

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

J & J SNACK FOODS CORP. and : CIVIL ACTION
J & J SNACK FOODS CORP. HEALTH :
AND WELFARE PLAN :

v. :

CAROLE F. KAFRISSEN, ESQ., LAW :
OFFICES OF CAROLE S. KAFRISSEN, :
P.C., KATHLEEN GORSKI DOWD, :
ADMINISTRATRIX of the ESTATE OF :
JAMES DOWD, KATHLEEN GORSKI :
DOWD, in her individual capacity, :
MATTHEW DOWD, A MINOR, :
THOMAS DOWD, the AUTOMOBILE :
INSURANCE CARRIER OF JAMES :
DOWD, and RYAN M. WALSH : NO. 98-5743

MEMORANDUM

ROBERT F. KELLY, Sr. J.

OCTOBER , 2001

I. INTRODUCTION

In a complaint filed on October 28, 1998, the Plaintiff-Intervenors in this matter, J & J Snack Food Corporation and J & J Snack Foods Corporation Health and Welfare Plans, have filed claims against Carole F. Kafrissen, Esq., the Law Offices of Carole F. Kafrissen, P.C., Kathleen Gorski Dowd, the Estate of James Dowd, Matthew Dowd and Thomas Dowd, arising from the payment of Plaintiff-Intervenors of approximately \$83,000 in hospital bills incurred by the late James Dowd arising from a collision on June 23, 1995 which resulted in Mr. Dowd's death. By way of Amended Complaint filed December 22, 1999, the Plaintiff-Intervenors filed a claim against Ryan M. Walsh, the defendant in the lawsuit brought by the Estate and survivors of James Dowd arising from the June 1995 accident, and the driver of the vehicle which struck Mr.

Dowd's automobile on that day.

Although there were many claims set forth in the original Complaint and the Amended Complaint, at the time of trial, counsel for Plaintiffs also stated that \$100,000 had been paid to the Plaintiffs representing \$83,000 for the medical expenses paid and \$17,000 for interest. The parties advised the Court that the only issues remaining were whether the Estate of Mr. Dowd and Ms. Kafrissen and her law firm were responsible for legal fees and whether Ms. Kafrissen was responsible for punitive damages. (N.T. 2)

II. JURISDICTION

This Court has diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332 and federal question jurisdiction pursuant to 28 U.S.C. § 1331, because J & J Snack Foods Corp. Health and Welfare Plan is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 101 *et seq.*

From the testimony taken at trial and the stipulations of counsel, we make the following

FINDINGS OF FACT

1. J & J Snack Foods Corp. ("J & J") is a corporation incorporated under the laws of the State of New Jersey with its principal place of business located at 6000 Central Highway, Pennsauken, New Jersey 08109. (Stip. ¶1).¹

2. At all times relevant hereto, the Law Offices of Carole Kafrissen, P.C. ("Kafrissen, P.C."), was a professional corporation incorporated in the Commonwealth of Pennsylvania doing business at Two Penn Center Plaza, 5th Floor, Philadelphia, Pennsylvania 19102. (Stip. ¶ 2).

¹References to "Stip." refer to facts stipulated by the parties as set forth in the Joint Pre-Trial Order.

3. Carole F. Kafriksen, Esq. is an attorney licensed to practice law in the Commonwealth of Pennsylvania. (Stip. ¶ 3).

4. Defendant, the Estate of James Dowd (“the Estate”), is an intestate estate recognized under the intestacy laws of the Commonwealth of Pennsylvania. Kathleen Gorski Dowd is the Administratrix of the Estate. (Stip. ¶ 4).

5. Defendant, Kathleen Gorski Dowd, is a citizen of the Commonwealth of Pennsylvania residing at 3523 Drumore Road, Philadelphia, Pennsylvania 19154. (Stip. ¶ 5).

6. Defendant, Matthew Dowd, is a citizen of the Commonwealth of Pennsylvania residing at 3523 Drumore Road, Philadelphia, Pennsylvania 19154. Matthew Dowd is a surviving son of James Dowd and is a beneficiary of the Estate. (Stip. ¶ 6).

7. Defendant, Thomas Dowd, is a citizen of the State of Virginia residing at 3531 Brigita Court, Virginia Beach, Virginia 23456. (Stip. ¶ 7).

8. Thomas Dowd is a surviving son of James Dowd and is a beneficiary of the Estate. (Stip. ¶ 8).

9. Ryan M. Walsh (“Walsh”) is an individual residing at 210 Ellis Street, Haddonfield, New Jersey 08033. (Stip. ¶ 9).

10. Dennis G. Moore is the Senior Vice President of J & J, and as such is responsible for overseeing the Plan. (Stip. ¶ 10).

11. J & J employed James Dowd as of the date of his death. (Stip. ¶ 11).

12. As an employee of J & J, James Dowd was covered under the Plan. (Stip. ¶ 12).

13. On June 23, 1995, James Dowd was involved in an automobile collision with Defendant, Walsh, in Philadelphia, Pennsylvania. (Stip. ¶ 13).

