IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA
CASE NO: 77,194

MARVIN M. SHUSTER, M.D.,
et al.,

Petitioner,

vs.

SOUTH BROWARD HOSPITAL
DISTRICT PHYSICIANS'
PROFESSIONAL LIABILITY
INSURANCE TRUST, ETC.,

Respondent.
_____/

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

Filed by:

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R E F E R E N C E

All reference to the Amicus is designated by the term "Amicus".

All reference to the Petitioner/Appellant is designated by the term "SHUSTER".

All reference to the Respondent/Appellee is designated by the term "PHYSICIANS TRUST".

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QUESTION CERTIFIED BY THE FOURTH DISTRICT COURT OF APPEAL

MAY AN INSURED MAINTAIN AN ACTION AGAINST HIS INSURER FOR BAD FAITH WHERE THE INSURER HAS SETTLED THE CAUSE OF ACTION AGAINST THE INSURED WITHIN THE POLICY LIMITS OF THE INSURANCE CONTRACT WHICH PROVIDES THAT THE INSURER MAY SETTLE THE CLAIM AS IT DEEMS EXPEDIENT, AND THE INSURED IS NOT EXPOSED TO AN EXCESS JUDGMENT BUT HAS CAUSED OTHER DAMAGES AS A RESULT OF THE SETTLEMENT?

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PRELIMINARY STATEMENT

The Amicus respectfully advises this Court that his interest, in these proceedings, is based on what he perceives to be bad faith by an insurance company in the manner in which it settled several claims arising out of a common incident as a result of which it exhausted all of its benefits, exposing its insured to liability from other claimants and the potential of a judgment rendered against its insured.

Your Amicus represents defendants named in a lawsuit presently pending in the Dade County Circuit Court involving a claim for injuries sustained as a result of an automobile accident. At the time of the accident the Defendants were covered by liability insurance. The insurer exhausted all of its liability limits by settling the claims of certain passengers in the plaintiff's vehicle. The insurer did not, in any way, attempt to settle the claims of all persons in the plaintiff's vehicle which included another passenger and the driver. That passenger and driver are plaintiffs in the case pending in the Circuit Court of Dade County. As of this date the case, although at issue, has not been noticed nor set for trial.

Although the case in Dade County involves an automobile accident, and not a medical malpractice case, your Amicus firmly believes that this honorable Court should render a pronouncement as to what constitutes good faith or bad faith of an insurer and what damages are available to a first party or third party as the case may be for the breach of such good faith obligation.

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ARGUMENT IN SUPPORT OF POINT ADVANCED BY PETITIONER HEREIN

Amicus herein joins in the argument advanced by the Petitioner, particularly to the effect that an insurance company has an obligation to act in good faith toward its insured whether in settling or defending a claim, and must be mindful of its insured's interest in doing so.

Amicus would cite the case of **Opperman** vs. **Nationwide Mut. Fire Ins. Co.**, 515 So.2d 263, (Fla. 5th DCA 1987) pet. for rev. denied, 523 So.2d 578 (1988). **Opperman** specifically addressed the type and kind of conduct that would expose an insurer to a first party bad faith action. In that case the insureds brought an action against their uninsured motorist carrier for bad faith refusal to settle. The Circuit Court of Brevard County dismissed the insureds' appeal, the District Court reversed and remanded, holding that the insureds had a cause of action against the insurer for bad faith refusal to settle insureds' first party claim against the insurer. What is interesting about **Opperman**, is the pronouncements made by Judge Orfinger in his opinion citing **Gruenberg** vs. **Aetna Insurance Co.**, 9 Cal.3rd 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973). That the Gruenberg Court held that the duty of an insurer to act in good faith in settling claims of its insured was no different from the duty of the insurer to act in good faith in handling claims of third parties against the insured. The Court said,

> "These are merely two different aspects of the same duty. That responsibility is not the requirement mandated by the terms of the policy itself - to defend, settle, or pay. It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Where in so doing, it fails to deal fairly and in good faith with its insured by refusing,

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> without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing." (Emphasis supplied)

Judge Orfinger further pointed out, citing **Gruenberg**, that this "legal duty is independent of any contractual obligation". He goes on to say "rather the cause of action has been described as 'tortous breach of contract'" citing 16A. Appelman, Insurance Law and Practice, §8877.25 (1981)

Your Amicus does recognize that **Opperman** dealt with an interpretation of Florida Statute §624.155 adopted in 1982, and it could be argued, that because it is a statutory remedy, it is not applicable. **Opperman** makes reference to the staff report made to the House Committee on insurance at the time the legislation was passed, and in fact quotes from that report as follows:

> [§624.155] requires insurers to deal in good faith to settle claims. Current case law requires this standard in liability claims, but not in uninsured motorist coverage; the sanction is that the company is subject to a judgment in excess of policy limits. This section would apply to all insurance policies. (Emphasis supplied)

Since the case against SHUSTER was a liability claim, it is respectfully suggested that even without §624.155, the current case law requires insurers to deal in good faith in the settlement of claims. The question then becomes, what is good faith in the settlement of a claim. Is the good faith requirement satisfied when an insurer settles a claim within its policy limits? Is the good faith satisfied when an insurer settles several claims exhausting policy limits leaving others unsettled, thereby exposing

