

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

-----X
NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA;

Plaintiff,

-against-

FORBA HOLDINGS, LLC; FORBA SERVICES, INC.;
SMALL SMILES HOLDING COMPANY, LLC; AND
SMALL SMILES OF TOLEDO, LLC;

Defendants.
-----X

Civil Action No.:

Judge:

**COMPLAINT WITH JURY DEMAND
ENDORSED HEREON**

Plaintiff, National Union Fire Insurance Company of Pittsburgh, Pa. (“National Union”), by and through its attorneys, Gallagher Sharp and Sedgwick, Detert, Moran & Arnold LLP, as and for its Complaint against defendants, FORBA Holdings, LLC, FORBA Services, Inc., Small Smiles Holding Company, LLC and Small Smiles of Toledo, LLC (collectively, “Defendants”), alleges upon knowledge as to its own acts and upon information and belief as to the acts of others, as follows:

NATURE OF THE ACTION

1. This is an action brought pursuant to 28 U.S.C. §§ 2201 and 2202 for a declaration of the parties’ rights and obligations under the following policies of liability insurance issued by National Union to Small Smiles Holding Company, LLC (“SSHC”): (1) Dentists Liability Policy No. DNU3375848 for the policy period September 26, 2009 through September 26, 2010 (the “Entities Policy”); and (2) Dentists Liability Policy No. DNU6360128 for the policy period December 1, 2009

through December 1, 2010 (the “Individuals Policy”) (collectively, the “Policies”). Certified copies of the Entities Policy and the Individuals Policy are annexed respectively hereto as Exhibits “1” and “2.”

2. Each policy, subject to the conditions, exclusions and limitations contained therein, generally affords Professional Liability Coverage, inclusive of a defense and indemnity, to that policy’s insureds for “damages” because of a covered “dental incident.”

3. On January 20, 2010, the United States Department of Justice (“DOJ”) publicly announced that it had settled False Claims Act allegations against FORBA Holdings, LLC concerning the submission of fraudulent claims for reimbursement for dental services provided to low-income children insured by Medicaid at various Small Smiles dental clinics around the country. As publicly reported, FORBA Holdings agreed to pay the United States and participating States \$24 million, plus interest, in connection with the settlement.

4. Thereafter, on January 25, 2010, Defendants were sued in a putative 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, under Civil Action No.: 10-CV-00172 (JGC) (the “Underlying Action”). A copy of the complaint filed in the Underlying Action is annexed hereto as Exhibit “3” (the “Class Action Complaint”).

5. Defendants have placed National Union on notice of the Underlying Action and are seeking coverage, including defense and indemnity, with respect to that action.

6. The Underlying Action, which is styled as a putative class action, is brought on behalf of a proposed Plaintiff Class, which is defined in the Class Action Complaint as “any child and/or the parent/guardian of any child who received medically unnecessary or excessive treatment, x-rays, sedation and/or restraints at any of Defendants’ nationwide clinics.” Plaintiffs in the Underlying Action (the “Class Action Plaintiffs”) also propose an Ohio subclass, which is defined as “any child and/or the

parent/guardian of any child who resided in the State of Ohio and received medically unnecessary or excessive treatment, x-rays, sedation and/or restraints at any of Defendants' Ohio clinics.”

7. The Underlying Action arises out of an alleged “nationwide conspiracy to perform medically unnecessary dental procedures and use unnecessary or excessive nitrous oxide sedation and physical restraints upon children at their pediatric dental clinics located in at least 23 states [including Ohio], in order to defraud their parents/guardians and third party payors, and obtain additional compensation.”

8. National Union now seeks a declaration that coverage is not available for Defendants under each of the Policies with respect to the Underlying Action.

PARTIES

9. National Union is a corporation organized and existing under the laws of Pennsylvania, with a principal place of business located in New York, New York. National Union is engaged in the business of providing insurance.

10. FORBA Holdings, LLC (“FORBA Holdings”) is a limited liability corporation organized and existing under the laws of Delaware, with a principal place of business in Tennessee and is registered and authorized to do business in Ohio.

11. Upon information and belief, and as alleged in the Class Action Complaint, FORBA Holdings “is a dental practice management company for a chain of at least 50 pediatric dental clinics operated under the name ‘Small Smiles’ in at least 23 states, including Ohio, that focus exclusively on providing dental services to children eligible for dental care under Medicaid and/or the applicable State Child Insurance Program.”

12. Upon information and belief, and as alleged in the Class Action Complaint, FORBA Holdings “owns, operates, develops, manages and supervises its nationwide chain of clinics, including Small Smiles of Toledo, LLC.” As further alleged therein, FORBA Holdings “recruits, hires, trains and

sets the compensation for Small Smiles employees, including [Small Smiles of Toledo, LLC] and issues and institutes policies and procedures which the Small Smiles clinics follow.”

