Case Study: *Yussen V. MCARE Fund*

--By Jacqueline Reynolds, Marshall Dennehey Warner Coleman & Goggin PC

Law360, New York (September 20, 2012, 3:17 PM ET) -- What constitutes a claim under Section 715 of the Medical Care Availability and Reduction of Error (MCARE) Act? Apparently, according to the Supreme Court of Pennsylvania in *Yussen v. MCARE Fund*, 2012 Pa. (May 29, 2012), a writ of summons in the absence of notice or a demand communicated to the insurer or insured does not.

Section 715 of the MCARE Act, 40 P.S. § 1303.715, provides that the Commonwealth of Pennsylvania, MCARE Fund and the Pennsylvania Insurance Department may be required to assume the central obligations of the primary insurer for a health care provider who has had a claim made against him or her more than four years after the date of loss.

The obligations include initial indemnification and funding the defense of the underlying civil action. The purpose of the section is to provide private insurance companies with greater certainty in terms of fixing reserves against possible claims in light of the Pennsylvania Discovery Rule, which extends the statute of limitations to when a plaintiff should reasonably have been aware of his injury. The question raised in Yussen was: on what date does a claim become a claim — the date in which the writ of summons is filed or the date the insured/insurer receives notice?

On June 2, 2007, Joanna Ziv filed a praecipe for a writ of summons against a number of health care providers, including Phillip S. Yussen, M.D., for alleged malpractice that took place on July 7, 2003. Yussen had a claims-made policy with his primary insurance carrier, which provides coverage for claims received and reported to the insurance carrier within the applicable policy period.

Yussen and his carrier first received notice of the writ of summons on July 23, 2007. On behalf of Yussen, a Form C-416 claim was submitted to MCARE requesting Section 715 indemnity and insurance coverage. MCARE denied coverage on November 13, 2007, on the basis that the claim was made when the writ of summons was filed, less than four years after the alleged malpractice. An appeal of the decision denying coverage was taken by Yussen to the Pennsylvania Insurance Department.

The Pennsylvania Commonwealth Court, having original jurisdiction over claims against the MCARE fund, appointed a hearing examiner, whose proposed decision recommended a reversal of MCARE's decision denying coverage. MCARE filed timely exceptions, arguing that the plain language of Section 715 states that a claim is made when it is first asserted, instituted or comes into existence and contended that a claim was made when the writ of summons was filed on June 4, 2007. The Commonwealth Court agreed with MCARE, stating that the claim was "made" when the writ was filed with the court, which was less than four years after the date of loss.

Yussen appealed the decision. In his appeal, Yussen argued that under Section 715, a claim is made when a demand is "communicated" to the insured. In support of his argument, Yussen contended that the statute was ambiguous as to what constitutes notice. Yussen also argued that the MCARE Act defines the terms "action" and "claim" differently.

A "medical professional liability action" is defined as "any proceeding in which a medical professional liability claim is asserted, including an action in a court of law or an arbitration proceeding," while a "medical professional liability claim" is "any claim seeking the recovery of damages or loss from a health care provider arising out of any tort or breach of

contract causing injury or death resulting from the furnishing of health care services which were or should have been provided."

Yussen argued that if the statute considered an action and a claim to be the same, it would not have provided different definitions. Further, the purpose behind the section was to provide certainty to insurers in terms of potential risk and for setting reserves. Yussen also stated that the Commonwealth Court's decision in *Cope v. Insurance Commissioner*, 955 A.2d 1043, 1050 (Pa. Cmwlth. 2008), which stated that "[r]eceiving a bare writ of summons … does not by itself provide notice that a claim is eligible for Section 715 coverage because it does not contain information that would enable a health care provider to make that determination," supported his position and that the court's decision in his case contradicted *Cope*.

MCARE argued that the Commonwealth Court should be affirmed because the statutory language clearly states that a claim is made when it comes into existence, i.e., filing of a writ of summons. It further argued that if Yussen's argument were adopted, the court would be ignoring the plain language of the statute and inserting its own notice requirement.

MCARE further contended that the statute provides for three scenarios in which Section 715 coverage is triggered: when a claim is made, when a claim is filed and when there is notice of a claim. Express notice only applies to the 180-day requirement for an insurer to request primary coverage from MCARE, and the court could not transfer the notice requirement from the 180-day requirement to the other two sections because its exclusion was intentional. MCARE disagreed with Yussen's interpretation of *Cope*.

In deciding this issue, the Pennsylvania Supreme Court agreed with Yussen and stated that the language in Section 715 is ambiguous. Specifically, "[t]he concept of a claim being made, considered in very broad terms, may indicate the claim's mere coming into existence, as [MCARE] asserts. On the other hand, as used in the litigation setting, the term often connotes conveyance of a demand to those intended to respond in damages."

The court also looked at the type of policy Yussen had — claims-made policy. With this type of policy, notice to the insured is required. In light of the ambiguousness of the language, the court employed "principles of statutory construction" and, more specifically, the circumstances surrounding the creation of the statute, its goal and consequences.

In doing so, the court found Yussen's argument that the statute was created to provide insurers with a level of understanding of potential claims or "certainty in calculating reserves" as persuasive. In order to allow for this goal, notice to the insured is necessary.

The court concluded that under Section 715, the mere filing of a writ of summons does not suffice to make a claim in the absence of some notice or demand communicated to the insured or insurer. The court did not specifically address what constitutes as "sufficient notice" since there was an absence of any evidence that notice and/or demand was made within the four-year time period. The Pennsylvania Supreme Court reversed the Commonwealth Court's decision and remanded the matter for entry of judgment in Yussen's favor.

The impact of this case will presumably affect future minor claims only. One of the conditions for Section 715 coverage is that the date of loss occurs on or before December 31, 2005. The number of cases that fall under Section 715 will, thus, diminish with each passing year.

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