ORIGINAL

IN THE SUPREME COURT OF OHIO

OHIO INSURANCE GUARANTY ASSOCIATION	)	CASE NO. 12-0653
Plaintiff-Appellant,	)	On Appeal from the Cuyahoga County Court of Appeals Eighth Appellate District
vs.	)	Court of Appeals Case No. 97236
BONNIE PIKKEL, et al.	)	
Defendants-Appellees.	)	

THE PIKKEL-APPELLEES' MEMORANDUM IN RESPONSE TO OIGA'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. THIS CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

The court of appeals narrowly decided this case based on its "unique facts". *Opinion,* p. 6. The court's decision turned on—and was confined to—the terms of the particular settlement agreement before it. The decision has little to no application beyond this lawsuit. There is no evidence that the Ohio Insurance Guaranty Association ("OIGA") entered into a similar settlement with any other claimant in any other insolvency. The settlement was not only rare, but dated: the underlying medical malpractice occurred more than fifteen years ago, and the settlement agreement was made nearly a decade ago as part of the P.I.E. insolvency—litigation which is long over and need not be revisited by this Court.

This case presents no unsettled issues of law. The extent of the OIGA's authority to settle and pay covered claims is well defined by statute and other decisions by this Court. The appellate court relied solely on this relevant statutory and Supreme Court authority in issuing its limited holding; namely, that: "*under the unique facts of the case at hand,* OIGA lacked the statutory authority to enter into the Additional Agreement." *Opinion* p. 6. (Emphasis added.)

In reaching its decision, the lower court neither created nor applied any novel legal theories. The settlement was governed by well settled, controlling law. The OIGA was required to pay up to $300,000 per policy for the primary and excess P.I.E. policies at issue.[1] *Rushdan v. Baringer* (August 30, 2001), 8th Dist. App. No. 78478, 2001 Ohio

[1]P.I.E insured the emergency group whose stipulated malpractice caused 47 year old Bonnie Pikkel to suffer a permanent loss of bowel, bladder and sexual function.

App. LEXIS 3827. *Rushdan* was expressly cited in the OIGA settlement documents as the basis for its $600,000 payment of Bonnie Pikkel's covered claims under the P.I.E. primary and excess policies. As in *Rushdan*, the OIGA stipulated that the value of the Pikkel claims against its P.I.E. insured was $1.3 million. The uncovered portion, in the amount of $700,000, was her personal Class II claim in the separate P.I.E. liquidation.

No injustice was served by the Court of Appeals decision. The OIGA has paid only what it was statutorily required to pay on the Pikkels' covered claims. The OIGA has also been reimbursed for these payments. As a non-profit association of insurers, the OIGA receives a percentage of all insurance premiums written in Ohio. This alone is usually sufficient to pay covered claims arising from any insurer insolvencies.[2]

Additionally, the OIGA received a statutory priority Class I claim to recoup its administrative expenses incurred in the P.I.E. insolvency, which was paid in full by the P.I.E. liquidation estate. The OIGA also received a statutory subrogation class II claim for amounts paid on covered claims like the Pikkels. By law the OIGA was entitled to recover the same pro-rata share of the liquidation proceeds as all other Class II claimants. See, R.C. 3903.42 (prohibiting subclasses among claimants.) This would include claimants like Bonnie Pikkel for the uncovered portion of her loss.

At the conclusion of the P.I.E. Liquidation, the Court allowed an 82% pro-rata distribution on all Class II claims. The OIGA was thus entitled to recover 82%—and only 82%—of the payments made on the Pikkel claim. In fact, the P.I.E. Liquidation

[2] See OIGA website under FAQ at http://www.ohioga.org.

Court expressly incorporated into its final distribution order representations that the insurance guarantee associations like the OIGA were receiving the same pro-rata distribution as all other Class II claimants (including the Pikkels) and would be receiving no windfalls.[3] Yet, if the OIGA recovered the $174,988 it sought from the Pikkels' own personal class II liquidation claim, plus 82% of its own class II claim for reimbursement of the $600,000 it paid her, the OIGA's percentage of the distribution would be nearly double the Pikkels. As a creature of statute, the OIGA's powers are not unlimited. Nowhere does the statute permit the OIGA to fund its association from a claimant's own personal liquidation claim—and receive more than its pro-rata share of the liquidation proceeds to the detriment of another class member like Bonnie Pikkel.

