2nd Civ. No. B 195725

in the COURT OF APPEAL of the
STATE OF CALIFORNIA
Second APPELLATE DISTRICT
DIVISION EIGHT

MARIA TERESA WATANABE,

Plaintiff and *Appellant,*

v.

CALIFORNIA PHYSICIANS' SERVICE dba BLUE SHIELD OF CALIFORNIA,

Defendant and *Respondent.*

From the Judgment After Trial, Los Angeles County Superior Court,
The Hon. Judith Chirlin, Judge Presiding (BC 324008)

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF

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APPLICATION

Under California Rules of Court, rule 8.200 (c) and the June 10, 2008 application for an extension of time, United Policyholders respectfully requests permission to file the attached proposed amicus curiae brief. This brief is written in support of plaintiff and appellant Maria Watanabe.

The financial security that insurance policies provide is critical to consumers and is an integral part of the fabric of our economy and our

society. United Policyholders is a non-profit charitable organization founded in 1991 that is helping preserve the integrity of the insurance system by serving as an information resource on policyholders' interests, rights and duties. Donations, grants and volunteer labor support the organization's work

United Policyholders monitors the national insurance marketplace with a particular focus on California. The organization's staff and volunteers participate in public policy forums, disseminate information about the claim process, and file amicus briefs in cases involving coverage and claim disputes. United Policyholders serves as a clearinghouse on consumer issues related to commercial and personal lines insurance products. (www.unitedpolicyholders.org.)

The issue in this case--the responsibility and liability of a managed care plan for the utilization review decisions made by the medical groups to which it delegates its authority--is an issue of extreme importance to California consumers. If health care service plans are allowed to avoid responsibility and liability by delegating duties, consumers will be deprived of essential legal rights to hold the health care service plans with which they contracted responsible when they are injured.

On behalf of United Policyholders, I have reviewed all the briefs filed in this case. I believe the proposed analysis expands on the issues

before this Court and will assist it. United Policyholders is vitally interested in the law governing health care service plans. Because of the breadth and depth of United Policyholders' presence in this community, and because of its spirited interest in the critical issues before this Court, amicus has a special concern in the outcome of this decision. Because I have substantial familiarity with these issues, both in the trial and appellate courts, I respectfully request permission to file the proposed amicus curiae brief on behalf of United Policyholders.

DATED: June 20, 2008

Respectfully submitted,

LAW OFFICES
OF DANIEL J. KOES

By: _____
DANIEL J. KOES
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UNITED POLICYHOLDERS

INTRODUCTION

Under established California law and public policy, a health care service plan--an insurer[1]--owes duties to its policyholders based on the implied covenant of good faith and fair dealing. Although an insurer delegates duties (as it must), it cannot delegate its implied covenant obligations. Therefore, the insurer remains responsible and liable to its policyholder for the breach of the implied covenant of good faith and fair dealing. Nothing in the Knox-Keene Act states otherwise.

The policyholder here--plaintiff and appellant Maria Watanabe (Maria)--sued for breach of the implied covenant of good faith and fair dealing (insurance bad faith) after her health care benefits were wrongfully and unreasonably denied. The trial court committed reversible error by allowing Maria's insurer--defendant and respondent California Physicians' Service dba Blue Shield of California (Blue Shield)--to shift its responsibility and liability imposed by the implied covenant of good faith and fair dealing to a medical group which had a contract with Blue Shield for the provision of health care services.

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[1] Following the California Supreme Court's lead, this brief discusses the issues in terms of insurance even though defendant is a health care service plan, not an insurer. (*Sarchett v. Blue Shield* (1987) 43 Cal.3d 1, 3, fn.1 [acknowledging that Blue Shield "is a health care service plan rather than an insurance company. Because the distinction is immaterial for purposes of our discussion, we discuss the issue in terms of insurance."].)

On appeal, Blue Shield claims its medical group--which had no contractual relationship with Maria and therefore no implied covenant duties (or bad faith liability)--should be solely responsible and liable for the wrongful and unreasonable denial of Maria's health care benefits. But California law and public policy do not afford any basis whatsoever for Blue Shield to transfer its implied covenant duties to its medical group (or any other person or entity).

In California, the insurer is responsible and liable for the wrongful denial of policy coverage. This is a simple case of insurance bad faith: Maria was injured because Blue Shield failed to provide health care benefits that were owed under the insurance policy.

California law is clear: an insurer cannot delegate its implied covenant duties. The Knox-Keene Act does not immunize insurance companies from bad faith liability.

Through smoke and mirrors, Blue Shield contends either its medical group is liable for the decision to wrongfully and unreasonably deny policy benefits or Maria is liable for that decision because she purportedly failed to exhaust grievance procedures. Neither contention holds water.

