

In the
Supreme Court of Ohio

| | | |
|------------------------------|---|--|
| LAURA GRACE, et al., | : | |
| | : | |
| Plaintiffs-Respondents, | : | Case No. 2009-0122 |
| | : | |
| v. | : | On Review of a Certified Question |
| | : | from the United States District Court, |
| STATE FARM MUTUAL AUTOMOBILE | : | Northern District of Ohio, Eastern |
| INSURANCE COMPANY, et al., | : | Division |
| | : | |
| Defendants-Petitioners. | : | |

**PRELIMINARY MEMORANDUM OF AMICI CURIAE
OHIO INSURANCE INSTITUTE AND NATIONAL ASSOCIATION OF MUTUAL
INSURANCE COMPANIES IN SUPPORT OF PETITIONERS**

James A. DeRoche, Esq.
GARSON & ASSOCIATES CO., LPA
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, OH 44113

Glenn D. Feagon, Esq.
8905 Lake Avenue, 4th Floor
Cleveland, OH 44113

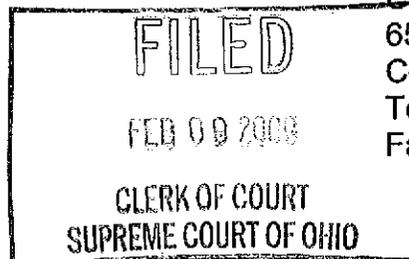
Attorneys for Respondents Grace, Garcia,
Ruffin and Jones

Alberto R. Nestico, Esq.
Gary W. Kisling, Esq.
Robert W. Redick, Esq.
Thomas Vasvari, Esq.
KISLING, NESTICO & REDICK LLC
3200 W. Market Street, Suite 300
Akron, OH 44333
Tel: (330) 869-9007
Fax: (330) 869-9009

Thomas E. Szykowny (0014603)
Michael Thomas (0000947)
VORYS, SATER, SEYMOUR AND
PEASE LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com

Attorneys for Amici Curiae
Ohio Insurance Institute and National
Association of Mutual Insurance
Companies

Mark A. Johnson (0030768)
Rodger L. Eckelberry (0071207)
Robert J. Tucker (0082205)
BAKER & HOSTETLER LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260
Tel: (614) 228-1541
Fax: (614) 462-2616



Austin Tighe, Esq.
FEAZELL & TIGHE, L.L.P.
6300 Bridgepoint Parkway, Bridgepoint 2
Suite 220
Austin, TX 78730
Tel: (512) 372-8100
Fax: (512) 372-8140

Attorneys for Respondent Angela Webb

Patrick J. Perotti, Esq.
Nicole T. Fiorelli, Esq.
DWOREN & BERNTEIN CO., L.P.A.
60 South Park Place
Panesville, OH 44077
Tel: (440) 352-3391
Fax: (440) 352-3469

Edwin E. Schottenstein, Esq.
SCHOTTENSTEIN LAW OFFICES
100 East Broad Street, Suite 1337
Columbus, OH 43215
Tel: (614) 462-2266
Fax: (614) 462-2406

Attorneys for Respondent Patricia Schwab

Michael K. Farrell (0040941)
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485
Tel: (216) 621-0200
Fax: (216) 696-0740

Attorneys for Petitioners State Farm
Mutual Automobile Insurance Company
and State Farm Fire and Casualty Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIESi

STATEMENT OF INTEREST OF AMICI CURIAE1

STATEMENT OF FACTS4

ARGUMENT4

 This Court should answer the certified legal question because it is
 dispositive of many pending cases and there is no controlling authority.4

CONCLUSION.....9

CERTIFICATE OF SERVICE.....10

TABLE OF AUTHORITIES

PAGE

CASES

Berrios v. State Farm Ins. Co. (2002), 98 Ohio St. 3d 109, 2002-Ohio-71156, 8, 9

Grange Mutual Cas. Co. v. Lindsey (1986), 22 Ohio St. 3d 1536, 8, 9

Lager v. Nationwide Mut. Fire Ins. Co. (2008), 120 Ohio St. 3d 47, 2008-Ohio-48386

Shearer v. Motorists Mutual Ins. Co. (1978), 53 Ohio St. 2d 1.....6, 7, 8, 9

Snyder v. American Family Ins. Co. (2007), 114 Ohio St. 3d 239, 2007-Ohio-40047

STATUTES

R.C. 3937.18.....3, 4, 6, 7

R.C. 3937.18(F).....8

R.C. 3937.18(G)8

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae National Association of Mutual Insurance Companies ("NAMIC") has served as a national trade association for the property and casualty insurance industry since 1895. NAMIC currently has more than 1,400 members, including small farm mutual companies, state and regional insurance companies, risk retention groups, reinsurance companies, and international insurance giants. Amicus curiae Ohio Insurance Institute ("OII") is a professional trade association representing property and casualty insurance companies throughout this State. Its members include domestic property and casualty insurers, foreign insurance companies, and reinsurers, who collectively account for approximately one-half of the property and casualty insurance business written in Ohio; insurance trade groups and other insurance organizations are also members.

