

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

**ST. PAUL FIRE & MARINE** )  
**INSURANCE CO.,** )  
 )  
**Plaintiff** )  
 )  
**v.** )  
 )  
**PENOBSCOT BAY MEDICAL** )  
**ASSOCIATES d/b/a MARTIN'S** )  
**POINT HEALTH CARE CENTER,** )  
**et al.,** )  
 )  
**Defendants** )

**Civil No. 94-3-P-C**

**RECOMMENDED DECISION ON CROSS-MOTIONS FOR JUDGMENT  
BASED ON A STIPULATED RECORD**

This diversity action requires the court to decide whether the phrase "professional services," as used in a contract of insurance, includes the tortious acts of a physician whose defamatory statements following a medical examination led to the patient's discharge from his employment. At issue are two insurance policies, one explicitly covering professional services and the other a general liability policy that includes coverage for defamation but explicitly excludes the rendering of or failure to render professional services. The parties have submitted the controversy for decision based on a stipulated record. Any factual disputes may therefore be resolved by the court. *See Boston Five Cents Sav. Bank v. Secretary of Dep't of Hous. & Urban Dev.*, 768 F.2d 5, 11-12 (1st Cir. 1985). For the reasons set forth below, I conclude that the insurer whose policy includes professional liability coverage is required by the terms of the policy to defend and indemnify the plaintiff, and that no such obligation attaches to the insurer that issued the general liability policy.

**I. Facts and Procedural History**

As stipulated by the parties, *see* Stipulated Facts of Record ("Stipulated Facts") (Docket No. 15), the relevant facts may be summarized as follows. On March 24, 1992 John W. Miller presented himself at the offices of defendant Penobscot Bay Medical Associates ("PBMA"), doing business as

Martin's Point Health Care Center, for a physical examination. On that date, Miller was employed by Texaco; he was required to submit to random drug testing and annual physical exams as a result of past violations of Texaco's substance abuse program. Dr. Robert Caven, an employee of PBMA, conducted the physical.

A preprinted form furnished by Texaco provided Caven with specific tests and other steps to perform in conducting the examination. Caven, who had not previously met Miller, conducted the exam and gave Miller a "pass." After Miller left PBMA, however, Caven discussed Miller's demeanor with other members of the PBMA staff who had seen him before the examination. Based on those discussions, and on his own observation that Miller had seemed agitated during the exam, Caven concluded that he had erred in giving Miller a "pass." Caven therefore made several revisions to his report. Under "general appearance," Caven added the notation "neat, but alcohol smell on breath." In response to a question asking whether Caven appeared emotionally unstable, Caven wrote, "no. Admits to stress and appears uptight." Under "additional remarks and recommendations," Caven noted, "all nurses and receptionist smelled alcohol on breath." Caven gave Miller a numerical rating of "3," which indicated that Miller may not be suitable for employment because he was a "possible unrecovered alcoholic."

On March 25, 1992 Caven telephoned Texaco's corporate medical director and Miller's rehabilitation coordinator to report his findings and to express his concern for Miller. In these conversations Caven stated that several people in his office had smelled alcohol on Miller's breath, that he had determined Miller's anxiety level was high, and that Miller had exhibited some physiological symptoms. Neither Caven nor PBMA was aware of what the consequences to Miller

would be of Caven's statements to Texaco. Texaco removed Miller from its substance abuse program and discharged him from employment effective March 25, 1992.

Miller filed a complaint in the Maine Superior Court naming Caven and PBMA among the defendants.<sup>1</sup> Count IV of the complaint alleged defamation by PBMA and Caven as a result of Caven's examination and subsequent reports to Texaco. Count VI alleged that PBMA and Caven intentionally interfered with the contractual relations between Miller and Texaco as a result of the same events. Count VII alleged that PBMA and Caven breached a third-party beneficiary contract between Texaco and PBMA as a result of Caven's reckless, negligent and improper reports to Texaco concerning Miller's suitability for employment. The matter was subsequently removed to this court. *See Miller v. Penobscot Bay Medical Assoc.*, 836 F. Supp. 31 (D. Me. 1993) (granting in part and denying in part the motion to dismiss filed by PBMA and Caven).

