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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 PHYSICIANS PROTECTIVE TRUST FUND

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REFERENCE

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

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".

PRELIMINARY STATEMENT

The Amicus Curiae, PPTF, is currently the Appellee in an appeal pending before the District Court of Appeal, First Appellate District, State of Florida, Case No. 90-00717, Style: Isabella K. Sharpe, M.D., Appellant, vs. Physicians Protective Trust Fund, Appellee.

PPTF is a professional liability insurance carrier. Isabella K. Sharpe, M.D. (hereinafter "SHARPE") purchased a medical malpractice policy from PPTF, which empowered it "the right and duty to defend any suit against the Member seeking such Damages, even if any of the allegations of the suit are groundless, false, or fraudulent, and **may make such investigation or settlement of any claim or suit as it deems expedient.**" (Emphasis added.)

Pursuant to its policy, PPTF undertook the defense of a wrongful death lawsuit lodged against SHARPE. PPTF investigated the claim, and, in accordance with the above-referenced policy provision, elected to settle the lawsuit for a sum within the PPTF policy limits. SHARPE filed a complaint against PPTF sounding a breach of contract and negligence alleging bad faith on the part of PPTF and damages as a result of the settlement. The trial court dismissed with prejudice the Plaintiff's Second Amended Complaint for failure to state a cause of action.

This Court's opinion will shape future case law concerning the obligations of an insurance company to its insured. SHUSTER seeks to expand the duties of an insurer beyond those contemplated by

the terms of its insurance contract and beyond those imposed by Florida law. The issue presented is one of wide interest to the public and should be explored from all points of view. For these reasons, PPTF respectfully submits this Amicus Curiae brief supporting the position of PHYSICIANS TRUST.

STATEMENT OF THE CASE AND FACTS

PPTF adopts the statement of the case and facts as presented by PHYSICIANS TRUST in its brief filed herein.

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?

SUMMARY OF THE ARGUMENT

An insured has no cause of action against his insurance company for settling a third party claim against the insured within policy limits. No such action is recognized or implied by Florida case or statutory law or by the public policy of this State. It is a specific and absolute contractual right of the insurance company to settle a lawsuit lodged against its insured within policy limits, where the policy empowers the insurer to "made such investigation and such settlement of any claim or suit as it deems expedient." There is no duty of good faith which would require an insurance company to obtain the insured's consent or to consult with its insured when making a settlement within its policy limits, where the policy empowers the insurer to "make such investigation and such settlement of any claim or suit as it deems expedient." To allow such a cause of action would contravene public policy.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY AFFIRMED THE TRIAL COURT'S DISMISSAL OF SHUSTER'S AMENDED COMPLAINT WITH PREJUDICE.

Throughout his pleadings, SHUSTER has alleged breach of contractual and common law obligations, as well as bad faith on the part of PHYSICIANS TRUST, in settling the three malpractice lawsuits within policy limits and without SHUSTER's consent. PHYSICIANS TRUST had the absolute contractual right to settle the lawsuits. The PHYSICIANS TRUST Professional Liability Insurance Policy provides, in pertinent part:

> The company shall have the right and duty to defend any suit against the named insured seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent. **The company may make such investigation and such settlement or any claim or suit as it deems expedient.** (Emphasis added.)

It has long been axiomatic in this state that the unambiguous terms and conditions of an insurance contract are controlling and the contract must be given effect as written. State Farm and Casualty Company v. Oliveras, 441 So.2d 175 (Fla. 4th DCA 1983); Brown v. Gulf Life Insurance Company, 343 So.2d 91 (Fla. DCA 1977). Concomitantly, the Court should not give a meaning beyond that expressed nor rewrite its terms. National Union Fire Insurance Company v. Carib Aviation, Inc., 759 F.2d 873 (11th Cir. 1985); City of Winter Haven v. Ridge Air, Inc., 458 So.2d 434 (Fla. 2nd DCA 1984); and, Fernandez v. U.S. Fidelity and Guaranty Company, 308 S.2d 49 (Fla. 3d DCA 1975). Without more, the expressed contrac-

tual provisions of the PHYSICIANS TRUST policy establish the absolute right of PHYSICIANS TRUST to settle a malpractice claim within the policy limits. SHUSTER's pleadings are devoid of any allegations of fraud or misrepresentation in the execution of the insurance contract which would obviate this right.

Other than the Fourth District Court of Appeal, only one Florida appellate court has addressed the precise issue presented in this case. The Fifth District Court of Appeal recently reviewed Morand v. St. Paul Fire and Marine Insurance Company, etc., Appeal 89-00801. As here, the physician appealed the lower court's dismissal of the amended complaint with prejudice for failure to state a cause of action. The appellate court affirmed, holding that no cause of action exists against the insurance company. Unfortunately, the Fifth District Court of Appeal issued a "per curiam affirmed" decision without an opinion.

