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CAN A PARTICIPANT IN THE NSW LIFETIME CARE AND SUPPORT SCHEME 'WITHDRAW' FROM THE SCHEME?

MAY 30, 2017 | COMPULSORY THIRD PARTY (CTP)

An issue which has arisen recently in practice, is whether or not a participant in the NSW Lifetime Care and Support Scheme (whether interim or permanent) can elect to 'withdraw' from the Scheme and refuse services provided by the Scheme, and instead seek to recover damages from the CTP insurer for those precise services which the Scheme offers. The scheme is also briefly reviewed in this article.

Whilst it is understood that severely injured claimants, who can prove fault in their claims, may prefer to receive a lump sum settlement of damages so that they can make their own decisions as to the exact type of treatment and care that they receive, arguably, this is no longer possible given the introduction of the Lifetime Care and Support Scheme (the Scheme).

The question therefore arises what can and should CTP insurers do, in circumstances where they are presented with a catastrophically injured claimant who has elected to 'withdraw' from the Scheme.

The setup of the Lifetime Care and Support Scheme

The Scheme was established in 2006 to provide seriously injured claimants with treatment and domestic care and assistance on a no fault basis. People who are injured in a motor vehicle collision and who can prove that their injuries were caused by the fault of the owner or driver of a motor vehicle, may also seek damages from the relevant CTP insurer for other heads of damages such as non-economic loss, loss of earning capacity and fund management expenses, if applicable. However, importantly, those services which are covered by the Scheme, namely past and future out of pocket expenses and past and future domestic care expenses, may not *also* be recovered from the CTP insurer.

It has always been understood that an essential element of the Scheme is that the injured claimants who are assessed to be either interim participants or permanent participants, could not choose whether or not to be part of the Scheme, they simply qualified as entrants to the Scheme on the basis of their injuries being of sufficient severity to warrant their inclusion as a participant. Importantly, even if a claimant does not apply to become a participant in the Scheme, the *Motor Accidents (Lifetime Care and Support) Act 2006* entitles the insurer to make an application, without the consent of the injured party, to have that party placed into the Scheme.

Participants are usually admitted to the Scheme on an interim basis, which is typically 2 years. After that time, they undergo the all important FIM assessment to ascertain whether or not they qualify to become a permanent participant of the Scheme and are therefore entitled to the Scheme benefits for the remainder of their lives.

The case in point

Recently, claimants have been advising insurers that they have chosen to 'withdraw' from the Scheme, that is, they have refused to avail themselves of any of the treatment offers and/or supports on offer and instead have 'chosen' to pursue the full range of damages from the CTP insurer, including past and future out of pocket expenses and past and future care expenses. Enquiries with the Scheme staff reveal that the case managers in charge of liaising with and managing the participants of the Scheme are in no way disposed to and probably cannot, in any way force or even encourage the various claimants to undertake the recommended treatment or accept the recommended care services. In these instances, then, the participant's connection with the Scheme is deemed to be *lapsed* and due to the overall lack of participation, the case workers are not able to accurately assess (by conducting a FIM assessment) whether or not an interim participant would qualify as a permanent participant within the Scheme.

In the instance where the person electing to withdraw is a permanent participant, much of the same applies in that the treatment and care services offered by the Scheme cannot be forced upon them.

What can the insurer do?

Recent case law suggests that there is a precedent upon which the insurer can rely to enforce the concept that participation of the claimant in the Scheme is not in fact optional.

The relevant case law

The relevant decision is that of the New South Wales Court of Appeal and was delivered on 22 September 2016. In the case *Nominal Defendant v Adilzada* [2016] NSWCA 266, the Court unanimously allowed the appeal, thereby determining that section 86 of the *Motor Accidents Compensation Act 1999* (NSW) (the MACA), which requires a claimant to comply with a request by an insurer to undergo a medical examination or rehabilitation assessment, can apply to a medical assessment which is designed to determine a claimant's eligibility to be a participant in the Scheme.

The Court further, by implication, found that if the claimant fails without reasonable excuse to comply with such a request, then section 86(4) of MACA applies so that the court proceedings or CARS proceedings cannot be commenced or, if commenced, cannot be continued in respect of the claim where the failure continues.

THE PRACTICAL IMPLICATION

What this means for insurers, is that a claimant who elects to 'withdraw' from the Scheme cannot unreasonably refuse to attend a medical assessment arranged by the insurer for the purposes of determining that person's eligibility for participation in the Scheme. The implication of the *Adilzada* decision is that if the claimant unreasonably refuses to undergo this assessment, their court proceedings may be delayed until co-operation in attending the assessment is secured.

Once the insurer has the FIM assessment, and assuming that assessment determines the claimant's eligibility to remain in the Scheme, the insurer without the claimant's consent may make an application bolstered by that medical support for the claimant to remain in the Scheme on a permanent basis.

Whilst the Scheme providers cannot compel the claimant to undergo the treatment and/or accept the services offered by the Scheme, there is a real argument that the claimant cannot, having refused those services and treatment, seek to then claim separately from the CTP insurer for those precise services which he/she in fact already has access to.

Whilst the decision of *Adilzada* may not stop all attempts by claimants to 'withdraw' from the Scheme, it does make it harder for them to make a claim for services, covered by the Scheme, from the insurer by way of lump sum compensation payments. This decision makes it clear that claimants will not be able to have their damages assessed at hearing if they have unreasonably failed to participate in a medical assessment such as a FIM assessment.

This threat to significantly delay the resolution of a claim in many instances should prove as some deterrent, at the very least, to claimants who view the Scheme as purely optional.

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