No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT GHIRINGHELLI, COLIN KEITH HOLLEY, DERROLD NASH, ANTHONY PETTITI, JR. and HARMON G. PYE, III

Petitioners,

v.

THE ASSURANCE GROUP, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The case involves application of the "separate accrual rule" to commissions earned by the Petitioners and collected each month by the Respondent from various insurance companies around the country, for the benefit of the Petitioners. Petitioners are insurance agents who have offered primarily Medicare-mandated insurance products to customers in the States of Tennessee, Georgia and South Carolina. Respondent is a North Carolina corporation. The question is whether, in a "diversity/borrowing statute" context, the "separate accrual rule" should apply, compelling accrual of a new statute of limitations commencement date with each newly-computed, monthly installment received by the Respondent. The United States District Court in Nashville and the Sixth Circuit have ruled that the agents' alleged contractual agreement requires application of North Carolina law (which does not adopt the separate accrual rule), to **all** of the agents' claims (with a three-year statute of limitations defeating the claim) since the agents became aware of what they describe as "minor discrepancies" several years before the suit was filed. Since the agents' claims involve not only breach of contract, but violation of various Tennessee insurance statutes, and Medicare regulations that compel regular accountings, Petitioners believe the present rulings are erroneous.

Without confining the interpretive context to the specific statutes involved, the United States Supreme Court has previously determined that each newly-computed monthly installment commences the running of a new period of limitations for that discrete installment through application of the "separate accrual rule." Petitioners respectfully insist that the

rulings of the trial court and the Sixth Circuit are in conflict with the following concise description of the separate accrual rule, and that its application should not be limited to the context of the copyright statute and the ERISA statutes which were involved in the cases of Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014) and the earlier Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc., 118 S. Ct. 542 (1997). Petitioners have repeatedly emphasized throughout the litigation that most of their insurance products (such a Humana) are governed by Medicare regulations, which compel regular accountings and payments to the agents. The parties' North Carolina contract should not defeat that mandatory application of the federal Medicare regulations.

The reasoning adopted in the attached opinion (Appendix A) by the Sixth Circuit Court of Appeals on May 23, 2018 is at odds with the following concise statement noted in Petrella and discussed in Bay Area Laundry:

> **"Because the first missed payment in the series fell outside the statute of limitations, the employer argued that the subsequent missed payments were also time barred. See Id. at 206, 118 S. Ct. 542, 553 ... We rejected that argument. The remaining claims were timely, we held, because each missed payment created a separate cause of action with its own six-year limitations period. Ibid. Cf. Klehr, 521 U.S. 190,**

> **117 S. Ct. 1984." Petrella, 134 S. Ct. 1962, at 1970.**
>
> **"Like a typical installment creditor, the plan has no right, absent default and acceleration, to sue to collect payments before they are due, and it has no obligation to accelerate on default. The employer and the plan are thus in the same position as parties to an ordinary installment transaction. We see no reason to apply a different limitations rule." Bay Area Laundry, 118 S. Ct. 542 at 553.**

In the present suit, the focused discussion on the diversity rules and the Tennessee borrowing statute in the opinions below treat those concepts as exclusive and preemptory of the other federal law considerations arising from the agents' sale of Medicare products in Tennessee, Georgia and South Carolina.

PARTIES TO THE PROCEEDING

Robert Ghiringhelli, Colin Keith Holley, Derrold Nash, Anthony Petitti, Jr. and Harmon G. Pye, III were the Plaintiffs in the District Court and Appellants in the Sixth Circuit. Other initially-designated Plaintiffs resolved their involvement in the case by settlement or dismissal. The Defendant/ Respondent is a North Carolina corporate entity, "The Assurance Group, Inc."

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The Sixth Circuit Opinion was filed May 23, 2018 (Appendix A). That Opinion affirmed the trial court memorandum and order in the United States District Court for the Middle District of Tennessee filed February 24, 2017 (Appendix B and Appendix C).

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

The Petition for Writ of Certiorari was electronically and paper filed within ninety (90) days from the filing of the May 23, 2018 Sixth Circuit opinion. No Petition for Rehearing was filed. The Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1). By letter of August 22, 2018, the Clerk permitted sixty (60) days for clerical (non-substantive) corrections, pursuant to Rule 14(5).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case ruling conflicts with the reasoning and result in two (2) United States Supreme Court cases, Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014) and Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc., 622 U.S. 192 (1997). Incidentally involved, and referenced in the trial and appellate records, is the following Medicare provision that is incidental to the agents' assertion that federal Medicare regulations require the accounting which they have never been provided, which may not be preempted by any state court period of limitations:

> **42 C.F.R. § 423.2274 (Broker and Agent Requirements:**
>
> **"(b)(3) Compensation structures must be available upon CMS request including for audits, investigations, and to resolve complaints.**
>
> **(e) ... Upon CMS request, the organization must provide CMS, in a form consistent with CMS guidance, the information necessary for it to conduct oversight of marketing activities."**

STATEMENT OF THE CASE

The Petitioners are independently-licensed insurance agents who have offered primarily Medicare-mandated insurance products to residents of the States of Tennessee, Georgia and South Carolina in separate contractual arrangements with the Respondent, The Assurance Group, Inc. Each of the independent agents had entered into agreements with The Assurance Group ("TAG") that involved an arrangement through which TAG collected from around the country all of the commissions earned by the independent agents, effectively as an administrative or clerical convenience. From the gross commissions earned for each agent, TAG would then deduct any appropriate expenses or charges, and was thereafter obligated to pay the net earned commission to each agent. The Assurance Group is headquartered in the State of North Carolina. The insurance products sold by the independent agents in their respective states, including Tennessee, included both federally-mandated "Medicare Advantage" policies (controlled by federal statutes) and standard state-governed life insurance policies.

In their initial Complaint, the allegation of the many agents involved is consistent and concise: A claim that TAG collected their money, and thereafter refused to provide regular accountings and payment of the net proceeds.

Plaintiffs filed suit in the United States District Court of Tennessee based upon diversity and the amount claimed in controversy (28 U.S.C. § 1332). A Complaint was filed October 18, 2010. Following the resolution of extensive discovery disputes, Defendant

The Assurance Group, Inc. sought summary judgment based primarily upon the claim that the statute of limitations had commenced running when the first discrepancy arose, and that, under North Carolina's three-year period of limitations, the statute of limitations had expired as to each Plaintiff except Eric Tuttobene. Mr. Tuttobene's case was resolved by agreement prior to the appeal. An interim order granting Defendant's summary judgment request was entered Febuary 24, 2017 (Docket Entry 196), incorporating a contemporaneous Memorandum of Law (Docket Entry 195). A final order (for F.R.C.P. Rule 54 appeal requirements) was entered October 3, 2017 Docket Entry 212). That order was followed by Plaintiffs/Appellants' timely Notice of Appeal on October 18, 2017 (Docket Entry 213).

Contemporaneously, a large group of agents in North Carolina filed suit in state court in North Carolina. Petitioners acknowledge that the agents made similar allegations regarding TAG's duty to account for the commissions they had collected on behalf of the agents. During the pendency of the above-captioned matter, the North Carolina state court proceedings were concluded, with a ruling in that state that the claims of those North Carolina agents would fail due to the undisputed fact that the first observed discrepancies in the accounting requirements occurred more than three (3) years before the filing of the North Carolina suit, and due to the applicable three-year **contract** period of limitations in North Carolina. The North Carolina Court of Appeals affirmed that decision, on a finding that North Carolina does not recognize any "separate accrual rule" for the past, present and future installments being collected by TAG from the various

private and Medicare insurance providers from around the country. Instead, a North Carolina appellate court concluded that the first default triggered commencement of the three-year statute of limitations on past, as well as future, periodic installments to be collected by TAG on behalf of the agents. The North Carolina Supreme Court refused to accept a Petition for Certiorari on that issue. The North Carolina agents petitioned the United States Supreme Court for certiorari, which was denied.

It is conceded that the issues presented by the present Applicants are similar, but are certainly not identical either factually or procedurally, as to jurisdiction.

REASONS FOR GRANTING THE PETITION

In every context in which this Court has had an opportunity to rule on the underlying legal issues related to the "separate accrual rule," the Court has ruled that a plaintiff should not be required to know the "unknowable." Where **separate periodic computations** are involved, which will vary from month-to-month, the statute of limitations commences when there is a precise, discrete, identifiable figure that can be ascertained with some certainty. The question, accordingly, is whether the procedural status of the Petitioners places them in a position which would require the United States District Court for the Middle District of Tennessee at Nashville (and the Sixth Circuit) to allow their claims to go forward for an accounting and payment on monthly installments that continue to accrue **and will accrue into the future**.

Conversely, are the District Court and the Sixth Circuit rulings correct in their determination that, because the agents (allegedly) signed contractual documents that agreed that North Carolina law should be applied to their case. Is that intermediate level North Carolina appellate ruling (declined by the North Carolina Supreme Court on certiorari application) a sufficient basis for application in the diversity context, to the exclusion of all other statutory considerations, including the Tennessee statutes which dictate otherwise, and, more significantly, the federal Medicare statutes and regulations which require regular accountings and prompt payment for agent commissions earned from those insurance products?

