

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

PAUL J. COHEN, ESQUIRE, : CIVIL ACTION  
PAUL J. COHEN, P.C., :  
COHEN & ROSS, P.C., and :  
COHEN & WILLWERTH, P.C. :  
 :  
 :  
v. :  
 :  
 :  
STATE AUTO PROPERTY :  
& CASUALTY COMPANY : No. 00-3168

MEMORANDUM ORDER

This case involves an insurance dispute. It arises from a claim for property damage to plaintiffs' place of business. At least one plaintiff had an insurance policy with defendant against such losses. Plaintiffs filed claims with defendant which allegedly refused to compensate them for some of the losses suffered.<sup>1</sup>

Plaintiffs each have asserted claims for breach of contract, for bad faith conduct in violation of 42 Pa. C.S.A. § 8371 and for "punitive damages and legal fees and costs" under § 8371. Presently before the court is defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Defendant contends that three of the plaintiffs lack standing to sue, that plaintiffs have failed to state cognizable claims for breach of contract and bad faith, and that all of plaintiffs' claims are barred by an appraisal provision in the insurance policy.

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<sup>1</sup>The court cannot discern from the pleadings the precise relationship between the four plaintiffs.

Dismissal for failure to state a claim is appropriate only when it appears beyond doubt that a plaintiff can prove no set of facts to support the claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984). Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). A complaint may be dismissed when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. See Pennsylvania ex. rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988).

Plaintiffs concede in their response that neither Paul J. Cohen, Esquire ("Cohen") nor Cohen & Willwerth, P.C. ("Willwerth") is in privity of contract with defendant and thus neither has standing to sue under the policy. See Seasor v. Liberty Mutual Ins. Co., 941 F. Supp. 488, 494 (E.D. Pa. 1996). They agree that Counts I, IV, V, VIII, IX and XII, in which said parties assert breach of contract, bad faith and punitive damages claims, should be dismissed.

Defendant argues that Counts II, VI, X should also be dismissed as Paul J. Cohen, P.C. ("Cohen PC") is not an insured under the policy at issue. Defendant, however, attached to its

motion a copy of the insurance policy and what appears to be renewal certificates of insurance naming both Cohen PC and Cohen & Ross, P.C. ("Ross PC") as insureds for the relevant period.<sup>2</sup> Plaintiffs also attach to their response insurance documents showing Cohen PC as the insured during the pertinent period. The insurance documents submitted by the parties relate to the same policy, have the same renewal dates and reflect identical liability coverage. The court cannot conclude beyond doubt that Cohen PC will be unable to show that it is an insured under the policy.

Defendant contends that the breach of contract claim in Count III is not pled adequately even under the liberal standard of Rule 8(a). To sustain a cause of action for breach of contract under Pennsylvania law, a plaintiff must show the existence of a contract to which plaintiff and defendant were parties; the essential terms of the contract; a breach of the duty imposed by contract; and, damages resulting from the breach. See Halstead v. Motorcycle Safety Found., Inc., 71 F. Supp.2d 455, 458-59 (E.D. Pa. 1999); McCabe v. State Farm Mut. Automobile Ins. Co., 36 F. Supp.2d 666, 672 (E.D. Pa. 1999). Plaintiff Ross PC alleges that it has a valid insurance contract with defendant,

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<sup>2</sup>The court may consider a document appended to a motion or pleading without converting a motion to dismiss into one for summary judgment. See Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993).

recites verbatim the essential terms and alleges that defendant did not honor its duty fully to pay proceeds to plaintiff under the insurance policy. Although plaintiff does not literally state that it suffered damages from the breach, it alleges that defendant failed to pay \$48,947 for total business loss and \$43,909.83 for extra business expense loss. It is apparent that plaintiff claims a loss as a result of the alleged breach.

Defendant also seeks a dismissal of plaintiffs' claims of bad faith asserted in Counts V, VI, VII and VIII. Defendant suggests that only a total denial of coverage is actionable under § 8371. Defendant relies on the widely-quoted definition of bad faith under § 8371 as "any frivolous or unfounded refusal to pay proceeds of a policy." See Williams v. Nationwide Mut. Ins. Co., 750 A.2d 881, 887 (Pa. Super. 2000); Bergman v. United States Automobile Ass'n, 742 A.2d 1101, 1106 (Pa. Super. 1999). There is nothing in this definition that suggests an insurer which pays any portion of a claim cannot act in bad faith in refusing to pay the balance of that claim. Defendant's reasoning ignores the remedial purpose of the statute and the liberal construction given to it by the courts. See Krisa v. Equitable Life Assurance Soc'y, 109 F. Supp. 2d 316, 320 (E.D. Pa. 2000) (§ 8371 is a remedial statute which should be construed broadly); O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. 1999) ("[W]e find that the broad language of section 8371 was designed to

remedy all instances of bad faith conduct by an insurer").

