THE SUPREME COURT STATE OF FLORIDA

IN RE: AMENDMENT TO FLORIDA RULES
OF CIVIL PROCEDURE 1.700-1.780
(MEDIATION) CASE NO. 75,151

PHYSICIANS PROTECTIVE TRUST FUND'S COMMENTS ON PROPOSED AMENDMENTS TO MEDIATION RULES

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PHYSICIANS PROTECTIVE TRUST FUND'S COMMENTS ON PROPOSED AMENDMENTS TO MEDIATION RULES

COMES NOW the Physicians Protective Trust Fund ("PPTF"), by and through its undersigned counsel, and files this its comments and suggestions regarding the proposed amendments to the Florida Rules of Civil Procedure, and says:

INTRODUCTION

PPTF is a self insurance trust fund created under the laws of Florida for the purpose of providing medical professional liability coverage on behalf of its trust fund members. PPTF, through its members, will be adversely affected by changes in the rules. PPTF files these comments on behalf of its trust fund members.

In Pinillos v. Cedars of Lebanon Hospital Corp., 403 So.2d 365, 367-368 (Fla.1981), this court stated:

> The legislature, in the preamble to the Medical Malpractice Reform Act, of which section 768.50 is a part, announced in detail the legitimate state interests involved in its enactment of this provision. The legislature determined that there was a professional liability insurance crisis in Florida. It found that professional liability insurance premiums were rising at a

> dramatic and exorbitant rate, that insurance companies were withdrawing from this type of insurance market making such insurance unavailable in the private sector, that the costs of medial specialist were extremely high, and that a certain amount of premium costs is passed on to the consuming public through higher costs for health care services. This insurance crisis, the legislature concluded, threatened the public health in Florida in that physicians were becoming increasingly wary of high-risk procedures and, accordingly, were downgrading their specialties to obtain relief from oppressive insurance rates and in that the number of available physicians in Florida was being diminished. The legislature expressed the concern that the tort law liability insurance system for medical malpractice would eventually break down and that the costs would continue to rise above acceptable levels.

Thus, reducing the costs of medical services while maintaining a high quality of care is of great importance to the citizens of the State of Florida. This point prevails throughout the entirety of these comments.

PPTF's specific criticisms and suggestions are directed to

Rule 1.720(b) (Sanctions for Failure to Appear). As proposed, Rule 1.720(b) states as follows:

> If a party fails to appear at a duly noticed mediation conference without good cause, the court upon motion, shall impose sanctions including an award of mediator and attorney fees and other costs against the party failing to appear. Unless otherwise stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:
> (1) the party or its representative having full authority to settle without further consultation; and
> (2) the party's counsel of record, if any; and
> (3) a representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle without further consultation.
>
> If a party to mediation is a public entity required to conduct its business pursuant to Chapter 286, Florida Statutes, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity.

I. PROPOSED RULE ATTEMPTS TO REGULATE CONDUCT OF NON-PARTIES.

Proposed Rule 1.720(b)(3) attempts to require a non party insurance carrier to make available its full policy limits to the plaintiff at mediation. The proposed rule requires an insurance carrier, although not a party, and never served in a lawsuit, to have its full policy limits available even in those instances in which plaintiff has filed a frivolous lawsuit. There are many instances in which an insurance carrier may rightfully elect not to tender its policy limits to a non meritorious or otherwise defensible case.

II. THE COMMITTEE'S FINDINGS DO NOT SUPPORT THE PROPOSED RULE.

The Final Report of the Florida Supreme Court Standing Committee on Mediation and Arbitration Rules, December 1, 1989 ("Final Report"), contains results of a survey of circuit judges and mediators in which the question was asked what sanctions should be used. Chart number 9 in the Final Report depicts the

responses of the circuit judges and the circuit mediators. It is important to note that 75.41 percent of the circuit judges and 62.72 percent of the mediators responded that there should be sanctions for "bad faith". However, examination of Chart number 9 shows that only 13.93 percent of the circuit judges and 16.57 percent of the mediators suggested a standard of "full settlement authority" in imposing sanctions. It is therefore unreasonable for the Rules Committee to require "full settlement authority" instead of mediating "in good faith" as a standard for the imposition of sanctions. The Rules Committee should not substitute its opinion for that of the day to day practitioners in the field.

From review of the transmittal letter of December 1, 1989 from the Chairman of the Committee to Honorable Raymond Ehrlich, it appears that the issues addressed by these comments were not fully addressed by the Committee. Although the Committee made a valiant effort and embarked upon a large undertaking, the concerns of PPTF need to be addressed more fully. In Exhibit "F" to the final report of the Standing Committee on Mediation of

Arbitration Rules, the following reason for the change in Rule 1.720(b) is given:

> Clarifies process for imposition of sanctions upon a failure to appear by either party. Defines "failure to appear" in light of experience from the field as to parties who must necessarily be present to make settlement possible. With respect to insurance carriers, the rule requires the physical presence of a direct representative of the carrier who has the ability to enter into a settlement pledging the full benefits of the policy involved. The intent is to avoid situations in which insurance representatives appear at mediation sessions with limitations on their authority which serve to place an absolute, unconditional barrier on settlement. While there is no intent in this rule to mandate any party to settle any case in mediation, it is the intent to have each party participating in a mediation directly vested with the ability to resolve the dispute. The only exception to this rule is spelled out in the last paragraph which provides for participation in mediation sessions by parties who, by statute, are precluded from making decisions outside public hearing process. (Emphasis supplied).

The result is that the insurance carrier must be willing to pledge full benefits of its insurance policy in an attempt at mediation or be subject to mandatory sanctions.

