IN THE SUPREME COURT

STATE OF ARIZONA

SAFEWAY INSURANCE COMPANY, INC., a foreign corporation, Plaintiff-Respondent v. PETER A. GUERRERO, individually; PETER A. GUERRERO, P.C., an Arizona professional corporation; CHARLES D. ROUSH, individually; CHARLES D. ROUSH, P.C., an Arizona professional corporation; ROUSH, McCRACKEN, GUERRERO & MILLER, ATTORNEYS AT LAW, a partnership of professional corporations Defendants-Petitioners.	No. CV-04-0146-PR Court of Appeals No. 1-CA-CV 02-0661 MARICOPA County Superior Court No. CV2002-004495

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

The opinion of the Court of Appeals in this matter provides that lawyers who negotiate *Damron* agreements on behalf of injured claimants do so "at their peril" and are exposed to liability for interference with the contract between insurer and insured prior to a determination of the issue of whether the insurer has acted in bad faith. In so concluding, the Court of Appeals exposes insureds throughout Arizona to the very harm sought to be avoided through the execution of *Damron* agreements. It also places lawyers at risk of personal financial loss contrary to § 57 of the Restatement (3d) of the Law Governing Lawyers.

1. THE COURT OF APPEALS' OPINION FAILS TO CONSIDER THE INTERESTS OF INSUREDS.

For years, the Arizona courts have permitted insureds to avoid potential economic hardship that may befall them in the event of excess judgments by *Damron* agreements. Such agreements are permissible where an insurer has failed in some respect to fulfill a legal duty to an insured. When an insured faces such a situation, this court has stated that:

> "the insured need not wait for the sword to fall and financial disaster to overtake. The insurer's breach narrows the insured's obligations under the cooperation clause and permits him to take reasonable steps to save himself. Among those steps is making a reasonable settlement with the claimant. So long as that settlement agreement is neither fraudulent,

> collusive, nor otherwise against public policy, the insured has not breached the cooperation clause.

Arizona Property and Cas. Ins. Guar. Fund v. Helme, 153 Ariz. 129, 138, 735 P.2d 451, 460 (Ariz. 1987).

Of course, whether the carrier's conduct rises to the level of a breach often is unclear. The court below recognized as much by stating "there is no bright line to signal an insured that a breach has occurred." It is in those situations that the Court of Appeals' opinion, if permitted to stand, has potentially devastating consequences for Arizona insureds. In such situations, the possibility of a lawsuit against the claimant or claimant's counsel will in and of itself intimidate and frighten claimants in such a manner that such agreements will not be available.[1] Consequently, the only method available to an insured to protect himself will never materialize and the insured will be left facing the "sharp thrust of personal liability." *Id.* at 137, 735 P.2d at 459.

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[1] The insurer's suit in this case was directed at the claimant's attorney. There is nothing in the court of appeals' opinion, however, that would prevent Safeway from bringing such an action against the insured's counsel. Thus, the Court of Appeals' opinion further constricts the ability of an insured to obtain pre-trial protection by providing defense counsel with disincentive to initiate discussions of the possibility of a *Damron* agreement with their clients.

In this case, it is undisputed that as a result of the negligence of Safeway's insured, Steven Botma, Holly Castano sustained "permanently incapacitating injuries, including serious brain injury, resulting in spastic quadraparesis, in addition to other problems." (Broomfield Order, p. 7) Without a pre-trial agreement, Botma faced liability to the plaintiff for an amount far greater than the policy limit. At the suggestion of Botma's counsel, and with Guerrero's assistance and advice, the plaintiff entered into a *Damron* agreement. This was the only method available to Botma to avoid personal exposure.

In the absence of an agreement, the insured's only protection against loss of assets and credit following an excess verdict is the good will or inaction of the claimant. In some circumstances, the insured's assets may be such that the claimant would willingly execute a post-trial agreement in exchange for the insured's assignment of a bad faith claim against the insurance carrier. In others, the claimant might insist upon enforcing some or all of the judgment against the insured. In either case, an insured may well be left with little more than assets which are legally beyond the reach of creditors and an outstanding judgment debt. The insured's only recourse would be to prosecute a bad faith suit against the insurer.

