IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Victor R. Solon, M.D., Petitioner	:	
v.	:	
Medical Care Availability and Reduction of Error Fund, Respondent	:	No. 302 M.D. 2010
	:	Argued: October 12, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: November 10, 2010

The Medical Care Availability and Reduction of Error Fund (Mcare) files exceptions to the decision of the Hearing Examiner which recommended the reversal of Mcare's decision to deny excess coverage for a claim against Victor R. Solon, M.D. (Dr. Solon). Mcare has also filed a Motion of the Medical Care Availability and Reduction of Error Fund to Dismiss Petition for Review Due to Mootness as a Result of a Favorable Resolution of the Underlying Claim Against Petitioner, Victor R. Solon, M.D. (Motion to Dismiss).

Professional liability insurance for physicians and hospitals in Pennsylvania is governed by the Medical Care Availability and Reduction of Error Act (the Act).[1] Section 712 of the Act, 40 P.S. §1303.712(a), states that Mcare was created "to pay claims against participating health care providers for losses or damages awarded in medical professional liability actions against them in excess

[1] Act of March 20, 2002, P.L. 154, 40 P.S. §§1303.101-1303.910.

of the basic insurance coverage. . . ." Mcare's statutory excess coverage only becomes available when a health care provider's liability exceeds its basic insurance coverage or self-insurance.

Mcare is funded by assessments paid by participating health care providers which are collected by primary insurance carriers and remitted to Mcare. Section 712(d)(1) of the Act, 40 P.S. §1303.712(d)(1). Health care providers practicing in Pennsylvania are required to participate in Mcare. Participation entails an appropriate assessment for Mcare's excess coverage. Applicable regulations state that assessments must be received by Mcare within sixty days from the effective date of a health care provider's primary insurance policy. 31 Pa.Code §§242.5, 242.6(a)(3). Regulations also provide that a health care provider who fails to timely pay the assessment shall not be covered by Mcare in the event of a loss. 31 Pa.Code §242.17(b). If Mcare receives the assessment after the sixty day period, Mcare accepts the assessment so that the health care provider is in compliance with Pennsylvania law requiring participation.

Here, Dr. Solon's Mcare assessment was due by February 29, 2008, sixty days after his primary insurance policy was renewed on December 31, 2007. Two invoices were forwarded to Dr. Solon for his medical malpractice coverage for the period from December 31, 2007, to December 31, 2008. The invoices reflected the totals due for both primary and Mcare coverage. The first invoice, dated October 31, 2007, stated that the amount due was $19,573. The invoice was forwarded to Dr. Solon by his broker, Michelle Wendt (Wendt). A second invoice was sent on November 8, 2007, to Dr. Solon and to Wendt from Pennsylvania

Physicians' Reciprocal Insurance (PaPRI) after PaPRI determined that it had miscalculated the amount due for the primary coverage portion on the first invoice. On January 16, 2008, Dr. Solon paid to PaPRI the amount handwritten onto the first invoice, $19,573. When PaPRI received this payment, it realized that it was insufficient to satisfy both the primary premium due and Dr. Solon's assessment to Mcare. PaPRI apportioned the payment to satisfy the primary premium which resulted in a $1,065 deficiency in the amount that it forwarded to Mcare. Neither PaPRI nor Wendt communicated the reason for the deficiency to Dr. Solon. Mcare records continued to show an amount due. On April 3, 2008, Mcare informed PaPRI that the amount it had remitted for Dr. Solon's assessment was deficient. On June 20, 2008, Mcare sent a non-compliance letter to Dr. Solon which informed him that he was in noncompliance with the statutory coverage requirements and that he was not covered by Mcare in the event of a claim. Mcare sent a second noncompliance letter to Dr. Solon on August 1, 2008.

On August 6, 2008, a malpractice claim was made against Dr. Solon by Barbara Young (Young Claim). On August 8, 2008, Dr. Solon left the United States to visit his family in the Philippines, where he remained until August 29, 2008.

