IN THE SUPREME COURT OF OHIO

Ernest Lemm, *et al*.,	:	
	:	
Appellants,	:	Case No. 01-1786
	:	
v.	:	Certified conflict from the
	:	Franklin County Court of Appeals
The Hartford,	:	
	:	
Appellee	:	

BRIEF OF *AMICUS CURIAE*, OHIO DEPARTMENT OF INSURANCE IN SUPPORT OF APPELLEE, THE HARTFORD

Jeffrey S. Sutton (0051226)
Jones, Day, Reavis & Pogue
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
Phone: (614) 469-3855
Fax: (614) 461-4198

Michael Y. Scudder, Jr. (0073438)
Jones, Day, Reavis & Pogue
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Phone: (216) 586-3939
Fax: (216) 579-0212

Counsel for Defendant-Appellee,
The Hartford

Ann E. Henkener (0025248)
Assistant Attorney General
Health and Human Services Section
30 E. Broad Street
Columbus, Ohio 43215
Phone: (614) 466-8600
Fax: (614) 466-6090

Counsel for *Amicus Curiae*,
Ohio Department of Insurance

Frank E. Todaro (0038500)
21 East State Street, Suite 300
Columbus, Ohio 43215
Phone: (614) 242-4333
Fax: (614) 242-3948

Counsel for Plaintiff-Appellants
Ernest and Alice Lemm

Robert W. Kerpshack (0041851)
21 East State Street, Suite 300
Columbus, Ohio 43215
Phone: (614) 242-1000
Fax: (614) 242-3948

Counsel for *Amicus Curiae*,
Ohio Academy of Trial Lawyers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

Proposition of Law: A homeowner's insurance policy that provides liability coverage for bodily injury sustained by a residence employee in an auto accident is not a motor vehicle liability policy subject to requirements of former R.C. 3937.18 2

CONCLUSION 5

CERTIFICATE OF SERVICE 6

TABLE OF AUTHORITIES

Page

Cases

Davidson v. Motorists Mutual Insurance Co. (2001), 91 Ohio St.3d 262 ..... 1, 4

Davis v. Shelby Ins. Co., 2001 Ohio App. LEXIS 2625 (June 14, 2001),
Cuyahoga App. No. 78610, unreported 1, 4

Jones Metal Products Co. v. Walker (1972), 29 Ohio St.2d 173 5

Lemm v. The Hartford, (2001) 93 Ohio St. 3d 1475 ..... 1, 5

Lemm v. The Hartford, 2001 Ohio App. LEXIS 4468 (October 4, 2001),
Franklin App. No. 01AP-251, unreported 1

OPUS III-VII Corp. v. Ohio State Bd. of Pharmacy (1996), 109 Ohio App.3d 102 5

State ex rel. McLead v. Indus. Comm. (1986), 25 Ohio St.3d 90 5

Swallow v. Indus. Comm. (1988), 36 Ohio St.3d 55 5

Statutes

Chapter 3935 of the Ohio Revised Code 2

R.C. 3935.01-.17 3

R.C. 3935.03(B) 3

R.C. 3935.04(A) 2, 3

R.C. 3935.04(H) 3

Chapter 3937 of the Ohio Revised Code 2

R.C. 3937.01-.17 3

R.C. 3937.03(A) 3

R.C. 3937.03(B) 2

R.C. 3937.03(H) 3

R.C. 3937.18 ..... 1, 2, 3, 5

Title 39 of the Ohio Revised Code 2

INTRODUCTION

On November 7, 2001, this Court certified a conflict between *Lemm v. The Hartford*, 2001 Ohio App. LEXIS 4468 (October 4, 2001), Franklin App. No. 01AP-251, unreported and *Davis v. Shelby Ins. Co.,* 2001 Ohio App. LEXIS 2625 (June 14, 2001), Cuyahoga App. No. 78610, unreported. *Lemm v. The Hartford*, (2001) 93 Ohio St. 3d 1475. The issue certified is:

> When a homeowner's insurance policy provides express liability for damages arising from a motor vehicle accident when the injured party is the homeowner's residence employee and the injury occurred in the course of that employment, is the policy deemed an automobile liability or motor vehicle policy subject to the requirement of former R.C. 3937.18 to offer uninsured and underinsured motorist coverage?

