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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 OF FLORIDA DEFENSE LAWYERS ASSOCIATION

By: KIMBERLY A. ASHBY, ESQUIRE
Florida Bar No.: 322881
MAGUIRE, VOORHIS & WELLS, P.A.
Post Office Box 633
Two South Orange Avenue
Orlando, Florida 32801
(407) 843-4421
Attorneys for FLORIDA DEFENSE LAWYERS ASSOCIATION AMICUS CURIAE

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Statement of the Case and Facts

The Florida Defense Lawyers Association adopts the Statement of the Case and Facts as presented by Respondent [hereinafter "the Trust"] in its Brief filed herein.

Summary of Argument

In their Amended Complaint, the Petitioners sought damages against respondent for bad faith due to the Trust's alleged failure to "investigate and defend" the facts underlying a three medical malpractice claims which were filed against them. Petitioners claim that the Trust did not heed their request to refuse to settle the claim, even if such settlements could be reached within the limits of their insurance policy. The express language of the policy provided that the Trust had "the right and duty to defend any suit against [Petitioners] seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent. [The Trust] may make such investigation and such settlement of any claim or suit **as it deems expedient.**" Thus, the terms of the contract between the parties specifically and adequately defines the duties and rights of the Trust here, which rights include the decision to settle cases within policy limits at its discretion without the necessity of the approval of Petitioners.

Petitioners have not alleged that any of the three claims would have been entirely defensible, or that any of them could have been settled for less than the amount which was actually paid. The majority of courts which have decided the precise issue before the Court have determined that to create a cause of action against an insurer for "bad faith settlement" within policy limits would place the insurance industry in an untenable Hobson's choice. There is no public policy which should override

the plain meaning of the policy language and to allow such a cause here.

Argument

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 THAT HAS CAUSED OTHER DAMAGE AS A RESULT OF THE SETTLEMENT?

Petitioners are asking the Court to create a new cause of action for them, one that does not exist pursuant to the terms of their insurance contract. In fact, the causes alleged in their Amended Complaint are in contravention to the express language of the insurance policy which gives the Trust the right to determine whether it is expedient to settle a claim, especially when such a settlement may be reached within policy limits. Further, the Florida Legislature outlined public policy in this area when it enacted section 627.4147(1)(b), Florida Statutes. Under this statute the insured does not, and may not, argue or allege that he has "veto power" to negate a proposed settlement by the carrier within policy limits.

Section 627.4147(b) specifically provides in pertinent part:

> A clause authorizing the insurer or self-insurer to determine, to make, and to conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s.766.106, settlement offer, or offer of judgment, if the offer is within the policy limits. It is against public policy for any insurance or self-insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration made pursuant to s.766.106, settlement offer, or offer of judgment, when such offer is within the policy limits.

A party to a contract may have an inherent duty to act in good faith in performing that contract, but the settlement of a claim within policy limits cannot give rise to liability without

more. Petitioners allege that the Trust failed to adequately investigate the claims and probe the basis of the plaintiffs' experts, but do not allege what favorable facts would have been uncovered had any such further investigation been undertaken. Petitioners contend that the Trust should have obtained its own expert to further develop the basis of the claim, but do not offer what such an expert would have reasonably opined, or how that would have ultimately affected the outcome of the case.

Petitioners allege the the Trust ignored their requests to defend the case and to deny liability, but any contention of veto power would be in express violation of section 627.4147(b). Finally, Petitioners state that too much was paid in settlement without any allegation that a smaller amount would have resolved the claim, and prevented the damages which they claim they have sustained. If Petitioners cannot make such a showing the amount of the settlement would be immaterial.

The obvious practical problem created by the attempts to state a cause for bad faith settlements below is the Hobson's choice that insurance carriers will be faced with every time it settles a claim, or decides not to settle. A carrier is faced with potential bad faith liability when it decides not to settle within policy limits when a demand is made within limits by the claimant and the ultimate verdict exceeds the limits. See Fla. Physicians Insurance Reciprocal v. Avila, 473 So. 2d 756 (Fla. 4th DCA 1985).

Other courts have recognized that requiring a carrier to settle or not to settle, and be faced with potential liability in

either situation creates a untenable Hobson's choice. Clement v. Prudential Property & Casualty Insurance Co., (11th Cir. 1986); Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988); Marginian v. Allstate Insurance Co., 18 Ohio St. 3d 345, 481 N.E. 2d 600 (Ohio 1985). This is especially true in light of the fact that the decision to settle is necessarily made without knowledge of the ultimate outcome if the case is tried. Thus, courts which have considered this issue have given insurance carriers latitude to exercise its discretion.

In Marginian v. Allstate Insurance Co., 18 Ohio St. 3d 345, 481 N.E. 2d 600 (1985), the Supreme Court of Ohio squarely addressed the identical issue before this Court. The court specifically noted the plaintiff's claim that his premiums would increase if the claims were settled as opposed to defended. The policy language granted the carrier the exclusive authority to settle the case, within policy limits, within its discretion. The Ohio court was also presented with the argument from the insured that the carrier had a duty to act in "good faith." Id. at 602.

The reasoning of the Marginian court is instructive here. Affirming the dismissal of the insured's pleadings, the court found that the express language of the contract language in the policy should be honored. Further, examination of public policy revealed a predilection to encourage early disposition of litigation and reduction of court dockets.