Prior to the date on which Caven had examined Miller, the plaintiff in this action, St. Paul Fire & Marine Insurance Co. ("St. Paul"), had issued to PBMA an insurance policy that included coverage for "comprehensive general liability" and defendant Medical Mutual Insurance Company of Maine ("Medical Mutual") had issued to PBMA an insurance policy covering "professional liability." Both policies remained in effect at all times relevant to the present proceedings.

PBMA notified both St. Paul and Medical Mutual on a timely basis of Miller's claims. Pursuant to its obligations under the insurance policy it had issued, St. Paul initially defended PBMA under a reservation of rights, issued on April 8, 1993. PBMA therefore withdrew its demand for defense and indemnity against Medical Mutual, with the agreement of Medical Mutual and without

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<sup>1</sup> Also named as defendants were Texaco, Inc., Texaco Marine Services, Inc. and Texaco Refining and Marketing, Inc. These defendants reached a settlement agreement with Miller.

prejudice to PBMA's right to renew its request at a later date. Notified orally on October 4, 1993 that St. Paul had changed its position to assert that its policy did not cover the Miller complaint, PBMA notified Medical Mutual that it was renewing its claim for defense and indemnity against Medical Mutual. The following day, St. Paul informed PBMA in writing that it would continue to defend PBMA but would not indemnify it in the event of an adverse judgment. Also on that date, St. Paul asked Medical Mutual to assume the defense and indemnification of PBMA and Caven. In response, Medical Mutual denied that its insurance policy obligated it to provide a defense or to indemnify PBMA or Caven.

Prior to trial, PBMA and Caven settled the tort case with Miller for approximately \$220,000. PBMA consulted with both St. Paul and Medical Mutual concerning the terms of the settlement; each insurance company agreed that the amount and terms of the settlement were fair, reasonable and appropriate. Pursuant to the terms of the settlement, Medical Mutual paid Miller \$30,000 without waiving or releasing its right to contest coverage of the claim.

St. Paul thereafter instituted the present action by filing a complaint in this court for a declaratory judgment against PBMA and Medical Mutual, contending that the obligation to defend and indemnify PBMA belonged to Medical Mutual and not St. Paul. PBMA answered and filed a counterclaim against St. Paul and a cross-claim against Medical Mutual asserting that both St. Paul and Medical Mutual had obligations to defend and indemnify. Medical Mutual answered and filed a counterclaim against St. Paul and a cross-claim against PBMA contending that the obligation to defend and indemnify was St. Paul's, or, in the alternative, that the underlying tort claim was covered by both policies of insurance and should therefore be apportioned between the two insurers. The

parties now submit the matter to the court on an agreed-upon statement of facts that includes copies of the insurance policies described above.

### **III. The Duty to Indemnify PBMA**

The defendants appear to agree, and the plaintiff does not dispute, that the substantive law of Maine governs this case. Under Maine law, ambiguities in an insurance contract are resolved against the insurer. *Allstate Ins. Co. v. Elwell*, 513 A.2d 269, 271 (Me. 1986). However, a court must interpret unambiguous language in an insurance policy according to the general principle of contract law that such language will be accorded its plain and commonly accepted meaning. *Brackett v. Middlesex Ins. Co.*, 486 A.2d 1188, 1190 (Me. 1985) (citing *Lidstone v. Green*, 469 A.2d 843, 846 (Me. 1983)). Therefore, the court must first determine if the relevant language in the two insurance policies is ambiguous.

Medical Mutual issued to PBMA a "Physician's Comprehensive Professional Liability Insurance Policy." Exh. 2 to Stipulated Facts at 1. In relevant part, this policy provided that Medical Mutual would pay all damages that PBMA becomes legally obligated to pay "for injury arising out of the rendering of or failure to render ... PROFESSIONAL SERVICES in the practice of the profession of physician or surgeon ... by any person for whose acts or omissions [PBMA] is legally responsible." *Id.* at 2 (emphasis in original). There is no other language in the policy that is relevant to the present dispute.

The policy issued to PBMA by St. Paul provided, in relevant part, coverage for "claims or suits for covered personal injury." Exh. 1 ("Insuring Agreement 36B") to Stipulated Facts at 3. The term "personal injury" explicitly included "injury, other than bodily injury, caused by ... libel or

slander" if the libel or slander is a result of PBMA's "business activities." *Id.* at 2. The policy further provided: "**Professional services.** We won't cover injury or damage resulting from ... the providing or failing to provide professional health care services." *Id.* at 6.

