Appellate Division – First Department

SUPREME COURT
State of New York

CHRISTOPHER E. DIPASQUALE,

Plaintiff-Appellant

Against

SECURITY MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, AND BERKSHIRE LIFE INSURANCE COMPANY,

Defendants-Appellees.

New York County Clerk's No. 601780/98

AND ANOTHER ACTION

BRIEF OF AMICUS CURIAE, UNITED POLICYHOLDERS, IN SUPPORT OF THE APPEAL OF CHRISTOPHER DIPASQUALE, PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

This amicus brief is filed in support of the appeal filed by insurance policyholder/consumer and plaintiff-appellant, Christopher DiPasquale. This is an appeal from decisions and orders of the Supreme Court (dated December 8, 2000) refusing to permit Christopher DiPasquale, the plaintiff-appellant, to amend his causes of action against two insurance company defendants.

The order and decision appealed from should be reversed on the law and on the facts with directions to the Supreme Court to order discovery from the defendants, the immediate payment by Security Mutual of current insurance benefits to Mr. DiPasquale and requiring Security Mutual to pay all past due benefits. This Court should also void the June 30, 1995 agreement between Security Mutual and Berkshire from its inception and require all claims adjusted by unlicensed Berkshire to be reviewed (and if necessary, readjusted) by Security Mutual.

INTEREST OF AMICUS CURIAE

United Policyholders is a non-profit corporation dedicated to educating policyholders about their rights and duties under their insurance policies. United Policyholders engages in charitable and educational activities by promoting greater public understanding of insurance issues and policyholder rights. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and governmental entities. These activities are limited only to the extent that United Policyholders exists exclusively on donated labor and contributions of services and funds.

Amicus curiae have a vital interest in seeing that policyholders have access to information so they can make informed decisions. As a public interest organization, United Policyholders seeks to assist and to educate the public and the courts about policyholders' insurance rights and to support efforts to have them enforced consistently throughout the country. The brief of United Policyholders will be of assistance to the court in understanding these issues, and thus should be considered under 22 N.Y.C.R.R. §500.11(e).

No party to this case has contributed directly or indirectly to the cost of this brief.

ISSUES

This appeal involves an illegal secret insurance combination operating shamelessly on a state wide-basis and in violation of New York's statutory insurance law, §2108.

This appeal involves the judicial nullification by the Supreme Court of Section 349 of the New York General Business Laws, the laws regarding amending complaints and the standards under a motion to dismiss pursuant to CPLR 3211(a)(7)..

This appeal involves an insurance claimant, plaintiff-appellant here, who is permanently disabled, but who doggedly – and thus far unsuccessfully – is trying to find the correct legal rubric in which to challenge a well-heeled, litigation savvy, illicit insurance combine.[1]

This appeal also involves the flouting by the illicit insurance combination of a clear consumer protection statute affecting the consumer public.

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[1] On a prior appeal of this case to this Court, Mr. DiPasquale had a mountain of facts about service of process; sort of a non-issue in the case. This obscured the simple fact that he had an upstate lawyer in Syracuse who has successfully litigated a very similar matter for another Security Mutual policyholder.

STATEMENT OF FACTS

There are sufficient undisputed facts in this record to enable this Court to set aside the contested Supreme Court order and to order payment of Mr. DiPasquale's insurance benefits.

Mr. DiPasquale purchased two disability insurance policies from Security Mutual Life Insurance Company of New York ("Security Mutual"). Different insurance companies have different "claims paying" philosophies. Some insurance companies see claims payment as a positive and honorable part of the public service nature of insurance.[2] Other insurance companies see claims paying as a drain on cash and profit, which rewards an avaricious, dishonest horde of scalawags (aided and abetted by mendacious "plaintiff's lawyers"). After Security Mutual engaged the unlicensed Berkshire in 1995, Security Mutual seems to have put itself in the second category; it became adverse to paying claims.

Mr. DiPasquale had every reason to believe – when he purchased the policies and when he first made his claim – that Security Mutual would be true to its original principles.