The Ohio Department of Insurance (Department), as the regulator of the insurance industry in the State of Ohio, is in a unique position to aid the Court in understanding the public policy implications of the two positions presented in the conflicting cases below. The Department is sensitive to the Court's questions during the oral arguments in *Davidson v. Motorists Mutual Insurance Co*. (2001), 91 Ohio St.3d 262, a case which also involved the scope of former R.C. 3937.18. In *Davidson*, the Court specifically inquired as to the position of the Ohio Department of Insurance on whether a vehicle such as a golf cart being covered in a homeowner's policy would trigger the requirement to offer coverage for uninsured/underinsured motorists. Therefore, the Department wants to assure that the Court is aware of its position concerning the "residence employee" language at issue in the instant case.

The Ohio Department of Insurance believes the decision of the Eighth District Court of Appeals in *Davis, supra*, is the better policy. First, in *Davis*, the Court recognized the difference between the purposes of homeowner's liability insurance coverage and uninsured motorist coverage. *Davis* at 7. The *Davis* Court also found that neither the insurer nor the insured

bargained for or contemplated that the homeowner's policy would cover personal injuries arising out of an automobile accident that occurred on a highway away from the insured's premise. *Id.* Secondly, the Department is concerned about the economic impact to an insurance company, and, in turn, to its insureds, when the company is obligated to pay expenses which were not considered when determining whether rates charged were sufficient to cover the potential liabilities.

ARGUMENT

> **Proposition of Law: A homeowner's insurance policy that provides liability coverage for bodily injury sustained by a residence employee in an auto accident is not a motor vehicle liability policy subject to requirements of former R.C. 3937.18.**

Under Title 39 of the Ohio Revised Code, the Ohio Department of Insurance is charged with the responsibility of regulating the insurance industry in the State of Ohio. At the time in question, homeowners insurance was regulated under Chapter 3935 of the Ohio Revised Code and automobile coverage was regulated under Chapter 3937 of the Ohio Revised Code.

Pursuant to R.C. 3935.04(A), insurance companies were required to file proposed rates and forms for automobile coverage with the Department:

> Every insurer shall file with the superintendent of insurance, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every form of a policy, endorsement, rider, manual, minimum class rate, rating schedule, or rating plan, and every modification of any of them, which it proposes to use.

Pursuant to R.C. 3937.03(B), insurance companies were required to file proposed rates and forms for automobile coverage with the Department:

> Every insurer shall file with the superintendent of insurance every form of a policy, endorsement, rider, manual of classifications, rules, and rates, every rating plan, and every modification of any of them, which it proposes to use.

Likewise, under R.C. 3935.04 and R.C. 3937.03, insurance companies may charge only those rates that are on file:

R.C. 3935.04(H) states:

> No insurer shall make or issue a contract or policy except in accordance with filings which are in effect for said insurer as provided in sections 3935.01 to 3935.17 of the Revised Code or in accordance with division (F) or (G).

R.C. 3937.03(H) states:

> No insurer shall make or issue a contract or policy except in accordance with filings which are in effect for the insurer as provided in sections 3937.01 to 3937.15 of the Revised Code.