I conclude that the term "professional services," as used in the Medical Mutual policy, and the terms "professional services" and "professional health care services" as used in the St. Paul policy, are not ambiguous. An insurance policy is ambiguous "if an ordinary person in the shoes of the insured would not understand" the extent of the coverage provided by the language in question. *Meiners v. Aetna Casualty & Surety Co.*, 645 A.2d 9, 10 (Me. 1994) (quoting *Elwell*, 513 A.2d at 271). In other words, the language is ambiguous if it is "reasonably susceptible of different interpretations." *Brackett*, 486 A.2d at 1189.

As other courts have noted, the line between what constitutes a professional service and what does not is capable of being drawn with some precision. The definition first articulated by the Supreme Court of Nebraska is the most frequently quoted discussion of the issue:

Something more than an act flowing from mere employment or vocation is essential.

The act or service must be such as exacts the use or application of special learning or attainments of some kind. The term "professional" in the context used in the policy provision means something more than mere proficiency in the performance of a task and implies intellectual skill as contrasted with that used in an occupation for production or sale of commodities. A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.... In determining whether a particular act is of a

professional nature or a "professional service," [the court] must look not to the title or character of the party performing the act, but to the act itself.

*Marx v. Hartford Accident & Indem. Co.*, 157 N.W. 2d 870, 871-72 (Neb. 1968) (citations omitted); accord *Harad v. Aetna Casualty & Surety Co.*, 839 F.2d 979, 984 (3rd Cir. 1988); *Bank of California, N.A. v. Opie*, 663 F.2d 977, 981 (9th Cir. 1981); *St. Paul Fire & Marine Ins. Co. v. Jacobson*, 826 F. Supp. 155, 160-61 (E.D. Va. 1993); *New Mexico Physicians Mut. Liab. Co. v. LaMure*, 860 P.2d 734 (N.M. 1993); *St. Paul Fire & Marine Ins. Co. v. Shernow*, 610 A.2d 1281, 1284 (Conn. 1992); *Roe v. Federal Ins. Co.*, 587 N.E.2d 214, 217 (Mass. 1992); *Niedzielski v. St. Paul Fire & Marine Ins. Co.*, 589 A.2d 130, 131 (N.H. 1991); *Shelton v. American Ins. Co.*, 507 So.2d 894, 896 (Miss. 1987); *South Carolina Medical Malpractice Liab. Ins. Joint Underwriting Assn. v. Ferry*, 354 S.E.2d 378, 380 (S.C. 1987); *Vigue v. John E. Fogarty Memorial Hosp.*, 481 A.2d 1, 3 (R.I. 1984); *Hirst v. St. Paul Fire & Marine Ins. Co.*, 683 P.2d 440, 444 (Idaho App. 1984).

The question of whether an intentional tort falls within the realm of conduct defined as "professional services" has typically arisen in circumstances where a physician or dentist has committed sexual misconduct with a patient during the course of medical or dental treatment. See, e.g., *Hirst*, 683 P.2d at 444 (absent "causal relationship" between medical treatment and alleged harm, sexual assault not covered by professional services insurance policy). In *Roe* the Supreme Judicial Court of Massachusetts held that such tortious conduct did not constitute the rendering of or failure to render professional services by a dentist because it was "self-evident that his professional services -- the cleaning and examination of teeth, the replacement of fillings, the extraction of a tooth, and appropriate follow-up care -- did not call for sexual contact between him and his patient."

*Roe*, 587 N.E. 2d at 218; *see also Ferry*, 354 S.E.2d at 380 (suggesting that a professional services insurance policy covers no intentional torts). Although the *Roe* court appears to have been unpersuaded by the dentist's having committed a sexual assault on at least one occasion after having given the patient novocain, *see Roe*, 587 N.E.2d at 215, the Supreme Court of Connecticut held in similar circumstances that professional liability covers a sexual assault precisely because the administration of an anesthetic, nitrous oxide, "had a direct relationship to a treatment in progress." *Shernow*, 610 A.2d at 1284. Although *Hirst* also involved a case in which the administration of drugs rendered the patient "more susceptible" to the improper sexual advances, *Hirst*, 683 P.2d at 444, the Connecticut court distinguished *Hirst* by noting that the administration of the drug in *Shernow* was, in itself, an act of professional negligence, *Shernow*, 610 A.2d at 1284.