Then Security Mutual changed! On June 30, 1995 Security Mutual entered into secret[3] agreement with Berkshire Life Insurance Company (Berkshire) delegating to Berkshire the job of adjusting its claims.

Berkshire was not licensed as an independent adjuster in New York. See the August 22, 1997 conclusion of the New York State Insurance Department (Exhibit A at Record 526-528) and letter dated October 26, 1999 from the New York State Insurance Department to David Kalib of Berkshire (Exhibit A at Record 547). Berkshire and Security Mutual are

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[2] See, e.g., Stephen Sills, Shopping the D&O Market, Risk Mgmt., July 1995, at 5.

[3] Note the provisions in the June 30, 1995 agreement designed to avoid disclosure of the fact that Security Mutual policyholders were shunted to Berkshire. (See Exhibit A at Record 131A)

collaterally estopped from contesting this conclusion of the Superintendent of Insurance. The delegation by Security Mutual to Berkshire was illegal.

The illegal agreement has a further and equally illegal and reprehensible feature. The June 30, 1995 agreement provides, in effect, that the less Berkshire pays to the Security Mutual Insurance Company's policyholders, the more Berkshire "earns." A bonus to claims adjusters for not paying claims is illicit.

The June 30, 1995 secret, illicit agreement explicitly provided that it was to be governed by Massachusetts law, but this choice-of-law aspect of the agreement is also illegal. New York law should govern New York claims handling by New York insurance companies for New York policyholders/consumers. The New York Insurance Department is proud and protective of its regulatory role. Security Mutual and Berkshire obviously think they have managed to "white-out" the New York Insurance Department. While Berkshire may try to abide by New York insurance law, the agreement does not require it to do so. Since Berkshire is unlicensed, it has no effective New York policeman.[4]

When this case is returned to the Supreme Court, it should be with directions from this Court to the Supreme Court to enter partial judgment for Mr. DiPasquale directing discovery of both defendants, directing Security Mutual to immediately make all past due benefit payments

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[4] Warren Buffet is reputed to be the second richest man in the world and is the Chairman of Berkshire Hathaway Inc. At the 1992 Annual Meeting of Berkshire Hathaway's shareholders, Mr. Buffet stated:

> The insurance business is a fiduciary business. You get access to other people's money under conditions where in many cases the other people have very little knowledge or control of where the money's going. So you need a cop.
> Warren Buffet, Outstanding Investor Digest, Vol. VII, Nos. 5 & 6, June 22, 1992, at 46; Warren Buffet on Insurance: The Maestro in His Own Words, Emerson, Reid's Insurance Observer, November 1995, at 11.

and directing Security Mutual hereafter to continue making payments pending final determination by that court with respect to Mr. DiPasquale's entitlement. This court should also immediately declare the June 30, 1995 agreement between defendants void ab initio.

POINT I.
THE JUNE 30, 1995 CONTRACT IS VOID

As the record in this case stands today, the June 30, 1995 contract was illegal. It was null and void. It should be declared void ab initio.

The New York Court of Appeals has held consistently for sixty years that contracts which violate licensing statutes are void. See Mortise v. 55 Liberty Owners Corp., 63 N.Y.2d 743, 745, 480 N.Y.S.2d 208 (1984); Richards Conditioning Corp. v. Oleet, 21 N.Y.2d 895, 896, 289 N.Y.S.2d 411, 412 (1968); Carmine v. Murphy, 285 N.Y. 413, 416 (1941); American Store Equipment Construction Corp. v. Dempsey's Punch Bowl, 174 Misc. 436, 437, 21 N.Y.S.2d 117, 119 (N.Y. Cty.), aff'd 258 A.D. 794, 283 N.Y. 601 (1939). The enforcement of licensing statutes is encouraged by voiding contracts which are in violation of those statutes. The New York State Insurance Department has already concluded that Berkshire was not licensed as an adjuster in New York, and this conclusion cannot be challenged. Thus, it was illegal for Berkshire to perform the adjusting services which the contract with Security Mutual purports to delegate to it. For this reason, the contract was void. The contract contains other illegal provisions which rendered it void; (a) it provided an incentive to claims adjusters for not paying claims, and (b) it sought to avoid the oversight of New York regulatory authorities by designating Massachusetts as the governing state's law.