NAMIC and OII provide a wide range of insurance-related services to their members and to the public, the media, and government officials. In connection with these services, NAMIC and OII closely monitor litigation and judicial decisions that address important issues of insurance law. They are uniquely qualified to provide this Court with broad perspectives on insurance law as well as practical insights into the specific legal question certified by the District Court in this case.

Insurance is the fourth largest industry in Ohio and an important pillar of this State's economy. Many major insurance companies have chosen to domicile here, creating jobs and generating business activity that benefits all Ohio citizens and all levels of state and local government. More generally, insurance makes modern economic life possible for both corporations and individuals by spreading risks of loss that a single business or individual could not bear alone. However, insurance cannot

provide that essential protection unless the extent of the covered risks is well-defined and the price charged for the insurance coverage reflects those defined risks. The covered risks of loss are defined and delimited by the provisions of the insurance policies, by consistent judicial interpretations of the policy provisions, and by statutory regulations enacted by the General Assembly. Judicial decisions that expand insurance coverage beyond the scope of the policy provisions and statutory requirements upset the settled expectations of insureds and insurers alike and undermine the risk calculations that were used to determine the price of the insurance.

The ability of insureds and insurers to define a risk and to set a rational price for insuring that defined risk is central to the legal question certified in this case: whether Ohio law prohibits insurers and insureds from agreeing to policy provisions that preclude insureds from collecting insurance benefits twice for the same medical bills, and to thereby limit the total amount of covered losses and reduce the concomitant cost of the insurance coverage. The certified question addresses the extent of covered losses under the uninsured-underinsured motorist and medical payments coverages of automobile insurance policies, and thus affects millions of Ohioans. If Ohio insurers are required to pay duplicative benefits under these two coverages for the same medical bills, the additional costs of that additional coverage will ultimately be borne by Ohio insureds, even if they do not want that coverage.

There would be many short-term and long-term adverse consequences for Ohio insureds and insurers if insureds and insurers were not allowed to agree to exclude coverage for duplicative payments for medical bills from automobile insurance policies. In the short run, insurers who calculated the premiums for existing policies on the basis

of the defined covered losses – which did not include double payments – would be required to provide that additional coverage. It is bad for the insurance industry, and bad for Ohio citizens, when insurers learn after-the-fact that they must pay losses twice after the insured agreed, in conformity with R.C. 3937.18, that those losses would be covered only once.

In the long run, insurers who are required to pay duplicative benefits must ultimately pass the cost of that additional coverage on to all insureds. This is precisely the type of situation the General Assembly had in mind when it amended R.C. 3937.18 to give insureds and insurers flexibility in setting the conditions of coverage that affect the cost of insurance.

This is not a case in which an insurer has attempted to place restrictions on coverage that violate Ohio law or public policy. On the contrary, R.C. 3937.18 expressly allows insureds and insurers to include policy provisions that limit coverage. There is no conceivable Ohio public policy that requires insurers to pay some insureds' medical bills twice at the expense of all insureds, who will be forced to pay higher premiums for that unnecessary coverage. There is no legal or public policy reason that insureds and insurers should be prohibited from agreeing that covered medical bills will be paid only once.

OII and NAMIC strongly urge this Court to accept review of the certified question of law and to enforce the express terms of the parties' insurance policies, as authorized by R.C. 3937.18. Eliminating duplication of insurance benefits – and the unnecessary costs it entails – is in the best interests of Ohio insureds and insurers.

STATEMENT OF FACTS

There is no dispute as to any facts that are relevant to the certified question. Amici curiae NAMIC and OII adopt the Statement of Facts set forth in the Preliminary Memorandum of Petitioners State Farm Automobile Insurance Company and State Farm Fire and Casualty Insurance Company, at 1 - 3.

ARGUMENT

This Court should answer the certified legal question because it is dispositive of many pending cases and there is no controlling authority.

The Supreme Court of Ohio may answer a question of law certified by a federal court when there is (1) "a question of Ohio law that may be determinative of the proceeding" and (2) "no controlling precedent in the decisions of [the Ohio] Supreme Court." S. Ct. Prac. R. XVIII, Sec. 1. In the present case, the United States District Court for the Northern District of Ohio, Eastern Division, found that three putative class actions raise a determinative legal question that has not been resolved by this Court: whether Ohio insureds and insurers may include provisions in automobile insurance policies that preclude duplicative payments for the same medical bills under the uninsured-underinsured motorist and medical payments coverages of the policies. See Memorandum and Order Certifying a Question of State Law to the Supreme Court of Ohio, Jan. 15, 2009.

