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update

Pennsylvania Superior Court Denies DPW Recovery of Past Medical Expenses of Minor Where Parents Did Not Sue for Recovery of Such Expenses

In a case of first impression, the Superior Court of Pennsylvania in *Bowmaster v. Clair*, 933 A.2d 86 (October 25, 2007) held that the Pennsylvania Department of Public Welfare was not entitled to a lien on the settlement proceeds that an injured child alone recovered during her majority because her parents did not seek recovery of medical expenses within the applicable limitations period.

Emily Bowmaster was born with severe birth defects. Her parents, as her court appointed guardians, filed a Complaint eight years later seeking damages for her injuries. The DPW asserted a lien of \$56,517.81 for past medical expenses. Emily's parents did not bring a claim within the applicable limitations period to recover medical expenses incurred during Emily's minority.

The Superior Court held that it was the parents' obligation to support their children until the age of majority. Accordingly, the true beneficiaries of the benefits received prior to Emily's majority were her parents, who fulfilled this obligation. Had the parents recovered those medical expenses, DPW would have been entitled to recovery from the settlement because of how the funds were allotted. Even though the DPW funds were paid for medical care rendered to the minor child, Emily Bowmaster, the Superior Court viewed her parents as the beneficiaries of those funds. Since the settlement funds were paid to settle the claims of the minor child only, DPW could not properly claim the right to reimbursement of medical benefit payments.

- Mark T. Perry, Esquire

Plaintiff May Recover Future Wage Loss Damages Where Trial Experts, Not Treating Physicians, Deem Him Partially Disabled

In a decision filed January 4, 2008, the Superior Court of Pennsylvania permitted a plaintiff to recover future wage loss where his trial experts, but not his treating physicians, determined that he would benefit from a reduced employment schedule. *Novitski v. Rusak*, 2008 PA Super 9 (2008).

John Novitski was injured in a motor vehicle collision. The defendant stipulated to negligence and the case proceeded to trial to assess causation and damages. After the collision, Novitski was treated by his primary care physician and underwent an MRI. He continued to work full time, but testified to a decrease in his hobbies. Novitski's treating family physician testified that he suffered from cervical strain, persistent pain in his neck, and numbness in his hand. The MRI revealed two herniated discs. A second MRI completed almost a year after the accident revealed, according to Novitski's treating family physician, that the disc herniations were more pronounced and that his condition had worsened. Although the primary care physician testified that Novitski was disabled, he admitted that he did not prescribe any work restrictions for Novitski and never wrote a letter excusing him from work.

Novitski's physical medicine and rehabilitation expert testified that Novitski had restricted use of his right arm and muscle spasms in his neck. He testified that Novitski's likelihood of improvement was remote and doubtful. However, on cross examination, he acknowledged that he did not recommend that Novitski stop working, reduce his work schedule, or restrict the hours in his work day. Novitski's vocational rehabilitation expert testified that his best chance to remain in the job market was to reduce his work schedule to three-quarter time. On cross examination, he admitted that he found no notation in the treaters' medical records that Novitski could not work, and no medical doctor had explicitly indicated that Novitski should reduce his work schedule. The reduction was his expert opinion based upon his vocational evaluation, which included review of the medical records. On cross examination, he admitted that Novitski continued to work full time and had not missed any work.

At trial, the defendant called its own specialist in physical medicine and rehabilitation who conceded the two herniated discs, but testified that Novitski's symptoms had resolved. The jury awarded \$300,000.00 for non-economic damages and \$100,000.00 for lost earning capacity. The defendant contended on appeal that the vocational experts' testimony was improper since there was no competent medical evidence from treating physicians to support the opinion that Novitski's accident-related injuries impacted his ability to work. Concurrently, the defendant contended on appeal that the opinion of the plaintiff's economic expert was improper since it was based upon the equally-improper opinion of the plaintiff's vocational expert. The Superior Court held that both expert opinions were permissible because, although the treating physicians did not recommend that Novitski restrict his work schedule, they did describe his need to avoid activities such as lifting, carrying, pushing, or pulling more than five pounds. This, according to the Superior Court, could factually support the opinion of the vocational expert that Novitski should reduce his work load to seventy-five percent of its current level.

- William J. Aquilino, J.D., M.B.A.

Pennsylvania Supreme Court Affirms *Sackett*, Requiring Insurers to Obtain New Stacking Waiver Each Time Vehicle Added to Multi-Vehicle Policy

In April 2007, the Pennsylvania Supreme Court in *Sackett v. Nationwide Mut. Ins. Co.*, 591 Pa. 416, 919 A.2d 194 (2007) ("*Sackett I*") held that every time a vehicle was added to a multi-vehicle insurance policy, the insurer must obtain new Section 1738(d) stacking waiver to permit the insured to waive the increased amount of available stacked UM/UIM coverage. If a named insured did not execute a new stacking waiver form when a vehicle was added to a policy that included UM or UIM coverage, then the limit of coverage available became the sum of the limits for each vehicle on the policy. This decision presented a host of difficult issues for insurers, not the least of which was how to handle recently settled claims where additional coverage was now available under the insured's policy based upon the rationale employed by the Court's decision in *Sackett I*. The Pennsylvania Supreme Court agreed to reconsider its decision in *Sackett I* after a considerable amount of negative feedback from the insurance industry and an amicus statement submitted by the Insurance Commissioner.

On December 27, 2007, the Pennsylvania Supreme Court affirmed the major holding in *Sackett I* which requires insurers to obtain new Section 1738(d) stacking waiver forms each time an insured adds a vehicle to a multi-vehicle policy.

The Court, however, modified its decision in *Sackett I* to address the peculiar issue of whether an insurer must obtain new waivers during the finite time frame when coverage is afforded to a newly purchased vehicle via an existing policy's "newly acquired vehicle" clause. A newly acquired vehicle clause permits consumers to extend existing coverage, with the same applicable types of coverage and limits, to new and/or substitute vehicles, with coverage applying automatically upon acquisition, subject to timely notice to the insurer. The Court held that during this limited time frame, *Sackett I* does not preclude the enforcement of an initial waiver of stacked UM/UIM benefits relative to coverage extended under after-acquired vehicle provisions of an existing multi-vehicle policy. Once the insured provides notice to the insurer of the addition of a vehicle to a multi-vehicle policy and coverage is no longer afforded under the newly acquired vehicle clause, an insurer must obtain new stacking waiver forms or coverage becomes the sum of the limits for each vehicle on the policy.

- Michael Blazick, Esquire



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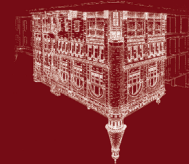
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