

M E M O R A N D U M

SUPREME COURT QUEENS COUNTY  
SUPREME COURT IAS PART 13

-----x Hon. JAMES P. DOLLARD

CASSEY SINGH, an infant by her  
father and natural guardian,  
JAIKARAH C. SINGH and  
JAIKARAH C. SINGH, Individually,

Index No. 23954/02

Plaintiff,

Motion Date: Aug. 3, 2005

Motion Cal.No.: 59

-against-

LONG ISLAND JEWISH MEDICAL  
CENTER, MARK A. MITTLER, MAYER  
SAGY, ROB D. DICKERMAN, GARY L.  
KOHN, MARY CHRISTINE BALDAUF,  
GERALD NOVAK, ALLESSANDRA M.  
ROTELLA, CHRISTINA M. FIGLOZZI,  
ZIPORA FEFER and ROBERT M. GALLER,

Defendants.

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The issue presented by this motion is whether an HMO which has provided medical services for the infant plaintiff in this action to recover damages for medical malpractice and in which the parties to the said action have agreed on the record in open Court to a settlement specifically excluding any recovery of or for medical expenses, should be permitted to intervene prior to the signing of the infant compromise order for the purpose of interposing a third-party action against the plaintiffs to recover all sums paid on behalf of the infant plaintiff.

The action arises out of treatment rendered by the defendants on October 6 and 7, 2000 at defendant hospital as a result of which the child suffered severe brain damage. She was approximately a year and a half old at the time. Her physical and cognitive functioning are severely impaired. She requires total assistance with all activities of daily living and personal care. She has no purposeful movements and is unable to speak. She is fed via a gastronomy tube. She has a tracheotomy and requires frequent suctioning to maintain her airway and intermittent use of oxygen for desatuation. She receives physical therapy treatments three times a week, speech therapy three times a week and occupational therapy three times a week. She requires assistance in all aspects of daily living and cannot be left alone and without full, knowledgeable and competent supervision for any period of time.

The instant action was commenced in 2002, discovery was

completed and a Note of Issue was served on May 27, 2004. After extensive negotiations an agreement was reached under which Medical Malpractice Insurance Company as the insurer of the defendant hospital agreed to pay the sum of \$4,100,000.00 to settle the case.

Out of the settlement \$1,600,000.00 is to be structured in a life annuity and \$1,210,495.80 is to be placed in a Supplemental Needs Irrevocable Trust and \$203,265.00 to be paid to the City of New York, Human Resources Administration in satisfaction of liens for medical assistance provided to the infant plaintiff. The settlement also provides for payment of \$500,000.00 to the plaintiff Jaikarah C. Singh, the infant's father to settle his cause of action for loss of services.

The settlement was placed on the record in open court on February 12, 2005. The following statement was made before the settlement was put on the record:

"MR. RABINOWITZ: Yes, Your Honor, we have reached a settlement subject to the approval of this Court; before I put the settlement on the record, I do have a statement I would like to make for the record and that statement is this, the settlement that we have reached does not include any allocation for medical expenses which were in the past or will be in the future reimbursed by any private health insurance company.

The parties recognize that in the event this case had gone to verdict, the defendants would be entitled to an offset pursuant to C.P.L.R 4545C for any money which was paid in the future by any private health insurer."

After a petition for the compromise of the infant's claim was presented to the Court Aetna Health Inc. moved for leave to intervene to assert a third-party action against the plaintiff to recover the sum of \$1,257,047.83 which it claims was paid for the infant's medical treatment and expenses pursuant to an HMO membership agreement between Aetna and the infant's father through his employer, the New York City Police Department. The proposed third-party complaint pleads that prior to the aforesaid settlement the third-party defendants and their legal counsel were placed on notice of Aetna's claims of contractual rights of reimbursement under the HMO Certificate of Coverage.

Intervention in this case at this time would be prejudicial to the plaintiffs. If granted the Court could not approve the compromise since there would be a possibility that the infant's recovery in the case would be substantially reduced to the point where it would not be in the best interest of the infant to accept

the amount of the settlement. It is clear from the terms of the settlement that the defendants are not paying anything for the medical expenses.

