DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2007

ANTHONY G. ROGERS, M.D.,
Appellant,

v.

CHICAGO INSURANCE COMPANY,
Appellee.

No. 4D06-1255

[May 16, 2007]

WARNER, J.

A medical doctor sued his professional liability insurer for failing to exercise good faith in settling a claim against him. He claimed that his insurance company failed to undertake the necessary investigation pursuant to section 766.106, Florida Statutes and settled a claim which was completely defensible, causing him damages, including the insurance company's subsequent refusal to renew his policy. The trial court dismissed the claim, finding that neither section 766.106 nor section 627.4147, upon which the doctor relied in making his claim, created a private cause of action against the insurer. We reverse, because the insured has a cause of action against his insurer for the breach of the obligation of good faith, as section 627.4147 requires that settlements within policy limits be made in good faith and in the best interests of the insured. The court also erred in determining that *Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust*, 591 So. 2d 174 (Fla. 1992), precluded recovery, because *Shuster* was decided based upon specific language in an insurance policy written prior to the enactment of section 627.4147.

Dr. Rogers, the appellant, purchased medical malpractice insurance coverage from appellee, Chicago Insurance Company ("Chicago"). In April 2002, the estate of a former patient served Dr. Rogers with a notice of intent to initiate litigation. Pursuant to section 766.106, Chicago had 90 days to conduct a presuit investigation of the claim. According to Dr. Rogers, Chicago did not initiate any investigation until approximately a week prior to the expiration of the period. It contacted a doctor to review

the materials provided by the plaintiff, but did not contact Dr. Rogers for any other materials. With time running out, it elected to settle the claim instead of defending.

Rogers filed suit against his insurance company, claiming that it had failed to exercise good faith in its conduct of the presuit investigation and settlement. He alleged violations of both the presuit investigation procedure pursuant to section 766.106 and violation of the duty of good faith settlement in the best interests of the insured under section 627.4147. Rogers alleged that if Chicago had properly investigated the claim, it would have discovered that the suit was completely defensible. Rogers alleged that as a result of Chicago's settlement of the claim, it refused to renew his policy of insurance, causing Rogers to pay substantially more in premiums. Chicago moved to dismiss, claiming that neither statute provided a private right of action and that Chicago's settlement within the policy limits precluded an action against it under the holding of *Shuster*. The trial court agreed and dismissed Rogers' complaint, prompting this appeal.

We begin our analysis of this issue with an examination of the insurer's obligation of good faith and *Shuster*. Our supreme court has long recognized the duty of the insurer to exercise good faith in handling claims against its insured. In *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980), the court outlined this duty:

> 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. 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 interests of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. 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 a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because

> the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.

Id. at 785 (citations omitted). The court further noted:

> An insurer cannot escape liability for breach of the duty of good faith by acting upon what it considers to be its interest alone. An insurer with control over defense and settlement must at all times act in good faith . . . .

Id. at 786. Where that duty is breached the insured has a cause of action against the insurer.

In *Shuster*, the court limited the holding of *Boston Old Colony* where the policy itself provided that the insurer had the authority to investigate and settle as it "deems expedient." There, the insurance company settled three medical malpractice claims against Shuster within the policy limits, but the settlements resulted in Shuster being unable to obtain medical malpractice insurance which limited his practice. He sued claiming bad faith. The trial court dismissed, and this court affirmed in *Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust*, 570 So. 2d 1362 (Fla. 4th DCA 1990), certifying a question to the supreme court.

The supreme court determined that where the policy contained the "deems expedient" provision with respect to settlement, an insurer may settle a claim within the policy limits even where the claim was frivolous and without consideration of the insured's interest. Although *Boston Old Colony* requires the insurer to act in the best interests of the insured, the *Shuster* court relied on contract principles in determining that the insurer could settle in its own best interests:

> The language of the provision is clear and the insured was put on notice that the agreement granted the insurer the exclusive authority to control settlement and to be guided by its own self-interest when settling the claim for amounts within the policy limits. The obvious intent behind placing the provision in the agreement was to grant the insurer the authority to decide whether to settle or defend the claim based on its own self-interest, and this authority includes settling for the nuisance value of the claim. Therefore, we interpret the provision as granting the insurer the discretion

> to settle cases for amounts within the policy limits, regardless of whether the claim is frivolous or not. The parties have expressly contracted with respect to the subject matter and this Court declines to rewrite the policy when the insurer merely exercises its rights under the agreement.

