

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Plaintiff,

v.

SMALL SMILES HOLDING CO., LLC,

Defendant.

Civil Action No. 3:10-cv-00743

Judge Todd J. Campbell
Magistrate Judge Juliet Griffin

JOINT CASE MANAGEMENT ORDER

A Case Management Conference is scheduled to be held in the above-entitled action on September 14, 2010 at 1:00 P.M. before Magistrate Judge Juliet Griffin. Pursuant to Local Rule 16.01(d)(1)(b), the parties submit this Joint Proposed Order for entry by the Court.

A. STATUS OF SERVICE OF PROCESS AND RESPONSIVE PLEADINGS:

Plaintiff ("National Union") served the Complaint upon Defendant ("SSHC") in Nashville, Tennessee on August 6, 2010 (Docket Entry No. 5) and in Wilmington, Delaware on August 9, 2010 (Docket Entry No. 7). On August 24, 2010, a Joint Motion to Extend Deadline was filed by the parties, whereby an extension for SSHC's time to answer or otherwise respond to the Complaint to September 10, 2010 was sought (Docket Entry No. 15). The Court has granted the parties' Joint Motion via its August 25, 2010 Order (Docket Entry No. 16).

B. BASIS ON WHICH JURISDICTION OF THE COURT IS INVOKED:

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states. This Court has personal jurisdiction over SSHC either generally – insofar as it is conducting business within Tennessee, see Tenn. Code Ann. § 20-2-225(2) – or specifically, see Tenn. Code Ann. § 20-2-214(a).

C. PARTIES' THEORIES OF THE CASE AND CLAIMS AND DEFENSES:

1. PLAINTIFF'S THEORY AND CLAIMS

In 2008 and 2009, National Union, a Pennsylvania insurance company with a principal place of business in New York, issued certain policies of professional liability insurance applicable to either entities (“the Entities Policies”) or individual dentists (“the Individual Dentists Policies”) (collectively, “the Policies”) to SSHC, a Delaware holding company with a principal place of business in Tennessee. SSHC owns a dental practice management business and manages a chain of 50 or more affiliated dental practices and dentists in at least 22 states, which specialize in providing dental services to children eligible for dental care under Medicaid or similar programs (“the Small Smiles Centers”). SSHC solicited and obtained the Policies on behalf of the insureds described in each of the Policies, including SSHC, its subsidiaries, the Small Smiles Centers and the dentists and employees working at the Small Smiles Centers.

Prior to the issuance of the Policies, SSHC knew certain material information relevant to the risks SSHC sought to insure under the Policies, including, but not limited to, the fact that SSHC, its subsidiaries, the Small Smiles Centers and the dentists and employees working at the Small Smiles Centers were the subjects of multiple state and federal investigations concerning SSHC’s business practices including, *inter alia*, Medicaid fraud and a pattern and practice of

subjecting pediatric dental patients to medically unnecessary dental procedures. Although SSHC had a duty to disclose to National Union all information known to SSHC that was material to the risks SSHC sought to insure under the Policies, SSHC breached its duty by failing to disclose known material information to National Union that increased the risk of loss under the Policies. National Union would not have issued the Policies to SSHC had SSHC disclosed the material facts known to SSHC at the time SSHC sought to obtain or renew insurance coverage from National Union. Accordingly, National Union is entitled to a declaration that SSHC's failure to disclose material information to National Union entitles National Union to rescind and make void *ab initio* each of the Policies

Alternatively, and only if National Union does not prevail on its claim for rescission, National Union seeks reformation of the Entities Policies and the Individual Dentists Policies in accordance with the true and actual intent of the parties at the time each of the Policies was issued.

2. DEFENDANT'S THEORY AND DEFENSES.

Prior to 2008, Small Smiles Holding Company, LLC, ("SSHC") a limited liability company which provides dental practice management services through its wholly owned subsidiary FORBA Holdings, LLC, had dental professional liability insurance through Fireman's Fund Insurance Company. SSHC purchased its dental professional liability insurance through Dentist's Advantage, a division of Affinity Insurance Services, Inc., which had a contract with American Insurance Company and its parent, Fireman's Fund Insurance (collectively, "Fireman's Fund") to underwrite dental professional liability insurance for them.

While SSHC was insured by Fireman's Fund, SSHC became aware of potential litigation against it, as well as government investigations of the company. Immediately upon learning of

each of the potential claims and investigations, SSHC formally notified Dentist's Advantage of the potential claims and investigations in order to preserve its rights to insurance coverage. Along with those notifications, SSHC sent a copy of all subpoenas and letters regarding the investigations to Dentist's Advantage. In addition, information about potential claims and investigations of SSHC was easily accessible with a simple internet search.

