

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION**

<b>NATIONAL UNION FIRE INSURANCE</b>	)	
<b>COMPANY OF PITTSBURGH, PA,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>Case No. 3:10-cv-00743</b>
	)	<b>Judge Campbell</b>
<b>v.</b>	)	<b>Magistrate Judge Griffin</b>
	)	
<b>SMALL SMILES HOLDING CO., LLC,</b>	)	
	)	
<b>Defendant.</b>	)	

**DEFENDANT’S COUNTERCLAIM**

Defendant Small Smiles Holding Co., LLC, for its counterclaim against Plaintiff National Union Fire Insurance Company of Pittsburgh, PA, asserts as follows:

**PARTIES**

1. National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) is an insurance company organized under the laws of Pennsylvania with a principal place of business in New York.

2. Small Smiles Holding Company, LLC (“SSHC”), through its subsidiary FORBA Holdings, LLC (“FORBA”), is a Tennessee limited liability company that provides dental practice management services to dental centers that serve children enrolled in Medicaid and the State Children’s Health Insurance Program (“SCHIP”) (the “Small Smiles Dental Center”).

**JURISDICTION AND VENUE**

3. Plaintiff is subject to the jurisdiction of this Court pursuant to 28 U.S.C. § 1332.
4. Venue is proper pursuant to 28 U.S.C. § 1391.

## FACTS

5. Since its formation in 2006, SSHC has purchased dental professional liability insurance for itself, FORBA, the Small Smiles Dental Centers, and the dentists who worked at the Small Smiles Dental Centers (the “SSHC- Insureds”) from Dentist’s Advantage, a division of Affinity Insurance Services, Inc.

6. In 2006 and 2007, Dentist’s Advantage sold dental professional liability insurance to the SSHC-Insureds on behalf of American Insurance Company and/or its parent, Fireman’s Fund Insurance Company (collectively, “Fireman’s Fund”).

7. While the SSHC-Insureds were insured by Fireman’s Fund, SSHC became aware of and had to respond to a series of investigations initiated by the Office of the Inspector General, U.S. Department of Health and Human Services (“OIG-HHS”), the United States Department of Justice, and various State Attorneys General and State Boards of Dental Examiners focusing on allegations that FORBA and certain Small Smiles Dental Centers committed wrongful acts in connection with claims for dental services submitted to Medicaid and SCHIP (the “Government Investigations”).

8. SSHC promptly notified Dentist’s Advantage of the Government Investigations and sent a copy of all subpoenas and other investigative demands to Dentist’s Advantage. Information about the Government Investigations also was publicly available and easily accessible, both through TV and the Internet.

9. On information and belief, in 2008 Dentist’s Advantage ended its agency relationship with Fireman’s Fund and entered into a contract with National Union, pursuant to which Dentist’s Advantage offers and sells dental professional liability insurance as an agent and

partner of National Union and provides underwriting, billing, claims, and other services on National Union's behalf.

10. National Union was aware that Dentist's Advantage held itself out as National Union's agent and partner.

11. 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 at the end of the policy term in September 2008. Instead, Dentist's Advantage would offer renewal with Dentist's Advantage's new partner National Union, an AIG company.

12. In notifying SSHC of the change to National Union, Dentist's Advantage advised SSHC that there would be no changes in the coverage or procedures, that the "transition to the new carrier will be very smooth," and that Dentist's Advantage would notify SSHC of the new premium as soon as Dentist's Advantage worked it up with National Union.

13. At no point during the transition of the SSHC-Insureds' insurance coverage to National Union did Dentist's Advantage ask SSHC to fill out any policy applications regarding obtaining coverage with National Union, nor did it request any additional information regarding the Government Investigations that SSHC previously had disclosed to Dentist's Advantage. National Union never communicated directly with SSHC at any time during the process. Instead, National Union relied on its agent and partner, Dentist's Advantage, in issuing the 2008/2009 and 2009/2010 policies (collectively, the "Policies") to the SSHC-Insureds.

14. SSHC paid all of the premiums and otherwise complied with all requirements of the Policies with National Union.

15. On January 25, 2010, during the policy periods of the Policies, SSHC, FORBA, and certain other SSHC-Insureds were sued in a class action entitled *Parnell, et al. v. FORBA Holdings, LLC, et al.*, currently pending in the United States District Court, Northern District of Ohio, Western Division, Civil Action No. 10-CV-00172 (JGC) (the “Parnell Action”).

16. Upon learning of the Parnell Action and in keeping with the notification requirements of the Policies, the SSHC-Insureds gave notice of the action and that they were seeking coverage, including defense and indemnity, with respect to that action.

17. On June 7, 2010, during the policy periods of the Policies, SSHC, FORBA, and certain other SSHC-Insureds were sued in a class action entitled *Hernandez, et al. v. FORBA Holdings, LLC, et al.*, in the District Court of Oklahoma County, Oklahoma, Case No. CJ-2010-1632 (the “Hernandez Action”).

18. Upon learning of the Hernandez Action and in keeping with the notification requirements of the Policies, the SSHC-Insureds gave notice that they were seeking coverage, including defense and indemnity, with respect to that action.

