COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-12691

DOUGLAS M. RAWAN AND KRISTEN A. RAWAN
Plaintiffs-Appellants,

v.

CONTINENTAL CASUALTY COMPANY
Defendant/Appellee,

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF OF THE AMICUS CURIAE BOSTON BAR ASSOCIATION THIS AMICUS CURIAE BRIEF IS FILED IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21(b)(i), the Boston Bar Association ("BBA") is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. The BBA is a bar association established almost 250 years ago and currently has nearly 13,000 members. There is no parent corporation or publicly held corporation that owns 10% or more of the BBA's stock.

CERTIFICATION OF AMICI INDEPENDENCE

In compliance with Appellate Rule 17, neither party, nor their counsel, authored this brief in part or in whole. Neither party, nor their counsel, contributed money that was intended to fund the preparation or submission of this brief. The BBA has not represented one of the parties to the present appeal in any other proceeding involving similar issues, nor in any proceeding that is at issue in the present appeal.

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INTEREST OF AMICUS CURIAE

The Boston Bar Association ("BBA") was founded in 1761 by John Adams and other prominent Boston lawyers. It is the nation's oldest bar association. The BBA's mission is to facilitate access to justice, advance the highest standards of excellence for the legal profession, and serve the community at large. From its early beginnings, the BBA has served as a resource for the judicial, legislative, and executive branches of government. The BBA's diverse, member-driven leadership draws attorneys from all areas of the legal profession, many of whom have opted to procure optional professional liability insurance policies.

The BBA respectfully submits this brief pursuant to Mass. R. App. P. 17 and the Court's solicitation of amicus briefs to address the following issues:

> Whether a liability insurer violated its duty, under G. L. c. 176D, § 3 (9) (f), to effectuate a prompt, fair, and equitable settlement of a claim in which liability had become reasonably clear, where the insured refused to consent to a settlement and the insurance policy provided that the insurer would not settle any claim without the informed consent of the insured; whether such a provision is unenforceable as against public policy.

Douglas M. Rawan v. Continental Casualty Co., No. SJC-12691, Amicus Announcement (February 2019).

STATEMENT OF THE CASE AND THE FACTS

The BBA adopts the statement of the case and statement of facts set forth in the brief filed by Defendant-Appellee Continental Casualty Company to the limited extent the facts relate to the sole question raised by the amicus request addressed in this brief and to the extent they detail the procedural history of this matter. However, the BBA takes no position as to any other factual issue raised in Plaintiff-Appellant Douglas M. Rawan's brief.

ARGUMENT

Many professional liability insurance policies — including those procured by numerous members of the BBA — include a consent-to-settle provision whereby the insured-professional is vested with the ultimate authority whether to consent to a proposed settlement in connection with a malpractice claim against the insured. This Court has never found that such provisions violate public policy and, indeed, declined to so rule in Van Dyke v. St. Paul Fire & Marine Ins. Co., 388 Mass. 671, 676 n.6 (1983).

Consent-to-settle provisions promote public policy in two distinct ways. First, consent provisions enable lawyers to exercise their professional discretion in striking the appropriate balance among a host of unique, individualized considerations presented by malpractice claims. Second, consistent with the unique implications of such suits, well-established freedom to contract principles protect professionals' abilities to tailor the terms of their liability insurance coverage. Consent provisions ultimately incentivize the procurement of optional professional liability insurance in Massachusetts because they enable professionals to enjoy insurance protections while preserving autonomy in controlling the resolution of a malpractice suit. To invalidate consent provisions within the Chapter 176D context or otherwise would be to divest professionals of an important malpractice claim management device which inures to the benefit of the insured, not the insurer.

I. CONSENT PROVISIONS ARE INTEGRAL TO PROFESSIONAL LIABILITY POLICIES BECAUSE THEY ALLOW PROFESSIONALS TO MANAGE CASE RESOLUTION

Attorneys, among other professionals, have a unique need to oversee case resolution because, unlike

many other classes of claims, malpractice matters have a significant fiscal and reputational impact on professionals, the effects of which often transcend both the duration and scope of any individual claim. This impact is best ameliorated by consent-to-settle provisions because they provide professionals with the unfettered ability to manage the defense and potential resolution of malpractice claims so as to address highly individualized interests.