The Court of Appeals has condemned lying to the courts. See Aufrichtig v. Lowell, 85 N.Y.2d 540, 548, 626 N.Y.S.2d 743, 747 (1995). Aufrichtig provides guidance to this Court in handling of the illegal activities in this case.

Dannett & Horowitz v. Moskovitz, 86 N.Y.2d 112, 629 N.Y.S.2d 1009 (1995); Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 956, 510 N.Y.S.2d 88, 89 (1986); Sabo v. Delman, 3 N.Y.2d 155, 160, 164 N.Y.S.2d 714, 717 (1957). Security Mutual touts its "good news" to policyholders (See Record at Exhibit A, R 176) but kept its bad news regarding the hiring of unlicensed Berkshire shrouded in secrecy.

POINT III.
MR. DIPASQUALE SHOULD BE PERMITTED TO AMEND HIS COMPLAINT TO ADD A CLAIM FOR VIOLATION OF GENERAL BUSINESS LAW SECTION 349 AGAINST BOTH DEFENDANTS

Mr. DiPasquale sought, and the Supreme Court below refused permission to amend his Broome County complaint to add a claim for violation of § 349 of the General Business Law against both defendants. Such leave should have been freely granted upon a prima facie showing of merit. CPLR § 3025(b); See Bristol Harbour Assocs. v. Home Ins. Co., 244 A.D.2d 885, 885, 665 N.Y.S.2d 142, 143 (4th Dep't 1997) (upholding order granting plaintiff right to amend complaint to add § 349 claim); Marcus v. Jewish National Fund, 158 A.D.2d 101, 107, 557 N.Y.S.2d 886, 890 (1st Dep't 1990) (same). The defendants will not be prejudiced by allowing Mr. DiPasquale to amend because discovery in this case has not begun.

General Business Law Section 349 declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349 (McKinney 1999). It is a remedial statute meant to be given broad application. Hart v. Moore 155 Misc.2d 203, 587 N.Y.S.2d 477, 479 (Sup. Ct. Westchester Co. 1992). In Hart, for example, the plaintiff was allowed to amend her complaint to state a cause of action under § 349 where she alleged that the defendant insurance company had extracted a release from her in an effort to defraud her. See also Karlin v. IVF America,

Inc., 93 N.Y.2d 282, 293, 690 N.Y.S.2d 495 (1999) (permitting § 349 claim arising out of defendant *in vitro* fertilization clinic's overstatement of pregnancy success rates).

New York courts, including the Court of Appeals, have on numerous occasions approved of the use of GBL § 349 as a means of checking improper behavior by insurance companies. See Riordan v. Nationwide Mutual Fire Insurance Co., 977 F.2d 47, 52-53 (2d Cir. 1992) (upholding jury verdict for plaintiff on its § 349 claim where defendant insurance company had failed to acknowledge correspondence from plaintiffs, had demanded a proof of loss statement without justification, had refused to pay, or even estimate, the replacement cost of plaintiff's destroyed personal effects, etc.); DiDonato v. INA Insurance Co., 1999 WL 436444, 1999 U.S. Dist. LEXIS 9410 (S.D.N.Y. 1999) (allowing plaintiff to maintain a claim under § 349 where plaintiff alleged that defendant sold disability insurance policies without intending to honor them); Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 344, 704 N.Y.S.2d 177 (1999) (allowing plaintiff to maintain a claim under § 349 where defendant insurance company relied on improper interest rate predictions to misrepresent date on which premiums would vanish).

The illegal claims adjusting contract and bonus system between Security Mutual and Berkshire are precisely the type of "consumer oriented" conduct that § 349 governs. This conduct affects all of Security Mutual's policyholders, every one of whom expected that their claims would be handled by an adjuster regulated (licensed) by the state of New York. The First Department of the Appellate Division recently affirmed a policyholder's right to assert a § 349 claim against his insurance company in Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 730 N.Y.S.2d 272 (1st Dep't 2001). In that case, the policyholder alleged that his insurance company had engaged in a practice of delaying and avoiding payment on his disability insurance policies.