14. The collision occurred at the intersection of 5th and Pine Streets. (Stip. ¶ 14).

15. After numerous surgeries and other procedures, on June 26, 1995, James Dowd died from the injuries he had sustained in the collision three days prior. (Stip. ¶ 15).

16. James Dowd received medical treatment, including several surgeries, at Thomas Jefferson University Hospital, as a result of the June 23, 1995 collision before he passed away. (Stip. ¶ 16).

17. James Dowd and his Estate incurred approximately \$130,000 in hospital bills as a result of the injuries he suffered in the June 23, 1995 collision. (Stip. ¶ 17).

18. Kathleen Dowd retained Kafrissen to represent her and the Estate of James Dowd in connection with claims against Walsh [Ex. P-17]. (Stip. ¶ 18).

19. The Estate of James Dowd and James Dowd's wife, Kathleen Gorski Dowd, instituted an action for wrongful death ("Wrongful Death Action") and an action for survivorship ("Survivorship Action") in the Philadelphia Court of Common Pleas against Walsh ("Underlying Lawsuit"). (Stip. ¶ 19).

20. Kathleen Gorski Dowd and the Estate of James Dowd were represented by Carole F. Kafrissen, Esq. and the Law Offices of Carole F. Kafrissen, P.C. (collectively, "Kafrissen") in the Underlying Lawsuit. (Stip. ¶ 20).

21. The underlying lawsuit was removed to the United States District Court for the Eastern District of Pennsylvania by way of a Notice of Removal filed on January 29, 1997. The case was heard before Robert F. Kelly, U.S.D.J., under the title Dowd v. Walsh, No. 97-CV-0644. (Stip. ¶ 21).

22. John M. Teijido, Esq. ("Teijido"), Associate General Counsel for Blue Cross and

Blue Shield of New Jersey, acting on behalf of Plaintiff-Intervenors, sent a letter to Kafrissen dated June 25, 1996, which stated in relevant part as follows:

I am writing to apprise you of said parties subrogation lien which they seek to assert in any third party action stemming from Mr. Dowd's auto accident. . . . Accordingly, this letter should serve as formal notice that BCBSNJ, on behalf of J & J Snack Foods, will be asserting a subrogation lien in the amount of roughly \$83,000, representing payments made on behalf of J & J Snack Foods to various medical providers during all relevant times.

[Ex. P-20]. (Stip. ¶ 22).

23. Kafrissen received Teijido's June 25, 1996 letter. (Stip. ¶ 23).

24. Plaintiff-Intervenors' then attorney, David N. Zeehandelaar, Esq. ("Zeehandelaar").

sent a letter to Kafrissen dated September 16, 1996, which stated in relevant part:

Please note that this law firm is counsel for J & J Snack Foods which, as you know, was Mr. Dowd's employer. Various medical benefits totaling approximately \$83,000.00 were paid as a result of this incident.

Our claims administrator, Blue Cross/Blue Shield, has notified you of the subrogation lien that would attach to any proceeds obtained from a third party regarding this incident. (Please see Mr. John Teijido's June 25, 1996 letter to you.)

The purpose of this letter is to request that we be periodically apprised regarding the status of this case. If suit has been filed, I would appreciate your forwarding me a copy of the Complaint and Answer, as well as the identity of defense counsel and, if applicable, defendant's insurer.

[Ex. P-23]. (Stip. ¶ 24).

25. Kafrissen received Zeehandelaar's September 16, 1996 letter. (Stip. ¶ 25).

26. Zeehandelaar sent a second letter to Kafrissen dated November 12, 1996, which stated in relevant part:

On September 16, 1996, I advised you that this law firm is private counsel for J & J Snack Foods, which paid approximately \$83,000 to your client in Workers Compensation benefits. In this regard, our client has a subrogation lien against any proceeds from a third-party lawsuit.

In my previous letter, I requested status of Mr. Dowd's claim. I continue to await your response in this regard.

[Ex. P-25]. (Stip. ¶ 26).

27. Kafrissen received Zeehandelaar's November 12, 1996 letter. (Stip. ¶ 27).

28. Zeehandelaar sent a letter to Kafrissen on April 16, 1997, that stated in relevant part:

As I have previously advised, this law firm is private counsel for J & J Snack Foods, which has a subrogation lien against any proceeds from a third-party lawsuit brought by the above individual. At your convenience, kindly let me know the status of this case.

[Ex. P-30]. (Stip. ¶ 28).

29. Kafrissen received Zeehandelaar's April 16, 1997 letter. (Stip. ¶ 29).

30. On November 3, 1997, on the advice and recommendation of Kafrissen, Dowd entered into a settlement (the "Settlement") with Walsh for a total amount of \$975,000 with an allocation of the Settlement as follows: \$900,000 to the Wrongful Death Claim and \$75,000 to the Survivorship Claim. (Stip. ¶ 30).

31. In November, 1997, Kafrissen filed a Petition to Compromise Wrongful Death and Surviving Action Involving a Minor [Ex. P-43]. (Stip. ¶ 31).

32. On November 14, 1997, the Honorable Robert F. Kelly approved the settlement set forth in the Petition [Ex. P-43]. (Stip. ¶ 32).

