to two distinct causes of action: one for the minor's parents and one for the minor. Among the items the parents can recover are medical expenditures made by the parents on the minor's behalf during the child's minority; medical expenses post-majority are recoverable only by the minor. The Superior Court reasoned that, since the parents are financially responsible for the minor child's medical care, the parents are true beneficiaries of the DPW's payments. The Superior Court's decision was based on the premises that a minor child could not recover medical expenses for the period of her minority and the claim for medical expenses during the age of minority rests solely with the parents.

How Medical Assistance Liens Are Placed by DPW

As a recap regarding the procedure, when the Commonwealth distributes funding to eligible persons for services under the Medicaid Act, the state is responsible to recover funds paid to such individuals when they are successful in lawsuits against third parties. The Act requires the Commonwealth to "take all reasonable measures to ascertain the liability of third parties" and must "seek reimbursement to the extent of such legal liability." To effectuate the DPW's responsibilities under federal law, the Pennsylvania General Assembly adopted the Public Welfare Code Fraud and Abuse Control Act (FACA). Section 1409 provides the DPW with several options to fulfill its responsibilities under the Medicaid Act, including the right to sue a potential third-party tortfeasor and the right to intervene at any time before trial in any litigation involving a potential third-party tortfeasor. The DPW may also place a statutory lien on tort recoveries.

Prior to 2006, the DPW could place a lien upon and obtain recovery from a personal injury award for past medical costs, regardless of the manner in which the damages included in the award were allocated, i.e., the award could be pain and suffering and medical damages, and the state could recover from both medical and pain and suffering allotments. However, in 2006, as a result of the United States Supreme Court's decision in <u>Arkansas Department of Health and Human Services v. Ahlborn</u>, 547 U.S. 268 (2006), states may only seek to place liens upon and to recover from awards of medical damages. In recent cases, the DPW has argued that this has encouraged litigants to include medical costs in a complaint but then to drop those claims when potential settlement seems near at hand. In this way, the Medicaid recipient will gain a greater recovery – one that is not subject to the Department's liens or recoupment.

Commonwealth Court Rejects the <u>Bowmaster</u> Analysis

In <u>Shaffer-Doan v. Commonwealth of Pennsylvania</u>, Ayden Shaffer-Doan ("ASD"), a minor, by his parents, filed a medical malpractice action arising out of the alleged negligent medical treatment with regard to the detection and treatment of seizures. ASD suffered cardio-pulmonary arrest resulting in extensive and permanent brain injury. In

the complaint, ASD sought compensatory damages for medical expenses, a large portion of which would be incurred after he reached the age of majority. Additionally, the parents, in their own right, ("Parents") sought recovery for past, present, and future medical expenses they had incurred and are expected to incur before ASD reaches the age of majority.

Prior to the settlement, the DPW asserted a claim for reimbursement of $47,000 which constituted the MA monies expended for medical care. Prior to trial, the trial court dismissed all claims brought on behalf of the parents in their own right, based upon the parents' failure to bring their claim within the prescribed two-year statute of limitations period. The Court did not address whether ASD could pursue the MA reimbursement claim in his own right. A settlement agreement established a Special Needs Trust, which contained a provision under which ASD and parents agreed to pay "any and all valid liens that have been asserted and/or which could be asserted for reimbursement of any medical benefits provided to ASD."

ASD argued that Parents received no recovery for the monies expended by DPW for past medical care and, therefore, DPW should not receive payment. ASD relying on Bowmaster, argued it is improper for DPW to enforce a lien for monies not recovered from a third party via settlement of a medical malpractice action because the monies would come out of funds that are to be set aside for ASD's future needs. DPW argued that Bowmaster was wrongly decided because it was based on the faulty premise that a child cannot recover benefits.

The Commonwealth Court reviewed the history of the common law development of the theory that only the parents could recover for the medical expenses. The Court also reviewed the language of FACA and the manner in which it was administrated and concluded that the minor child is, in fact, the beneficiary. FACA clearly defines the term "beneficiary" as the recipient of the benefits, whether a past recipient or a future one. Acceptance of MA benefits for which a minor child has applied (through his parents) essentially creates, by operation of law, a contractual relationship arising from the parents' inability to fully provide for the child's medical needs. Such a relationship is consistent with the language and policy behind FACA, which shows a clear legislative intent to provide DPW with a broad means of recovering funds expended on a minor as a result of a third-party tortfeasor's actions. Statutes should be construed to favor the public interest over private interests, and the public interest is protected more by requiring tortfeasors, and not taxpayers, to pay for the negligent acts of the tortfeasors.

The Court concluded that a minor may seek medical expenses incurred while a minor to enable the DPW to recover its lien provided the claim is not duplicated by the parents. The Court also noted that a new section, 1409.1, added to FACA on July 4, 2008, requires the trial court or agency to allocate a portion of the award or agreement to medical fees, and afford DPW a first lien or actual payment from the medical portion of the award.

Following Shaffer, Commonwealth Court Holds that DPW Must Be Placed on Notice Regarding the Status of a Case in Which MA Monies Were Paid

In Jordan v. Western Pennsylvania Hospital, the DPW appealed from an order that overruled the DPW's objections to the trial court's approval of a settlement of a tort action brought by the parents of Grady Jordan, a minor, on his behalf, seeking damages for injuries he suffered as a result of alleged medical malpractice at the time of birth. The Court vacated the trial court's order and remanded.