On September 5, 2008, PaPRI submitted a claim reporting form to Mcare and requested coverage for the claim. The form indicated that Dr. Solon was first notified of the claim on August 6, 2008. By letter dated September 10, 2008, Mcare denied coverage. On September 19, 2008, Dr. Solon sent a check to

cover the outstanding balance with Mcare. On September 22, 2008, Dr. Solon appealed from the coverage denial.[2]

The Hearing Examiner issued a recommendation that Mcare's decision to deny excess coverage for the claim be reversed. Mcare filed exceptions to the Hearing Examiner's recommendation.

On October 4, 2010, Mcare filed two motions with this Court: 1) the Motion to Dismiss and 2) Motion of the Medical Care Availability and Reduction of Error Fund to Stay Argument Currently Scheduled for October 12, 2010, Pending Resolution of Respondent's Motion to Dismiss Petition for Review Due to Mootness (Motion to Stay).[3]

In the Motion to Dismiss, Mcare alleges:

> 9. On September 30, 2010, counsel for Dr. Solon contacted the undersigned counsel for Mcare and indicated that Dr. Solon was being dismissed from the underlying medical malpractice action and that no payment was being made on his behalf to settle the case.

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[2] Dr. Solon originally appealed to the Pennsylvania Insurance Department. Before the Insurance Commission issued an adjudication, our Pennsylvania Supreme Court ruled in Fletcher v. Pennsylvania Property and Casualty Insurance Guaranty Association, 603 Pa. 452, 985 A.2d 678 (2009), that this Court has original jurisdiction over claims against Mcare such as Dr. Solon's. On February 17, 2010, this Court ordered that all Mcare coverage appeals then pending before the Insurance Department were deemed filed in this Court. The parties stipulated to the transfer of the administrative record from the Insurance Department to this Court. This Court appointed the Hearing Examiner to prepare a proposed decision subject to the exceptions of either party.

[3] On October 8, 2010, this Court dismissed the Motion to Stay as moot.

10. Since the dismissal of Dr. Solon from the underlying malpractice action without payment on his behalf would render the present controversy moot, counsel for Mcare urged counsel for Dr. Solon to withdraw his Petition or, at minimum pending final disposition of the underlying case, request a stay of the October 12, 2010 argument. . . .

11. On October 1, 2010, counsel for Mcare learned further that plaintiff in the Young Claim had already executed a general release of Dr. Solon from the underlying medical malpractice action on August 27, 2010.

12. Upon discovering that Dr. Solon had been released from all liability for the Young Claim without payment implicating Mcare's excess coverage layer, counsel for Mcare urged Dr. Solon to immediately withdraw his Petition pending before this Court. . . .

13. In response to Mcare's counsel's requests, counsel for Dr. Solon responded that unless Mcare withdrew its Exceptions to the Proposed Decision, which counsel characterized as an 'Appeal,' he believes it is his obligation to move forward with the argument on October 12, 2010. . . .

14. The only issue before the Court in the instant case is whether Mcare owes excess medical professional liability coverage to Dr. Solon for the Young Claim.

15. The recent developments regarding the underlying Young Claim . . . render moot the present controversy regarding whether Mcare owes excess liability coverage for that claim.

16. Dr. Solon has been released from all liability for the Young Claim, has made no payment in resolution of the Young Claim, and therefore Mcare's excess liability coverage is not and cannot be implicated.

17. Even if this Court were to grant to Dr. Solon . . ., the relief which he is seeking . . ., such an order would be

> purely hypothetical and have no practical effect since the Young Claim has already been resolved in Dr. Solon's favor.
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> 18. Despite Dr. Solon's counsel's mischaracterization of Mcare's Exceptions to the Proposed Decision as an 'appeal,' if Mcare were to simply withdraw its Exceptions as he suggests, this Court would remain faced with making a final determination of the ultimate issue in controversy, which is undeniably moot due to the favorable resolution of the underlying case for Dr. Solon. Therefore, it is respectfully submitted that this Court should not rule further upon the Hearing Examiner's recommended disposition as to the substantive issue in this case, but rather should dismiss the Petition of Victor R. Solon, M.D.

Motion of the Medical Care Availability and Reduction of Error Fund to Dismiss Petition for Review Due to Mootness as a Result of a Favorable Resolution of the Underlying Claim Against Petitioner, Victor R. Solon, M.D., October 4, 2010, Paragraph Nos. 9-18 at 3-5.