13. FORBA Services, Inc. (“FORBA Services”) is a corporation organized and existing under the laws of Delaware, with a principal place of business in Tennessee and is registered and authorized to do business in Ohio. Upon information and belief, FORBA Services is a wholly owned and/or controlled subsidiary or affiliate of FORBA Holdings.

14. Small Smiles Holding Company, LLC (“SSHC”) is a corporation organized and existing under the laws of Delaware, with a principal place of business in Tennessee. Upon information and belief, SSHC is the parent company of FORBA Holdings.

15. Small Smiles of Toledo, LLC (“SS Toledo”) is a limited liability corporation organized and existing under the laws of Ohio, with a principal place of business in Toledo, Ohio. SS Toledo is engaged in the business of providing professional dentistry services in Ohio.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.

17. This Court has personal jurisdiction over Defendants either generally – insofar as they are incorporated under the laws of Ohio, or are registered to do business within Ohio as foreign corporations or have appointed an Ohio agent for service of process – or specifically, pursuant to R.C. 2307.382. Upon information and belief, Defendants, who are each persons for the purposes of the statute, directly and through their agents: (1) transact business in Ohio; (2) contract to supply services in Ohio; (3) caused tortious injury by an act or omission in Ohio; (4) caused tortious injury in Ohio by an act or omission outside of Ohio and regularly do or solicit business, engage in other persistent course of conduct, or derive substantial revenue from services rendered in Ohio; or (5) caused tortious injury in Ohio to any

person by an act outside of Ohio committed with the purpose of injuring persons such that Defendants might reasonably have expected that some person would be injured thereby in Ohio.

18. Subjecting Defendants to personal jurisdiction in Ohio does not violate Defendants' due process rights and comports with requirements of fair play and substantial justice.

19. Venue is proper under 28 U.S.C. § 1391 because a substantial part of the alleged events or omissions giving rise to the claim occurred in this district and Defendants are subject to personal jurisdiction here. Further, the Underlying Action is also venued in this district.

FACTS COMMON TO ALL CLAIMS

The Underlying Action

20. As alleged in the Class Action Complaint, FORBA Holdings, FORBA Services and SSHC collectively conspired to issue, implement and enforce guidelines, policies, procedures, practices and "billing production goals" to the nationwide Small Smiles dental clinics, including SS Toledo, that were designed to result in the battery of minor children and defrauding of parents/guardians and third-party payors through the performance of medically unnecessary dental procedures upon children, including pulpotomies (baby root canals), extractions, fillings and crowns. In furtherance of the foregoing purported scheme to batter and defraud, Defendants also allegedly subjected children, or caused children to be subjected, to, *inter alia*, improper and unnecessary or excessive use of nitrous oxide sedation, physical restraints and/or behavior management techniques during the dental procedures.

21. The Class Action Plaintiffs allege that Small Smiles employees, including employees of SS Toledo, were taught and pressured to follow Defendants' policy of "conversion," whereby pediatric patients who were brought in to the clinics for routine care and cleaning were "converted" into having medically unnecessary – and traumatic – procedures. In particular, Small Smiles employees were allegedly taught to attempt to convert the routine procedures into pulpotomies and steel crown implants.

This purportedly allowed Defendants to defraud the parents/guardians and third-party payors by billing for much more expensive procedures than would ordinarily be medically indicated.

22. The Class Action Plaintiffs allege that in furtherance of Defendants' alleged conspiracy to commit fraud and battery for profit, the Small Smiles dentists/employees told the parents/guardians of the minor children, following a routine checkup and cleaning, that extensive additional procedures were medically necessary, even though the recommended procedures were not medically necessary. The Class Action Plaintiffs allege that x-rays taken during the routine checkups often were not medically necessary, taken incorrectly, taken by employees not licensed to operate the x-ray machine and/or were unreadable or even blank. Parents/guardians were then allegedly pressured by the Small Smiles dentists/employees to sign consent forms immediately so that the unnecessary procedures could be performed on the same day as the initial consultation, purportedly in order to increase the number of such procedures that could be billed for by Defendants and to ensure that the parents/guardian did not seek a second opinion from other dentists or change their mind and refuse these additional, unnecessary procedures.

23. As alleged in the Class Action Complaint, determinations as to what procedures were medically necessary were often made by employees, agents and servants of Defendants who were not licensed to practice dentistry in the state where the dental services were being rendered. As further alleged therein, unqualified assistants with no formal education or training performed unnecessary and/or excessive nitrous oxide sedation.