The Department is responsible to review these filings to assure they are in compliance with R.C. 3935.01-.17 and R.C. 3937.01-.17. R.C. 3935.04(A) and R.C. 3937.03(A). Specific to the instant case, the Department must assure that the rates are not excessive, inadequate, or unfairly discriminatory. R.C. 3935.03(B). The Department has made such a review of the form that includes the "residence employee" provisions at issue in the instant case, and has determined that insurance coverage provided under the terms of that form does not require the offering of uninsured/underinsured motorists' coverage under former R.C. 3937.18. See attached affidavit of John R. Pedrick, Chief Actuary of the Office of Property and Casualty Services of the Ohio Department of Insurance. Numerous insurance companies in Ohio and in the United States of America offer homeowner's coverage that includes the "residence employee" exception to the more general exclusion, and do not offer uninsured/underinsured motorists coverage. The department, in its review, does not consider a homeowners policy to be an automobile liability policy or motor vehicle policy. These are two distinct types of policies and different statutes and regulations apply. Had the Department contemplated that a homeowners policy that contained the "residence employee" language would trigger the requirement to offer

uninsured/underinsured motorists coverage, it could not and would not have approved such homeowner's coverage. The rates for homeowners' policies that include the "residence employee" language in question do not include a component for claims for uninsured/ underinsured motorists coverage. Had this been included, the Department would have disapproved the rate because it does not indicate the coverage contemplated in a homeowners policy and it would have been excessive.

Both insureds and insurance companies benefit from rates that match the coverage contemplated. Insureds benefit from actuarially sound rates, that is, rates that are not excessive, inadequate, or unfairly discriminatory. These requirements prevent overcharges for costs not contemplated in the policy. These requirements allow insurers to collect sufficient funds to cover their costs, resulting in widespread availability of coverage in Ohio.

The Department supports the use of the "common sense" approach used both in the case conflicting with the instant case, *Davis v. Shelby, supra*, and in *Davidson v. Motorists Mutual Insurance Co*. (2001), 91 Ohio St.3d 262, 269. Common sense dictates that neither the insured nor the insurer bargained for or contemplated that the homeowner's policy in question required the offering of uninsured/underinsured motorists coverage, or that it would cover such injuries by operation of law if it were not offered. The coverage attributable to the residence employee provision is limited to bodily injury to a resident employee arising out of the homeowner's ownership, maintenance, use, loading or unloading of motor vehicles in the course of the employment. It is an exception to an exclusion, and is an incidental coverage.

Courts in Ohio give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise in the particular subject area and to which the General Assembly has delegated the responsibility of implementing the legislative command.

Swallow v. Indus. Comm. (1988), 36 Ohio St.3d 55; *State ex rel. McLead v. Indus. Comm*. (1986), 25 Ohio St.3d 90; *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173; *OPUS III-VII Corp. v. Ohio State Bd. of Pharmacy* (1996), 109 Ohio App.3d 102.

CONCLUSION

The Ohio Department of Insurance requests that this Court defer to the administrative expertise of the Ohio Department of Insurance, the agency to which the General Assembly has delegated the responsibility of regulating the insurance industry in the State of Ohio. The Department requests that this Court support the reasoning of the Appellee, The Hartford, in the instant case; that this Court reverse the decision of the appeals court in *Lemm v. The Hartford*, below; and that this Court determine that a homeowner's policy which includes coverage for a "residence employee" is not an "automobile liability or motor vehicle liability policy" as contemplated by former R.C. 3937.18.

Respectfully submitted,

BETTY D. MONTGOMERY (0007102)
Attorney General

_____
ANN E. HENKENER (0025248)
Assistant Attorney General
Health and Human Services Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215-3428
(614) 466-8600
(614) 466-6090 Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of *Amicus Curiae*, Ohio Department of Insurance was sent via regular U.S. Mail on this ____ day of February, 2002, to: **Jeffrey S. Sutton,** Jones, Day, Reavis & Pogue, 1900 Huntington Center, 41 South High Street, Columbus, Ohio 43215, and **Michael Y. Scudder, Jr.**, Jones, Day, Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114, Counsel for Defendant-Appellee, The Hartford; **Frank E. Todaro**, Counsel for Plaintiff- Appellants, Ernest and Alice Lemm, 21 East State Street, Suite 300, Columbus, Ohio 43215; and **Robert W. Kerpshack**, Counsel for *Amicus Curiae,* Ohio Academy of Trial Lawyers, 21 East State Street, Suite 300, Columbus, Ohio 43215.

_____
ANN E. HENKENER
Assistant Attorney General