A malpractice claim against an attorney — often advanced in the very court system in which the attorney practices — has an inherent adverse reputational impact. Because certain harms are sustained upon even the filing of a malpractice claim, many attorneys may be reluctant to pursue settlement following publication of the suit. See 14 Couch on Ins. § 203:10 (3d ed. June 2019 Update) ("Policies such as medical malpractice or other professional liability coverage may contain provisions requiring the insured's consent to settlement, because of the potential effect that a professional negligence or misconduct claim may have on a professional's reputation and future ability to practice his or her profession."); 14 Am. Jur. Trials 265 §8 (May 2019

Update) ("The practice of suing on a damage claim immediately, in the expectation that the defendant will open settlement negotiations, may not be appropriate in the case of a professional negligence claim against an attorney. The mere filing of an action against him often seriously affects his professional reputation. . . ."). Building on that, the settlement of a malpractice claim is fairly viewed by some as lending credence to the claim regardless of its actual underlying merit, thereby exacerbating the adverse reputational effect. See Ronald E. Mallen, Legal Malpractice Insurance Guide § 10:1 (2019 ed.) ("Many attorneys are sensitive to the effect of settling a disputed claim which they perceive can affect their reputation in the legal community."); see also 14 Am. Jur. Trials 265 §8 (May 2019 Update) ("The accused attorney should remember that a dissatisfied client, especially if he is talkative, can seriously damage a professional reputation, particularly that of a new practitioner.").

Consent provisions further address the concern that settlement of one claim might invite additional claims by other clients who learn of the settlement. Ronald E. Mallen, Legal Malpractice Insurance Guide §

10:2 (2019 ed.) (stating that "an attorney with a claims history is more likely to be the subject of later legal malpractice claims"). Although settlement agreements may include a confidentiality clause to mitigate this harm, claimants do not always agree to such provisions, and even when they are in a settlement agreement, confidentiality clauses present difficult enforceability issues because the bringing of an action to enforce the clause causes the very harm the clause was intended to avoid: publicity regarding the claim and the settlement. See Andrew S. Hanena and Jett Hanna: *Legal Malpractice Insurance: Exclusions, Selected Coverage and Consumer Issues*, 33 S. Tex. L. Rev. 75 (1992) ("The attorney or law firm may perceive that its professional reputation will be damaged by settlement of the claim. The attorney may also fear that the claimant's attorney will 'come back to the well again' if the case is settled.").

These are also applicable to other professionals subject to reporting requirements by licensing boards, such as physicians and brokers licensed by the Financial Industry Regulatory Authority. See Magarick & Brownlee, 2 Cas. Ins. Claims § 35:13 (4th ed. May 2018 Update); 45 C.F.R. § 60.7(a); FINRA Rule 4530.

Pursuant to 45 C.F.R. § 60.7(a), for instance, all payments made for the benefit of a health care practitioner in connection with a claim or judgment must be reported to the National Practitioner Data Bank. Physicians subject to medical malpractice suits have voiced concerns similar to those of lawyers regarding the effect of malpractice claims on their reputation and practice. See Scott Stephens Thomas, J.D., 16 J. Legal Med. 545 (1991) ("Research indicates that the filing and accompanying publicity of a medical malpractice suit may have devastating effects on a physician's professional reputation and self-image . . . ."). As a result, physicians similarly exhibit strong preferences to manage case resolution based on their individualized calculus. See Scott Stephens Thomas, J.D., 16 J. Legal Med. 545 (1991) ("The defendant physician, on the other hand, may prefer trial whenever the potential loss to professional reputation, self-image, and productive medical practice outweighs the time commitment, emotional stress, and dollars expended at trial.").

Where, however, the insured-professional has the benefit of a consent provision, she can find some solace in the level of control bestowed by the consent

provision to address her individualized preferences and circumstances. Without these provisions, a professional who purchases liability insurance cannot control the settlement of a malpractice claim, the consequences of which could affect the insured long after the settlement.

Because of the unique and individualized harms borne by the insured both during and after a malpractice claim, consent provisions inure to the benefit of the insured, not the insurer. Cf. Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 567-68 (2001) (stating Chapter 176D enacted "to encourage settlement of insurance claims and discourage *insurers* from forcing claimants into unnecessary litigation to obtain relief") (emphasis added); Clegg v. Butler, 424 Mass. 413, 419 (1997) (noting Chapter 176D was "enacted to encourage the settlement of insurance claims . . . and discourage *insurers* from forcing claimants into unnecessary litigation to obtain relief.") (emphasis added). There is simply nothing to suggest that insurers use consent-to-settle provisions to sidestep their Chapter 176D obligations because the exercise of a consent provision rests entirely with insured-professional following the

delicate balancing of their personal risk-aversion, reputational interest, and willingness to endure the temporal and emotional commitment of trial.

