

## Med Mal Plaintiff Can Sue CAT Fund for Payment

By Laurie Stewart

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A plaintiff who obtains a judgment that implicates the CAT Fund has a direct right of action against the fund to compel payment, according to a recent unpublished Commonwealth Court opinion.

That ruling in *Wester v. The Medical Professional Liability Catastrophe Loss Fund* came in a decision denying the CAT Fund's motion for summary judgment after the plaintiff filed a writ of mandamus seeking to compel the CAT Fund to make full payment in a judgment.

While the court did find in the case that the fund had waived the defense because it failed to raise it in preliminary objections, Judge Warren Morgan did go on to conclude that a plaintiff has a direct right of action against the CAT Fund to compel payment.

Morgan noted that the CAT Fund Act does not expressly state that any party has a right to action against the fund, but he reasoned that the issue of standing under the act turns on whether the claimant deserves legal protection.

The CAT Fund Act states that a person who has substantial injury or death as a result of a tort on the part of a health care provider can obtain a prompt adjudication of the claim and the determination of fair compensation, the judge said.

"The act does not so provide nor would it further the purpose of the act to require a successful claimant to proceed first by execution against the health care provider, requiring the health care provider then to proceed against the CAT Fund to compel payment," Morgan said.

Suzanne Wester Matteo and Tony Matteo met while residents at Jefferson University. In 1994, they were married and operated their private ob/gyn practice but were without children of their own. After unsuccessfully trying to conceive a child for a year, the couple decided to seek the advice of a fertility

doctor and came under the care of Drs. Jerome Check and Ahmed Nazari, plaintiffs' attorney Tom Kline of Kline & Specter said.

The Matteos worked with Check, who recommended that the couple take steps toward in vitro fertilization. Suzanne Matteo's ovaries were hyperstimulated, allowing an increased number of eggs to mature at the same time. This treatment causes the ovaries, usually the size of a walnut, to swell to the size of a lemon.

Prior to the oocyte retrieval, Check diagnosed Suzanne Matteo with antiphospholipid antibody syndrome (APD), which makes the implantation of embryos in the uterine lining difficult because the uterus is more susceptible to blood clots. Check prescribed heparin and aspirin therapy. The effects of heparin disappear within hours of taking the drug, but aspirin, which can thin blood, can stay in the body for weeks.

On Dec. 29, 1995, Suzanne Matteo underwent the egg-retrieval procedure at Check and Nazari's New Jersey office. Nazari performed the retrieval and harvested 18 eggs from Suzanne Matteo's ovaries. Typically, such a procedure yields eight to 12 eggs.

According to Kline, hospital records show that, prior to surgery, Suzanne Matteo alerted the attending nurse anesthetist that she had undergone the heparin and aspirin treatment.

The procedure was completed at noon. Soon after, a routine ultrasound was performed by a nurse in the New Jersey office, but, according to trial testimony, attending physician Nazari never saw the results of the test after being told that everything appeared normal.

In fact, the ultrasound showed that a large mass of fluid, which turned out to be blood, was forming in Suzanne Matteo's abdomen.

Prior to the procedure, Nazari and Check had scheduled intravenous immunoglobulin therapy to treat Suzanne Matteo's APD syndrome. So, after the ultrasound, Suzanne Matteo left the New Jersey office with her husband and headed for the defendants' Pennsylvania office for the treatment.

Registered nurse Nina Kaplan began administering the therapy at 3:30 p.m. Approximately an hour later, Suzanne Matteo complained of lightheadedness and, according to Kaplan, became pale. Hospital records show that her blood pressure also dropped, and, as a result, Kaplan terminated the administration of the therapy. The nurse then repeatedly tried to contact Check, who was overseeing the therapy.

According to Kline, Check did not respond to Kaplan's calls until 1 1/2 hours after Kaplan first called him for assistance. Check found his patient lethargic and hallucinating.

About this time, Tony Matteo was contacted at his office at Holy Redeemer Hospital and was told of his wife's condition. After arriving at her bedside, he decided her condition was severe and transported his wife to Holy Redeemer, where he operated on Suzanne Matteo and discovered that about 75 percent of her blood had pooled in her abdomen.

At trial, Tony Matteo testified that he removed "handfuls and handfuls of blood clots" during the procedure. Suzanne Matteo emerged from the surgery in stable condition.

For the remainder of Dec. 29 and through Dec. 30, Suzanne Matteo appeared to be recovering. However, her heart stopped in the early morning of Dec. 31, Kline said. She lost consciousness and remained in a coma until her death nine days later.

In the hours just prior to her death, Suzanne Matteo was under the care of registered nurse Elinore Newhall. While Suzanne Matteo's lungs were failing, Newhall made no attempt to summon a physician to Suzanne Matteo's bedside, according to Kline.