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its insured to potential judgment? Your Amicus would respectfully state that there cannot be selective good faith. An insurance company must act responsibly in the discharge of its obligation to defend, settle or pay a claim. This responsibility, however, requires the insurer to act for the benefit of its insured and not in its own self interest. The District Court, below, recognized these standards when it said, as follows:

> "An insurer in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business [citing **Auto Mutual Indemnity Co.** vs. **Shaw**, 134 Fla. 815, 184 So.2d 852 (1938)] for when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interest of the insured, [citing **Liberty Mutual Ins. Co.** vs. **Davis,** 412 F.2d 473 (5th Cir. 1969)]....the insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where the reasonably prudent person, faced with the prospect of paying the total recovery, would do so [citing additional cases].

The Fourth District, also considered the case of **Barney** vs. **Aetna Cas. and Sur. Co.**, 185 Cal. App. 3rd 1966, 230 Cal. Rptr. 215 (Cal. App. 2d Dist. 1986). That was a case in which the insured sued her insurance company for settling in bad faith even though the settlement was within the policy limits. In reviewing the facts, the **Barney** court stated that it would "look beyond the four corners of the policy to determine whether the insurer is liable for bad faith conduct. 'In short, the insurance company may not ignore the insured and then seek refuge in the fine print of the policy'". **Barney** at p.220.

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The Court further quoted from **Barney** when it said as follows:

> "An insured reasonably expects that the insurer in using the authority granted under the policy, will not knowingly effect a settlement which works to the detriment of the insured. The insured can hardly be said to have received any benefit from the policy of insurance if that benefit is totally voided by a countervailing detriment imposed upon him by the insurer without his consent."

The DCA then concluded that **Barney** stood for the proposition that an insurance company has a duty not to knowingly use its discretionary power to settle under the policy in a manner which is injurious to its insured's rights, even when the settlement is within the policy limits.

The Fourth District also recognized the pronouncements made in the case of **Gardner** vs. **Aetna Cas. & Sur. Co.**, 841 Fed.2d 82 (4th Cir. 1988). The Court noted under **Gardner** that an insurer had an obligation "to deal fairly with the insured in the handling and disposition of any claim." (Emphasis supplied) **Gardner** went on to say, as follows:

> "Logically, the range of a company's good faith discretion would be broader when deciding to settle a claim within policy limits than when electing to refuse a settlement and proceed to trial. We are not convinced, however, that the responsibility to exercise good faith simply evaporates in all cases if the eventual settlement leaves the insured without an immediate financial obligation. Under the proper circumstances an involuntary settlement could still inflict harm of other types upon the policyholder."

Florida Courts recognize that a fiduciary relationship exists between insured and its insurer. **Baxter** vs. **Royal Indem. Co.**, 285 So.2d 652 (Fla. 1st DCA 1973). The decisions in **Barney** and **Gardner** are also founded on the Court's recognition of a quasi fiduciary relationship between the insurer and the insured and in those cases

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recovery was allowed based on tort. This is as it should be. When an insured gives the insurer the right and authority to settle and pay claims for which the insured may be liable, the fiduciary relationship that exists between them, dictates that the insurance company should exercise such authority in a manner as to accomplish the very object under which that authority has been delegated, protecting its insured. In doing so, however, the insurance company must not ignore the insured's rights and then seek refuge in the fine print of the policy, saying that settlement of the claim alone discharged the insurers obligation.

As in any fiduciary relationship the agent (insurer) should be held accountable to its principal (insured) for negligence in the manner in which it performed in its undertaking if, in doing so, the principal (insured) proximately suffers loss or injury. In the case at bar SHUSTER's insurer did not give any consideration to the effect its action would have upon SHUSTER in voluntarily settling the claim against him.

Similarly, an insurer should be responsible to its insured if it settles certain claims voluntarily and, in doing so exhausts all the benefits of its policy, thereby exposing its insured to potential judgment from other claimants in the same accident. In either situation the insurer was negligent and should be held accountable for any loss or injury suffered by its insured.

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CONCLUSION

Amicus agrees with SHUSTER that this Court should reverse the decision rendered by the Fourth District Court of Appeal and reinstate SHUSTER's Amended Complaint.

Respectfully submitted,

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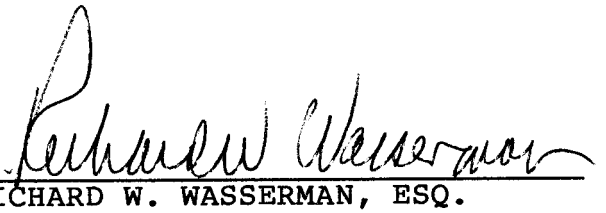
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief in Support of Petitioner served upon CHARLES C. POWERS, ESQ., POWERS AND KOONS, Attorneys for Petitioner, Suite 201, 1801 Australian Avenue South, West Palm Beach, Florida 33409 and to JAY COHEN, ESQUIRE, Attorney for Respondents, Post Office Drawer 2088, Hollywood, FL 33022 by regular mail on this 12th day of March, 1991.



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