33. A full and Final Release was executed by Kathleen Gorski Dowd, Individually, as Administratrix of the Estate of James Dowd, and as Parent and natural Guardian of Matthew

Dowd on November 18, 1997. (Stip. ¶ 33).

34. Defendant paid to the Dowd defendants the sum of \$975,000 (“Settlement Proceeds”). (Stip. ¶ 34).

35. The beneficiaries of the Estate (Kathleen Gorski Dowd, Thomas Dowd and Matthew Dowd) have received the Settlement Proceeds. (Stip. ¶ 35).

36. Kafrissen has very limited experience with ERISA law or ERISA plans in her personal injury practice. In her seventeen years of practice, Kafrissen and her clients were never required to pay an ERISA-type subrogation claim. (N.T. 94).

37. Although Kafrissen knew that James Dowd had health benefits from his job at J & J, Kafrissen had no knowledge that J & J’s health benefit plan was an ERISA plan. (N.T. 94-95).

38 At no time prior to settlement of the Dowd v. Walsh case did any employee, representative or agent of J & J or J & J’s Health and Welfare Plan (“the Plan”) inform or notify any of the Kafrissen or Dowd defendants in the present case that the Plan was an ERISA plan. (N.T. 75, 94-95).

39. At no time prior to settlement of the Dowd v. Walsh case did any employee, representative or agent of J & J Snack Foods or J & J’s Health and Welfare Plan provide Kafrissen or Kathleen Dowd with a copy of J & J Snack Foods’ Comprehensive Major Medical Booklet. (N.T. 71, 164).

40. The first time that Kafrissen learned that the Dowd case involved an ERISA claim was in the fall of 1998, almost one year after settlement of the Dowd case. (N.T. 75).

41. Prior to September 1998, one year after the settlement in Dowd v. Walsh, neither J & J Snack Foods nor J & J’s Health and Welfare Plan, nor Blue Cross informed Dowd or Kafrissen

that the “subrogation lien” was based upon ERISA instead of Pennsylvania law. (N.T. 94-95).

42. On September 15, 1995, Blue Cross wrote to Dowd that it paid a hospital bill for services provided to James Dowd at Thomas Jefferson University Hospital between June 23, 1995 and June 26, 1995. Dowd turned the letter over to Kafrissen.

43. The September 15, 1995 letter stated that both J & J and the hospital advised that Dowd’s admission was due to an automobile accident. The hospital also advised that Dowd did not have automobile insurance, even though “Pennsylvania law requires mandatory auto insurance containing \$10,000 in primary medical expense coverage...” The letter concluded: “[J & J] has requested that we recap [sic] from the hospital \$10,000 in effect coordinating benefits as though the benefits existed.” [Ex. P-16].

44. The September 15, 1995 letter did not claim that Dowd owed J & J money. Instead, the letter stated that the first \$10,000 in medical expenses should have been paid by automobile insurance, and therefore the hospital should return \$10,000 to Blue Cross. In effect, the letter suggested that the hospital - not J & J - had a claim against Dowd for \$10,000.

45. Given the references within the September 15, 1995 letter to Pennsylvania automobile insurance law and coordination of benefits, a principle embodied with Pennsylvania’s Motor Vehicle Financial Responsibility Law (“MVFL”), Kafrissen believed that the letter attempted to claim a right of recovery of PIP benefits or \$10,000 under Pennsylvania law (N.T. 101). Kafrissen correctly believed that no such right of recovery existed due to the lack of subrogation rights under the MVFL.

46. The September 15, 1995 letter never stated, explicitly or implicitly, that J & J or Blue Cross were entitled to recovery of any monies under ERISA. [Ex. P-16].

47. On June 25, 1996, counsel for Blue Cross, John Tejjido, wrote to Kafrissen that Blue Cross and J & J were asserting a “subrogation lien ... or roughly \$83,000 in any third party action stemming from Mr. Dowd’s auto accident, representing payments made on behalf of J & J Snack Foods to various medical providers during all relevant times.” [Ex. P-20]. Kafrissen believed that the reference to “subrogation lien” was an attempt to claim subrogation rights under Pennsylvania’s MVFRL, a right which Blue Cross and J & J did not possess. (N.T. 101). Nor did the June 25, 1996 letter state, explicitly or implicitly, that Blue Cross or J & J based this “subrogation lien” upon ERISA,

48. In 1996, Ms. Kafrissen had a conversation with a person whose name she could not remember during which she stated that medical expenses are not subject to subrogation under Pennsylvania law. (TR. 98). Plaintiffs have failed to establish that Plaintiffs’ representative made any mention of ERISA in response to Ms. Kafrissen’s questions and comments regarding Pennsylvania subrogation lien law.

49. On September 16, 1996, counsel for J & J, David Zeehandelaar, Esquire, wrote to Kafrissen that J & J asserted a “subrogation lien” of \$83,000 in any third party action regarding James Dowd’s accident. [Ex. P-23]. Kafrissen believed that the reference to “subrogation lien” was an attempt to claim subrogation rights under Pennsylvania’s MVFRL, a right which Blue Cross and J & J did not possess. Nor did the September 16, 1996 letter state, explicitly or implicitly, that Blue Cross or J & J based this “subrogation lien” upon ERISA. Because of the misleading nature of Mr. Zeehandelaar’s reference to “subrogation lien”, Kafrissen did not respond to Mr. Zeehandelaar’s letter.