With or without a pre-trial agreement between the claimant and the insured, the carrier's exposure to damages remains the same. As demonstrated in Petitioner's

Supplemental Brief, and the Amicus Brief filed by the Arizona Trial Lawyers Association, Guerrero's conduct in either encouraging or entering into a pre-trial agreement with the insured could not cause any harm to the insurance company. If Botma had not executed the *Damron* agreement two weeks before trial, he probably would have a judgment entered against him based upon a verdict far in excess of the minimum policy limits available to him. Safeway would have been obligated to pay the $15,000 policy limit in partial satisfaction of that judgment. Botma then would have the choice of trying to hold Safeway liable for the remaining judgment balance by way of a bad faith lawsuit or he could assign his bad faith claim to the claimant in exchange for protection of his personal assets. Botma could execute such an agreement without breaching the insurance contract and Guerrero could not be accused of wrongful interference with Safeway's contractual rights.[2] In any

[2] The insurance policy gave Safeway the right to control the defense and settlement of the lawsuit against Botma and imposed a duty upon Botma to cooperate in the defense of the lawsuit. Once the lawsuit was completed, Botma's duty to cooperate in the defense of the case was extinguished. At that time, whatever claim he might possess against Safeway for its alleged bad faith in failing to settle the case within policy limits would simply be an asset owned by Botma which Botma could then offer to Himes in exchange for a covenant not to execute on Botma's other assets.

subsequent bad faith case, whether brought by Himes or by Botma, the carrier would incur fees and costs for defending the bad faith action.

Instead, Botma negotiated a *Damron* agreement in advance of trial. If the carrier had previously violated its obligation of good faith, then Botma was freed of the constraints of the cooperation clause and did not breach the insurance policy. *United Services Automobile Association v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987). Under such a scenario, Guerrero cannot be accused of inducing a breach of contract where no breach occurred.

If, on the other hand, Safeway had not acted in bad faith, and Botma breached the cooperation clause by executing the *Damron* agreement, then Safeway incurred no damage as a consequence of the insured's breach. In such a situation, Safeway would be freed of its obligation to indemnify Botma under the insurance policy and would realize a net savings of $15,000 (i.e., the policy limit). *State Farm Mut. Auto. Ins. Co. v. Peaton*, 168 Ariz. 184, 812 P.2d 1002 (App. 1990). The company would, of course, face the prospect of incurring fees and costs in a second bad faith case. Those are the same fees and costs, however, that Safeway would incur had no *Damron* agreement been executed and the case had commenced after the personal injury trial.

Thus, in a very real sense, the Court of Appeals' opinion creates an illusory cause of action in favor of Safeway, the only tangible result of which will be to unnecessarily inhibit the ability of an insured to obtain protection for his or her personal assets prior to being exposed to the "sharp thrust of personal liability." For some insureds that "sharp thrust" will be exceedingly financially painful. The Court of Appeals' analysis ignores any consideration of the rights and interests of insureds. Permitting the opinion to stand will adversely affect those rights and interests with no tangible benefit for insurers.

II. INSUREDS BENEFIT FROM RULES GOVERNING THE CONDUCT OF LAWYERS WHO NEGOTIATE *DAMRON* AGREEMENTS FOR THEIR CLAIMANT CLIENTS.

The Restatement (3d) of the Law Governing Lawyers is a comprehensive set of rules designed, in part, to allow a lawyer to advise a client free from the retribution of nonclients. Safeway Insurance misstates the purpose of the Restatement view and ignores the fact that a lawyer's advice may often benefit one nonclient while leaving other nonclients unhappy or dissatisfied.

Safeway's argument that § 57 of the Restatement supports the Court of Appeals' opinion is misplaced. In fact, the opposite is true. Section 57(3) provides that a lawyer who advises or assists the client to make or break a contract, to enter or

dissolve a legal relationship, or to enter or not enter a contractual relationship, is not liable to a nonclient for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means. The comments and illustrations following § 57 apply in this case.

