

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

HENRY B. RUDISILL . CIVIL ACTION  
: :  
: :  
V. : :  
: :  
CONTINENTAL INSURANCE : NO.00-CV-1603  
COMPANY :

ORDER

AND NOW, this 21<sup>st</sup> day of November, 2001, upon consideration of defendant Continental Insurance Company's Motion for Certification Pursuant to 28 U.S.C. § 1292(b) (Docket #20), as well as the plaintiff's opposition thereto, **IT IS HEREBY ORDERED** that the defendant's motion is **DENIED**.

The defendant has asked this Court for permission to immediately **appeal** the Court's earlier decision denying the defendant's motion to dismiss the plaintiff's bad faith claim. The district court has discretion to decide whether or not to certify a case for immediate **appeal**. See Milbert v. Bison Labs., Inc., 260 F.2d 431, 434 (3d Cir. 1958). If the court determines that an **appeal** is **appropriate**, it has to certify in **writing**: (1) that there is a controlling question of law, (2) that there **are** substantial grounds for a **difference** of opinion on the **question**,

and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation. See 28 U.S.C. § 1292(b).

These are not the only factors that **the** court can consider in the exercise of its **discretion** though. The court can weigh, for example, the likelihood of serious harm to the litigants during the pendency of the litigation from an erroneous interlocutory order, as well **as the** desirability **of** avoiding protracted litigation over damages when there **is** no liability. See Katz v. Carte Blanche Corp., 496 F.2d 747, 754 (1974) (en bane). It can consider the strong overarching policy against piecemeal appeals, as well as the amount of time **it takes** the circuit court to decide an appeal. See Piazza v. Major League Baseball, 836 F.Supp. 269, 270-271 (E.D. Pa. 1993). "[T]he 1292(b) **appeal** is the exception, to **be** used only in the rare case where an immediate appeal **would** avoid expensive and protracted litigation." Orson, Inc. v. Miramax Film Corp., 867 F.Supp. 319, 321 (E.D. Pa. 1994); see also Piazza, 836 F.Supp. at 270; Oyster v. Johns-Manville Corp., 568 F.Supp. 83, 86 (E.D. Pa. 1983).

The parties agree that this Court's decision denying the defendant's motion to dismiss turned *on a* controlling question of law. The next issue to be addressed **is** whether there are **substantial** grounds for disagreement on the question.

The decision denying the motion to dismiss **required the** Court to determine whether 75 Pa.C.S.A. § 1716 (Section **1716**) of Pennsylvania's Motor Vehicle Financial Responsibility Law (MVFRL), which provides **for** awards of interest and attorney fees when an auto insurance company unreasonably delays payment to an insured, preempts 42 Pa.C.S.A. § 8371 (Section **8371**), which provides for awards of interest, attorney fees, and punitive damages when an insurance company acts in bad faith. The defendant argued that Section 1716 did preempt Section 8371, and that the plaintiff's **Section 8371** claim **should** therefore **be** dismissed.

This **Court's** research has uncovered just one case which holds that Section **1716** preempts Section 8371. See Riddell v. State Farm Fire and Casualty Co., No. **91-CV-1461**, 1992 WL **209971** at \*3 (M.D. **Pa.** July 9, 1992). In its motion for certification, the defendant cites to cases that interpret another provision of the MVFRL, 75 Pa.C.S.A. § 1797 (Section **1797**), which sets out detailed procedures for resolving disputes between insurers and insureds over medical necessity. The cases interpreting Section 1797 uniformly hold that it preempts Section **8371**. They also include language to the effect that, at least in cases involving **medical** benefits, the entire MVFRL preempts Section 8371.