More specifically, the District Court found that earlier decisions by this Court prohibiting non-duplication insurance provisions are not controlling precedent in light of the 2001 amendments to R.C. 3937.18. (*Id.*, at 7.) Moreover, "there are a number of other lawsuits in both state and federal court" that raise the same issue, creating "the

possibility of additional inconsistent rulings” unless this Court agrees to answer the certified question. (Id.)

The District Court’s findings cannot seriously be challenged: there is no controlling precedent in the decisions of this Court on this determinative question of law under the 2001 statutory amendments, and this Court therefore has authority pursuant to Sup. Ct. Prac. R. XVIII to answer the certified question. Amici curiae NAMIC and OII urge the Court to exercise its authority to answer the certified question and resolve this important issue now.

A. The certified question is determinative.

First, the question certified by the District Court “is a question of Ohio law that may be determinative of the proceeding,” as required by S. Ct. Prac. R. XVIII, Sec. 1. All of the plaintiffs in this case seek duplicative benefits for their medical bills: once under the uninsured-underinsured motorist coverage of their automobile insurance policies, and once again under the medical payments coverage of those policies. Each of the plaintiffs’ insurance policies expressly prohibits duplicative recovery for the same medical bills. See Mem. and Order, *supra*, at 3. Accordingly, plaintiffs’ claims must be dismissed as a matter of law unless the non-duplication provisions of the insurance policies violate Ohio law.

The certified question is also dispositive of a host of other pending lawsuits. See State Farm’s Preliminary Memorandum, at 4 – 5. The plaintiffs in those cases also seek double-recovery for medical expenses under insurance policies that contain non-duplication provisions. Inasmuch as non-duplication clauses are standard in automobile insurance policies, the certified question will also be dispositive of many additional

cases. This is precisely the situation that S. Ct. Prac. Rule XVIII was designed to address.

B. There is no controlling precedent.

The Court should also answer the certified question because “there is no controlling precedent in the decisions of this Supreme Court.” S. Ct. Prac. R. XVIII, Sec. 1. Although the Court addressed a similar issue in three earlier cases, *Shearer v. Motorists Mutual Ins. Co.* (1978), 53 Ohio St. 2d 1, *Grange Mutual Cas. Co. v. Lindsey* (1986), 22 Ohio St. 3d 153, and *Berrios v. State Farm Ins. Co.* (2002), 98 Ohio St. 3d 109, 2002-Ohio-7115, its decisions in those cases were based upon language in R.C. 3937.18 that was eliminated by S. B. 97 in 2001. Accordingly, the Ohio law that the Court applied in its three earlier decisions is no longer the law of Ohio, and there is no controlling precedent on the certified question. See *Lager v. Nationwide Mut. Fire Ins. Co.* (2008), 120 Ohio St. 3d 47, 2008-Ohio-4838, at ¶ 23 (“precedent from the era [prior to the S. B. 97 amendments] is not compelling in the era of current Ohio insurance law”).

“Among the significant changes in the 2001 amendment was the removal of the requirement that insurers must offer uninsured- or underinsured-motorist coverage to persons purchasing motor vehicle liability insurance.” *Snyder v. American Family Ins. Co.* (2007), 114 Ohio St. 3d 239, 2007-Ohio-4004, at ¶ 14. “Eliminating the mandatory coverage offering and simultaneously permitting the parties to agree to coverage exclusions not listed in [R.C. 3937.18] provide insurers considerable flexibility in devising specific restrictions on any offered uninsured- or underinsured-motorist coverage.” (*Id.*, at ¶ 15.) “Absent a specific statutory or common-law prohibition,

parties are free to agree to the contract's terms. . . . [The post-2001 version of] R.C. 3937.18(l) confirms that the parties may include terms that exclude recovery of uninsured-motorist benefits under specified circumstances." (Id., at ¶ 24.)

When this Court earlier ruled that non-duplication clauses are invalid under Ohio law, it reasoned that set-offs from coverage would dilute the mandatory uninsured and underinsured motorist coverage required at that time by the pre-2001 version of R.C. 3937.18. See, e.g., *Shearer*, supra, 53 Ohio St. 2d at 8, ("[t]he uninsured motorist coverage required to be offered by [the pre-2001 version of] R.C. 3937.18. . . cannot be diluted or diminished by payments made to the insured pursuant to the medical payment provision"); and *Berrios*, supra, 98 Ohio St. 3d at 113, 2002-Ohio-7115, at ¶ 35 ("[t]he thrust of *Shearer* and *Lindsey* was the rejection of policy language that created setoffs against statutorily mandated UM coverage").