Two Supreme Court decisions arising in very different factual and procedural settings, should leave no doubt about the basis for reversal in the present matter, unless it is concluded that, indeed, basic diversity concepts, and the North Carolina contracts, mandate the application of the North Carolina intermediate appellate court, which is the direct opposite of the Supreme Court rulings quoted above.

While the diversity issue is admittedly a factor in the evaluation of the disputed issues, it is not the sole basis of jurisdiction (supplemental jurisdiction, 28 U.S.C. § 1367). The rulings in the United States District Court for the Middle District of Tennessee and the Sixth Circuit Court of Appeals are in conflict with the rulings of this Court in Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014), and Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corporation of California, Inc., 522 U.S. 192 (1997). Those cases arose in vastly different factual

settings and upon separate federal statutes. The lower courts disallowed the significance by noting that they arose under the cited copyright and ERISA statutes. It is a difference, without legal distinction. As Justice Ginsberg's quote above suggests, the broadly-applied separate accrual rule is not limited to those statutes. It should apply to the Medicare regulations and to Tennessee statutes as a matter of federal preemption and public policy. At best, the alleged contract provisions should (by the Tennessee borrowing statute) defeat **only** the claims based upon contract law, rather than federally-mandated public policy requirements of the Medicare laws:

A federal court may have more than a single basis to exercise jurisdiction over a dispute between parties from a different state. Of course, one basis is diversity (statute 28 U.S.C. § 1332) concededly invoked by the Petitioners in the Nashville United States District Court against the North Carolina corporation with whom they had contracted as independent agents. Petitioners will not rehash in substantial factual detail the circumstances surrounding that contract relationship, as disallowed by both the trial and appellate courts. Contracts for certain Plaintiffs were not signed, or apparently could not be located by TAG, but Plaintiffs conceded that the contracts were "similar" though not "identical." For purposes of the present Petition, Petitioners will not attempt to challenge what the Petitioners perceive to be patently incorrect evaluations of the "North Carolina law" provisions in those **contracts**, and will, instead, focus on the narrower, policy-significant reasons why diversity considerations should not mandate the three-year North Carolina statute of limitations in the Nashville District Court.

First, the Complaint and Amended Complaint clearly establish that "the contract" was certainly not the sole basis of the claims against the Respondent. The insurance sales occurred in states other than North Carolina. Accordingly, the **contract** claims, while appropriately founded under North Carolina contract law do not defeat, by necessary preemption, other cognizable remedies under the Tennessee statutes that: (a) establish a statutory fiduciary duty to account by such administrators; (b) permit litigation in Tennessee state and federal courts on the exclusive basis of those statutes; and, most importantly, (c) application of the Medicare regulations to the parties' relationship. The policy requirements behind those Medicare regulations may not be contractually diminished or superseded by the ruling of the North Carolina appellate court.

The cited U.S. Supreme Court cases that have supplied consistent reasoning in support of the broad application of the "separate accrual rule" in evaluating **any applicable statute of limitations** demonstrate a common thread. Regardless of the statutory basis for the Plaintiffs' substantive claim (the copyright statute or ERISA), those cases stand firmly for the proposition that a plaintiff may not be required, for statute of limitation purposes, to "know the unknowable," and file a suit on an as-yet unaccrued and non-computed net payment owed to that plaintiff. Once computed and ascertained, the statute of limitations commences. The fundamental, unanswered question skirted by the trial court and the Sixth Circuit is what reasoning would exist to conclude that the underlying nature of the statutory claim (i.e., copyright or ERISA) would control or

restrict a broad application of the "separate accrual rule" to any discretely-identified claim for accounting and payment. The Sixth Circuit's exclusionary focus on the North Carolina contract obligations for application of North Carolina law gives no credence to the idea that the contract, even **if** executed by all of the Plaintiffs, may establish the parties' rights and remedies **in a contract action**. But, the contract itself, and the North Carolina interpretation of the contract, does not abrogate the mandatory requirements of Tennessee or Medicare statutes and regulations which require that the Respondent has a duty, once it collects the Petitioners' money, to account for that money and pay the Petitioners under the terms of those statutes and regulations. Indeed, while purporting to invoke an exclusive application of North Carolina law to the **contractual relationship**, the agreement "general provisions" references any "... legal action ... at any time based on any controversy or claim **arising out of or relating to this agreement** ..." and thereafter limits such action to a suit in the state court in North Carolina, and not otherwise. The "severability" provisions of that same agreement acknowledge that other remedies may apply to the parties' relationship, although they are not specifically described.