Several out-of-state jurisdictions have addressed the issue presented herein and the majority have held that no cause of action lies against an insurance company for settling within policy limits without the insured's consent. Feliberty v. Damon, 517 N.Y.S.2d 632 (N.Y. App.Div. 1987), aff'd., 531 N.Y.S.2d 778 (N.Y. 1988); Orion Insurance Co., Ltd. v. General Electric Co., 493 N.Y.S.2d 397 (N.Y.1985); Marginian v. Allstate Insurance Company, 481 N.E.2d 600 (OH 1985); Casualty Insurance Company v. Town and Country Preschool Nursery, Inc., 498 N.E.2d 1177 (Ill.App.Ct. 1st Dist. 1986); United States Fidelity and Guaranty Co. v. Sanders Drilling & Workover Co., Inc., 396 So.2d 1353 (La.App.), writ denied 402 So.2d 975 (La.

1981).

The Feliberty case presents facts and issues which are strikingly similar to this case. A New York physician sued his malpractice insurer alleging, inter alia, that the carrier did not consult him prior to settling a third party malpractice claim within policy limits. The insurance contract specified that the insurer "may make such settlement of any claim or suit as it deems expedient." (Emphasis added.) Faced with the identical contractual language contained in the PHYSICIANS TRUST policy, the New York Court of Appeals concluded that the unambiguous language of the insurance contract gave the insurance company the absolute right to settle claims within policy limits without the consent of the insured. That action did not involve "either a bad faith failure to settle within the policy limits or breach of the obligation to defend." 517 N.Y.S.2d 632, at 634. The Court reasoned:

> "Unlike bargained-for and presumably costlier policy provisions contemplating the insured's consent to settlement, here the parties' contract gave the insurer the unconditional right to settle any claim or suit without the plaintiff's consent."

In another New York case, an insurer sought reimbursement of a deductible in accordance with the contract of insurance, following settlement of a third party claim without the insured's consent and contrary to its wishes. The New York court construed the same policy language which empowered the insurer to "defend any suit against the insured . . . the company may make such investigation, negotiation, and settlement of any claim or suit as it deems expedient." (Emphasis added.) Reading the contract as a whole,

the Court held that "it was clear that the insurers have the right under the contract to settle an action with out without [insured's] consent, and the authority extends to all or any part of the deductible." Orion Insurance Co., Ltd. v. General Electric Co., 493 N.Y.S.2d 397 (N.Y. 1985).

In an Ohio case, an insured brought an action for bad faith against his automobile liability insurer, after the insurer settled two claims within policy limits, contrary to the insured's instructions not to settle. The insurance policy stated that the insurer "may settle any claim or suit if we feel this is appropriate." Given that policy language, the court could find no set of circumstances under which the insured's causes for relief could be granted. The court held:

> Where a contract of insurance provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging the breach of the insurer's duty of good faith will not lie where the insurer has settled such claim within the monetary limits of the insured's policy.

Marginian v. Allstate Insurance Company, 481 N.E.2d 600 (OH 1985).

Illinois is in accord. An insurer sought reimbursement of the deductible amount of the policy the insurer had paid in settlement of the third party suit. The Illinois court construed the identical language contained in the PHYSICIANS TRUST policy and held that the insurer had no duty to consider the interest of its insured where the insurer had the right under the policy to settle claims within policy limits without the insured's consent. Casualty Insurance Company v. Town and Country Preschool, 498 N.E.2d 1177

(Ill. App. Ct. 1st Dist. 1986).

SHUSTER, as did the insureds in the preceding cases, has asserted that the insurer had a duty to act in good faith in the handling of claims where the insurer settled within policy limits. SHUSTER cites numerous Florida "Bad Faith" cases which identify a "duty of good faith" that an insurer owes its insured. Those authorities are totally inapplicable to the case at bar. The cases cited by SHUSTER involve bad faith claims against an insurer for either failure to settle a third party claim within policy limits, or failure to pay insurance benefits directly to the insured, i.e., first party bad faith claims. SHUSTER cites to no case, nor can he, which recognizes the existence of a "duty of good faith" premised upon the carrier's settlement of a lawsuit within policy limits, where, by contract, the carrier has the absolute right to do so.

In Florida, the duty of good faith arises under two situations: (1) Where the insurer's refusal to defend the insured results in a judgment against the insured, or (2) where the insurer fails to settle within the policy limits resulting in an excess judgment, thereby exposing the insured's personal assets. Thomas v. Lumberman's Mutual Casualty Co., 424 So.2d 36 (Fla. 3d DCA 1982), rev. den., 419 So.2d 1198 (Fla. 1982); Kelly v. Williams, 411 Sos.2d 902 (Fla. 5th DCA 1982). The Florida courts have uniformly recognized that an grounded in bad faith will not lie where the insured is not exposed to an excess judgment. Clement v. Prudential Property and Casualty Insurance Company, 790 F.2d 1545

(11th Cir. 1986); Florida Physicians Insurance Reciprocal v. Avila, M.D., 473 So.2d 756 (Fla. 4th DCA 1985), rev. den., 484 So.2d 7 (Fla. 1986); Kelly v. Williams, supra.