*Shernow* applies quite neatly by analogy to the instant case. Like the sexual assault there, Caven's defamatory communications to Miller's employer may not have been, in themselves, the rendering of or failure to render professional services. The act of stating a falsehood does not necessarily require any of the professional skill described in *Marx* and its progeny. But just as there was a direct relationship in *Shernow* between the negligent administration of nitrous oxide, a task that certainly meets the definition in *Marx* of a professional service, and the assault, so was it necessary here for Caven to apply (or fail to apply) professional skill in reaching the conclusions that he then communicated to the employer. Caven did not merely call Texaco and tell the company that Miller was unsuitable as an employee. Rather, Miller noted that his staff had smelled alcohol on Miller's breath and thus "recommended that 'blood alcohol levels' be taken." Stipulated Facts at & 16. And Caven indicated that his views as to Miller's unsuitability for employment stemmed from his conclusion that Miller was a "possible unrecovered alcoholic." *Id.* In differentiating between

cases that involve professional services and those that do not, "[c]ommon sense, of course, will always provide a useful guide." *Roe*, 587 N.E.2d at 217. It would be well beyond the bounds of common sense to conclude that the making of a recommendation for further medical testing, and the tentative diagnosis of a disease such as alcoholism, coming as they did immediately after the administration of a medical exam, do not constitute the rendering of or failure to render professional services. The defamation committed by Caven was "intertwined with, and inseparable from," the medical services he provided to Miller and his employer. *Niedzielski*, 589 A.2d at 132 (quoting *St. Paul Fire & Marine Ins. v. Asbury*, 720 P.2d 540, 542 (Ariz. App. 1986); cf. *Shelton*, 507 So.2d at 894, 896 (fraudulent inducement to enter into an employment contract not rendering of or failure to render professional services by insurance agent); see also *Jacobson*, 826 F. Supp. at 161-62 (physician's fraudulent use of his own sperm to inseminate patients involved provision of professional services). The defamation therefore was covered by the policy issued by Medical Mutual, and unambiguously excluded from the coverage provided by the policy issued by St. Paul.<sup>2</sup>

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<sup>2</sup> Relying on *Felton v. Schaeffer*, 279 Cal. Rptr. 713 (Cal. App. 1991), Medical Mutual further argues that Caven's conduct did not implicate the professional services coverage in Medical Mutual's policy because Miller did not have a physician-patient relationship with Caven. Medical Mutual contends that Caven owed a duty of care only to the employer, and that Caven was therefore not providing professional services during the examination. Although the question of whether Caven owed a duty of care to Miller may have been an issue in the underlying litigation, as a consequence of the settlement it has no bearing on the significant issue presently before the court, which is whether Caven's acts constituted the rendering of or the failure to render professional services.

#### IV. The Duty to Defend PBMA

The parties also seek a determination of whether St. Paul, Medical Mutual or both had a duty to provide a defense to PBMA in connection with Miller's claims. In its motion for judgment on a stipulated record, Medical Mutual contends that the duty was exclusively St. Paul's or, in the alternative, was shared with Medical Mutual. Neither St. Paul nor PBMA raises the issue in their respective motions, although St. Paul's complaint seeks a declaration that the duty to defend was Medical Mutual's, and PBMA contends through its crossclaim and counterclaim that both insurers had a duty to defend. St. Paul defended PBMA in the underlying proceeding pursuant to a reservation of rights, and PBMA withdrew its demand for defense and indemnity against Medical Mutual, without prejudice to PBMA's right to renew the demand at a later date. On October 5, 1993 St. Paul asked Medical Mutual to assume the defense and indemnification of PBMA and Caven, a request Medical Mutual refused.

