Bad Faith: Malpractice Carrier Has A Legal Duty To Settle A Liability Claim Within The Policy Limits, Court Says.

There were allegations that the obstetrician and the hospital's labor and delivery nurses negligently delayed phoning for a pediatric specialist to attend to the baby immediately after his birth by emergency cesarean section.

That is, it was claimed a pediatrician should have been summoned right when the emergency cesarean was called, in anticipation of the newborn's needs, rather than waiting until after the birth, when his needs were obvious and emergent.

The jury awarded $9,600,000 as damages, pro-rating fault 75% to the obstetrician ($7,200,000) and 25% to the hospital's nurses ($2,400,000).

The hospital's primary malpractice insurance limit was $1,000,000. The hospital's excess carrier had to pay the excess $1,400,000. The excess carrier turned around and sued the primary carrier for bad faith, that is, for breach of the legal duty to make a reasonable attempt to settle the case for $1,000,000 or less.

The family's attorney indicated after the fact he would have recommended his clients accept $1,000,000 if that amount had been offered during the trial.

The US Circuit Court of Appeals for the Second Circuit upheld the second insurance company's suit against the first.

Insured Is Entitled To A Good Faith Effort To Settle A Liability Claim

The principle is the same when a healthcare provider with malpractice insurance coverage is faced with a significant liability exposure.

The insured should consult different legal counsel than the defense counsel provided by the insurance company to explore whether the insurance company is honoring its legal obligation to avoid exposing the insured to an over-limits verdict. **New England Ins. Co. v. Healthcare Underwriters Mut. Ins. Co., __ F. 3d __, 2002 WL 1467282 (2nd Cir., July 9, 2002).**

A medical malpractice insurance company has exclusive control over how liability cases against the insured are handled.

The insurance company must make a realistic assessment of the patient's chances of proving the healthcare provider guilty of negligence and a realistic assessment of the amount of money a jury would be likely to award.

In some cases, like birth and neonatal injuries, the damages for lifelong special care for an impaired individual can reach into the tens of millions of dollars and can potentially exceed the limits of the insured's malpractice policy.

The insured can hire independent legal counsel to evaluate whether the insurance company and its legal counsel are doing all they can to settle the case.

The insured's legal counsel can write to the insurance company and insist on a good faith settlement offer to the patient within the policy limits.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
July 9, 2002

Lymphedema: Court Rules It Can Be An Occupational

A nurse had a left-side mastectomy and a right-side node resection.

Three years later because of staff reductions her employer began to require her to lift patients as part of her job as a hospital staff nurse.

Over the next few years she developed lymphedema in her upper left arm.

A worker's compensation judge denied her claim for an occupational injury.

A pre-existing infirmity aggravated or accelerated by a series of events characteristic of a particular employment combining to produce disability is an occupational disease.

It is immaterial that the disability could have been brought on by causes other than work-related trauma, if, in fact, trauma on the job is a disabling factor.

COURT OF APPEAL OF LOUISIANA
June 21, 2002

The Court of Appeal of Louisiana, in an opinion that has not as yet been released for publication, agreed it was not an occupational injury.

However, the court ruled the nurse was entitled to compensation, as the victim of an occupational disease rather than an occupational injury.

It was true that lymphedema can develop after breast surgery for causes unrelated to the demands of the individual's job. But in this case the nurse's physician linked it directly to lifting patients at the hospital, the court pointed out. **Dunn v. Riverview Medical Center, 2002 WL 1350456 (La. App., June 21, 2002).**