For example, Comment b states that a general rule of lawyer liability "could discourage lawyers from representing clients with proper vigor and thus impede the access of litigants to court. Moreover, the adversary system itself provides some control against improper lawyer conduct in litigation, as does the tribunal's power to govern the conduct of lawyers appearing before it [cite omitted] and the availability of professional discipline [cite omitted]. . . ."

Similarly, Comment g to § 57, which addresses a lawyer's liability for interference with a client's contract, states:

> That protection [of non-liability] reflects the need of contracting parties for advice and assistance, the difficulty of knowing in advance whether an arguable refusal to perform will be held to constitute an actionable breach of contract, and the view that even an actionable breach may sometimes be defensible. Thus a lawyer may ordinarily, without civil liability, advise a client not to enter a contract or to breach an existing

> contract. A lawyer may also assist such a breach, for example by sending a letter stating the client's intention not to perform, or by negotiating and drafting a contract, with someone else that is inconsistent with the client's other contractual obligations. The same principles apply to dissolving relationships such as a marriage or business partnership. They likewise apply to advising or assisting a client to interfere with a contract or a prospective contract or business relationship with one party, for example by entering into a contract or relationship with another, or to interfere with a contract or relationship between nonclients. . . . A lawyer so advising and acting is not liable if the lawyer does not employ wrongful means and if the lawyer acts to protect the client's welfare.

Guerrero did not use "wrongful means" within the meaning of the Restatement. The principal allegation of Safeway's complaint is that Guerrero was acting under a contingency fee and that Guerrero acted to "make a substantially larger fee. . . " by entering into the *Damron* agreement. (Complaint, ¶ 16) Safeway conceivably could make this argument under every circumstance because the lawyer presumably is entitled to a fee for all services provided. For that reason, § 57 specifically provides

that a lawyer's pecuniary gain from the services he provides is not itself "wrongful." Comment g to § 57 specifically states:

> So long as the lawyer acts or advises with the purpose of promoting the client's welfare, it is immaterial that the lawyer hopes that the action will increase the lawyer's fees or reputation as a lawyer or takes satisfaction in the consequences to a nonclient.

One of the cases cited in the comments to § 57 is *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321 (9th Cir. 1982), in which an attorney was sued for allegedly inducing a client to breach a contract under circumstances in which the attorney would benefit as well as the client. The court found the attorney's activities to be privileged, stating:

> . . . where, as here, an advisor is motivated in part by a desire to benefit his principal, his conduct in inducing a breach of contract should be privileged. The privilege is designed to further certain societal interests by fostering uninhibited advice by agents to their principals. The goal of the privilege is promoted by protecting advice that is motivated, even in part, by a good faith intent to benefit the principal's interest.
>
> We believe that advice by an agent to a principal is rarely, if ever, motivated purely by a desire to benefit only the principal. An agent naturally hopes that by providing beneficial advice to his principal, the agent will benefit indirectly by gaining the further trust and confidence

> of his principal. If the protection of the privilege were denied every time that an advisor acted with such mixed motive, the privilege would be greatly diminished and the societal interests it was designed to promote would be frustrated.

Id. at 328.

Safeway recognizes in its Supplemental Brief at pages 15-17, that $15,000 provided so little benefit to Holly Castano as to be meaningless. Thus, Guerrero's conduct, which gave Castano an opportunity to receive meaningful compensation for her injuries, unquestionably promoted the interests of his client. Under § 57 of the Restatement, the fact that Guerrero's would also benefit from his effort does not deprive him of the protection of the privilege and does not expose him to liability to Safeway.