In July 2008, Dentist's Advantage notified SSHC that Dentist's Advantage had terminated its contract with Fireman's Fund, and for that reason its dental professional liability insurance policies would not be renewed with Fireman's Fund. Dentist's Advantage further advised that when SSHC's policy was up for renewal in September 2008, Dentist's Advantage would offer the renewal terms with Dentist's Advantage's new partner AIG. Dentist's Advantage specifically stated that SSHC's insurance coverage and procedures would not change and that the transition to a new insurance provider would be smooth. Because SSHC had notified Dentist's Advantage of all potential claims against SSHC of which it was aware and had disclosed any and all known information that was material to the risk of the insurer, SSHC did not re-notify Dentist's Advantage of the potential claims, nor was it requested to do so by Dentist's Advantage or AIG. Indeed, SSHC had no communications with AIG or its subsidiary, National Union, which was the actual AIG affiliate that provided SSHC's dental professional liability insurance. Neither Dentist's Advantage nor National Union asked SSHC to fill out a policy application or to provide any other additional information prior to renewing the coverage. Dentist's Advantage, as agent for and partner with National Union, arranged for National Union to provide dental professional liability insurance to SSHC for 2008/2009 and 2009/2010. SSHC paid all required premiums for that insurance.

Because SSHC has complied with all requirements of the insurance agreements with National Union, SSHC is entitled to full insurance coverage under the Policies. Additionally, because National Union conducted no underwriting investigation prior to offering the renewal terms and issuing the Policies and only now, after its insured has become the subject of numerous claims and potential claims that are covered under the Policies, is National Union trying to “underwrite” its Policies, SSHC is investigating whether National Union’s actions in this regard constitute a violation of the Tennessee Consumer Protection Act and Tenn. Code Ann. § 56-7-105, such that National Union is liable to SSHC for damages and attorneys’ fees.

D. PLAINTIFF’S ISSUES PRESENTED:

(1) Whether, prior to the issuance of the Policies, SSHC failed to disclose to National Union SSHC’s knowledge of numerous systemic problems concerning the quality and propriety of dental care provided by the Small Smiles Centers, thereby increasing the risk of loss under the Policies to National Union and breaching SSHC’s duty to disclose such material information to National Union.

(2) Whether, prior to the issuance of the Policies, SSHC failed to disclose to National Union the fact that SSHC, its subsidiaries, the Small Smiles Centers and the dentists and employees working at the Small Smiles Centers were the targets of multiple state and federal investigations concerning SSHC’s business practices including, *inter alia*, Medicaid fraud and a pattern and practice of subjecting pediatric dental patients to medically unnecessary dental procedures, thereby increasing the risk of loss under the Policies to National Union and breaching SSHC’s duty to disclose such material information to National Union.

(3) Whether, prior to the issuance of the Policies, SSHC failed to disclose to National Union the fact that SSHC had made multiple insurance claims arising from the

numerous state and federal investigations regarding SSHC's business practices to its prior professional liability insurance carrier, thereby increasing the risk of loss under the Policies to National Union and breaching SSHC's duty to disclose such material information to National Union.

(4) Whether, prior to the issuance of the Policies, SSHC failed to disclose to National Union the fact that SSHC's previous professional liability insurance carrier had nonrenewed its policies for claims experience prior to the inception of any of the Policies, thereby increasing the risk of loss under the Policies to National Union and breaching SSHC's duty to disclose such material information to National Union.

(5) Whether, prior to the issuance of the Policies, SSHC failed to disclose to National Union SSHC's indemnification demands to the previous owners of SSHC's dental practice management entities for the Small Smiles Centers for losses caused by the multiple state and federal investigations regarding SSHC's business practices, thereby increasing the risk of loss under the Policies to National Union and breaching SSHC's duty to disclose such material information to National Union.

(6) Whether, prior to the issuance of the Policies, SSHC failed to disclose to National Union the existence of multiple *qui tam* actions commenced against SSHC's subsidiaries, certain of the Small Smiles Centers and the dentists and employees working at the Small Smiles Centers alleging Medicaid fraud and a pattern and practice of subjecting pediatric dental patients to medically unnecessary dental procedures, thereby increasing the risk of loss under the Policies to National Union and breaching SSHC's duty to disclose such material information to National Union.

(7) Whether National Union is entitled to rescind the Policies due to SSHC's failure to disclose to National Union known material information pertaining to the risks insured by National Union that increased the risk of loss to National Union under the Policies.

(8) If National Union does not prevail as to its rescission claim, whether certain specified errors in the Entities Policies make those policies, as issued by National Union to SSHC, incorrect, the product of a mutual mistake and not reflective of the true and actual intent of the parties.

(9) If National Union does not prevail as to its rescission claim, whether National Union is entitled to reform each of the Entities Policies to conform to the true and actual intent of the parties.

(10) If National Union does not prevail as to its rescission claim, whether certain specified errors in the Individual Dentists Policies make those policies, as issued by National Union to SSHC, incorrect, the product of a mutual mistake and not reflective of the true and actual intent of the parties.

(11) If National Union does not prevail as to its rescission claim, whether National Union is entitled to reform each of the Individual Dentists Policies to conform to the true and actual intent of the parties.

E. DEFENDANT'S ISSUES PRESENTED:

(1) Whether, despite the fact that SSHC disclosed all known material information to National Union's agent and partner, Dentist's Advantage, and paid all premiums, National Union may now rescind the insurance policies issued to SSHC, its subsidiaries, the Small Smiles Centers and the dentists working at the Small Smiles Centers.