24. The Class Action Plaintiffs allege that FORBA Holdings, FORBA Services and SSHC purportedly encouraged the nationwide dental clinics, including SS Toledo, to use papoose boards to restrain children and render them unable to move their extremities – immobilizing the children during these procedures – and implemented policies such that parents/guardians of every child under the age of five were to be told that their child required immobilization, regardless of the true nature of the need for

restraint. The Class Action Plaintiffs allege that Defendants engaged in these practices in order to defraud the parents/guardians and/or third-party payors and increase Defendants' billings.

25. As alleged in the Class Action Complaint, as a result of the battery upon the minor children and the fraud upon parents/guardians and third-party payors, Defendants received significant amounts of additional revenue from each "converted" patient. FORBA Holdings, FORBA Services and SSHC allegedly created and enforced nationwide corporate policies that set daily, monthly and annual billing quotas, or "billing production goals," for each facility and in connection with which monetary bonuses were given to employees to encourage conversion of routine patients into ones requiring extensive additional procedures that were medically unnecessary.

26. As alleged in the Class Action Complaint, Defendants fraudulently held themselves out as pediatric dentists even though the personnel employed at the clinics did not hold the requisite certification.

The Entities Policy

27. The Entities Policy was issued to SSHC as the First Named Insured.

28. The policy period for the Entities Policy is identified therein as September 26, 2009 to September 26, 2010.

29. The Entities Policy has an inception date of September 26, 2009.

30. The Professional Liability Coverage Part for the Entities Policy is subject to a Retroactive Date of February 1, 2001.

31. By Endorsement to the Entities Policy entitled "Schedule of Named Insureds," Item 1 of the Declarations was amended to include as Named Insureds those listed on the Schedule on File with Agent. The attached schedule of "Owners - Entity renewal 9/26/09" identifies, among others, FORBA Holdings, LLC and FORBA Services, Inc.

32. By Endorsement entitled “Additional Insured Endorsement,” the Entities Policy is amended to include as an insured the person or entity shown in the Schedule on File with the Agent, but only with respect to their liability arising out of the conduct of “your business.” The attached schedule of Additional Insureds includes “Small Smiles of Toledo, LLC” among others.

The Individuals Policy

33. The Individuals Policy was issued to SSHC as the First Named Insured.

34. The policy period for the Individuals Policy is identified therein as December 1, 2009 to December 1, 2010.

35. The Individuals Policy has an inception date of December 1, 2009.

36. The Professional Liability Coverage Part for the Individuals Policy is subject to a Retroactive Date of February 1, 2000.

37. By Endorsement to the Individuals Policy entitled “Schedule of Named Insureds,” Item 1 of the Declarations was amended to include as Named Insureds those listed on the Schedule on File with Agent. The attached multi-page schedule identifies individual dentists employed at various Small Smiles dental clinics.

The Professional Liability Insuring Agreement Under the Policies

38. The Professional Liability Coverage Part under each of the Policies generally provides that National Union will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages because of a “dental incident,” provided that the “dental incident” occurs on or after the Retroactive Date and prior to the end of the policy period, and the claim is first made against any insured during the policy period.

39. “Dental incident” is generally defined in each Policy to mean any act, error or omission in the rendering of or failure to render dental services provided by trained and qualified personnel by an insured or by any person for whose acts, errors or omissions it is held legally liable.

40. Also under the Professional Liability Coverage Part to each of the Policies, National Union has the right and duty to defend the insured and pay defense expenses against any “claim” and to which the insurance applies, even if the allegations in such “claim” are groundless, false or fraudulent. However, National Union has no duty to defend the insured against any “claim” to which such insurance does not apply.

41. “Claim” is defined under each of the Policies in relevant part as a demand for damages to which the insurance applies.

The Exclusions Under the Policies

42. Each of the Policies contains several exclusions to coverage, which are applicable to the claims asserted in the Class Action Complaint.

43. Pursuant to Exclusion A, the Policies do not provide coverage for a “dental incident” that occurred prior to the inception date of the Policy if an insured knew, or reasonably should have known, that the “dental incident” could result in, or had resulted in, a “claim.”

44. Pursuant to Exclusion B, the Policies do not provide coverage for a “dental incident” arising out of any dishonest, fraudulent, criminal, or knowingly wrongful acts, errors, or omissions committed by or at the direction of any insured.

45. Pursuant to Exclusion I, the Policies do not provide coverage for a “dental incident” that involves the use of intravenous or intramuscular injections or “general anesthesia.”

46. Pursuant to Exclusion K(1), the Policies do not provide coverage for a “dental incident” arising out of the prescribing or dispensing of any drugs, pharmaceuticals or controlled substances by anyone without the appropriate license, registration or certification.