Safeway also contends that Guerrero's "wrongful means" consisted of "threatening Botma with a multi-million dollar judgment . . .". (Supplemental Brief, p. 4) This reasonable assessment of Botma's situation is not "wrongful" within the meaning of the Restatement. Comment g states that "wrongful" means might consist of activities "such as threatening the nonclient with an unfounded criminal prosecution in order to induce the nonclient to cancel a contract." Here, however, Safeway agrees that there was nothing "unfounded" about Guerrero's evaluation of the case: Safeway

acknowledges that Botma's negligence caused Holly Castano's catastrophic injuries and that Botma was liable for damages far in excess of the policy limit. Thus, Safeway's argument is simply that Guerrero, acting to benefit his client, gave Botma the option of settling or proceeding to trial on the merits. The fact that an attorney correctly expresses a well based and accurate belief to an adversary that the evidence will support a large judgment for his client does not support an allegation that the attorney is acting with "wrongful means."

Safeway next argues that Guerrero's "wrongful" means consisted of a "misrepresentation" to Botma in the settlement process. Specifically, Safeway says that the *Damron* agreement, which says that "Safeway had made no reasonable attempts to settle Himes' claims against Botma," (Supplemental Brief, p. 10) is not true. This so-called "misrepresentation" is a recitation of opinion, not fact. Arizona law typically does not impose liability for statements of opinion. *See, e.g., Hall v. Romero*, 141 Ariz. 120, 685 P.2d 757 (App. 1984)(a representation of opinion will ordinarily not be regarded as a basis for actionable fraud).

Moreover, in the context of the facts in this case, the alleged "misrepresentation" is clearly meaningless. Botma was represented by three lawyers prior to execution of the *Damron* agreement. Each was retained and paid by Safeway. Judge Broomfield's Order of March 6, 2003 (which Safeway asks the Court to

consider as part of the record), shows that before the *Damron* agreement was signed, the insured (Botma) discussed the *Damron* agreement with Ronald Huser. Mr. Huser was Botma's first lawyer in the personal injury action and is Safeway's lawyer in this case. (Order, pp. 58-59) Thereafter, and before the *Damron* agreement was executed, Safeway retained attorney Donald R. Wilson to defend Botma. (*Id.*, p. 18) Wilson not only defended the personal injury action against Botma, but also prosecuted a counterclaim alleging that the personal injury case had been settled prior to the filing of the personal injury action. That counterclaim was tried to a jury; the jury found that the claim had not been settled prior to the institution of suit. (*Id.*, p. 18)

Thereafter, Safeway retained attorney Don Stevens to replace Wilson as counsel for Botma. (*Id.*, p. 18) Stevens advised Safeway of his belief that it had breached the implied covenant of good faith and fair dealing by failing to settle the case within policy limits and informed Safeway that he would propose a *Damron* agreement to Guerrero if the company did not take steps to otherwise protect Botma. When Safeway's response was not sufficient to satisfy Stevens, he suggested a *Damron* agreement to Guerrero. Stevens was obligated to advise his client and to obtain authority for that strategy and was the person who advised Botma to break his agreement with Safeway. Approximately three months later, Botma and Himes executed the agreement which Stevens recommended. (*Id.*, pp. 18-19) Botma's three

lawyers were aware of the pre-trial settlement negotiations and had fiduciary obligations to keep Botma fully informed of these circumstances. If Botma's lawyers did not share the opinion set forth in the agreement, they could have removed or changed it.

Moreover, the insurance company also had an independent duty to keep Botma informed of all settlement negotiations. The insurer's duty of good faith in a third-party case includes the obligation to keep the insured informed of settlement negotiations and opportunities:

> The good faith duty of Nationwide obligated it "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. . . "

Kivi v. Nationwide Mut. Ins. Co., 695 F.2d 1285, 1288 (11th Cir. 1983)(quoting *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So.2d 783 (Fla.1980)). *See also*, *Anguiano v. Allstate*, 209 F.3d 1167 (9th Cir. 2000)(Allstate's failure to inform its insured about settlement possibilities was sufficient to impose third party bad faith liability). Thus Stevens, hired by Safeway to protect Botma, fairly evaluated Safeway's settlement effort and presumably advised Botma to make the *Damron* agreement as written. Botma had the advice of three lawyers as well as the entitlement

to full and complete information from his insurance company concerning settlement. Conversely, Botma had no right to rely upon statements of his adversary's counsel. *See, e.g., Linder v. Brown & Herrick*, 189 Ariz. 398, 943 P.2d 758 (App. 1997).