50. On November 12, 1996, counsel for J & J, Mr. Zeehandelaar, wrote to Kafrissen that

J & J asserted a “subrogation lien” of \$83,000 based upon “workers’ compensation benefits” paid to Dowd. Dowd’s accident did not occur within the scope of his employment; therefore, J & J never paid workers compensation benefits. Mr. Zeehandelaar acknowledged that the reference in his November 12, 1996 letter to “workers compensation benefits” was incorrect. (N.T. 18-19, 21). Mr. Zeehandelaar did not know the claim was ERISA-related until 1998. Until 1998, he believed it was a claim for workers’ compensation benefits. Accordingly, had Ms. Kafrissen called him to inquire further, he would not have told her it was an ERISA lien.

51. Nor did the November 12, 1996 letter state explicitly or implicitly, that Blue Cross or J & J based this “subrogation lien” upon ERISA. (N.T. 12-13).

52. Even if these monies constituted workers’ compensation benefits, J & J had no right of subrogation to these benefits. See 75 Pa.C.S. § 1720.

53. On November 13, 1996, when Kafrissen received Mr. Zeehandelaar’s November 12, 1996 letter, she believed that J & J could subrogate for workers’ compensation benefits under Pennsylvania law. (N.T. 100). Accordingly, Kafrissen wrote to State Farm Insurance Company that there was a “subrogation lien” of \$83,000 in the Dowd action. Id. Subsequently, however, Kafrissen realized that Dowd was not working on the date of his accident, which negated any claim for workers’ compensation benefits and led Ms. Kafrissen to believe that no lien existed. (N.T. 101).

54. Mr. Zeehandelaar was not aware that during litigation of the Dowd wrongful death action, J & J received subpoenas bearing the docket number of that action. (N.T. 23). Nor did J & J ask Mr. Zeehandelaar to review any subpoenas relating to the wrongful death action or provide anything pertaining to that action. (N.T. 25).

55. Nevertheless, it is clear that J & J received a subpoena from Kafrissen during the Dowd case. (N.T. 49-50). Moreover, J & J received the Dowd pleadings during the pendency of the Dowd case, as J & J customarily did during litigation involving their employees. (N.T. 51).

56. On April 16, 1997, Mr. Zeehandelaar wrote to Kafrissen that J & J asserted a “subrogation lien” in any third party action brought by Dowd. Kafrissen believed that the reference to “subrogation lien” was an attempt to claim subrogation rights under Pennsylvania’s MVFRL, a right which Blue Cross and J & J did not possess. Nor did the April 16, 1997 letter state, explicitly or implicitly, that Blue Cross or J & J based this “subrogation lien” upon ERISA. Id. [Ex. P-30].

57. In or about August, 1997, Kafrissen, on behalf of Dowd, filed a settlement memorandum with the Court in the Dowd v. Walsh case. The settlement memorandum did not seek compensation for James Dowd’s medical expenses, because (a) the above letters sent to Kafrissen led Kafrissen to believe that J & J had paid James Dowd’s medical expenses pursuant to the Pennsylvania MVFRL; (b) Kafrissen believed that under Pennsylvania’s MVFRL, the Dowd family was not entitled to any monies relating to the \$83,000 in paid medical bills (but by the same token, neither could J & J or Blue Cross subrogate against any monies in the settlement); and (c) Kafrissen had no knowledge that J & J or Blue Cross purported to pay James Dowd’s medical expenses pursuant to ERISA.

58. Subsequently, Kafrissen, on behalf of Dowd, filed a Petition to Compromise Wrongful Death and Survival Action Involving a Minor (the “Petition to Compromise”) in Dowd v. Walsh which alleged that James Dowd was survived by Plaintiff and two sons, Thomas Dowd (aged 22), and Matthew Dowd (aged 10). The gross amount of the proposed settlement was

\$975,000, of which \$900,000 was allocated to the wrongful death action and \$75,000 was allocated to the survival action.

59. The Petition to Compromise did not identify a lien of \$83,000, because based upon the letters from J & J's representatives, Kafrissen believed that J & J was asserting a lien for medical benefits which was not cognizable under Pennsylvania's Motor Vehicle Financial Responsibility Law. (N.T. 92-93).

60. Had Kafrissen believed that there was a valid lien, she would have included it within the Petition to Compromise because she believed, either rightly or wrongly, that it would have benefitted her and Dowd to do so. (N.T. 94). As Kafrissen testified:

[I]f I would have asked for \$83,000 more . . . we could have gotten more in the settlement, probably, and my fee was on the gross amount of the settlement, so that if I got \$83,000 more in settlement, I would have earned approximately \$25,000 more in fees.

(N.T. 93). And, as Kafrissen also testified: "Had they sent me a letter pursuant to XYZ statute, which is what PGW does, and Medicare does, and said this is the basis of our lien, and it was a recognizable lien, I would have noted it, and we would have placed it, and it would have been paid." (N.T. 102).