47. Pursuant to Exclusion O, the Policies do not provide coverage for a “dental incident” expected or intended by any insured or by any person for whose acts, errors or omissions an insured may be held liable.

48. Due to the limited information provided by Defendants herein to National Union, it cannot yet be determined whether any other terms, limitations and/or exclusions of the Policies may be implicated by the allegations set forth in the Class Action Complaint and, therefore, National Union reserves the right to assert such additional terms, limitations and/or exclusions based upon facts ascertained through discovery, all of which are specifically reserved by National Union along with any and all other rights, remedies and defenses under each of the Policies and at law.

The Claims Asserted Against Defendants In the Underlying Action

49. In the Underlying Action, the Class Action Plaintiffs seek judgment against Defendants jointly and severally and also seek: (1) a determination that the action may proceed as a class action; (2) compensatory damages; (3) punitive damages; (4) reasonable attorney's fees and costs; (5) treble damages; (6) pre-judgment interest; and (7) such further and other relief the court deems just, equitable and proper.

50. The Class Action Complaint asserts nine claims for relief. They are: (1) Fraud (the First Claim for Relief); (2) violations of the Ohio state RICO statute (the Second Claim for Relief); (3 & 4) Assault and Battery (the Third and Fourth Claims for Relief); (5 & 6) Intentional and/or Negligent Infliction of Emotional Distress (the Fifth and Sixth Claims for Relief); (7) Loss of Consortium (the Seventh Claim for Relief); (8) Violation of the Ohio Consumer Sales Practices Act (the Eighth Claim for Relief); and (9) Punitive Damages (the Ninth Claim for Relief).

FIRST CLAIM FOR RELIEF

(Declaratory Judgment)

51. National Union incorporates by reference each of the allegations of paragraphs 1 through 50 of this Complaint as if fully set forth herein.

52. An actual controversy of a justiciable nature presently exists between National Union and Defendants concerning the proper construction and application of each of the Policies and the rights or obligations of the parties thereto with respect to the Underlying Action.

53. A judicial declaration is necessary as to National Union's duties and obligations and Defendants' rights under each of the Policies with respect to the Underlying Action.

54. The Policies do not provide coverage for the Underlying Action because the claims for relief alleged in the Class Action Complaint are not covered, either in whole or in part, under the Professional Liability Coverage Part to each of the Policies.

55. The Policies do not provide coverage for the Underlying Action because the claims for relief alleged in the Class Action Complaint are precluded from coverage, either in whole or in part, by the applicable exclusions contained in each of the Policies.

56. The Policies do not provide coverage for the Underlying Action because the claims for relief alleged in the Class Action Complaint are precluded from coverage, either in whole or in part, under applicable law and public policy.

57. National Union is entitled to a declaration that each of the Policies does not provide coverage for the claims for relief alleged in the Class Action Complaint and that, as a consequence, National Union has no duty to defend or indemnify Defendants with respect to the Underlying Action.

SECOND CLAIM FOR RELIEF

(Declaratory Judgment – No Coverage for Punitive Damages)

58. National Union incorporates by reference each of the allegations of paragraphs 1 through 50 of this Complaint as if fully set forth herein.

59. An actual controversy of a justiciable nature presently exists between National Union and Defendants concerning the proper construction and application of each of the Policies and the rights or obligations of the parties thereto with respect to the Underlying Action.

60. A judicial declaration is necessary as to National Union's duties and obligations and Defendants' rights under each of the Policies with respect to the Underlying Action.

61. The Policies do not provide coverage for the punitive damages sought in the Class Action Complaint (set forth in Ninth Claim for Relief) because coverage for such is barred by public policy and R.C. 3937.182.

62. National Union is entitled to a declaration that each of the Policies does not provide coverage for the punitive damages sought in the Ninth Claim for Relief in the Class Action Complaint.

WHEREFORE, Plaintiff National Union demands judgment as follows:

1. On the First Claim for Relief, declaring that each of the Policies does not provide coverage for the claims for relief alleged in the Class Action Complaint and declaring that National Union has no duty to defend or indemnify Defendants with respect to the Underlying Action;

2. On the Second Claim for Relief, declaring that each of the Policies does not provide coverage for the punitive damages sought in the Ninth Claim for Relief in the Class Action Complaint;
and

3. For such other and further relief as the Court deems just and equitable.

Respectfully submitted,

s/ D John Travis
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**ATTORNEYS FOR NATIONAL UNION FIRE
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JURY TRIAL DEMANDED

Plaintiff demands trial by jury on all issues so triable.

s/ D John Travis
D JOHN TRAVIS (0011247)
RICHARD C.O. REZIE (0071321)
GALLAGHER SHARP