Safeway also alleges that Guerrero hid documents from Safeway and/or Botma at some stage. While Safeway does not identify the documents, it is clear that the documents relate to pre-litigation settlement negotiations and had no bearing on Botma's liability: Safeway concedes that Botma was at fault for the motor vehicle accident, that Castano sustained catastrophic injuries, and that Botma had inadequate insurance coverage to satisfy Botma's liability. As in the case of the so-called "misrepresentation" by Guerrero, it is difficult to see how Guerrero's conduct affects anything in this setting. Botma's attorneys were knowledgeable about Safeway's settlement efforts and even unsuccessfully litigated the issue of settlement in a jury trial. Safeway and it lawyers, not Guerrero, had the obligation to keep the insured informed of the settlement negotiations and Botma had no right to rely upon Guerrero to educate him concerning the details of any settlement negotiations conducted by his insurer. Moreover, Guerrero had no duty to provide documents to Botma other than those subject to the discovery process. If Botma was unaware of the status of pre-trial settlement negotiations, Safeway should look to Botma's lawyers, not Guerrero, for

responsibility. Guerrero's conduct was not "wrongful" within the meaning of the Restatement.

All of Safeway's make-weight arguments really circumvent the real argument it wants to make: Guerrero did not accept the policy limit offer extended by Safeway prior to suit. However, as set forth in the Restatement, Guerrero is protected from liability so long as he is acting to further his client's interests and he is not using wrongful means of doing so. Holly Castano was a stranger to the Safeway insurance contract with Botma. The plaintiff and her counsel had no duty to settle within the policy limits just as the insurer had no duty to the plaintiff to settle. *See, e.g., Leal v. Allstate*, 199 Ariz. 250, 17 P.3d 95 (App. 2000).

Thus, while Safeway complains (and the Court of Appeals agreed) that Guerrero acted "wrongfully" by rejecting Safeway's settlement offer because he wanted to benefit his client by avoiding an "empty chair" argument at a products liability trial, his conduct was privileged under § 57 of the Restatement. Neither he nor his client was under an obligation to accept the offer of settlement. *See Miel v. State Farm Mut. Auto. Ins. Co.*, 185 Ariz. 104, 912 P.2d 1333 (App. 1995)(a person injured by an insurer's policyholder occupies no contractual or fiduciary relationship with the insurer and is not subject to a duty to settle). Guerrero was, instead, free to act on behalf of his client so long as he did not use "wrongful" means. Pursuit of a

meritorious claim, and deciding not to settle when one is under no duty to settle, is not "wrongful" means within the meaning of the Restatement. It is simply a type of decision that lawyers necessarily make every day in order to properly pursue their client's best interests. Such conduct is privileged, and non-actionable, under § 57 of the Restatement (3d) of the Law Governing Lawyers.

III. CONCLUSION.

Safeway contends that any attorney representing a claimant in a personal injury action who participates in the execution of a *Damron* agreement is liable to the insurer for interference with contract in any case in which the company did not first breach one of its obligations to the insured. The court of appeals essentially agreed. If permitted to stand, the opinion will have far reaching and adverse consequences for insureds in this jurisdiction. Amicus urges this Court to follow the dictates of § 57 of the Restatement and affirm the trial court's dismissal of the complaint.

RESPECTFULLY SUBMITTED this _____ day of November, 2004

JOHN L. TULLY, P.C.

_____

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John L. Tully

CERTIFICATE OF COMPLIANCE

Pursuant to the Arizona Rules of Civil Appellate Procedure, Rule 23(f), the undersigned certifies that this Amicus brief is double spaced, uses 14 point proportionally spaced Arial/ Times New Roman typeface and does not exceed 15 pages in length.

_____ _____

Date

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Attorneys for Amicus United Policyholders