After Suzanne Matteo's estate filed suit against Check, Nazari, Newhall and the doctors' employers, the defendants joined Tony Matteo as a third-party defendant. But Matteo was released as a defendant and was not liable for any part of his wife's death.

A pre-trial settlement of \$5 million for a joint tortfeasor pro rata release was made with Holy Redeemer Hospital, Newhall and Tony Matteo, with \$1 million allotted to the nurse's insurance company, \$1 million to the CAT Fund on behalf of Tony Matteo and \$3 million to the hospital.

The settlement released Tony Matteo as a defendant in the suit.

A separate settlement with Check and Nazari's malpractice insurers of \$8 million, bringing the settlement total to \$13 million, was made pre-trial, but neither Check nor Nazari was released from the suit at the time the jury delivered its \$25 million verdict.

The physicians had four layers of coverage: \$400,000 in primary coverage guaranteed by the Pennsylvania Property and Casualty Insurance Guaranty Association, \$2 million in coverage from the CAT Fund, \$4 million in additional coverage with Lexington Insurance Co. and \$20 million in excess coverage with Lloyd's of London. Before trial, Lloyd's and Lexington settled with Wester, with Lloyd's paying \$4 million and Lexington paying \$1 million for Nazari and \$1 million for Check.

After the jury reached its verdict and awarded Wester \$25 million in late 2001, the CAT Fund acknowledged its liability for coverage of Nazari and Check but only agreed to pay \$600,000. According to the opinion, the CAT Fund calculated its portion of liability on the basis that the doctors were the only insureds under the \$4 million Lexington coverage and that Lexington, Lloyd's and PPCIGA must all be credited against the verdict before the CAT Fund was required to pay toward the verdict.

#### On Appeal

According to the opinion, the CAT Fund claimed that the coverage of the three sources totaled \$24.4 million, and, it argued, it only had to pay the \$600,000 balance of the verdict.

But, Morgan said, the CAT Fund's calculations were incorrect because Lexington had only \$2 million in coverage on the doctors, not \$4 million as calculated by the fund, because the hospital that employed the doctors had \$2 million in the Lexington coverage. Thus, the court reasoned, regardless of the order of payment for each coverage provider, the balance due on the verdict exceeded the CAT Fund's \$2 million coverage on the doctors.

In addition to its argument regarding the plaintiff's standing to sue the fund directly, the CAT Fund also asserted that because the liability of the corporations was vicarious, their coverage should be deemed available for Check and Nazari and should be included when calculating the total of the doctors' coverage.

Morgan strongly disagreed. "This argument hardly warrants comment," he wrote. "No authority is cited for this 'availability' theory. Nothing more appears in the facts of this case than that the coverage of the corporations was to protect the assets of the corporations and was paid out in furtherance of that purpose. There are no facts in the case to suggest otherwise, and no basis in law for crediting the coverage of the corporations against the CAT Fund's coverage of the doctors."

Morgan then turned to the CAT Fund's argument that it was last in line in paying out on the jury's award. "The CAT Fund's basic contention regarding the order of payment is flawed," Morgan said. "The flaw . . . is that although PPCIGA and Lexington provided basic coverage, Lloyd's policy was, without question, 'excess coverage' and the law is clear that PPCIGA is required to pay on claims of an insolvent insurance carrier prior to the collection of the proceeds of the insured's excess policy."

Whether the CAT Fund's duty to pay arises before PPCIGA's obligation would not, Morgan said, change the fund's obligation to pay prior to Lloyd's.

Finally, the CAT Fund argued that the doctors were released from all liability in the settlement with Lexington and Lloyd's, and therefore it was released from all payment obligations.

In part, the settlement agreement reads: "It is further understood and agreed, however, that this release does not and is not intended to release the Check [and Nazari] parties or the CAT Fund with respect to the CAT Fund coverage applicable to the claims against the Check parties in the legal action. . . Except for the Check parties' coverage with the . . . CAT Fund, the Check parties shall have no personal financial exposure or obligation to pay on any judgment rendered against them in the legal action."

The CAT Fund, Morgan said, ignores the fact that the settlement agreement does not release the doctors from the liability claim. "The argument by the CAT Fund is inexplicable," Morgan wrote. "The CAT Fund, up until the motion for summary judgment was filed, acknowledged that the judgment did . . . implicate its coverage."

Kline said he wasn't surprised by Morgan's ruling.

"The CAT Fund was clearly out of luck because even on their best argument, it was clear all along that the CAT Fund position was wrong," he said. "It looked for every conceivable argument they could make not to pay."

Robert Waeger, deputy director of the CAT Fund, represented the fund. He did not return telephone calls seeking comment by press time.