61. J & J, however, never notified Ms. Kafrissen that it was asserting a lien under ERISA (N.T. 166), therefore, Ms. Kafrissen never knew that J & J sought subrogation under ERISA until her conversation with Mr. Tejjido nearly one year after settlement of the Dowd case.

62. Ms. Kafrissen had no incentive to conceal any lien from the Court. Instead, had Ms. Kafrissen known of any cognizable lien, she would have incorporated the lien into the settlement, and payment of the lien would have come out of Dowd's portion of the settlement, not

Kafrissen's portion. (N.T. 93). Ms. Kafrissen researched the law and did not claim the \$83,000 because she believed she had no right to make any such claim under Pennsylvania law. If Ms. Kafrissen had any idea that an ERISA lien was being asserted, she would have brought it to the Court's attention during the settlement conference, and she would not have settled the case without obtaining additional monies to cover the lien.

63. On October 28, 1997, the Clerk of Court entered an order dismissing Plaintiff's case without prejudice based upon the parties' report that they had effectuated a settlement.

64. The settlement in Dowd v. Walsh did not include settlement for the \$83,000 in medical expenses and did not provide the Dowd family with any monies pertaining to James Dowd's medical expenses. (N.T. 95). All expenses and fees listed in the distribution order were paid. (N.T. 95).

65. The settlement allocated \$900,000 for wrongful death and \$75,000 for survival. Two reasons dictated allotment of \$75,000 to the survival action: (1) Dowd was unconscious after the accident and only lived several more days and (2) there are no taxes on the wrongful death portion of the settlement. (N.T. 98).

66. On March 9, 1998, almost four months after the Court's settlement order, J & J's representative, Gary Sabo, wrote to Kafrissen that both J & J's attorney and Blue Cross's attorney "provided you with a copy of the plan's subrogation rights . . . but have not received any response or acknowledgment from your office." In reality, the prior letters from J & J and Blue Cross merely referred to "subrogation rights" which did not exist under Pennsylvania law. None of the prior letters enclosed any "copy of the plan's subrogation rights" or any brochure relating to subrogation rights. Kafrissen believed that the reference to "subrogation rights" was an

attempt to claim subrogation rights under Pennsylvania's MVFRL, a right which Blue Cross and J & J did not possess.

67. Nor did the March 9, 1998 letter state, explicitly or implicitly, that Blue Cross or J & J based this "subrogation lien" upon ERISA.

68. Ms. Kafriksen wrote on the top of the March 9, 1998 letter from J & J:

"Dear Mr. Sabo: There is no right to subrogation in this case. Mr. Dowd died as a result of a motor vehicle accident, which pursuant to Pennsylvania law does not allow subrogation for medical benefits provided. Thank you for your cooperation and attention to this matter."

(N.T. 151-152). At the time that Ms. Kafriksen wrote this statement, she believed that J & J was asserting an invalid claim for medical benefits which was prohibited under Pennsylvania's Motor Vehicle Financial Responsibility Law. (N.T. 152).

69. On April 2, 1998, pursuant to J & J's instructions, Gary Sabo filed a complaint with the Pennsylvania Disciplinary Board relating to Kafriksen. [Ex. D-15]. The complaint made no reference to ERISA and did not state that J & J was asserting an ERISA subrogation lien. [Ex. D-15].

70. On June 23, 1998, Mr. Zeehandelaar stated in a letter to J & J that he was unsure whether J & J had any lien against the proceeds of the Dowd settlement. Mr. Zeehandelaar's letter stated:

It is my understanding from the file that Mr. Dowd was killed in an automobile accident which was allegedly caused by the driver of the other vehicle. It is not clear from the file, however, whether Mr. Dowd was in the scope of his employment when the accident occurred or whether he was driving his own personal vehicle or it was a company owned vehicle. **This is significant in evaluating the type of benefits paid to Mr. Dowd and the effect on the subrogation aspects of this matter.** Finally, are you aware

whether Mr. Dowd was paid any benefits from any other carrier arising out of injuries suffered in this accident?

[Ex. D-7, N.T. 30].

71. Mr. Zeehandelaar admitted that the June 23, 1998 letter did not mention anything about an ERISA-type claim (N.T. 31). In fact, like Mr. Zeehandelaar's November 12, 1996 letter, his June 23, 1998 letter indicated that he thought that J & J might have a lien against worker's compensation proceeds. (N.T. 30).

72. In the fall of 1998, during a conversation with Tejjido, Kafrissen learned for the first time that Dowd's benefits were under an ERISA plan. (N.T. 95-96). Tejjido also informed Kafrissen during this conversation that he did not think that J & J could recover or subrogate against these benefits. (N.T. 96). This was the only conversation that Ms. Kafrissen had with Mr. Tejjido concerning ERISA or J & J's plan. (N.T. 155).

73. On September 14, 1998, ten months after the settlement order, Mr. Tejjido sent a letter to Kafrissen confirming their telephone conversation. (N.T. 96). Tejjido's letter stated the same point that he made during the telephone conversation, namely that the J & J Health Care Plan mistakenly paid James Dowd's hospital expenses, because **the Plan excludes coverage for injuries resulting from automobile accidents.** [Ex. D-14, N.T. 96]. The letter also contended that the Plan contained a "rather generic subrogation provision" but then stated that this provision was not applicable because "this is a clear case of mistaken payment, not so much subrogation." [Ex. D-14, N.T. 97-98].