III. PPTF'S FIDUCIARY OBLIGATIONS TO ITS MEMBERS ARE IN JEOPARDY.

There are times in which an insurance carrier will not and can not be in a position to tender its policy limits. For example, PPTF is a self insurance trust created under the laws of Florida for the purpose of providing medical professional liability coverage on behalf of its trust fund members. Potential assessments are made against its members in those years in which money is paid out in a settlement of claims in an amount greater than anticipated at the time of collecting the original premium. The trust fund has fiduciary duties to its members. If it settles cases for policy limits which should not be so settled, then the trust fund violates those fiduciary duties and exposes its members to liability for assessments.

There are times when insurers and even PPTF must determine that no coverage exists. This is an infrequent occurrence but nonetheless legal rights and issues must be preserved. How can

PPTF come to mediation with full policy limits in hand and maintain that no coverage exists? PPTF may be fined or made to suffer penalty for exercising its rights and duties to avoid coverage when such circumstances arise.

IV. SANCTIONS ARE NOT NECESSARY.

If the rules are going to require that an insurance carrier must come to mediation with full authority to settle for policy limits, then the only reasonable quid pro quo is that the plaintiff must come to the mediation table with full authority to drop its case and walk away without payment. To do otherwise may well be violative of equal protection to the members of the trust fund. U.S. Const. amendment 14, section 1.

Listen to what is being said by way of the proposed rule change. All plaintiffs who file a lawsuit seeking a payment of money are presumed to be entitled to be paid. Defendants, the rule implies, are presumed guilty of negligence and seek to avoid paying their lawful obligations. Are these valid presumptions? It so, the proposed rules and even more are needed. If not, the suggested change should fail.

A standard of good faith in settlement negotiations and mediation should be and currently is imposed on defendants. The rule and statutes regarding offers of judgment and demands for settlement take care of the potential unreasonableness of the parties. See Fla.Stat. 768.79 (1986); Fla.Stat. 45.061 (1987) and Fla.R.Civ.P. 1.442. Therefore there is no need for mandatory sanctions when mediation does not result in settlement.

There is no problem with both parties being required to honestly and fairly evaluate their positions based upon the knowledge known to them, prior to coming to the mediating table. However, there are certainly times in which one or both parties brings new information to mediation which changes the overall picture of the litigation. These unforeseen and unanticipated developments must not be the basis of sanctions against either party.

Plaintiffs already have a "big stick" to wield against unreasonable liability carriers when they fail to act in good faith in offering to settle a claim. The bad faith lawsuit is the "big stick" available to them. The bad faith lawsuit will be

filed as surely as day follows night when an excess verdict is obtained. If a defendant knows or reasonably should have known that the case was one of probable liability with large damages, beyond policy limits, a new lawsuit is often filed for the excess amount of the verdict. There is no such "big stick" which defendants may wield against plaintiffs when a defense verdict is obtained.

Plaintiffs also have Florida Statutes 624.155 available to them as a civil remedy when settlements are unreasonably withheld.

V. CONSTITUTIONAL ISSUES.

Although article 5, section 2, Fla.Const., makes provision for the Supreme Court to adopt rules of practice and procedure in all courts, anything else not otherwise provided for would not be lawfully promulgated. Proposed Rule 1.720(b) is extra-judicial in nature in that it purports to effect rights of citizens who are not before the Court.

The United States Constitution reserves the right to trial by jury. (Amendment 7: "In suits at common law, where the value

in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, then according to the rules of common law."). Likewise, the constitution of the State of Florida provides for right to trial by jury. (Article 1, Section 22: "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law".). As certainly as a plaintiff has a right to file suit, the defendant must have the right to have that suit tried by a jury. The rules as proposed would do great injustice to any defendant who happens to have insurance covering the incident.

Florida Constitution, article 1, section 21 provides that "the courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay". The trust fund members of PPTF must be allowed access to the courts. The result of the proposed rules, is as a practical matter that once the plaintiff files suit and requests mediation, PPTF must be prepared to pay its policy limits or

suffer fine or penalty. This is a preposterous result. Why is the plaintiff immune from such coercion?

The Florida Constitution, article 1, section 2 (Basic Rights) states in part as follows: "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be awarded for industry, and to acquire, possess and protect property. . . ." The fund members are certainly natural persons. This raises the question of whether the proposed rules deny equal protection under the laws to trust fund members.

CONCLUSION

Hopefully, it has been made apparent that ample sanctions already exist to punish a defendant and his insurer for reprehensible conduct in settlement negotiations. The lyrics to the old stand-by tune could well be changed as follows:

> Scotch and Soda,
> Jigger of Gin,
> Oh what Bad Faith I'm In,
> Oh my, Oh my!

For all of the above stated reasons, the Physicians Protective

Trust Fund respectfully requests that this Court carefully consider the proposed amendments to Florida Rules of Civil Procedure 1.700-1780 (Mediation) and specifically, PPTF requests that this Court delete those provisions providing for mandatory sanctions and requiring a representative of an insurance carrier to have "full authority to settle without further consultation."

REQUEST FOR ORAL ARGUMENT

The undersigned desires an opportunity to address the Court at the oral argument of this matter which is currently set for February 5, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded by U.S. Mail to the State Court Administrator, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1900; Stephen N. Zack, as President of the Florida Bar, Courthouse Center, 26th Floor, 175 N. W. First Avenue, Miami, Florida 33128; James Fox Miller, as President Elect of the Florida Bar, Post Office Box 7259, Hollywood, Florida 33081-1259; John F. Harkness, as Executive Director of the Florida Bar, The Florida Bar Center, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and Bruce J. Berman, as Chairman of the Civil Procedure Rules Committee, Weil, Gotshal & Manges, 701 Brickell Ave., Suite 2100, Miami, Florida 33131-2801; this 26th day of January, 1990.

Richard B. Collins