Nearly eight years after Grady's birth, his parents filed a complaint alleging medical malpractice relating to allegedly negligent conduct during the resuscitation of Grady after delivery. The complaint alleged that Grady suffers from cerebral palsy and requires long-term care. The complaint originally sought recovery for past medical expenses.

During trial, the Plaintiffs submitted a trial exhibit including past medical costs, and submitted a point for charge to the jury that included past medical costs. However, the Defendants filed a motion *in limine* to exclude the claim for past medical costs. Plaintiffs did not oppose the motion and agreed the claim for past medical costs was not meritorious. Plaintiffs' counsel did not inform the DPW of this, ultimately divesting the DPW of its right to pursue a claim for its lien.

The parties entered into an agreement that would guarantee Grady a minimum settlement of $10 million and a maximum of $23 million (high-low agreement). The jury awarded $57 million, which was reduced to $23 million as a result of the high-low agreement. The Jordans never apprised the DPW of the status of the case until they filed their petition to approve the minor's settlement.

The DPW filed objections to the petition to approve the settlement complaining the Jordans provided inadequate notice to the DPW on the status of the case. The DPW also asserted that the trial court should disapprove the settlement and provide the DPW with an opportunity to intervene. The trial court approved the settlement and part of the proposed distribution and settlement of funds, but directed that an amount equal to the lien was to be placed in escrow pending the resolution of DPW's objections, citing the Superior Court's decision in Bowmaster as the sole basis for denying the DPW's objections.

The Jordan Court acknowledged the Shaffer-Doan decision (above) in which the Bowmaster analysis was rejected. The Court followed Shaffer-Doan, finding that FACA's provisions ensure that DPW has a place at the settlement table and, if necessary, the trial table, in cases for which it has paid MA benefits. By providing DPW the opportunity to be involved in negotiations, the statutory language affords DPW the means to ensure that any settlements have a specific line item for DPW's claims or lien. Such a system protects taxpayers by allowing DPW to be compensated from the actual tortfeasors, while not detracting from the minor's recovery. Further, this opportunity cannot be denied by improper notice nor by antiquated notions of dual recovery.

Accordingly, the trial court's order was vacated, and remanded to trial court, which was directed to provide the DPW with the opportunity to conduct discovery and to consider any motions the DPW may file as the intervenor regarding the settlement. The Court also provided that the DPW would have an opportunity to seek additional relief as an intervenor.

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ders and reviews bone scan tests and either directly or in consultation with the patient's other treating physicians, determines how the results of the bone scan will impact the patient's treatment protocol. The physicians reviewing bone scans and the impact that the results of the same have upon treatment of prostate cancer is a national standard.

Plaintiffs also invoked the waiver provisions associated with the same-specialty requirement set forth in 512(d) and (e) of the Mcare Act. The urologist's motions were all denied pre-trial. The jury rendered a verdict awarding monetary damages in favor of Plaintiffs, and filed a motion for post-trial relief challenging the admission of Dr. Sanford's testimony concerning the medical standard of care.

On appeal, the urologist criticized the trial court's analysis as superficial and faulted the Court for failing to acknowledge, comment upon, or make findings of fact regarding Section 512(c)(2) (same subspecialty) and (c)(3) (board certification) requirements. Similarly, the urologist challenged the Superior Court for failing to meaningfully address these requirements and for proceeding directly to the waiver provision of 512(d).

The Court agreed that the record did not contain a trial-court finding that Dr. Sanford practiced in a subspecialty having a standard of care substantially similar to urology for the specific care at issue. The Court found Dr. Sanford did not testify on *voir dire* that radiation oncology has a substantially similar standard of care to urology. The Court also agreed 512(d) waiver (the primary subject of the Superior Court's reasoning) on its terms simply does not address the "board certification requirement."

However, the Court found that the physician did not preserve the argument for appeal. The Court held that litigants bear some responsibility in assisting the courts in achieving "sharpness" in the administration of justice. Physician's pretrial motions and his oral argument asserted at the outset of trial, stood in stark contrast to the focused arguments presented in the physician's appeal briefs. Significantly, in Appellant's objections asserted before and during trial, he did develop an argument invoking Section 512(c)(3) (board certification). It is unremarkable, then, that the trial court's responses did not focus on 512(c)(3).

In concurring, Justice Greenspan wrote separately because he believed the physician properly preserved his objection. Consequently, he would have reached the merits of the appeal. However, as to the merits, he would affirm on the basis that, at a minimum, Dr. Sanford was eligible for a waiver of those requirements. Justice Greenspan believed that the fact that the pretrial motions *in limine* specifically cited all of the sections of 512(c) was significant. The urologist challenged Dr. Sanford's testimony under Section 512's requirements that an expert be the same or a similar type of specialist was certainly, at minimum, apparent from the context of both his written and oral objection.

Justice Greenspan found Justice Saylor's focus on the "categorical" nature of the urologist's objection to be misplaced. Section 512 places the burden on the party proffering Dr. Sanford to demonstrate that Dr. Sanford either meets Section 512's requirements or qualifies for a statutory waiver of certain requirements. To preserve an objection to Dr. Sanford's testimony, Appellant's written and oral motions needed only be sufficient to invoke Plaintiffs' burden to establish Dr. Sanford's competency, which they were. Justice Greenspan wrote that he feared Justice Saylor may be inviting a broad array of malpractice actions and ineffective assistance claims even in cases where, as here, counsel and the trial court were fully aware of the specific objections being raised.

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