In Maine, an insurer's duty to defend its insured presents a question of law that the court determines by comparing the allegations in the underlying complaint with the provisions of the insurance policy. *City of Old Town v. American Employers Ins. Co.*, 858 F. Supp. 264, 267 (D. Me. 1994); *Baywood Corp. v. Maine Bonding & Casualty Co.*, 628 A.2d 1029, 1030 (Me. 1993) (citations omitted). "The duty to defend ... is considerably broader than the duty to indemnify." *Id.* Thus, an insured is entitled to a defense "if there exists any legal or factual basis which could be developed at trial that would obligate the insurers to pay under the policy." *Id.* (quoting *L. Ray Packing Co. v. Commercial Union Ins. Co.*, 469 A.2d 832, 833 (Me. 1983)). Application of the comparison test may sometimes require an insurer to defend where there may be no ultimate duty to

indemnify. *Maine Bonding & Casualty Co. v. Douglas Dynamics, Inc.*, 594 A.2d 1079, 1080 (Me. 1991) (citing *State Mutual Ins. Co. v. Bragg*, 589 A.2d 35, 36 (Me. 1991)).

Since Medical Mutual had a duty to indemnify PBMA, it follows that this insurer was also obligated to provide a defense for PBMA in the *Miller* litigation. Determining whether St. Paul also had a duty to defend PBMA, even though St. Paul has no duty to indemnify, requires the precise application of the comparison test described above. In relevant part, the complaint filed by Miller in the underlying action stated that:

20. On or about March 24, 1992, in accordance with instructions from the Special Health Services Division of TEXACO, [Miller] presented himself at the Martin's Point Health Care Center in Portland, Maine to receive the final results of the final physical examination before discharge from the substance abuse rehabilitation program as an employee in good standing.

21. At the above time and place, [Miller] is informed and believes and thereupon alleges, that Defendant CAVEN informed employees of TEXACO's Special Health Services Division and TEXACO MARINE, orally and in writing, *inter alia* as follows:

- a. That [Miller] was drunk at the time he presented at Martin's Point, Portland;
- b. That [Miller] was under the influence of alcohol at the time he presented at Martin's Point, Portland;
- c. That [Miller] had alcohol in his blood;
- d. That [Miller] was not emotionally suitable for employment;
- e. That [Miller] was not emotionally stable;
- f. That [Miller] was not suited for the job as a master in the marine department;
- g. That [Miller] was not a good candidate for shipboard responsibility;
- h. That [Miller] was emotionally unstable; and

i. That [Miller] was chemically impaired.

22. [Miller] is informed and believes and thereupon alleges that at the time the statements were made by Defendant CAVEN, he knew, or should have known, that the making of such statements was substantially certain to result in [Miller's] immediate discharge from the Substance Abuse Program, and his immediate termination from employment.

Complaint, *John W. Miller v. Texaco, Inc., et al.*, appended as Exh. B to Complaint (Docket No. 1) at 6-7. Count IV of the Miller complaint, sounding in defamation against Caven and PBMA, recited, at paragraph 52, that each statement set forth in paragraph 21 was false, and that,

[a]t the time of the making of each statement alleged in Paragraph no. 21, Defendant CAVEN either knew of the falsity of each statement or, alternatively, published each statement in conscious and reckless disregard of whether or not the statements were true.

*Id.* at 15-16. Count VI of the complaint, asserting intentional interference with a contractual relationship, alleged at paragraphs 67 and 68, in relevant part, that the defendants

interfered with the contractual relationship between TEXACO REFINING and [Miller] by recklessly and falsely routing the information contained within [paragraph 21] without proper investigation, proper training, proper documentation, or any reasonable belief as to whether the statements were true or not.... The actions on behalf of defendants and each of them were known by each to be substantially certain to cause TEXACO REFINING to terminate the employment of [Miller], thereby breaching their contract with [him].

*Id.* at 19-20. Finally, Count VII, asserting breach of a third-party beneficiary contract between Texaco and PBMA, alleged at paragraphs 73 and 74, in relevant part:

This contractual relationship involved the performance of medical monitoring and reporting services by PBMA and ROBERT E. CAVEN at the request of TEXACO through their Special Health Services Division.... [Miller] is informed and believes and thereupon alleges that the terms of the contractual relationship concerning the Substance Abuse Program as between TEXACO, PBMA and ROBERT E. CAVEN included, but were not limited to the following:

- a. That physicians in the employ of PBMA, including ROBERT E. CAVEN, would perform monitoring functions as requested by the Special Health Services employees of TEXACO;
- b. That, as part of the monitoring duties alleged above, ROBERT E. CAVEN, and other physicians similarly employed by PBMA would conduct medical procedures on employees and prospective employees of TEXACO and its subsidiaries;
- c. That PBMA, through its employed physicians and ROBERT E. CAVEN, would report to employees at TEXACO concerning results of the procedures and examinations performed by PBMA and its employed physicians as alleged above.