As a matter of law and policy, an insurer cannot delegate its implied covenant duties. By concluding otherwise, the trial court committed reversible error.

LEGAL DISCUSSION

Under California Law And Public Policy, Blue Shield Cannot Delegate Its Implied Covenant Duties. To Conclude Otherwise Would Allow Insurers To End-Run Around Bad Faith Liability.

California law and public policy prevent (not facilitate) Blue Shield from pawning off bad faith liability to others. As our Supreme Court explained it, the insurance obligation is enforced by way of a tort remedy because assuring that insurance benefits are provided without resort to unnecessary litigation is a matter of public--as well as private--concern. (*Kransco v. American Empire Surplus Lines Ins. Co.* (2000) 23 Cal.4th 390, 400.) That concern is especially strong in the health care insurance context when coverage decisions often involve matters of life or death. (See *Sarchett v. Blue Shield* (1987) 43 Cal.3d 1 [upholding bad faith claim against health care service plan].)

Blue Shield's implied covenant obligations and bad faith tort liability are predicated upon its special relationship with the insured. (*Kransco v. American Empire, supra,* 43 Cal.4th. at p. 402, quoting *California Fair Plan Assn. v. Politi* (1990) 220 Cal.App.3d 1617, 1618-1619.)

A stranger (non-party) to the insurance policy owes the insured no implied covenant duties. Nor can an insurer delegate its implied covenant duties because California law and policy preclude insurers from shifting

bad faith tort liability to strangers (i.e., agents or independent contractors); no faith liability lies against a stranger to the insurance contract. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576; see *Cooper v. Equity Gen. Ins.* (1990) 219 Cal.App.3d 1252, 1258-1260.)

In simple terms, an action based on breach of the implied covenant depends on a contractual relationship between the parties. And an insurer's agent or independent contractor is not a party to the contract. (*Gruenberg v. Aetna, supra*, 9 Cal.3d at p. 576.) Therefore, independent contractors and agents--who are employed by an insurer--are not parties to the insurance contract and those strangers are not subject to liability for breach of the implied covenant. (*Gruenberg v. Aetna, supra*, 9 Cal.3d at p. 576; *Elfstrom v. New York Life Ins. Co.* (1967) 67 Cal.2d 503, 513-514 [holding insurer is responsible for third party administrator's conduct]; *Iversen v. Superior Court* (1976) 57 Cal.App.3d 168, 171 [applying *Gruenberg* to insurer's claims-handling supervisor employee]; *Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681 [applying *Gruenberg* to insurer's employees and independent contractors who were insurer's agents].)

To allow an insurer to delegate its implied covenant duties would effectively allow insurers to eliminate bad faith liability. Indeed, that is precisely what happened here.

Blue Shield convinced the trial court it had no bad faith liability because the Knox Keene Act allowed it to delegate duties to its medical

group.[2] While Blue Shield (like every other insurer) can delegate duties, it cannot delegate its implied covenant duties.

Because it could not delegate its implied covenant duties, Blue Shield was liable for the wrongful denial of medical benefits. As Blue Shield concedes throughout its brief, Blue Shield retained the right, power and discretion to overturn the medical group's determination. (*See, e.g.*, Respondent's Brief 38.) That makes perfect sense because the insurer (Blue Shield) is ultimately responsible and liable for the medical group's unreasonable denial of coverage.[3]

To accept Blue Shield's position would effectively eliminate bad faith liability. Absent the threat of bad faith liability, an insurer has little incentive to afford policy benefits. That is not the law and that cannot be the law in the health care insurance context.

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[2] In addition to its medical group, Blue Shield attempts to shift responsibility to Maria. According to Blue Shield, it had no liability because (1) Maria "had control over whether Blue Shield's independent expertise was going to be brought to bear on any 'medical necessity' determination," and (2) Maria failed to exhaust all grievance procedures. (RB 38.) If that were the case, then a patient--who was unreasonably denied medical treatment and consequently died--would have no recourse because the deceased was never able to complain about the medical group's improper denial of benefits. But this Court need not go down this slippery slope because (as fully briefed by Maria) the grievance procedure is in addition to any other available remedy. (Health & Safety Code, sec. 1368(d); Reply Brief 29-32.)

[3] This is not a foreign concept. While a lawyer may delegate work to others, the lawyer is ultimately responsible and liable for the work performed.

CONCLUSION

California law and public policy preclude Blue Shield from delegating its implied covenant duties. To conclude otherwise would allow insurers to end-run around bad faith liability. Therefore, the judgment should be reversed.

Respectfully submitted,

Dated: June 20, 2008

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CERTIFICATE OF WORD COUNT

I certify that, under California Rules of Court, rule 8.204, this amicus curiae brief contains _____ words.

Respectfully submitted,

Dated: June 20, 2008

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