19. During the policy periods of the Policies, SSHC has also learned of other claims or potential claims against SSHC, FORBA, and certain SSHC-Insureds that allegedly arise out of acts, errors, or omissions in the rendering of or failure to render dental services.

20. Upon learning of each of those claims and potential claims, in keeping with the notification requirements of the Policies, the SSHC-Insureds have given notice that they are seeking coverage, including defense and indemnity, with respect to each of those claims.

21. National Union now seeks to avoid its contractual obligations to the SSHC-Insureds and advances the frivolous and unfounded contention that its insurance contracts with SSHC are voidable and should be rescinded because SSHC allegedly “failed to disclose” certain

“material information” to National Union during the underwriting and issuance of the Policies. National Union has espoused this position despite the fact that prior to National Union’s issuance of the Policies (a) National Union never asked for a policy application from SSHC and never asked for any of the information that it now claims was “material” to National Union’s analysis of the risk involved; (b) SSHC, in fact, already had provided express notification to and engaged in extensive correspondence with National Union’s agent, Dentist’s Advantage, regarding the Government Investigations; and (c) information about the Government Investigations was publicly available and easily accessible.

22. National Union’s refusal to acknowledge the disclosures made to its agent, National Union’s attempt to conduct underwriting now, after failing to conduct any investigation of the risk prior to issuing the Policies, and National Union’s efforts to rescind its insurance contracts with the SSHC-Insureds constitute bad faith and a violate the Tennessee Consumer Protection Act.

**COUNT I: VIOLATION OF TENNESSEE CONSUMER PROTECTION ACT**

23. All of the preceding allegations are incorporated herein by reference.

24. The Tennessee Consumer Protection Act (“TCPA”), TENN. CODE ANN. § 47-18-101, *et seq.*, prohibits “unfair or deceptive acts or practices affecting the conduct of any trade or commerce,” including “engaging in any act or practice which is deceptive to the consumer or any other person.”

25. The representations, omissions, and other conduct of National Union in handling SSHC’s claims under the Policies, including National Union’s bad faith attempt to avoid its contractual obligations under the Policies by engaging in post-claim underwriting and by falsely claiming that SSHC did not provide notice of Government Investigations, constitute unfair or

deceptive acts or practices in violation of the TCPA, entitling SSHC to actual damages plus attorneys' fees and costs.

26. National Union's unfair or deceptive acts or practices in violation of the TCPA affected trade or commerce as defined in the TCPA.

27. As a direct result of National Union's unfair or deceptive acts or practices in violation of the TCPA, SSHC has suffered an ascertainable loss of money or property, including but not limited to the costs associated with seeking the insurance coverage to which it is entitled under the Policies from National Union.

28. National Union's unfair or deceptive acts or practices in violation of the TCPA were willful and knowing, entitling SSHC to treble damages.

## **COUNT II: BAD FAITH REFUSAL TO HONOR INSURANCE CONTRACT**

29. All of the preceding allegations are incorporated herein by reference.

30. TENN. CODE ANN. § 56-7-105 provides an insurer's "refusal to pay the loss" that is "not in good faith," thereby inflicting "additional expense, loss, or injury including attorney fees upon the holder of the policy" constitutes a bad faith refusal to pay, entitling an insured to damages, including a statutory bad faith penalty not exceeding twenty-five percent (25%) of the liability on the loss.

31. In keeping with the notification requirements of the Policies, SSHC provided formal notice of each of the claims brought against it as soon as it learned of the claims and formally demanded coverage, including defense and indemnity. National Union has in turn sought rescission of its insurance contracts with the SSHC-Insureds, by falsely claiming that SSHC did not provide notification of the potential claims and investigations against it at the time National Union issued its Policies to SSHC.

32. National Union, in a conspicuous effort to shirk its contractual obligations and obtain rescission of the Policies, has falsely claimed that SSHC did not provide notice of the Government Investigations and has otherwise acted in bad faith in regard to its obligations under the Policies.

33. National Union's bad faith refusal to provide coverage constitutes a violation of TENN. CODE ANN. § 56-7-105, which entitles Small Smiles to damages, including but not limited to, the bad faith penalty of 25% of the liability on the loss, including attorney's fees, provided for in TENN. CODE ANN. § 56-7-105.

WHEREFORE, Small Smiles demands that the Court grant judgment against National Union and in favor of Small Smiles for:

1. A sum sufficient to compensate it for its loss of all coverage under the Policies, together with pre-judgment interest;
2. A statutory bad faith penalty equal to twenty-five percent (25%) of the liability on the loss, including attorney's fees, pursuant to TENN. CODE ANN. § 56-7-105;
3. An amount of damages to be proven at trial, plus reasonable attorney's fees and costs, and treble damages pursuant to TENN. CODE ANN. § 47-18-101, *et seq.*;
4. Such other and further relief as the Court deems just.

Respectfully submitted,

/s/ Emily B. Warth

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been served, via the Court's electronic filing system on all registered users, and via United States mail, first-class postage prepaid on all others, on the following:

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This 28<sup>th</sup> day of October, 2010.

/s/ Emily B. Warth