*Id.* at 21. The complaint further alleged in paragraphs 76 and 77 that "[b]y recklessly, negligently and improperly reporting to TEXACO through its Special Health Services Division, the information contained in Paragraph 21, (a) through (i) inclusive, Defendants CAVEN and PBMA breached its [sic] contractual duties to TEXACO," and that Miller had standing to sue as intended beneficiary. *Id.* at 22.

A fair reading of the allegations in the Miller complaint supports a determination that there existed no factual basis that could have obligated St. Paul to indemnify PBMA. The St. Paul insurance policy contained an unambiguous exclusion for matters arising out of the rendering of or

the failure to render professional services. Nowhere does the complaint allege that Caven was acting other than pursuant to the contract to provide substance abuse evaluations for Miller's employer. Had the complaint alleged or been reasonably susceptible to a reading that Caven undertook to provide Texaco with false information that had nothing to do with Miller's physical or emotional health, or the extent of his substance abuse, then St. Paul clearly would have had a duty to defend pursuant to the terms of the general liability policy and its explicit coverage for defamation. But every allegation concerning Caven relates to statements he allegedly made concerning the state of Miller's health. Evaluating Miller's physical and mental health was exactly the kind of professional service that Caven had been engaged by Texaco to provide, and the kind of act that was explicitly excluded from coverage pursuant to the St. Paul policy. St. Paul therefore had no duty to defend PBMA in the Miller litigation.

### **V. Laches**

Relying on *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907 (1st Cir. 1989), Medical Mutual further contends that St. Paul's claims are barred by the doctrine of laches. According to Medical Mutual, St. Paul acted with unreasonable delay in notifying Medical Mutual that it considered Miller's claim to be a medical malpractice action. Medical Mutual asserts that it received this notification on the "eve of trial," *see* Medical Mutual's Memorandum of Law (Docket No. 17) at 17, and that it was prejudiced thereby because it was unable to move for dismissal of Miller's claims so that the case could be submitted to a medical malpractice panel pursuant to the Maine Health Security Act, *see* 24 M.R.S.A. ' 2853. This contention is unpersuasive. Well before St. Paul notified Medical Mutual that it considered the obligation to defend and indemnify PBMA to belong

to Medical Mutual and not St. Paul, Medical Mutual had notice from PBMA of the underlying claim. Nothing that St. Paul either did, or failed to do, in connection with the Miller litigation prevented Medical Mutual from acting to protect its rights under its insurance contract with PBMA. *See, e.g., Couch on Insurance 2d* (Rev. ed.) ' 51:54 at 509 (noting that in deciding not to provide a defense to an insured, the insurer assumes the risk that it may be breaching its obligations pursuant to the insurance contract). In declining to participate in the defense of PBMA, Medical Mutual risked the very liability at issue in this proceeding. It certainly has not made the required showing that a delay by St. Paul in bringing suit was both unreasonable and resulted in its prejudice. *See Murphy v. Timberlane Regional Sch. Dist.*, 22 F.3d 1186, 1189 (1st Cir. 1994). Accordingly, Medical Mutual's claim of laches should fail.

## VI. Conclusion

For the foregoing reasons, I conclude that defendant Medical Mutual had an obligation to defend and indemnify defendant PBMA in the underlying action, and that the plaintiff, St. Paul Fire & Marine Insurance Company, was under no such obligation. Accordingly, I recommend that judgment be entered in favor of St. Paul on its complaint against PBMA and Medical Mutual, in favor of St. Paul on PBMA's counterclaim, in favor of PBMA on its cross-claim against Medical Mutual, in favor of St. Paul on Medical Mutual's counterclaim, and in favor of PBMA on Medical Mutual's cross-claim against PBMA.

### NOTICE

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 10th day of November, 1994.***

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*David M. Cohen*  
*United States Magistrate Judge*