Four well respected judges—at the trial court and then the court of appeals—unanimously found the OIGA acted outside its statutory authority when it entered into the unique settlement at issue here. Because the lower court decision was narrowly limited to the facts before it, this case presents no issue of compelling public or great general interest for this Court's consideration.

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[3]*See* Motion for Order Approving Liquidator's Final Report etc, in *Mary Jo Hudson, Superintendent of Insurance v. The P.I.E. Mutual Ins. Co.*, Franklin County C.P. Case No. 97CVH12-10867 and Order http://www.ohinsliq.com/documents/companydocuments/20_20091119_1_motionforfinalreport.pdf.http://www.ohinsliq.com/documents/companydocuments/20_20091124_1_orderapprovingfinalreport.pdf.

II. PROPOSED PROPOSITION OF LAW AND ARGUMENT OPPOSING IT

Proposed Proposition of Law: R.C. 3955.08(A)(4) grants the OIGA broad power to negotiate and enter complex settlements, even if the settlements are evidenced by multiple documents and even if the settlements require performance at various times.

The OIGA is now presenting a proposition of law that was not raised or decided in the trial court or court of appeals. It is not the issue in this case and is not determinative of the outcome of this case. Thus, the proposition is not a proper basis for acceptance or review by this Court. The issue is what the OIGA attempted to do in its additional agreement—not whether it could enter into a complex or contingent settlement agreement. Both the court of appeals and the trial court found its side agreement exceeded the OIGA's statutory authority by what it attempted to do in the agreement. The OIGA's proposition does not even address that issue.

The OIGA "has no authority beyond the authority conferred by statute and it may exercise only those powers that are expressly granted by the General Assembly. *St. ex rel. Lucas Cty. Bd. Of Commrs. v. Ohio Environmental*, 88 Ohio St.3d 166, 171 (2000)." *Id.* at p. 4.

The Ohio Insurance Guaranty Association Act, codified at R.C. Chapter 3955, was enacted to protect third-party claimants like the Pikkels from potentially catastrophic losses due to the insolvency of a member insurer. *PIE Mut. Ins. Co. v. Ohio Ins. Guar. Assn.* (1993), 66 Ohio St.3d 209, at syllabus ¶1. The OIGA, a *nonprofit* unincorporated association, was created as a mechanism to accomplish the Act's objectives. The express statutory purpose for the OIGA is *to pay covered claims* of insolvent insurers, *reduce*

financial loss to claimants and policyholders because of their insolvency and *to assess the cost of that among member insurers.* R.C. §3955.03. (Emphasis added).

Moreover, while the OIGA has the power to negotiate and become a party to a contract, it can only do so "to carry out its statutory *purpose*." (Emphasis added). The Act "shall be construed liberally to effect the *purposes* stated under section 3955.03," and those purposes "shall constitute an *aid and a guide to interpretation.*" R.C. §3955.04. (Emphasis added). As the OIGA itself recognized below, "[t]he OIGA's statutory purpose, embodied in the Revised Code, *is to protect Ohioians from potentially catastrophic loss when an insurance company becomes defunct.*" (OIGA Appellant Brief, p. 23).

But the OIGA sought here to do just the opposite. The OIGA has no statutory authority to force undercompensated claimants to sacrifice their personal liquidation rights as part of a settlement with the OIGA. Rather than "provide an association to assess the cost of such protection *among insurers*," as mandated by R.C. §3955.03, the OIGA could assess those costs among those who can least afford it and who the Act was designed to protect—undercompensated claimants. Bonnie Pikkel is already undercompensated for her loss, and the OIGA lacked the statutory authority to increase that loss even further, as it attempted to do so here.[4]

CONCLUSION

The court of appeals correctly found that the OIGA acted outside its statutory authority based on the unusual agreement and "unique" facts before it. Given its limited

[4]Bonnie Pikkel has recovered only $1,072,500 on claims that the OIGA stipulated were valued at $1.3 million. Had the OIGA prevailed below, her recovery would be reduced to $897,511.60.

precedential value, this case presents no issue of public or great general interest requiring this Court to exercise its discretionary jurisdiction. The OIGA's request that this Court do so should be denied.

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served by regular U.S. Mail, postage prepaid, this 16th day of May, 2012 upon:

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