In that context, the Petitioners sought a remedy in the United States District Court for Tennessee, based upon sales that occurred in states other than North Carolina, of both general **and Medicare** insurance products that produced commissions to be paid from insurance companies around the country. The legal claims were multiple: **"Conversion and breach of fiduciary duty;" "breach of contract;" and "statutory/regulatory**

violations" that were alleged to compel, as a matter of public policy and regulatory requirements, accountings and payment for insurance business generated within the State of Tennessee. The relief included not only a request for "damages" but, declaratory judgment relief under F.R.C.P. Rule 57 (incorporating 28 U.S.C. § 2201). Petitioner Derrold Nash (for whom TAG could produce no written contract) has specifically requested an accounting for his "Medicare Advantage" commissions. Similarly, the claims of Petitioner Colin Keith Holley emphasize his sales emphasis with Medicare products such as Humana, United Healthcare and Universal Health. Petitioner Harmon Pye's commission sales were similarly produced through Humana. Petitioner Robert Ghiringhelli alleges an emphasis with Humana and United Healthcare.

The trial court adopted the idea, endorsed by the appellate decision, that Tennessee courts must apply the statute of limitations of the **contracted** forum as a procedural measure. Citing Mackey v. Judy's Foods, Inc., 654 F. Supp. 1465, 1469 (M.D. Tenn. 1987), affirmed, 867 F.2d 325 (6th Cir. 1989).

The "contract obligations" may have accrued under North Carolina law (if the contract defects are overlooked), but the statutory violations did not. They occurred in Tennessee, Georgia and South Carolina.

Lost in that diversity/borrowing statute debate in both the trial and appellate opinions is any explanation (if the "contract" wording is to envelope all potential theories and remedies involved) as to how an opinion by an intermediate North Carolina Court

of Appeals may usurp Tennessee policy-related statutes that address the handling of commissions within the State of Tennessee, as well as federally mandated Medicare regulations and requirements.

Paragraph 21 of the Petitioners' Motion for Summary Judgment at the trial level (Doc. 165, p. 31 of 35, Page ID #1282) specifically references the Medicare provisions of **42 C.F.R. § 423.2274 (Broker and Agent Requirements)** which mandates a prompt response by TAG, upon request by one of its agents:

> **"(b)(3) Compensation structures must be available upon CMS request including for audits, investigations, and to resolve complaints.**
>
> **(e) ... Upon CMS request, the organization must provide CMS, in a forum consistent with CMS guidance, the information necessary for it to conduct oversight of marketing activities."**

Similarly, "access to books, documents, and records of subcontractors" is addressed in 42 C.F.R. § 420.303 (HHS criteria for requesting books, documents and records) and further provides a clear statement of the uniform requirements related to the financial relationship between The Assurance Group, Inc. and its participating independent agents, regardless of any "North Carolina contract" that TAG may have insisted upon in creating its "contractual" relationship with the independent agents. Obviously, such a contractual provision may not usurp the

authority of the Congress and the Medicare regulatory agency. It is that fundamental point that should control in evaluating both the diversity/borrowing statute issue, as well as the entirely discrete consideration of the fact that there are multiple bases for the U.S.D.C. jurisdiction in Nashville, all of which merely complemented the diversity basis.

Both the trial and intermediate appellate decisions minimize the significance of Petrella and Bay Area by noting that those "discrete accrual" applications arose in the context of a federal copyright and an ERISA statute. Significantly, neither precedent opinion cites any wording within those statutes as the basis for their adoption of the "separate accrual rule." No wording appears in either of those decisions which predicates their application of the "separate accrual rule" to any wording contained in each of the statutes. Accordingly, it appears that the "separate accrual rule" should apply to any context, especially the statutory (including Medicare) issues set forth in the summary judgment argument. This Court has uniformly applied the "separate-accrual" analysis in every factual situation in which future figures are to be computed based upon as-yet unknown and unknowable figures.

Significantly, Petitioners' argument is not a form or application of the so-called "discovery" rule. Instead, it is a recognition that claims in lawsuits may not be predicated on figures that are not presently knowable. A plaintiff may reasonably conclude that an amount in issue, when a dispute is first recognized, is relatively insignificant, and not worthy of litigation. It is not an issue of fraudulent concealment, but one of mathematical computation from a known set of

figures that may not be acted upon legally until the calculation is complete.

CONCLUSION

The Petition for Certiorari should be granted to clarify the applicability of Petrella and Bay Area to the "separate accrual rule" to all accounting claims related to commission accountings owed under any Tennessee or federal (Medicare) statute.

Respectfully submitted,

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