Case No. 2008-CA-00642
(Consolidated with 2008-CA-01351)
IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS

SOUTHERN HEALTHCARE SERVICES, INC.,
MEDFORCE MANAGEMENT, LLC
d/b/a WILLOW CREEK RETIREMENT CENTER
AND, DALESON ENTERPRISE, LLC d/b/a JONES COUNTY REST HOME

Appellants

v.

LLOYD'S OF LONDON AND CERTAIN
UNDERWRITERS AT LLOYD'S OF LONDON

Appellees

APPEAL FROM CAUSE NO. 2006-26-CV8
CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT
JONES COUNTY MISSISSIPPI

APPELLANTS' REPLY BRIEF

Respectfully Submitted,

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

The following is a list of parties and counsel to the trial court's judgment,

Trial Judge:

Honorable Robert G. Evans
Circuit Court
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Raleigh, Mississippi 39153

Appellants (Plaintiffs):

Southern Healthcare Services Inc.,
Medforce Management, LLC d/b/a Willow Creek Retirement Center, and Daleson Enterprise, LLC d/b/a Jones County Rest Home

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Appellees (Defendants):

Lloyd's of London and Certain Underwriters at Lloyd's of London

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DISTRICT OF JONES COUNTY MISSISSIPPI

APPELLANTS' REPLY BREIF

To the Mississippi Court of Appeals:

On its face, Underwriters' responsive brief is compelling. Underwriters assert that they "provided defense to Plaintiffs in the five (50 underlying matters and eventually facilitated a resolution in each." They further contend that "[d]efendants stepped in and chose to advance the deductible amounts in order to settle Plaintiffs' suits and protect plaintiffs' interest." Finally, Underwriters claim that "[d]efendants never breached the Policy but rather fulfilled all of their obligations under the Policy by resolving the five claims brought against their insured."

However, what is missing in Underwriters' analysis is the timing of their "stepping in" and "protecting" the insured. Specifically:

- Daleson and Medforce were insureds under the Policy in 2003 and 2004, and Underwriters had accepted a $360,100 premium payment in exchange for Appellees' promise of coverage.

- While the policy was in effect, during a span covering part of 2003 and part of 2004, five lawsuits were filed against Daleson and Medforce.

- In accordance with the Policy, Daleson and Medforce made claims to the Appellees, invoking Underwriters contractual duty to defend and indemnify Daleson and Medforce.

- Rather than provide such defense and indemnity, though, Underwriters demanded that Daleson and Medforce pay the first $250,000 in defense costs on each of the five claims.

- The Policy, though, is clear: Daleson and Medforce had no obligation whatsoever to pay any part of any deductible before being entitled to coverage. In other words, Underwriters sought to "rewrite' the Policy when faced with the prospect of having to provide the paid for and bargained for coverage.

- The defense counsel initially promised by the Underwriters withdrew for non-payment.

- When Underwriters denied coverage, both Daleson and Medforce were forced to seek the protection of the bankruptcy court. While Underwriters blithely refer to this as a "business decision," it was nothing more than a Hobson's choice for Daleson and Medforce. Simply put, left "naked' when Underwriters refused to honor the Policy, Daleson and Medforce had no other choice. In fact, the business decision that ought to be the focus of this matter was the choice Daleson and Medforce made when they sought insurance protection from Underwriters when the Policy's premium was paid. To state the obvious, the premium was paid, but the coverage was denied.

- Being left "naked,' and with no other viable solution, Daleson and Medforce filed for bankruptcy protection on January 10, 2005.

- Even after the bankruptcy filings, bankruptcy counsel made written demand for coverage to the Underwriters but to no avail.

- As a result, Daleson and Medforce suffered damages of attorneys fees and costs, lost profits, lost management fees, and perhaps most importantly, the loss of state licensing, an extremely valuable asset.

- Consequently, on August 3, 2006, the underlying suit was filed.

- ***Only after suit was filed, and following numerous demands did Underwriters "step in" to "protect their insureds, Daleson and Medforce.***

- Specifically, no defense or indemnity was provided to Daleson and Medforce until the period between December 2006 and August 2007. At that point, the damage had been done and Underwriters' belated attempt to "cure" their breach of the Policy was too little, too late.

Mississippi jurisprudence is crystal clear: a material breach by either party terminates a contract. See Restatement (Second) Contracts § 253; *Estate of Reaves v. Owen*, 744 So.2d 799, 802 (Miss. App. 1999). In fact, "the majority of cases now recognize the undesirability of rewarding the insurer which refuses to honor its contractual obligations" *State Farm Mut. Auto Ins. Co. v. Allstate Ins. Co.*, 255 So.2d 667, 669 (Miss. 1971); see also 8 Appleman, Insurance Law and Practice, Section 4913, page 398.