II. FREEDOM TO CONTRACT PRINCIPLES ALLOW PROFESSIONALS TO TAILOR THEIR OPTIONAL MALPRACTICE INSURANCE CONTRACTS TO THEIR UNIQUE NEEDS[1].

Courts are reluctant to invalidate contracts as void against public policy and have done so only in limited circumstances where the "public's interest in freedom to contract is outweighed by other public policy considerations." A.Z. v. B.Z., 431 Mass. 150, 160 (2000); see also Frishman v. Maginn, 75 Mass. App. Ct. 103, 116 (2009) ("Courts will not go out of their way to discover an illegality in a contract and they proceed with great caution when determining whether the contract must be voided due to the public policy issues.") (citing Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318 (1996) (internal citation omitted)); Miller v. Cotter, 448 Mass. 671, 683 (2007). Cf. 17A Am. Jur. 2d Contracts § 292 ("Given the general principle in favor of the

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[1] A thorough argument that consent to settle provisions do not conflict with Massachusetts Public Policy is set out in Appellee's Opening Brief at pages 22-29 and we do not replicate that argument here.

freedom to contract, courts should not invalidate enforceable promises except in the clearest of cases . . . .") (footnote omitted); 5 Williston on Contracts § 12:3 (4th ed. July 2019 Update) ("[T]he mere fact that a contract under some circumstances may result in an act contrary to public policy will not invalidate it when that consequence will not necessarily result from performance of the contract, since it will be presumed that the parties will conform to the law.") (footnote omitted).

The balance of public policy considerations strongly militates in favor of allowing consent-to-settle provisions because without such provisions the insured-professional is deprived of the option to litigate a malpractice claim consistent with their individualized calculus. Indeed, the notion of invalidating consent provisions presents a separate, countervailing policy concern such that professionals could be disincentivized from obtaining optional malpractice insurance entirely if they are divested of this right. See 7 Couch on Ins. § 101:14 (collecting cases where the public policy of freedom to contract supported upholding bargained-for insurance contracts). The public policy concerns of regulating

insurers should not restrict the rights of insureds who buy optional professional liability insurance for their own protection unless there is an unequivocal legislative intent to do so.

Consent-to-settle provisions have been a bargained-for feature of optional professional liability policies for decades. See, e.g., 14 Couch on Ins. 203:10 (3d ed. 2005); 1A Long, The Law of Liability Insurance § 5A.01 (1993). Many professionals actively seek insurance products with these provisions and have come to rely on them when presented with a malpractice claim. Claimants, of course, have an unadulterated right to bring malpractice claims to trial and, as such, can reasonably or unreasonably refuse a settlement offer. In contrast, without consent clauses, there would be an incongruity between a claimant's absolute right to unreasonably refuse settlement while the insured-professional, by virtue of having procured optional insurance, would be subject to the unilateral determination by her insurer of how to proceed. This presents an absurd result such that professionals who buy non-compulsory liability insurance will have fewer rights in matters which affect their livelihood than

those who have elected to self-insure or not insure at all.

Against that backdrop, the obvious asymmetry of this approach will likely result in professionals attempting to cure the inequity by foregoing insurance altogether in favor of another mechanism whereby professionals can preserve their ability to manage settlement or present defenses at trial, even if such defenses might not ultimately carry the day.

Public policy further favors the right to contract for consent provisions because they also help alleviate conflicts between an insured and insurer. To that end, although Chapter 176D requires insurers to make a determination whether liability is reasonably clear in their own right, if that determination conflicts with the professional's assessment of the case then, absent a consent clause, the professional will have little recourse to prevent settlement. In that way, consent provisions enable professionals who, as a result of their experience and training, are apt at assessing liability exposure.

CONCLUSION

The BBA asks this Court to conclude that public policy militates in favor of consent-to-settle

provisions because such provisions enable professionals to manage the unique implications of a malpractice claim and incentivize the procurement of optional professional liability insurance.

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DATED: August 14, 2019

CERTIFICATE OF COMPLIANCE

I certify that the above document complies with the rules pertaining to the filing of briefs, including, but not limited to, Rules 16, 18 and 20 of the Massachusetts Rules of Appellate Procedure.

With respect to Rule 20, this brief is written in Courier New, 12-point monospaced font. The brief contains 19 pages.

/s/Allen N. David
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CERTIFICATE OF SERVICE

I certify under the penalties of perjury, that, on August 14, 2019, a copy of the foregoing document was filed electronically through the Court's e-filing system. Paper copies will be served by mail on all non-registered participants:

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