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SID J. WHITE
MAY 6 1991
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

Case No. 77194

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

Petitioner,

vs.

SOUTH BROWARD HOSPITAL
DISTRICT PHYSICIANS MUTUAL
LIABILITY INSURANCE TRUST,
etc.

Respondent.
_____/

AMICUS CURIAE BRIEF OF
ISABELLA K. SHARPE, M.D.

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CITATION OF AUTHORITIES

REFERENCE

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

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

All reference to the Respondent/Appellee is designated by the term "PHYSICIAN'S TRUST".

PRELIMINARY STATEMENT

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

This Court's opinion will be dispositive of the issues in Dr. Sharpe's appeal.

STATEMENT OF THE CASE AND FACTS

Dr. Sharpe adopts the statement of the case and facts as presented by Marvin M. Shuster and Marvin M. Shuster, M.D., P.A. and their initial brief filed herein.

QUESTIONS 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 a cause of action against its insurer for bad faith where the insurer's bad faith caused consequential damages without an excess judgment. The terms of an insurance contract cannot remove the legal requirements of good faith dealing by an insurer on behalf of its insured. Damages are not limited to excess verdict amounts, but also include the natural consequences of the insurer's bad faith dealing that should reasonably have been contemplated by the parties.

ARGUMENT

I

THE TERMS OF AN INSURANCE CONTRACT CANNOT REMOVE THE LEGAL REQUIREMENTS OF GOOD FAITH DEALING BY AN INSURER.

An insured has a cause of action against his insurer for bad faith where the insurer's bad faith caused consequential damages without an excess judgment.

The terms of the insurance contract do not completely define the duties of the insurer. In Auto Mutual Indemnity Co. v. Shaw, 184 So. 852 (Fla. 1938), language in an insurance policy attempting to define the duties and rights of an insurer was the basis for the creation of duties beyond the contract and served as the foundation for bad faith actions against insurers in Florida. The policy in Auto Mutual provided:

> 3. Defense. To defend, in the name and on behalf of the Assured, any claim or suit against the Assured, even if groundless, to recover damages on a Count of bodily injuries and/or property damage recovered hereby.
>
> (B). Settlements. The company shall have any right to settle any claim or suit at its own cost and the Assured shall not incur any expense (other than for said immediate surgical aid) nor settle any such claim or suit, except at his own cost, without the written consent of the company. Auto Mutual Indemnity Company vs. Shaw, 184 So. 852 (Fla. 1938).

The contract gave the insurer the right to settle an action as the insurer deemed expedient. Nowhere in the insurance contract was there a duty to consider the interests of the insured with regard to settlement. The Florida Supreme Court, however, found the duty of good faith in settling claims was

inherent where the contract gave the power of settlement to the insurance company and took it away from the insured. The Supreme Court adopted the view that "the insurer cannot escape liability by acting upon what it considers to be for its own interest alone, but it must also appear that it acted in good faith and dealt fairly with the insured." Auto Mutual, supra, at 859.

The words of the insurance contract, therefore, do not entirely define nor limit the duties of an insurer and are not impediments to finding a duty of good faith applies to an insurer even when the insurer believes settlement to be expedient.

In the present case, Physicians Trust's policy gives the power of settlement to the insurer and takes it away from the insured. The basis for applying a duty of good faith therefore exists, as it did in Auto Mutual.

Physicians Trust suggests the following language of its policy precludes any duty of good faith:

> The company shall have 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 and such settlement of any claim or suit as it deems expedient, but the trust fund shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of trust fund's liability has been exhausted by payment of judgments or settlements. (Emphasis added.)

Physicians Trust suggests that under the provision that it may settle a claim as it deems expedient, it is merely exercising its contractual right when it settles a claim. This view is

rather myopic in that it ignores adverse provisions of the insurance contract to which attaches the duty of good faith:

> The company shall have the right and duty to defend any suit against the named insured seeking such damages . . . .

To the contractual duty to defend attaches the legal duty to use good faith. An insurer must defend a case, not settle it, under the well-established duty to defend in good faith. To permit an insurer to settle a claim as it "deems expedient" is to allow an insurer to emasculate the requirement of good faith inherent in its duty to defend. An insured cannot lawfully deem it expedient to settle a case where the well-established duty of good faith requires the insurer to defend. Yet this would be the result if an insurer, by its contractual terms, was able to limit its good faith duty under the law.

II

DAMAGES ARE NOT LIMITED TO EXCESS VERDICT AMOUNTS, BUT ALSO INCLUDE THE NATURAL CONSEQUENCES OF INSURER'S BAD FAITH DEALING.

The Court in Auto Mutual did not limit bad faith actions to circumstances where the insured sustained an excess verdict, although that was the factual background.

Nor does applying the measure of damages in contract actions limit damages to excess verdicts.

> Under a general allegation of damages in an action on a contract, such damages as the law holds to be the direct, natural and necessary result of the breach complained of may be recovered. Special damages are those that do not necessarily, but do directly, naturally and proximately, result from the breach, and they may be recovered in proper cases on sufficient allegations and proofs.
>
> . . .
>
> A party is in law held to have contemplated the natural and proximate results of its acts . . . Under special circumstances warranting it, damages may also be recovered for losses that are the natural, direct and necessary consequences of the breach when they are capable of being estimated by reliable data, and are such as should reasonably have been contemplated by the parties. Moses v. Autuono, 47 So. 925, 926 (Fla. 1908).

Consequential damages in contract actions are allowable for bad faith when contemplated by the parties or when they should reasonably have been contemplated by the parties. South Broward Hospital District Physicians Professional Liability Insurance Trust should reasonably have contemplated the results of their bad faith. No one was in a better position than Physicians Trust to understand the effects of settlement for excessive amounts on Dr. Shuster's ability to obtain malpractice insurance and its

resulting detrimental effect on his ability to practice at hospitals where insurance coverage is required. No one was in a better position to understand the loss of reputation to Dr. Shuster and the resulting monetary loss against which Physicians Trust was to shield.

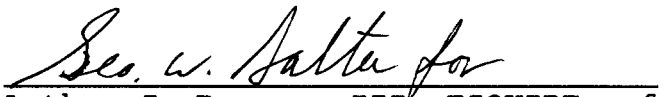
The argument that a cause of action for settlements made in bad faith would discourage settlements, has little merit. Under this logic, it would have been inappropriate for the Florida Supreme Court to have applied the duty of good faith to an insurer's contractual duty to defend.

An insurer under this logic would not settle a case in fear that a bad faith action for failure to defend could result. The Florida Supreme Court did not find that to be compelling reason to deny good faith dealing in 1938 and it is not compelling today.

CONCLUSION

For the foregoing reasons, the question certified by the Fourth District Court of Appeal should be answered in the affirmative.

Respectfully submitted,



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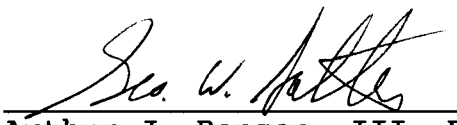
CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished to: Richard W. Wasserman, Esquire, 420 Lincoln Road, Suite 256, Miami Beach, Florida 33139; J. Cohen, Esquire, 1946 Tyler Street, Hollywood, Florida 33022-2088; Charles C. Powers, Esquire, 1801 Australian Avenue South, Suite 201, West Palm Beach, Florida 33409; Kimberly A. Ashby, Esquire, P.O. Box 633, Orlando, Florida 32801; and Joseph M. Taraska, Esquire and Todd M. Cranshaw, Esquire, P.O. Box 538065, Orlando, Florida 32853-8065, by U.S. Mail, this 3rd day of May, 1991.



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