This is supported not only by the portion of the transcript quoted above but by an affirmation of the attorney representing the defendants which is attached to the papers offered in opposition to the motion. The reason for this would appear to be obvious. If this case were to go to trial CPLR 4545(a) would bar the plaintiffs from recovering from the defendant the cost of any medical care that was or in the future would be replaced from any collateral source such as insurance except such collateral sources (such as medicaid or medicare) entitled by law to liens against any recovery of the plaintiff. (See, Humbach v. Goldstein, 229 AD2d 64, 67,lv. to app. disp. 91 NY2d 921).

Even without such clear evidence of the intentions of the instant parties to the settlement, reason dictates that a defendant would be unlikely to pay in settlement all or part of medical expenses that it would not be required to pay after a trial. Subdivision (d) of CPLR 4111 which was enacted at the same time as CPLR 4545(a) requires an itemized verdict of the elements of damage including medical expenses in order to differentiate damages for pain and suffering from economic damages.

Cases are settled to alleviate the risk of a trial. In deciding whether to approve a settlement of an infant's claim the Court must determine if the settlement is in the infant's best interest. In this case although Four million, One Hundred Thousand Dollars probably is less than the sustainable value of pain and suffering after a trial considering the devastating injuries the child has sustained, before a jury could consider damages it must find that the plaintiff has proved by the preponderance of the evidence that defendants departed from accepted practices and that such departure was a substantial factor in causing the infant's injuries. Resolution of those issues in medical malpractice cases generally comes down to a battle of the respective experts and the jury must be instructed that if it finds that the evidence weighs so evenly that it is unable to say that there is a preponderance on either side it must find for the defendant. In light of this there is a considerable risk for any plaintiff to proceed to trial and a settlement offer must be weighed against the possibility of no recovery. Of course the reason a settlement offer is made in any case is that the defendant desires to limit the risk of larger sustainable verdict. When the plaintiff is an infant the Court has a function and a duty to ensure that the settlement is in the best interest of the child. At bar the Court has examined the papers submitted in support of the compromise order including the manner in which the settlement monies will be used and determines that

this settlement is sufficient to make a significant and appreciable difference in her life and the lives of her caregivers and that it would be imprudent to risk a trial. It appears that if the settlement is not approved the case will be vigorously defended on the grounds that her injuries were the result of her pre-existing condition.

The infant's parents lack the means to provide her with adequate housing, transportation, additional schooling, therapies, care and extra necessities. The instant settlement will provide sufficient funds for these items. If the settlement is reduced by over a million dollars the remainder probably will be insufficient. The infant's parents are not people of means. The father is a New York City Police Officer. Her mother stays at home to care for Cassey and her three siblings, three and sixteen year old girls and a seventeen year old boy. The family presently is living in the first floor of a two family house on Hillside Avenue, a very busy street. Cassey, her life support equipment and nurses occupy a third of the living space which has been converted to a makeshift hospital. The two older children share a bedroom. Cassey's privacy is hindered because the apartment entrance leads through her bedroom and her window faces Hillside Avenue. These conditions would continue without an adequate settlement or a judgment.

The proposed intervener relies principally on Teichman v. Community Hospital of Western Suffolk, 87 NY2d 514. The facts there are similar to, but in this Court's opinion, distinguishable from those at bar. Both cases involve claims by infants for medical malpractice with allegations that health insurance payments had been made pursuant to a group insurance plan provided by the employer of the infant's parent. In both of the cases the health insurer had given notification of a reimbursement claim. In both cases a substantial settlement was entered into between the parties and the malpractice action without the involvement of the health insurer in any settlement negotiations. In both cases after the stipulation was placed on record the insurer moved (cross-moved in Teichman) for leave to intervene. What is distinguishable in so far as the question of prejudice is concerned, the Court of Appeals in Teichman stated that the plaintiff made the contractual issue a part of the action by moving to vacate a claim for reimbursement and by seeking a declaration that the health insurer had no rights to settlement proceeds. In addition in Teichman there was some question as to whether the settlement included any medical payments. The Court stated at page 519 "We agree with the Appellate Division that MetLife has no lien on the settlement proceeds but conclude that intervention was proper to allow the insurer to establish its right to recoup covered medical payments, if any, made to plaintiffs by defendants as part of the settlement" (emphasis supplied). Based on the exchange of comments by the

attorneys at the settlement hearing in Teichman, both the trial court and the Court of Appeals believed there was an issue as to whether medical expenses were included in the settlement and would constitute a potential double recovery by the plaintiffs. (see pg. 523). The matter was remitted to the trial court for further proceedings, apparently to determine that issue. At bar there is no issue. The colloquy at the settlement hearing makes it clear that the settlement does not include medical expenses.