Dr. Solon responded to the Motion to Dismiss:

> 10. . . . . While Dr. Solon's dismissal from the 'Young Claim' may have rendered moot his Mcare coverage for that specific claim, there is no guarantee at this point that Mcare's decision to deny coverage does not apply to claims made in the future based upon the same policy period. Accordingly, Dr. Solon will not voluntarily agree to withdraw his challenge of Mcare's decision.
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> However, the only reason that this matter is proceeding before this Honorable Court is because the Mcare Fund elected to file exceptions to the Proposed Decision of the Hearing Examiner, James Johnson.
>
> Therefore, if the Mcare fund feels that this matter is now moot, the Mcare Fund can certainly elect to withdraw the

> exceptions it filed, and agree to abide by the terms set forth in the Proposed Decision.

Response of Victor Solon, M.D., to the Motion of the Medical Care Availability and Reduction of Error Fund to Dismiss Petition for Review, October 7, 2010, Paragraph No. 10 at 1-2.

On October 12, 2010, this Court heard oral argument on the Motion to Dismiss as well as on the merits.

The law is well settled that a case will be dismissed as moot "unless an actual case or controversy exists at all stages of the judicial or administrative process." Musheno v. Dep't of Pub. Welfare, 829 A.2d 1228, 1231 (Pa. Cmwlth. 2003) (citing Faust v. Cairns, 242 Pa. 15, 88 A. 786 (1913)). In In re D.A., 801 A.2d 614, 616 (Pa. Super. 2002), our Pennsylvania Superior Court stated:

> An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to an intervening change in the applicable law. In that case, an opinion of this Court is rendered advisory in nature. An issue before a court is moot if in ruling upon the issue the court cannot enter an order that has any legal force or effect. (quotations and citations omitted).

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (citation omitted). Cases presenting mootness problems are those that involve litigants who clearly had standing to sue at the outset of the litigation. Then during the course of litigation, changes in the facts or in the law allegedly deprive the litigant of the necessary

stake in the outcome. Pap's A.M. v. City of Erie, 571 Pa. 375, 812 A.2d 591 (2002).

On a rare occasion an exception to this principle is made where the case involves an issue important to the public interest, the conduct complained of is capable of repetition yet likely to evade review or a party will suffer some detriment without the court's decision. Strax v. Dep't of Transp., Bureau of Driver Licensing, 588 A.2d 87 (Pa. Cmwlth. 1991), aff'd per curiam, 530 Pa. 203, 607 A.2d 1075 (1992).

Here, the issue Dr. Solon brought to this Court was whether Mcare erred when it denied coverage for the claim made in the Young Claim. It is undisputed that Dr. Solon was dismissed from the Young Claim litigation. Because there is no outstanding claim against Dr. Solon, it is irrelevant that Mcare denied his claim because Dr. Solon has no need for Mcare's excess liability coverage. There is no case or controversy. If this Court were to rule on the merits of the matter, its order would have no legal force or effect. Dr. Solon argues that the case is not moot because another claim could arise from the same period when Dr. Solon's had not paid Mcare in full for coverage. This is pure speculation, and this Court will not enter an advisory opinion.

Accordingly, this Court grants the Motion to Dismiss due to mootness.[4]

BERNARD L. McGINLEY, Judge

[4] Because of the decision reached by this Court, this Court need not address the merits of the case. The issues raised by MCARE included the following:

> 1. Whether MCARE properly denied excess coverage for a claim against Dr. Solon when MCARE did not receive his complete assessment payment until more than sixty days after the effective date of his primary insurance policy and after the claim was made against him?
>
> 2. Whether the Hearing Examiner's proposed decision was inconsistent with the Mcare Act, regulations, and applicable case law?
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> 3. Whether the evidence in the record was insufficient to support the factual findings used to distinguish this case from applicable precedent requiring that MCARE's denial of coverage be upheld?

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O R D E R

AND NOW, this 10th day of November, 2010, the Motion of the Medical Care Availability and Reduction of Error Fund to Dismiss Petition for Review Due to Mootness as a Result of a Favorable Resolution of the Underlying Claim against Petitioner, Victor R. Solon, M.D. is granted and this case is dismissed.

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BERNARD L. McGINLEY, Judge