The previous statutory requirements that the Court relied upon in those earlier decisions are no longer a part of Ohio law and thus do not invalidate the non-duplication clauses in the present case. Moreover, the Court's related comment in *Berrios*, supra, 2002-Ohio-7115, at ¶ 26, that "people who pay separate premiums for separate coverages should get what they pay for" (i.e., double recovery) was also based on the pre-2001 version of the statute. The General Assembly has formally recognized in the S. B. 97 amendments that the number of premiums paid is not determinative of the coverages provided by the policies. The insurance provisions at issue in this case do not provide coverage for medical expenses under underinsured motorist coverage if the same medical expenses have been paid under the medical payments coverage. These are "separate coverages," in the sense that they cover separate losses, but the insureds

got exactly what they paid for: medical expense coverage benefits and underinsured motorist coverage benefits that are not duplicative of the medical payments benefits.

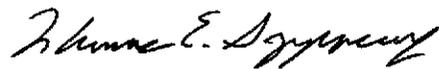
The current version of the statute allows insureds and insurers to agree “without regard to any premiums involved” that different coverages cannot be stacked to increase benefits, R.C. 3937.18(F). The General Assembly thereby acknowledged that policy exclusions can affect other coverages regardless of whether the premiums are charged separately. See also R.C. 3937.18(G), which expressly allows insureds and insurers to agree to policy terms that subject all claims arising from a bodily injury to one person, collectively, to the limit of liability applicable to a single person or single claim, “regardless of the number of insureds. . . or premiums. . . .”

In short, this Court's decisions in *Lindsay*, *supra*, *Shearer*, *supra*, and *Berriors*, *supra*, are not precedential authority on this issue and do not answer the certified question of law. The resulting confusion in the lower courts about this question creates unnecessary lawsuits and appeals, and leaves both insureds and insurers uncertain about the scope of coverage of their insurance policies. It is extremely important that the Court accept the certified question and settle Ohio law on this issue.

CONCLUSION

As set forth above, the question of Ohio law certified by the United States District Court may be determinative of this case, as well as many others, and there is no controlling precedent in this Court's previous decisions. This Court thus has the authority to answer the certified question under Sup. Ct. Prac. R. XVIII, and it should exercise that authority to provide clear guidance to the lower courts, insureds, and insurers on this important issue.

Respectfully submitted,



Thomas E. Szykowny (0014603)
Michael Thomas (0000947)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216-1008
Tel: (614) 464-5671
Fax: (614) 719-4990
teszykowny@vorys.com

Attorneys for Amicus Curiae
Ohio Insurance Institute and National
Association of Mutual Insurance
Companies

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Preliminary Memorandum Of Amici Curiae Ohio Insurance Institute And National Association Of Mutual Insurance Companies In Support Of Petitioners was served via regular United States mail on this 9th day of February, 2009, on the following:

Mark A. Johnson, Esq.
Rodger L. Eckelberry, Esq.
Robert J. Tucker, Esq.
BAKER & HOSTETLER LLP
Capitol Square, Suite 2100
65 East State Street
Columbus, OH 43215-4260

Michael K. Farrell, Esq.
BAKER & HOSTETLER LLP
3200 National City Center
1900 East Ninth Street
Cleveland, OH 44114-3485

James A. DeRoche, Esq.
GARSON & ASSOCIATES CO., LPA
1600 Rockefeller Building
614 West Superior Avenue
Cleveland, OH 44113

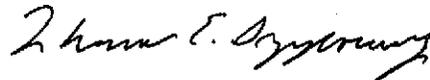
Glenn D. Feagon, Esq.
8905 Lake Avenue, 4th Floor
Cleveland, OH 44113

Alberto R. Nestico, Esq.
Gary W. Kisling, Esq.
Robert W. Redick, Esq.
Thomas Vasvari, Esq.
KISLING, NESTICO & REDICK LLC
3200 W. Market Street, Suite 300
Akron, OH 44333

Austin Tighe, Esq.
FEAZELL & TIGHE, L.L.P.
6300 Bridgepoint Parkway, Bridgepoint 2
Suite 220
Austin, TX 78730

Patrick J. Perotti, Esq.
Nicole T. Fiorelli, Esq.
DWOREN & BERNTEIN CO., L.P.A.
60 South Park Place
Panesville, OH 44077

Edwin E. Schottenstein, Esq.
SCHOTTENSTEIN LAW OFFICES
100 East Broad Street, Suite 1337
Columbus, OH 43215



Thomas E. Szykowny