While the court in Teichman stated that since CPLR 4545 applies to admissibility of evidence at trial and to judgments and is silent as to pretrial settlements and that parties to a settlement may consider whether the infant has received collateral pretrial payments, the court stated expressly that "nothing in the rules governing settlements in an infant's claim indicates that such settlement must be reduced by collateral source payments" (Teichman, supra, at 523).

In addition to the prejudice of the risk of trial and the delay in the determination of the action it could be prejudicial to the infant's case "by permitting the jury to speculate that the plaintiff already has been compensated" and could create an adversarial posture between the insurer and the insured (Humbach v. Goldstein, supra, 68, 69); see also McGuire v. Long Island Jewish Medical Center, 237 AD2d 417, lv. to app. dismiss 91 NY2d 922; Soden v. Long Island Railroad Company, 277 AD2d 442 and cases cited therein).

The Appellate Division, Third Department observed in Berry v. St. Peter's Hospital, (250 AD2d 63, 67, lv to app dismiss, 92 NY2d 1045).

"The public interest in assuring the integrity of relations between insurers and their insured require that even the potential for conflict of interest in these situations be avoided and militates against allowing the insurer to, directly or indirectly, place its own interests above those of its insured (see, Pennsylvania Gen. Ins. Co. v. Austin Power Co., 68 NY2d 465, 472, 510 NYS2d 67, 502 NE2d 982). We agree with the Second Department that "[t]he intervention of various medical providers could create an adversarial posture between carriers and plaintiffs" (Humbach v. Goldstein, supra, at 68 653 NYS2d 950; see McGuire v. Long Is. Jewish-Hillside Med. Ctr., 237 AD2d 417, 654 NYS2d 420, lv dismissed 91 NY2d 922, 699 NYS2d 263, NE2d 132), a posture which we view as antithetical to the fundamental nature of the relationship between an insured and his or her insurer."

In view of the foregoing it is unnecessary to consider the

merits of the proposed pleading. The Court does note, however, that the affidavit of Aetna's Subrogation Manager offered in support of the motion attaches two certificates of insurance, one of which she "confirms" reflects the health insurance policy language that was in effect at the time of the incident and the other she "confirms" reflects the language that is currently in effect. Each of these documents contains 52 pages of small print. The contractual language relied on by Aetna is in a section entitled "Third Party Liability and Right of Recovery" which is located on the 41<sup>st</sup> and 42<sup>nd</sup> pages of the former document and the 43<sup>rd</sup> page of the latter. Page 2 of the former although labeled "Table of Contents" contains no page numbers for the various items listed. Page 3 of the latter, also entitled "Table of Contents" states "ERROR! no table of contents entries found". This would appear to violate §3102 of the Insurance Law entitled "Requirements for the use of reasonable and understandable insurance policies". Subsection (c) of that section reads "Readability requirements. (1) In addition to any other requirements of law, no insurance policy, except as set forth in subsection (b) of this section, shall be made, issued or delivered in this state on a risk located or resident of in this state, unless: xxx (G) it contains a table of contents or an index of the principal sections of the insurance policy if the insurance policy has more than three thousand words or if the insurance policy has more than three pages regardless of the number of words".

Furthermore, when the above section is reviewed in its entirety it would hardly qualify as subject to being understood by an ordinary lay person as meaning that an insured member would be required to reimburse the insurer for its past medical expense payments out of monies recovered from a third-party for damages other than past medical expenses such as past or future damages including dental expenses, podiatric expenses, loss of earnings, impairment of earning ability and pain and suffering (see CPLR 4111(d)).

In its Memorandum of Law the insurer argues that the certificate sets forth three separate rights, or remedies, the first a right of recovery, the second a remedy of assignment and the third a remedy of an equitable First Priority Lien and further contends all three rights or remedies unambiguously contractually bind the insured member to reimburse the insurer for benefits paid out of any funds received by the plaintiff.