In his GBL § 349 claim, Dr. Acquista alleged that this practice had been aimed at other policyholders. This court held that it would be improper to draw a factual conclusion at the pre-discovery phase as to whether or not the conduct alleged in the complaint affected other consumers. Because the conduct outlined in the complaint fell within the parameters of an unfair or deceptive practice this court permitted the claim to go forward. 285 A.D.2d at 82-83, 730 N.Y.S.2d at 279.

Similarly, the conduct alleged in Mr. DiPasquale's complaint – that Security Mutual illegally delegated its claims adjusting handling to an unlicensed entity (who also unlawfully acquired the personal, medical and financial records of consumers statewide) with a financial incentive to deny claims – constitutes an unfair or deceptive practice. Mr. DiPasquale has made out a *prima facie* case under GBL § 349 against both defendants, and dismissal of that claim by the lower court without giving Mr. DiPasquale an opportunity to conduct discovery on the extent to which this practice affected other consumers was improper. Cf. New York University v. Continental Ins. Co., (plaintiff New York University could not make claim under § 349 because it was a major university acting through its director of insurance, the policy at issue was not a standard policy but was tailored to meet the university's requirements, and premiums were in excess of $55,000). Mr. DiPasquale could not be more different from New York University. He is a mere consumer who purchased standard form disability insurance policies, no different from policies purchased by numerous other consumers, and whose claim was subjected to Security Mutual's standard, albeit illegal, claims adjusting procedure.

Whether Mr. DiPasquale was at one time an "insurance agent," as the Supreme Court wrote in one opinion, or "broker," as the Supreme Court wrote in a second opinion, does not deprive Mr. DiPasquale of the consumer protection afforded to others. It would be strange to

hold that people who know the most get the least. Does ignorance pay? The insurance policies have no "odor." The Security Mutual and Berkshire illegal conduct in this case not only was secret, and therefore undetectable to policyholders regardless of sophistication, but also happened after the insurance policies were purchased. Even a policyholder with far greater sophistication than Mr. DiPasquale would not be able to predict that in the future its insurance company would enter into a secret illegal agreement regarding claims handling.

POINT IV.
LEGISLATIVE HISTORY ABOUT SECTION 349

Mr. DiPasquale has collected an impressive collection of material reflecting the legislative history and evidencing the legislative intent behind GBL § 349. This material is in Exhibit A of the record, beginning at R 430 and deserves the very careful attention of this Court. This court should reject any attempts by defendants to have the court ignore the clear legislative intent of GBL § 349.

POINT V.
THE LOWER COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In New York, a covenant of good faith and fair dealing is implied in all contracts, including insurance policies. Smith v. General Accident Ins. Co., 91 N.Y.2d 648, 652-53, 674 N.Y.S.2d 267 (1998). A policyholder who establishes that his insurance company's conduct constituted a gross disregard of his interests – that is, a deliberate or reckless failure to place the interests of the policyholder on equal footing with the insurance company's own – may maintain an action for breach of the duty of good faith and fair dealing. See Pavia v. State Farm Mutual Automobile Ins. Co., 82 N.Y.2d 445, 453, 605 N.Y.S.2d 208 (1993). Mr. DiPasquale has alleged facts sufficient to demonstrate that, by entering into a secret agreement to provide an

unlicensed adjuster with unlawful access to private consumer medical and financial records and with a financial incentive to deny the claims of Security Mutual policyholders, the defendant Security Mutual grossly disregarded the rights of Mr. DiPasquale and other consumers. This constitutes bad faith. The court below did not even address this cause of action, violating this court's clear edict in Nadle v. L.O. Realty Corp., Docket No. 5077N (decided November 13, 2001).