Section 8371 has been held to encompass a broad range of insurer conduct. See Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742 (3d Cir. 1999) ("bad faith" includes lack of investigation and failure to communicate with insured); Leo v. State Farm Mut. Automobile Ins. Co., 939 F. Supp. 1186, 1189-92 (E.D. Pa. 1996) (insurer insisted plaintiff make statement under oath before offering settlement and then offered plaintiff a low settlement amount). See also Adams v. Allstate Ins. Co., 97 F. Supp.2d 657, 658 (E.D. Pa. 2000) (denying motion to dismiss bad faith claim under Pennsylvania Unfair Insurance Practices Act where insurer unreasonably delayed insured's claim causing insured to incur expense of unnecessary arbitration hearing).<sup>3</sup> At least one court has denied summary judgment on a § 8371 claim where an insurer paid plaintiff on some claims but denied other claims for additional damage. See Duffy v. Allstate Ins. Co., 1998 WL 470156, \*3 (E.D. Pa. Aug. 11, 1998).

Particularly in light of the remedial purpose and broad application of § 8371, the court cannot accept defendant's position. To exempt an insurer which pays any portion of

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<sup>3</sup>A court "may look to (1) other cases construing the statute and the law of bad faith in general; (2) the plain meaning of terms in statute; and/or (3) other statutes addressing same or similar subjects" in evaluating bad faith under § 8371. MGA Ins. Co. v. Bakos, 699 A.2d 751, 754-55 (Pa. Super. 1997).

proceeds due under a policy while capriciously or unreasonably withholding the balance would substantially undermine the statute.

Defendant alternatively argues that plaintiffs' failure to allege that defendant knew it lacked a reasonable basis for denial of payment is fatal to plaintiffs' § 8371 claims. Defendant is essentially correct about this element of bad faith, although reckless disregard may substitute for knowledge. See Klinger v. State Farm Mut. Automobile Ins. Co., 115 F.3d 230, 233-34 (3d Cir. 1997); Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1994). See also Phillips v. Nationwide Mut. Ins. Co., 1996 WL 635685, \*1 (E.D. Pa. Oct. 31, 1996). While plaintiffs have not explicitly stated that defendant knew or recklessly disregarded the fact it lacked a reasonable basis to refuse full payment, this is a clear inference from what is alleged. Plaintiffs allege several actions by defendant including a failure to offer a reasonable amount to resolve the claim presented, all of which were allegedly undertaken in "bad faith." The term "bad faith" imports knowledge or reckless disregard. Nevertheless, plaintiffs may wish to amend the remaining bad faith claims in Counts VI and VII to allege clearly that defendant knew or recklessly disregarded the fact that it lacked a reasonable basis for its denial of payments or other challenged actions, and they may do so within ten days. See

Booze v. Allstate Ins. Co., 750 A.2d 877, 880 (Pa. Super. 2000) (claim properly dismissed where plaintiff failed to allege insurer knew or recklessly disregarded fact that it lacked reasonable basis for denying payment).

Defendant also reads claims under the Unfair Insurance Practices Act ("UIPA") into plaintiffs' bad faith counts and asks that they be dismissed. Plaintiffs respond that they have asserted no claim under the UIPA, but merely refer to the UIPA in the context of describing bad faith conduct in the § 8371 claims. This is not impermissible. See Parasco v. Pacific Indem. Co., 920 F. Supp. 647, 655 (E.D. Pa. 1996) (court may consider UIPA bad faith provisions in determining whether an insurer has violated § 8371).

Defendant alternatively seeks dismissal of Count VI for lack of privity of contract. The heading of Count VI indicates that Cohen PC is asserting this claim, but the ad damnum clause seeks judgment in favor of Paul Cohen, Esq. The court assumes that Count VI is asserted on behalf of Cohen PC. As Count V contains an identical claim by Cohen individually, Count VI would otherwise be redundant. The court will allow plaintiffs ten days to amend Count VI to make clear it is asserted on behalf of Cohen PC.

Plaintiffs acknowledge that Counts IX, X, XI and XII

should be dismissed as duplicative of Counts V, VI, VII and VIII.

Defendant finally argues that the entire complaint is premature because an appraisal clause in the policy requires an insured to submit to an appraisal before filing a lawsuit. The appraisal clause, however, is not mandatory. It only requires that the parties participate in an appraisal if one party makes a written demand for an appraisal of a loss. There is no suggestion that any party made a written demand for an appraisal.

**ACCORDINGLY**, this        day of February, 2001, upon consideration of defendant's Motion to Dismiss (Doc. # 2), and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to Counts I, IV, VIII, IX, X, XI and XII, and said Motion is otherwise **DENIED** with leave to plaintiffs to amend Counts VI and VII as discussed herein within ten days.

**BY THE COURT:**

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**JAY C. WALDMAN, J.**