

## The Pennsylvania Commonwealth Court Rules That MCARE Owes Coverage Over Extended Reporting Endorsements Despite The Absence Of Additional Surcharge

Joseph A. Arnold • 215.665.2795 • [jarnold@cozen.com](mailto:jarnold@cozen.com)

In the latest installment of the long-running *Fletcher v. Pennsylvania Property & Casualty Insurance Guaranty Ass'n* case, the Pennsylvania Commonwealth Court rebuked the state insurance department's effort to negate the excess medical liability coverage obligation of the Medical Care Availability and Reduction of Error Fund ("MCARE") where the claim was covered by an extended reporting endorsement.

In December 2002, Johanna Fletcher initiated a medical malpractice action on behalf of her husband's estate, alleging that negligent medical treatment over a 10-year period by two doctors and their medical practice resulted in Mr. Fletcher's untimely death in February 2001. Fletcher won a verdict in excess of \$7.727 million, which included delay damages.

In an odd set of circumstances, both doctors predeceased Mr. Fletcher. Therefore, when Fletcher filed the lawsuit in December 2002, no current insurance policies existed. PHICO insured one of the doctors and the medical practice for five successive years from 1997 through 2001. The MCARE Fund, Pennsylvania's state-run excess medical liability fund, provided coverage excess to PHICO. To further complicate matters, PHICO was placed into liquidation in January 2002, and the Pennsylvania Property & Casualty Insurance Guaranty Association became liable for the statutory maximum of \$300,000 per claim.

Prior to the underlying verdict, both the Guaranty Association and MCARE denied coverage. MCARE claimed that the health care providers were not entitled to access MCARE's coverage because of nonpayment of an MCARE assessment for tail coverage.

Fletcher filed a declaratory judgment action against MCARE and the Guaranty Association in April 2006. Fletcher settled with the Guaranty Association, but MCARE challenged the

Commonwealth Court's jurisdiction, arguing that the state insurance department maintained exclusive subject-matter jurisdiction over MCARE's written coverage determinations. This aspect of the dispute resulted in a widely reported decision from the Pennsylvania Supreme Court, in which the court ruled that the Commonwealth Court had original jurisdiction over coverage disputes involving MCARE. *Fletcher v. Pa. Prop. & Cas. Ins. Guar. Ass'n*, 985 A.2d 678 (Pa. 2009).

Subsequently, MCARE asserted two primary defenses to coverage: (1) because the primary PHICO policies did not contain an extended reporting endorsement, MCARE owed no excess coverage; and (2) MCARE never received a surcharge payment for any alleged extended reporting endorsement.

The Commonwealth Court rejected both arguments. First, the evidentiary record supported a finding that one of the doctors and the medical practice were covered for the Fletcher claim under an automatic extended reporting endorsement in the PHICO policies. The court likened the extended reporting coverage to "occurrence" coverage and noted that the statutory surcharge requirement (since 1997) was the same regardless of whether the insured bought "claims made" or "occurrence" coverage. Because the parties did not dispute that all surcharges on those PHICO policies were paid in full, the court found that the insureds satisfied the surcharge requirement.

The court dismissed MCARE's alternative argument that the insureds were required to purchase separate "MCARE tail coverage" because MCARE could not "identify any mechanism, let alone duty" in the statutory language that required the insureds to do anything other than ensure they had extended reporting coverage from their primary

medical liability insurer. MCARE also argued that the insureds forfeited coverage by their failure to pay the tail surcharge on policies issued prior to 1997. The court likewise dismissed that argument because coverage was nonetheless available from 1997 through 2001.

The court granted summary judgment on Fletcher's claims that the doctor and medical practice had tail coverage under the 1997-2001 policies and the MCARE surcharge was paid in full. This ruling in effect obligates MCARE to provide coverage in excess of primary insurance provided by open-ended extended reporting endorsements without the payment of an additional surcharge.

Despite the impact of this ruling, the court *denied* summary judgment on the ultimate issue of MCARE's liability due to a disputed issue of fact as to the timing of the occurrence. Fletcher argued that the "occurrence" took place in 2000,

when her husband first manifested symptoms and when the PHICO policies (with the extended reporting coverage) were in place. MCARE pointed to Fletcher's allegations of negligent treatment between 1991 and 2001 and to medical records casting doubt as to when Mr. Fletcher first started to exhibit symptoms. Therefore, the *Fletcher* saga is to be continued.

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*Cozen O'Connor is a global leader in representing the insurance industry on coverage matters. For further analysis of Fletcher v. Pennsylvania Property & Casualty Insurance Guaranty Ass'n, No. 107 M.D. 2006 (Pa. Cmwlth. Aug. 26, 2011), and how it may impact various coverage issues, please contact Joseph A. Arnold at [jarnold@cozen.com](mailto:jarnold@cozen.com).*