The defendant Security Mutual's bad faith is relevant to the nature of the damages Mr. DiPasquale can recover. This court, the Appellate Division, First Department, recently held that a policyholder who establishes that his insurance company acted in bad faith in reviewing a claim is entitled to consequential damages, which may exceed the value of the policy. See Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 730 N.Y.S.2d 272 (1st Dep't 2001). In Acquista this court recognized that traditional contract damages may not be sufficient to compensate a policy holder whose insurance company has breached it duty of good faith, because among other things, a policyholder does not necessarily have access to an alternative source of funds from which to pay that which the insurer refuses to pay. 285 A.D.2d at 79. The policyholder's inability to pay what the insurance company should be covering may result in further damages to the policyholder. Id. Further, as this cause notes, to limit the policyholder's damages to the amount of the policy would do nothing to discourage the dilatory tactics of insurance companies seeking to delay and avoid payment of proper claims. Id. at 80. In that case, the court reversed a dismissal under CPLR §3211 because it determined that the plaintiff was entitled to discovery and an opportunity to prove his allegation that the defendant insurance company's delay was based not upon a reasonable assessment of the situation but rather solely

upon its own financial self-interest. Id. at 82. Mr. DiPasquale is entitled to the same opportunity to proceed with his claim against the defendants.

POINT VI.
THE COURT BELOW IMPROPERLY DISMISSED MR. DIPASQUALE'S CLAIMS AGAINST BERKSHIRE FOR TORTIOUS INTERFERENCE WITH HIS CONTRACT WITH SECURITY MUTUAL, WITH HIS ATTORNEY AND FOR PUNITIVE DAMAGES

Mr. DiPasquale alleges that Berkshire's illegal claims handling constitutes a tortious interference with the contract between himself and Security Mutual. A claim of tortious interference with contract is made out by pleading (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach; and (4) damages. Foster v. Churchill, 87 N.Y.2d 744, 642 N.Y.S.2d 583 (1996). Mr. DiPasquale has properly pled these elements.

The court below improperly dismissed Mr. DiPasquale's claim for tortious interference. While the "economic interest" of a defendant may provide sufficient justification for effecting a breach of a contract between third parties, such economic interest cannot serve as a defense to a tortious interference claim where there has been a showing of fraudulent or illegal means. Id. at 750. The illegal agreement whereby Berkshire received an economic incentive to deny claims by Security Mutual policyholders, even though Berkshire had no legal authority to review such claims, is precisely the type of illegal activity which would defeat the defense of "economic interest." Furthermore, even if Berkshire is entitled to assert such a defense, it is a fact-based defense, and resolution on a motion to dismiss before any discovery has been conducted is improper. See U.S. Fidelity and Guarantee Co. v. Petroleo Brasileiro S.A.-Petrobas, 2001 WL 300735 at *24 (S.D.N.Y., March 27, 2001) (denying motion to dismiss tortious interference claim based on a defense of economic justification); Ives v. Guilford Mills,

Inc., 3 F. Supp.2d 191, 198 (N.D.N.Y. 1998) (same). Mr. DiPasquale is entitled to conduct discovery and offer proof on his claim for tortious interference. The same is true of Mr. DiPasquale's tortious interference claim against Berkshire. Discovery is also needed to provide Mr. DiPasquale with the opportunity to prove his claim for punitive damages against unlicensed, undisclosed Berkshire whose actions evince criminal indifference to civil obligations and were aimed at the public and the courts generally.

CONCLUSION

Amicus curiae United Policyholders suggest to this Court that the decisions and orders of the Supreme Court refusing to permit the plaintiff-appellant to amend his complaint, to assert claims based on Section GBL 349 of the General Business Law, to amend this complaint to assert claims based on breach of the implied covenant of good faith and fair dealings and dismissing his claims for tortious interference and punitive damages should be reversed. Discovery should be ordered against defendants. Security Mutual should be directed to pay Mr. DiPasquale's past and current benefits pending further order of the Supreme Court. The June 30, 1995 agreement between defendants should be declared void ab initio.

Dated: New York, New York
December 10, 2001

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