The "Right of Recovery" language which is provided in the first paragraph of the section certainly is unambiguous, but negates rather than supports Aetna's agreement. The last sentence of that paragraph states in express terms:

"The right of recovery will only be exercised by HMO when the amounts received by the Member through a third-party settlement or satisfied judgment are specifically identified in the settlement or judgment as the amounts previously paid by HMO for the same Medical Services and benefits"

What the Memorandum of Law refers to as the "Remedy of Assignment" is contained in the third paragraph of the section, although such paragraph is not so labeled. The word "assignment" appears only on the fifth line of the paragraph. Nothing in this paragraph states that the assignment of the proceeds of a settlement, judgment or other payment extends to proceeds not specifically identified in the settlement or judgment as the amounts previously paid by the insurer "for the same medical services and benefits" and provided by the last line of the first paragraph. While the first paragraph refers to "right of recovery" and "right to repayment and the third paragraph to "right to reimbursement" there is nothing to indicate the drafter of the section intended "reimbursement" to be distinguished from "repayment" or "recovery" rather than be synonymous with those terms. Accordingly, giving these terms their plain and ordinary meaning the third paragraph does not afford the insurer a right to assignment of amounts not specifically identified as amounts previously paid for the same medical services and benefits.

The Third remedy propounded by Aetna is the "Remedy of An Equitable First Priority Lien". The Court assumes this claim is based on subparagraphs "C" and "D" of the unnumbered third paragraph. These provisions do not unambiguously identify the Res or property to which the lien applies. It is not clear whether they are merely inartfully drafted or artfully drafted with the intention of masquerading the drafter's true intention. If it was the intention of Aetna to claim a contractual or equitable lien on monies recovered by a member for such things as past and future loss of earnings, impairment of earning ability and pain and suffering the contract should have included such a provision in clear and unambiguous language; preferably beginning with the words "notwithstanding the limitation" set forth in the first paragraph.

This is not an insignificant matter. An employee prior to choosing one of several group health insurance options offered by his or her employer should be afforded an opportunity to know by clear and understandable language what rights he or she may forfeit by accepting a particular plan. In this case it would not be unreasonable for a layperson to believe that the HMO's right to a lien was limited to a lien on amounts received from a third-party in reimbursement for the same amounts paid by the HMO.

The importance that a surrender of an insured's right to be

made whole for his or her losses be made clearly and unambiguously is exemplified by the language of the Court of Appeals in Winkelmann v. Excelsier Ins. Co. (85 NY2d 577, 583) where in a different context that Court expressed the general rule regarding relations between insurers and insureds:

"The insurer cannot share in proceeds the insured has obtained from a third party\*\*\*when the insured has not been made whole. Only if the insured recovery exceeds its loss can the insurer share in the excess proceeds\*\*\*. The rule is based upon the relationship between the insurer and the insured-if the loss of one of the two must go unsatisfied, it should be the insured who has been paid to assume the risk of loss\*\*\*". (See also Berry v. St. Peter's Hospital, supra at pages 67).

CPLR 4545(a) was enacted to abolish the former collateral source rule under which it was possible for an insured party to receive a windfall in the form of a double recovery for medical expenses. At bar there can be no windfall or double recovery for the plaintiffs but rather Aetna seeks a windfall of the return of benefits it paid in return for premium, the result of which would be to prevent plaintiffs from being made whole for the only kind of damages they could recover on a trial. A contract giving such a recovery to an insurer should be clear, explicit and in language reasonably understandable by a policy holder or prospective policy holder. In the court's opinion the policy language relied upon fails this test.

The court notes that the two unreported cases in this court cited by the movant, Scherer v. Seiler, Index No. 16737/00 decided by Justice LeVine and Taylor v. Cross Island YMCA, Index No. 25375/00 decided by the undersigned are distinguishable. In both of these cases plaintiffs moved to extinguish claims by Aetna. Aetna had not moved for leave to intervene in either of the cases. Moreover no determination as to the merits of Aetna's right to enforce alleged contractual remedies was made in either case.

Dated: February 17, 2006

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J. S. C.