SHUSTER's attempt to state a new cause of action in Florida contravenes the public policy of this state. In Florida, settlement of lawsuits is encouraged as a means of amicably resolving doubts and preventing lawsuits. Lotspeich v. Neogard, 416 So.2d 1163 (Fla. 3d DCA 1982). Nowhere is settlement encouraged than in the area of medical malpractice. In Florida, extensive litigation has been dedicated toward an early resolution of claims before suit has been filed. In fact, provisions exist for mandatory mediation and the law even allows for arbitration in the pre-suit phases of medical malpractice actions, giving a defendant an opportunity to admit liability and arbitrate damages. These measures evidenced the state's favoritism towards settlements. The position advocated by SHUSTER would serve as an obstacle to the early and efficient settlement of lawsuits. Though equipped with a contract giving it authority to settle claims, whether groundless, false or fraudulent, within the policy limits, insurers will refrain from entering settlement, until such time as extensive formal discovery has been completed, and in order to protect themselves from suit by their insured.

Indeed, an insurance company faced with a potential bad faith claim when it decides not to offer policy limits, or settle within policy limits, when demanded by a claimant and the ultimate award exceeds policy limits. Florida Physicians Insurance Reciprocal v.

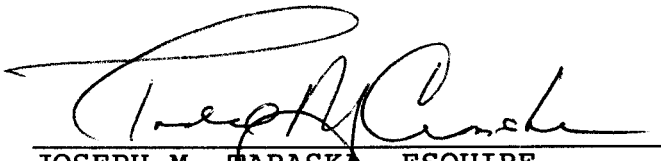
Avila, M.D., 474 So.2d 756 (Fla. 4th DCA 1985). SHUSTER now seeks to invade the province of the insurance company and expose it to potential bad faith liability when it decides to settle a third party claim against its insured within policy limits and without the insured's consent, and where the policy language empowers the insurer to do just that. In essence, SHUSTER seeks to utilize the PHYSICIANS TRUST policy as a double-edged sword prepared to sue the carrier if it fails to settle or elects to settle within policy limits. This creates a "Catch-22" situation for insurance companies, and, as such, contravenes the public policy of this state.

What SHUSTER fails to allege is that he could have simply bargained for a consent clause. There are no allegations that the parties to the contract were on unequal bargaining terms. There are no allegations that SHUSTER was forced to sign an application for malpractice insurance. SHUSTER wants something he did not bargain for, to wit, either a veto or consent provision. SHUSTER wants to control the litigation by rejecting the settlement, while at the same time, claim an advantage by receiving a defense at the insurer's expense and protection from the third party claim. Because SHUSTER sought protection of his insurance, he must accept the burdens that went with it. Accordingly, SHUSTER's remedy is to bargain for whatever specific coverage he is seeking in the future.

CONCLUSION

For the foregoing reasons, the Fourth District Court of Appeal properly affirmed the trial court's dismissal of SHUSTER's Amended Complaint with prejudice. The unambiguous terms of the PHYSICIANS TRUST policy gave PHYSICIANS TRUST the unequivocal right to settle the three malpractice claims within its policy limits and PHYSICIANS TRUST did just that. No cause of action exists in Florida against an insurance company for exercising its contractual right to settle a lawsuit within its policy limits, when the policy empowers it to do so. To allow such a cause of action would entrap the insurance companies in an untenable "Catch-22" situation and contravene public policy.

Respectfully submitted,



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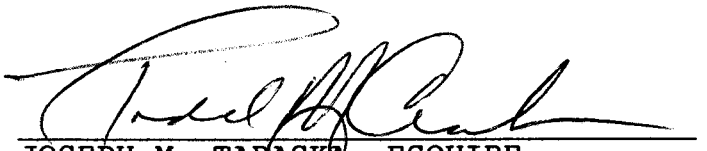
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished by U. S. Mail this 15 day of April, 1991 to: RICHARD W. WASSERMAN, ESQ., 420 Lincoln Road, Suite 256, Miami Beach, FL 33139; JAY COHEN, ESQ., 1946 Tyler Street, Hollywood, FL 33022-2088; CHARLES C. POWERS, ESQ., 1801 Australian Avenue South, Suite 201, West Palm Beach, FL 33409; and KIMBERLY A. ASHBY, ESQ., P. O. Box 633, Orlando, FL 32801.



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