74. Contradicting Blue Cross's letter dated September 15, 1995, Mr. Tejjido asserted in his September 14, 1998 letter that "when Blue Cross received the actual claim, it was not advised of the fact that it was auto related. Once word was received that the injuries were, in fact, auto

related, attempts were made to obtain a reimbursement of this money.” Id. In reality, Blue Cross had acknowledged in its September 15, 1995 letter that both J & J and Thomas Jefferson University Hospital advised that James Dowd’s hospital admission resulted from a car accident, and both J & J and Blue Cross had asserted a “subrogation lien” against the medical expenses instead of a right of reimbursement.

75. Blue Cross’s September 14, 1998 letter noted, for the first time in any communication from J & J or Blue Cross, that the J & J Health Care Plan was self-insured and governed by ERISA.

76. Thus, Kafrissen never heard the term “ERISA” in connection with the Dowd case until almost one year after the Dowd case settled. (N.T. 82).

77. Kafrissen’s understanding was that not every plan is an ERISA plan. (N.T. 83).

78. At the time Kafrissen filed the Dowd action, she concluded, based upon the information that the plaintiffs provided to her, that J & J did not have a valid “subrogation lien”. (N.T. 85). Kafrissen believed, based upon review of letters from J & J’s representatives, that J & J was asserting a lien against worker’s compensation benefits, which was not cognizable under Pennsylvania law. (N.T. 87-89).²

79. On March 16, 2000, eighteen months after the September 14, 1998 letter, and well over one year after the instant litigation began, Blue Cross wrote a letter to J & J which attempted to “clarify” Teijido’s September 14, 1998 letter. (N.T. 68-69).

80. Neither Dowd nor Kafrissen ever received J & J’s comprehensive Major Medical

²The Notes of Testimony state incorrectly on page 88, line 16 that Kafrissen reviewed a letter dated November 12, 1996 from Mr. “Dean Lambert”. In fact, as discussed above, the letter was from Mr. Zeehandelaar.

Booklet until months after the settlement in the Dowd v. Walsh case.

81. J & J's comprehensive Major Medical booklet contains a General Exclusions section on pages 23-24 which provides in relevant part:

You are not covered for:

- * Services provided under any law or government program. This exclusion applies no matter where the law is in effect and whether you assert your rights to that coverage. . .
- * * * * *
- * Services for injuries from a motor vehicle accident if such services are eligible for payment under the Personal Injury Protection or compulsory Medical Payments provisions of a motor vehicle insurance contract required by any federal or state no-fault motor vehicle insurance law. This exclusion applies whether or not a proper and timely claim for these services is made under the motor vehicle insurance contract.

82. As stated above, Mr. Teijido admitted in his September 14, 1998 letter that in view of the "services for injuries from a motor vehicle accident" exclusion, J & J and the Plan mistakenly paid James Dowd's hospital expenses. [Ex. D-14].

83. Accordingly, J & J and the Plan mistakenly paid James Dowd's hospital expenses under the "services provided under any law or government program" exclusion.

84. J & J's Comprehensive Major Medical booklet contains a subrogation provision at page 28 which provides in relevant part:

Third party responsibility

A "third party" is any person or entity that is responsible for an act or omission causing injury or illness to a person covered under this Plan. . . . If benefits are paid under this plan due to any injury or illness caused by a third party, then to the extent that the covered person recovers similar medical expenses for the same injury or

illness from the third party or the third party's insurer, this Plan shall be entitled to a refund of such benefits and may file a lien for the refund. Upon request you must complete required forms and return them to Blue Cross and Blue Shield of New Jersey, Inc.

85. Neither J & J nor the Plan is entitled to recovery under the subrogation provision, because (a) benefits were not paid "under this plan" given that payments were made in violation of the exclusions recited in ¶ 81, supra and (b) the Dowd family did not recover any medical expenses in the Dowd v. Walsh settlement.

86. Although J & J and the Plan were on actual or constructive notice of the Dowd v. Walsh case by April 1997, J & J and the Plan failed to intervene in the Dowd action until almost one year after the date of settlement.

CONCLUSIONS OF LAW

1. The parties have settled Plaintiffs' action for compensatory damages and interest.
2. The only remaining claims are Plaintiffs' request for attorney fees and punitive damages.
3. The final Joint Pretrial Order states: "In addition, federal subject matter jurisdiction over this action exists pursuant to 28 U.S.C. § 1331, because J & J Snack Foods Corp. Health and Welfare Plan is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 101, et seq., and thus the claims asserted herein arise under the laws of the United States." (Final Joint Pre-Trial Order pp. 1-2). Therefore, I find that Plaintiffs have asserted a claim under the ERISA Statute despite the statement contained in footnote 3, page 3 of the Final Joint Pre-Trial Order.
4. Under ERISA, the Court may award attorney fees only if the defendant acts culpably or in bad faith. Here, Ms. Kafriksen did not act in bad faith, since she called when she received

the first letter about plaintiffs' claim and was not informed that the lien was ERISA-related. Moreover, Ms. Kafrissen received multiple letters from Mr. Teijido, Mr. Zeehandelaar and others which consistently failed to mention that J & J was asserting a lien under ERISA. Instead, the letters' vague references to "subrogation liens" misled Ms. Kafrissen into thinking that plaintiffs were asserting a right of recovery under Pennsylvania's MVFRL, a right which did not exist.