(2) Whether SSHC had any obligation to disclose information that was not requested by National Union.

(3) Whether National Union exercised ordinary diligence prior to offering the renewal terms and issuing the Policies.

(4) Whether National Union is entitled to reformation of the insurance policies issued to SSHC, its subsidiaries, the Small Smiles Centers and the dentists working at the Small Smiles Centers.

F. ISSUES THAT HAVE BEEN RESOLVED:

None

G. SCHEDULE FOR DISCOVERY:

(1) Plaintiff and Defendant will make initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1) by no later than October 15, 2010.

(2) The parties agree to conduct fact discovery prior to expert discovery.

(3) All fact discovery shall be completed by March 18, 2011. Discovery-related motions, except those dealing with experts, are due by February 18, 2011.

(4) Plaintiff and Defendant may each serve up to fifty (50) interrogatories, inclusive of all subparts. The parties may further alter any discovery limitations imposed under the Fed. R. Civ. P. and/or the Local Rules, to the extent permitted, upon fully executed written mutual agreement.

(4) Plaintiff shall disclose any experts and expert reports by April 15, 2011, and Defendant shall disclose any experts and expert reports by May 16, 2011.

(5) Expert depositions shall be completed by June 30, 2011.

(6) Discovery is not stayed during the pendency of dispositive motions, unless ordered by the Court.

H. DISPOSITIVE MOTIONS:

Any dispositive motions shall be filed by the parties, if necessary, by July 29, 2011. Responses to dispositive motions shall be filed within forty-five (45) days after the filing of dispositive motions. Optional reply briefs shall be filed within twenty-nine (29) days of any response.

I. OTHER PLEADINGS AND DEADLINES FOR FILING:

NEED FOR COUNTERCLAIMS, CROSSCLAIMS, THIRD-PARTY CLAIMS, AMENDMENTS, OR JOINDER

(1) Defendant to file counterclaims against Plaintiff, if any, by November 9, 2010 in accordance with Fed. R. Civ. P. 13.

(2) Defendant to commence third-party claims, if any, by January 31, 2011 in accordance with Fed. R. Civ. P. 14.

(3) Parties to join additional parties, if any, by January 31, 2011 in accordance with Fed. R. Civ. P. 19 or 20.

(4) Parties to amend pleadings, if at all, by January 31, 2011 in accordance with Fed. R. Civ. P. 15.

J. SUBSEQUENT CASE MANAGEMENT CONFERENCES:

The parties anticipate the need for subsequent case management conferences, which should be regularly scheduled on a monthly basis to address any and all issues that the parties are unable to resolve amongst themselves.

K. TRIAL:

A jury has been demanded by the Plaintiff and a trial on the merits of this case will be expected to take approximately 10 to 14 days. The parties anticipate that the action will be ready for trial by mid-November 2011, and it is recommended that the trial be scheduled no earlier than **January 10, 2012.**

L. SETTLEMENT:

At this stage of the litigation, the parties have not discussed settlement, but it remains an option to be explored. If appropriate, the parties will seek to schedule a settlement conference, either with the Court or via mutually agreed upon ADR, by March 30, 2011.

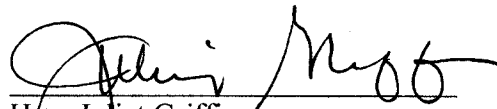
J. MAGISTRATE JUDGE:

The parties decline the option to proceed before the Magistrate Judge in this matter.

This Initial Case Management Order has been agreed upon by the parties on this the 10th day of September, 2010.

IT IS SO ORDERED.

This the _____ Day of September, 2011.



Hon. Juliet Griffin
United States Magistrate Judge

APPROVED FOR ENTRY:

Dated: September 10, 2010.

/s/ W. Brantley Phillips, Jr.
John C. Speer
W. Brantley Phillips, Jr.
BASS, BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
(615) 742-6200
jspeer@bassberry.com
bphillips@bassberry.com

Attorneys for Plaintiff

Lawrence Klein
Scott D. Greenspan
Sedgwick, Detert, Moran & Arnold LLP
125 Broad Street, NY 10004
(212) 422-0202
lawrence.klein@sdma.com
scott.greenspan@sdma.com

Attorneys for Plaintiff

Robert Jackson Walker
John M. Tipps
Emily B. Warth
WALKER, TIPPS & MALONE
150 Fourth Avenue North
2300 One Nashville Place
Nashville, TN 37219
(615) 313-6000
bwalkwer@walkertipps.com
mtipps@walkertipps.com
ewarth@walkertipps.com

Attorneys for Small Smiles Holding Co., LLC

CERTIFICATE OF SERVICE

I hereby certify that, on September 10, 2010, a true and correct copy of the foregoing was filed electronically with the U.S. District Court for the Middle District of Tennessee. Notice of this filing was served via the court's electronic filing system on all counsel listed below:

Robert Jackson Walker
John M. Tipps
Emily B. Warth
WALKER, TIPPS & MALONE
150 Fourth Avenue North
2300 One Nashville Place
Nashville, TN 37219

/s/ W. Brantley Phillips, Jr.