Here, Appellees materially breached the Policy when they demanded "prepayment" of the $250,000 per claim deductible from Daleson and Medforce. First, the Policy specifically provided that only the "First Named Insured" was responsible for the deductible. Southern, and not Daleson or Medforce, was the first named insured. It is uncontroverted that under no scenario under the Policy would either Daleson or Medforce be required to pay or reimburse Underwriters for any deductibles in order to receive the coverage that Underwriters was paid to provide. Second, neither Underwriters nor Caronia sought payment of the deductibles from Southern until after Daleson and Medforce were forced into bankruptcies due to the five tort claims that Underwriters and Caronia refused to defend or indemnify. Third, even had Underwriters and Caronia sought prepayment of the deductibles from Southern, ***there is absolutely no requirement in the Policy that prepayment of the deductible is a condition precedent to Underwriters' duty to defend and indemnify the insureds, Daleson and Medforce***. Rather, this "prepayment" condition was only first presented when Caronia, on behalf of Underwriters, told Daleson and Medforce in letters that Underwriters would not defend or indemnify until after $250,000 had been expended by Southern for each of the five tort

claims. In other words, Caronia and Underwriters sought to "rewrite" the Policy by imposing this new "prepayment" clause. However, as the Court will note, the actual Policy requires no such prepayment of the deductible before defense and indemnification is provided. Further, until this time, the Appellants had only authorized and believed that the deductible was $25,000.

In *Monticello Insurance Company v. Mooney*, 733 So.2d 802, 804 (Miss. 1999), a case directly on point, a building owned by Mooney was destroyed by a fire. The building was insured under two insurance policies, including one by Monticello Insurance Company. *Id.* Because arson was suspected, the insurance policy required that Mooney and her husband both submit to examinations under oath and produce personal and business financials. *Id.* This was despite the fact that the insurance policy listed Mrs. Mooney as the sole insured. *Id.* Only Mrs. Mooney submitted to the examination and no financials were produced. *Id.* Later, the Mooneys offered to provide the records requested. *Id.* at 807. By the time the Mooneys offered to cure the breach, Monticello had already filed a declaratory judgment action concerning the matter. The court found that ***the belated offer, after suit had been filed, did not cure the breach.*** *Id.* at 808; *see also Archie v. State Farm Fire & Casualty Co.*, 813 F.Supp. 1208, 1213 (S.D.Miss. 1992)(Emphasis supplied).

As to the judgment granted in favor of the Underwriters against Southern, under Mississippi law, once Underwriters intentionally breached the agreement the insurance contract was terminated. *Estate of Reaves v. Owen* at 802. Certainly when the Underwriters had failed to fulfill their obligations, Southern had no obligation to the Underwriters. Therefore, with no obligation, a judgment is not appropriate. The Underwriters' actions and practices caused the damages in this matter and surely the Underwriters can not be rewarded by this Court for their refusal to honor their contractual promises. If that were so, from now on every insurance

company doing business in this state would refuse coverage and wait for a lawsuit to be filed before the insurance company would take any action. Then, after suit is filed, claim "no harm no foul" because the insurance company was forced to do what it was required to do to begin with. As in this case, all of this was done after the insurance company takes a $360,100 premium payment. This can not be considered to be justice and can not be the law in Mississippi.

CONCLUSION

Underwriters' defense that it "stepped in" and "protected" its insured is belied by the timing of such "protection." Underwriters **only** "stepped in" after they had been sued for breaching the Policy by failing to provide insurance protection to Daleson and Medforce. It is proper to question whether Underwriters would have "stepped in" but for the suit against them.

For these reasons, Appellants ask the Court to reverse the Circuit Court's judgment of summary judgment with respect to Appellants' claims against Underwriters and Caronia, and render a judgment that Underwriters and Caronia materially breached the Policy before any alleged breach by Appellants occurred, and remand the matter for further proceedings consistent with this opinion.

Appellants ask the Court to reverse the Circuit Court's judgment awarding damages to Underwriters against Southern and to render a take nothing judgment with respect to Underwriters' claims. In the alternative, Appellants ask the Court to remand the matter to the Circuit for determination of Appellants set-offs against Underwriters' alleged damages.

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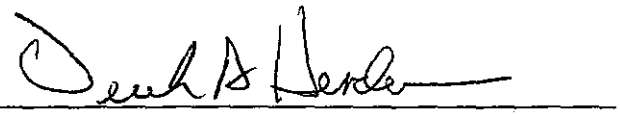

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CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of February, 2009, a true and correct copy of the above and foregoing was delivered as follows:

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