On the other hand, there are several cases holding that

Section 8371 **applies** in medical benefit cases as long as the dispute revolves around an issue other than medical necessity. See, e.g., Neun v. State Farm Ins. Co., 95-CV-7577, 1996 WL 220980 at \*3 (E.D. Pa. May 2, 1996) (holding that Section 8371 applied where the insurance company questioned not medical necessity but causation); Grove v. Aetna Cas. & Sur. Co., 855 F.Supp. 113, 115 (W.D. Pa. 1993) (same); Seeger by Seeger v. Allstate Ins. Co., 776 F.Supp. 986, 990-991 (M.D. Pa. 1991) (holding that there was no conflict where the insurance company questioned not medical necessity but coverage). There are also cases which directly hold that Section 1716 **does** not preempt Section 8371. See, e.g., Schwartz v. State Farm Ins. Co., 1996 WL 189839 at \*9 (E.D. Pa. April 18, 1996); Weisbein v. The Home Ins. Co., No. 93-CV-6909, 1994 WL 121033 at \*2 (E.D. Pa. Apr. 11, 1994); Seeser by Seeger, 776 F.Supp. at 991.

Although **there** may be grounds for a difference **of** opinion here, I am not convinced that they are substantial. Even if they were, however, the case could not be certified for immediate appeal because the defendant has failed to establish that granting the appeal now **would** be likely to materially advance the termination of this litigation.

The defendant argues that if an appeal **is permitted** now, and if the Third Circuit reverses, it **would** expedite the disposition

of this case by eliminating the need for discovery and for a trial, because this court could decline to exercise pendent jurisdiction over the plaintiff's Section 1716 claim, which is **for less** than \$75,000. **This** has to **be** balanced against the possibility that the Third Circuit would not reverse, meaning that the case would be delayed unnecessarily.'

The Piazza Court found that "[a] review of the Third Circuit cases reveals that the time from the district court's certification or the appellate court's allowance of appeal in § 1292(b) cases to the decision **may** approach or exceed one year." Piazza, 836 F.Supp. at 271. This is still the case. In the years 2000 and 2001, the Third Circuit took between 7 and 21 months to **decide** the six Section 1292(b) appeals which are available on Westlaw; the average Section 1292(b) appeal took 12 months to decide.

A year's delay must be weighed against the fact that this an ordinary case, which would not require an unusual amount of discovery and which could be tried quickly. According to the Case Status Reports that the parties submitted **at** the end of

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'In addition, the Third Circuit would be predicting what the Pennsylvania **Supreme** Court **would** do, just **like** this Court did. "By not taking an expedited **appeal**, the Pennsylvania courts **are** given more time **to possibly** reach, and decide, the [issue] on their own." Olejar v. Powermatic Div. of DeVlieg-Bullard Inc., 808 F.Supp. 439, 445 (E.D. Pa. 1992).

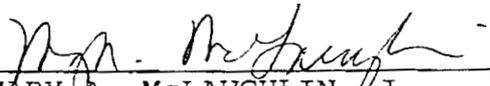
September, even if the bad faith claim - which the defendant argues would greatly complicate discovery and trial - remains, this case could be ready for trial by May of 2002. The trial would take at most 5-6 days, The Third Circuit in *Milbert* quotes from the legislative history of Section 1292, which references district court backlogs which required litigants to wait for four years **for** a trial. *Milbert*, 260 F.2d at 434. **The** situation here is different - the trial would likely happen sooner than an interlocutory appeal could be decided.

Of course, the defendant might appeal after trial, but it might not, **because** it might prevail on the merits of the bad faith claim, Even if the defendant did appeal, and succeeded on appeal, the Third Circuit could **just** reverse the award **of** punitive damages. There would be no need for a second trial. Overall, the savings in time and expense promised by an interlocutory appeal are speculative and limited, whereas the costs are definite and significant.

The Motion for Certification Pursuant to 28 U.S.C. § 1292(b) is denied for all of the above reasons.

BY THE COURT:

\* Mailed 11/26/01  
Eagan, log (via fax)  
Roda, log (via fax)  
Kent, log.  
Fitzgerald, log.

  
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MARY A. McLAUGHLIN, J.