5. Specifically, the attorneys' letters referred to:

- (A) Kathleen Dowd's duty to pay PIP benefits under automobile insurance law, a principle embodied in Pennsylvania's MVFRL;
 - (B) Plaintiffs' "subrogation liens", a concept which the MVFRL prohibits, see 75 Pa.C.S. § 1720; and
 - (C) Workers' compensation liens, a patently false claim given that James Dowd was not injured in the course of employment. Plaintiffs admitted during trial that the use of "workers compensation liens" was erroneous.
 - (D) Medical benefits, another vague term which did not suggest an ERISA lien.
- None of the letters explicitly mentioned ERISA or came close to doing so.

6. J & J has failed to prove that the conversation between Ms. Kafrissen and Mr. Teijido, in which he advised her that the Plan was a self-funded ERISA Plan, took place prior to the settlement of the Dowd case.

7. Because I have found that J & J has failed to establish that they notified Ms. Kafrissen of the actual nature of the lien, Kafrissen violated no duty to disclose the alleged subrogation lien to the Court prior to the settlement of this action.

8. J & J has failed to establish its claim for attorneys' fees based upon the ERISA Statute.

9. Plaintiffs contend that they have a common law right to recover attorney's fees in this case based upon the authority of Ames v. Westinghouse Electric Corp., 864 F.2d 289 (3d Cir. 1988). In Ames, the Court held that since the duty of fair representation is imposed upon the union by federal labor law, the plaintiff could recover attorney's fees incurred in bringing a breach of collective bargaining agreement in an action against the Union only if it was found that the Union wrongfully withheld representation. That case provides no authority for awarding attorney's fees in the case at hand.

10. At common law, the "American rule" provides that "there can be no recovery for counsel fees from the adverse party to a cause, in the absence of express statutory authority allowance of the same, or clear agreement by the parties, or some other established exception." First State Underwriters Agency of New England Reins. Co. v. Travelers Ins. Co., 803 F.2d 1308, 1318 (3rd Cir. 1986).

11. I find that none of the exceptions to the "American rule" recognized in Alyeska Pipe Line Co. v. Wilderness Society, 421 U.S. 240, 257-59 (1975) apply to this case. The Defendants have not disobeyed a Court order nor conducted the lawsuit in bad faith. This lawsuit does not confer a common benefit to others in addition to the Plaintiffs. Plaintiffs have failed to prove a common law right to attorney's fees.

12. Plaintiffs also contend that they are entitled to attorney fees based upon the constructive trust theory of recovery set forth in Dardovitch v. Haltzman, 190 F.3d 125 (3d Cir. 1999).

13. In Dardovitch, the Third Circuit, applying Pennsylvania law, held that a trustee was liable for attorney fees due to his refusal to pay trust funds to the beneficiaries.

14. Plaintiffs claim that they are entitled to attorney fees under Dardovitch based upon the Kafrissen defendants' alleged breach of their fiduciary duty to give plaintiffs their proper share of the settlement proceeds in the underlying wrongful death action.

15. The Kafrissen defendants, however, do not owe any fiduciary duty to plaintiffs under Pennsylvania law. Pennsylvania law provides that an attorney in a tort action does not owe a fiduciary duty to distribute settlement proceeds to an alleged subrogee of his client. Janson v. Cozen and O'Connor, 676 A.2d 242 (Pa. Super. 1996).

16. Moreover, Dardovitch requires the plaintiffs to demonstrate that the defendants acted in bad faith.

17. Accordingly, a constructive trust theory of recovery does not apply to the instant case.

18. Plaintiffs also have claimed that they are entitled to punitive damages. In order to prove punitive damages, plaintiffs must establish that defendants' conduct was outrageous, that is, that defendants' acts were done with a bad motive or with a reckless indifference to the interests of others. Chambers v. Montgomery, 411 Pa. 339, 192 A.2d 355 (1963).

19. This Court has already found that plaintiffs have failed to establish that the Kafrissen defendants acted in bad faith. Accordingly, plaintiffs are not entitled to punitive damages.

DISCUSSION

Mr. Teijido is an attorney who was employed by Blue Cross/Blue Shield in 1996. (N.T. 104-105). He was assigned the task of asserting a subrogation lien on behalf of the J & J Health and Welfare Plan against the proceeds of a lawsuit filed by the Estate of James Dowd. (N.T. 107). Teijido sent the letter dated June 25, 1996 (Ex. P-20) to Mrs. Kafrissen and admitted at

trial that he did not specifically mention in the letter that the Plan was self funded. (N.T. 108).