Shuster, 591 So. 2d at 176-77. *Shuster* thus stands for the proposition that, although there is a duty on behalf of an insurer to exercise good faith in the settlement of claims, including settlements within the policy limits, this duty may be limited contractually by a provision which permits the insurer to settle claims as it deems expedient or in its self-interest. However, even in *Shuster* the court found some exceptions to this rule, and under certain circumstances a settlement within the policy limits would be considered in bad faith where an insured settled only one of multiple claims or prevented the insured from pursuing a counterclaim.

Neither this court nor the Florida Supreme Court determined what effect section 627.4147(1) would have on the case, as the policy in that case was issued prior to that statute's enactment. That statute, passed in 1985, provides that a medical malpractice policy cannot include a provision giving the insured veto power over a settlement within the policy limits.

> (1) In addition to any other requirements imposed by law, each self-insurance policy as authorized under s. 627.357 or s. 624.462 or insurance policy providing coverage for claims arising out of the rendering of, or the failure to render, medical care or services, including those of the Florida Medical Malpractice Joint Underwriting Association, shall include:
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> (b)1. . . . 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. <u>However, any offer of admission of liability, settlement offer,</u>

> or offer of judgment made by an insurer or self-insurer shall be made *in good faith and in the best interests of the insured.*

(emphasis supplied). Thus, section 627.4147(1) *requires* malpractice insurance policies to grant the insurer the sole authority to settle a claim where settlement is within policy limits. However, the statute also sets a standard for the insurer's exercise of its authority, requiring that such a settlement be made *in the best interests of the insured*. This is in contrast to the policy in *Shuster* which permitted the insurer to settle a claim within the policy limits in its own self-interest.

Chicago claimed, and the trial court agreed, that the statute did not create a private right of action for the insured. It relies primarily on *Murthy v. N. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994), in which the supreme court determined that "legislative intent . . . should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one." *Id.* at 985. However, *Murthy* quotes with approval *Moyant v. Beattie*, 561 So. 2d 1319, 1320 (Fla. 4th DCA 1990), stating, "In general, a statute that does not purport to establish civil liability but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability." *Id.* at 986. In *Murthy*, the supreme court determined that the statute in question was one created merely to secure the safety or welfare of the public. *Id.*

Section 627.4147 cannot be construed as securing the safety or welfare of the public. It regulates insurance policies between medical malpractice insurers and insureds and sets requirements of those policies and the relationship between the insurer and the insured. The statute prohibits the insured from contracting for a professional liability policy which permits the insured to refuse to consent to a settlement. The insured, therefore, *must accept* a policy giving the insurer the exclusive authority to settle claims within policy limits. In return, the insurer must exercise its authority in the best interests of the insured, not in its own self-interest. This obligation is solely for the benefit of the insured. If the insured cannot enforce this obligation, then it has no effect at all. "[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002). To adopt Chicago's position that the insured cannot sue for enforcement of this provision of the statute would render meaningless the obligation of the insurer to act in the best interests of the insured in settling within the policy limits.

We conclude that a medical malpractice insurer has a duty to settle within the policy limits in the best interests of the insured. Further, in the context of a claim for medical malpractice, it may not always be in the best interests of the insured to concede liability, where none is present, and settle the claim within the policy limits. We find that the insurer's failure to act in the insured's best interests can be enforced by the insured. In Rogers' complaint, he alleges that his insurance company failed to act in his best interests in settling a completely defensible claim against him solely because the company failed to comply with the presuit investigation procedures for medical malpractice claims. *See* § 766.106, Fla. Stat. As noted in *Boston Old Colony*, "Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith." *Boston Old Colony*, 386 So. 2d at 785. While the insurer must be given wide discretion in investigating a claim and making settlement decisions, it cannot act on its interests alone.

Because the trial court determined that no action based upon section 627.4147 existed, we reverse and direct the reinstatement of Rogers' complaint.

Reversed and remanded for further proceedings.

STEVENSON, C.J., and TAYLOR, J., concur.

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Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Amy L. Smith, Judge; L.T. Case No. 502003CA012769XXCDAD.

Douglas E. Thompson, West Palm Beach, for appellant.

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Not final until disposition of timely filed motion for rehearing.