Citing Marginian as authority, an Illinois appellate court reached the same conclusion about the viability of a cause for

"bad faith" settlement within policy limits. Casualty Insurance Co. v. Town & Country Pre-School Nursery, Inc., 147 Ill. App. 3d 567, 498 N.E. 2d 1177 (Ill. 1st Ct. App. 1986). The facts in Town & Country were not even as favorable to the carrier. The carrier's motion for summary judgment was affirmed in which the carrier sought reimbursement for the insured's deductible which was used to settle the case. Although this resulted in out-of-pocket expenses to the insured, the court found that the insured had contracted to the carrier the complete authority to settle the claim within policy limits. Id. at 1178. See American Home Assurance Co., Inc., v. Hermann's Warehouse, 215 N.J. Super. 260, 521 A. 2d 903 (1987), cert. gr. 540 A. 2d 165 (N.J. 1988) (affirmed reimbursement of deductible on similar facts.)

In the instant case, as well as Town & Country, the insured did not allege that he was in an unequal bargaining position when contracting. 498 N.E. 2d at 1178. Thus, this issue is not before the court. See also Orion Insurance Co., Ltd. v. General Electric Co., 129 Misc. 2d 466, 493 N.Y.S. 2d 397 (1985).

A New York court considered allegations by an insured doctor that the carrier's decision to settle within policy limits caused damage to his professional reputation. Feliberty v. Damon, 72 N.Y. 2d 112, 527 N.E. 2d 261 (1988). In Feliberty, the appellate court affirmed the dismissal of an identical claim to the one here. The court noted that a policy provision providing for the insured's consent to settle was probably costlier and should be bargained for separately. Id. at 262 (citing 7C Appleman, Insurance Law and Practice § 4711, at 55 [1988 Supp]).

The Feliberty court also noted that the record did not reflect any "bad faith" in the handling of the claim, other than the decision to settle. Similarly, the Petitioners merely allege that further investigation should have been undertaken. However, there are no ultimate facts to support a conclusion that the additional investigation would Ave achieved a more favorable result. It should be recognized that the insured in Feliberty attempted to allege causes in contract and negligence and failed.

The Fifth District Court of Appeal has defined the limits of a cause for "bad faith" against an insurance carrier in Kelly v. Williams, 411 So. 2d 902 (Fla. 5th DCA 1982). The trial court was presented with stipulation which limited the settlement amount to within policy limits. The court held, "Where the parties have stipulated as they have in this case, that [the insured's] and [the carrier's] liability is limited to the fifty thousand dollar ($50,000) policy amount, then no cause of action for bad faith can exist." Id. at 904 (citing Stubblefield v. St. Paul Fire & Marine Ins., Co., 267 Or. 397, 517 P. 2d 262 (1973)). See also Clement v. Prudential Property & Casualty Insurance Co., 790 F.2d 1545 (11th Cir. 1986) (construing Florida law, settlement which released insured from liability beyond limits of policy extinguished any bad faith claim against the carrier).

Substantially similar language to the Physician's Protective Trust policy was construed in Mitchum v. Hudgens,. 533 So. 2d 194 (Ala. 1988) and found to preclude the cause attempted here. The insured in Mitchum sued in contract, negligence and fraud,

yet the Alabama Supreme Court found that none of these were legal causes sustainable against the carrier.

Petitioners suggest that the usual, ordinary meaning of "defend" such as it is used in the insurance policy connotes an adversarial contest, or more simply, litigation. Even without reference to the policy that the law favors amicable settlement over litigation, the legal definition of "defend" refers to the settlement alternative. Black's Law Dictionary includes the following definition of "defend":

> To protect, to shield, to make a stand for, or uphold by force of argument, vindicate, to maintain or keep secure, to guaranty, to agree to indemnify. (citations omitted, emphasis added).

Black's Law Dictionary (Rev. 4th Ed.) at p.507. Thus, the legal definition of "defend" contemplates the very action which was taken by the carrier here.

Petitioners also rely on Barney v. Aetna Casualty & Surety, 185 Cal. App. 3d 966, 230 Cal. Rptr. 215 (1986), however, the Barney case is factually distinguishable on facts which deal materially with the rationale of creating a new cause of action. In Barney, the plaintiff/insured had been involved in an auto accident, and as a result had hired a lawyer to sue the other driver for his negligence. Thereafter, Aetna retained a law firm to defend the insured for the accident. With knowledge of the other pending suit, Aetna caused a general release to be executed and a dismissal with prejudice to be filed which essentially eliminated the claims in the insured's personal injury suit.

The Barney court noted that the principles of the 1970 ABA National Conference of Lawyers and Liability Insurers provided in pertinent part: "The insured should be advised that the pending suit may affect or impair such [personal injury] claims; that the insurance policy does not provide coverage for any legal service or advise as to such claims; and that the insured may wish to consult an attorney of his choice with respect to it." Thus, the action was allowed to stand because of the intentional extinguishment of the insured's separately filed claim without knowledge and consent.

Conclusion

The trial court properly held that the insured had not stated a cause of action pursuant to the express language of the insurance policy, and Florida law, and could not amend to state one. Although a dismissal on the pleadings seems drastic in result, the trial court could not reach a contrary conclusion without unconstitutionally impairing the contract rights of the parties, or violating Florida public policy.

The majority of jurisdictions which have addressed the issue of the creation of a cause for "bad faith settlement" have rejected such a cause. Recognizing the Hobson's choice which insurance carriers would face, these courts have dismissed on the pleadings even when insureds have incurred actual out of pocket expenses.

Notably, Petitioners did not attempt to allege that any of the actions which they contend the Trust should have taken would have effected any of the outcomes of the three claims. It would require clairvoyance on the part of the Trust to foresee with certainty a favorable verdict on any of the three claims.

Florida law favors settlements. The Florida Legislature has expressly forbidden an insured's veto over a proposed settlement. The insurance contract gives the Trust to settle cases when expedient to do so. The Florida Defense Lawyers Association believes that the certified question should be answered in the negative.

Respectfully submitted,

/ Kimberly A. Ashby
KIMBERLY A. ASHBY