IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ESTATE OF RICHARD SCHOCH, JR., BY GRETCHEN SCHOCH, ADMINISTRATRIX,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION No. 99-6254
AMERISURE INSURANCE CO.,	)	
Defendant.	)	

MEMORANDUM

Padova, J. April , 2000

This matter arises on Defendant's Motion to Dismiss, filed February 22, 2000. The matter has been fully briefed. On April 20, 2000, the Court held oral argument on the issues raised in Defendant's Motion. For the reasons that follow, the Court will deny Defendant's Motion to Dismiss.

I. BACKGROUND

Richard Schoch was critically injured in a motor vehicle accident on or about May 16, 1987. He survived the accident, but was rendered disabled. At the time of the accident, Mr. Schoch was a member of his mother's, Lorraine Schoch, household At the time of the accident, Lorraine Schoch had a policy of automobile insurance issued by Defendant, which provided uninsured motorist coverage for Mrs. Schoch and any relative members of her household. Mr. Schoch was killed in March, 1989, in an automobile accident unrelated to the instant litigation. The Estate of Mr. Schoch, the Plaintiff herein, brought suit against the owner and operator of the motor vehicle involved in the 1987 accident. In July 1989, Plaintiff lost that action. On November 16, 1992, Plaintiff gave notice to Defendant of Mr. Schoch's claims for personal injury. Defendant forwarded to counsel a two page document (hereinafter referred to as “Notice”) which reduced the uninsured/ underinsured motorists

coverage on the policy from $100,000.00, to $35,000.00. The Notice bears Mrs. Schoch's signature, but Mrs. Schoch denied that she signed the Notice. By May 18, 1993, Plaintiff advised Defendant that the signature was not that of Mrs. Schoch, and demanded the policy limit of $100,000.00, in uninsured motorist coverage. Defendant refused payment based on the signed Notice.

Plaintiff had the signature examined by a forensic expert who concluded that Mrs. Schoch did not sign the document. On November 18, 1993, Plaintiff forwarded a copy of the forensic report to Defendant. Defendant wished to have the signature analyzed by their own expert, and allegedly sought examination of the signature by its own forensic expert. In December 1998, Defendant paid Plaintiff the policy limit of $100,000.00, as uninsured motorist coverage for the 1987 loss.

On December 8, 1999, Plaintiff filed the instant bad faith action pursuant to 42 Pa. Cons. Stat. §8371. On February 22, 2000, Defendant filed a Motion to Dismiss.

II. STANDARD

The purpose of a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of the Complaint. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 1994), aff'd, 72 F.3d 318 (3d Cir. 1995). A claim may be dismissed under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff could prove no set of facts in support of the claim that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In considering such a motion, a Court must accept all of the facts alleged in the Complaint as true and must liberally construe the Complaint in the light most favorable to the plaintiff. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The question is not whether the plaintiff will ultimately prevail, but whether he is entitled to present evidence in support of his claims. Scheuer, 416 U.S. at 236.

III. ANALYSIS

Defendant's Motion to Dismiss raises one issue: whether this action is time barred under the appropriate statute of limitations. First, Defendant asks the Court to examine whether Plaintiff's Complaint brings other causes of action in addition to a bad faith delay in payment claim. At oral argument, Defendant suggested that Plaintiff may be bringing a fraud claim. In the Court's view, the allegations surrounding the forgery relate to whether Defendant's delay in paying Plaintiff's insurance claim was reasonable, and do not state an independent claim for fraud. Moreover, at oral argument, Plaintiff agreed that this action was filed and should proceed as a bad faith delay in payment case.

Next, the Court must determine whether this bad faith delay in payment action was timely filed. In Thomas v. State Farm Ins. Co., Civ. A. 99-2268, 1999 WL 1018279, (E.D. Pa. Nov. 5, 1999), the Court squarely held that the statute of limitations for bad faith causes of action based on delay in payment begins to run from the date payment is finally made. Id. at *3. Defendant asks the Court to revisit Thomas and directs the Court's attention to Adamski v. Allstate Ins. Co., 738 A.2d 1033 (Pa. Super. 1999).

Adamski, however, does not support Defendant's position. First, Adamski involved a bad faith claim based on the denial of payment. Here, like Thomas, Plaintiff brings a bad faith delay in payment claim. Furthermore, the Adamski Court expressly declared that "for the purposes of the statute of limitations, a claim accrues when a plaintiff is harmed." 738 A.2d at 1042. Adamski holds that in claims for bad faith failure to defend, indemnify or make payment, such harm accrues at the initial denial of coverage. Id.

In the instant case, Defendant allegedly neither denied nor made payment on Plaintiff's insurance policy until December 1998, when Defendant finally tendered payment. In harmony with Adamski, the Thomas Court held that a claim for bad faith delay in payment accrues when payment is made. Here, Defendant tendered payment in December of 1998. (Complaint ¶38). Plaintiff

commenced this action on December 8, 1999, one year after payment of the claim. Thus, even under the shorter two year statute of limitations[1], this case was timely filed.

In accordance with the foregoing, the Court will deny Defendant's Motion to Dismiss. An appropriate Order follows.

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[1]The Court notes the split in this jurisdiction regarding the applicable statute of limitations in a statutory bad faith claim. The Pennsylvania Supreme Court has not decided this issue. Between 1997 and 1999, at least seven United States District Court for the Eastern District of Pennsylvania opinions have attempted to predict whether the Pennsylvania Supreme Court would apply the two year statute applicable to tort cases or the six year "catchall" statute applicable to cases that do not sound entirely in tort or contract law.See alsp McCarthy v. Scottsdale Ins. Co., No. 99-978, 1999 WL 672642 (E.D.Pa. Aug. 16, 1999)(applying two-year statute of limitations); Mantakounis v. Aetna Casualty & Surety Co., No. 98-4392, 1999 WL 600535 (E.D.Pa. Aug. 10, 1999)(citing two Eastern District cases supporting the two-year limitation and two cases supporting six years, and concluding the two-year statute of limitation applies) Woody v. State Farm Fire & Cas. Co., 965 F. Supp. 691 (E.D. Pa. 1997)(applying six-year statute of limitations). Because a two-year statute would not bar Plaintiff's cause of action, the Court does not reach this issue.

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ORDER

AND NOW, this day of April, 2000, upon consideration of Defendant's Motion to Dismiss, Plaintiff's response thereto, the supplemental briefing filed by both parties, and the oral argument held April 20, 2000, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (docket #5) is **DENIED**.

BY THE COURT:

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John R. Padova