With reference to a conversation with Ms. Kafrissen, Tejjido said, at N.T. 109,

“ . . . so I do recall giving her a call at some point. I don’t know if it was a month or two after sending out the letter, and I don’t know if she called me.”

He said he did recall speaking with her because he had only five cases dealing with subrogation. (N.T. 109). He testified further that he remembered that it dealt with Pennsylvania law and he remembered informing Ms. Kafrissen about the case of MFC v. Holiday, 498 U.S. 52 (1990). N.T. 110.

When asked to recount the specifics of this important conversation, he said:

“I don’t remember the actual specifics. I do remember telling her that this was an ERISA-governed case, that the account was self insured, and actually citing the court case.”

The testimony of Mr. Tejjido, if accepted, would be significant because he states at one point that he said he remembered telling Ms. Kafrissen it was an ERISA-funded case and the account was self insured. Tejjido places this conversation a month or two after the June 25, 1996 letter [Ex. P-20]. Ms. Kafrissen does not deny that such a conversation took place, but testified that it occurred almost a year after the case was settled in September of 1998. I find that it is more likely that this conversation took place in September of 1998 and not a month or two after June 25, 1996 for the following reasons:

Despite what he now says, his direct and cross examination indicate that he was uncertain as to the content and the time of the call.

He had a specific recollection of one conversation and said that he may have had more. (N.T. 123).

He had no written note or document memorializing or confirming that the conversation took place in 1996. (N.T. 121)

He had no telephone bill indicating that this long distance telephone call took place in 1996. (N.T. 121).

The one document that does exist is the letter of September 14, 1998 [Exs. D-14; P-44] he sent to Ms. Kafrissen, where he referred to a recent conversation they had had and makes reference to the case of FMC v. Holiday. This letter conforms exactly to what Mr. Tejjido said was discussed in the telephone call. However, this letter would place the call in September of 1998 and not June of 1996. That would place this conversation almost one year after the settlement of the Dowd case and indicate that Ms. Kafrissen was not specifically advised of the nature of the J & J Health Care Plan until long after the settlement had taken place.

Mr. Tejjido's confusion about some of the circumstances of this case can be explained by the fact that he left Blue Cross/Blue Shield in December of 1998 and had no contact with any of the parties with regard to this matter until May 1, 2001. (N.T. 135). I believe that an example of Mr. Tejjido's uncertainty is demonstrated by the following example. When cross-examined, defense counsel pointed out to Mr. Tejjido that there were no telephone records showing a 1996 call from Ms. Kafrissen to Mr. Tejjido's office, even though it would have been a long distance call. (N.T. 125). Counsel for plaintiffs objected stating: "we don't have all of the phone records." (N.T. 126). At which point, Mr. Tejjido, who was on the witness stand, interjected:

"A. I can speak to that. I don't know what was subpoenaed. As far as I know, I called her. I think that's what I testified to earlier. I would have initiated the phone call.

Q. Now are you sure you called her?

A. Well - -

Q. Are you sure you called her?

A. Am I a hundred percent sure? No. But there is a strong likelihood that I called her. Now, am I a hundred percent sure that we had a discussion? That I am. In terms of who initiated that, I

don't know. She could have called from the courthouse. She could have called from a public phone. I don't know. Would there have been records of that? Probably not."

He originally broke into the exchange between counsel about Kafrissen's phone records to explain, in effect, that Ms. Kafrissen's phone records did not reflect a 1996 phone call because he called her. However, when cross-examined about that, he retreated from that statement and ended by suggesting that Ms. Kafrissen could have made the phone call from the Courthouse or a public phone. It is this sort of exchange which caused me to lose confidence in Mr. Tejjido's accuracy and recollection and to conclude that Ms. Kafrissen's statement that the telephone conversation took place after the September 14, 1998 letter [Ex. D-14; P-44] and not after the June 25, 1996 letter [Ex. P-20].

For the foregoing reasons, I hereby enter the following Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

J & J SNACK FOODS CORP. and : CIVIL ACTION
J & J SNACK FOODS CORP. HEALTH :
AND WELFARE PLAN :

v. :

CAROLE F. KAFRISSEN, ESQ., LAW :
OFFICES OF CAROLE S. KAFRISSEN, :
P.C., KATHLEEN GORSKI DOWD, :
ADMINISTRATRIX of the ESTATE OF :
JAMES DOWD, KATHLEEN GORSKI :
DOWD, in her individual capacity, :
MATTHEW DOWD, A MINOR, :
THOMAS DOWD, the AUTOMOBILE :
INSURANCE CARRIER OF JAMES :
DOWD, and RYAN M. WALSH : NO. 98-5743

ORDER

AND NOW, this day of OCTOBER, 2001, a VERDICT is hereby entered in favor of Defendants, Carole F. Kafrissen, Esquire, Law Offices of Carole F. Kafrissen, P.C., Kathleen Gorski Dowd, Administratrix of the Estate of James Dowd and Kathleen Gorski Dowd in her individual capacity and against the Plaintiffs J & J Snack Foods Corp. and J & J Snack Foods Corp. Health and Welfare Plan.

The Clerk is directed to mark this case CLOSED.

BY THE COURT:

ROBERT F. KELLY, Sr. J.