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

| | | |
|---|---|---|
| ROBERT ALVAREZ | : | CIVIL ACTION |
| v. | : | |
| INSURANCE CO. of NORTH AMERICA, et al. | : | NO. 06-4326 |

MEMORANDUM

Dalzell, J. December 12, 2006

In the Spring of 1992, Robert Alvarez purchased long-term care insurance through a group policy issued by the Insurance Company of North America ("INA"). After twelve years without change, in 2004 INA raised the premiums for everyone insured under that policy and announced additional premium increases in the coming years. Unhappy with this turn of events, Alvarez brought suit on behalf of himself and all others insured under the policy in which he claims that INA[1] defrauded them and therefore owes them damages. Because the allegations in the complaint do not and cannot make out a claim of fraud under applicable law, we will grant defendants' motion to dismiss.

**Facts**

Robert Alvarez is an eighty-five year old resident of Ocala, Florida. On March 28, 1992, while living in Maryland, he completed an application to purchase long-term care insurance from INA. INA agreed to cover Alvarez under a group policy

[1] Alvarez also raises claims again CIGNA Corporation. CIGNA has moved to quash on the grounds that it is not an insurance company and had no stake in the policy at issue here. Because we dismiss Alvarez's claims as to all defendants, we need not reach the question of CIGNA's involvement. For simplicity, we will refer to the insurer as INA.

issued to National Group Benefits Insurance Trust and which was available to members of the American Chemical Society. Alvarez's coverage was effective April 1, 1992 and his certificate promised that the "coverage will automatically be renewed provided the required premium is paid and benefits have not been exhausted." Def. Mot., Exh. F at 1.[2] The certificate listed a semi-annual premium of $594.00. Id. The master policy stated that "[o]ur table of rates is subject to change at any time after payment of the first premium." Def. Mot., Exh. B at 16.

In 1992, after Alvarez bought his coverage, INA "closed the block" of coverage, determining that it would not write any more coverage under the master policy.[3] The semi-annual premium remained the same until 2004 when INA increased it to $1,069.00. INA has expressed an intent to further increase the premium to $1,924.00 within the next two years.[4]

---

[2] We have already decided that it is proper for us to consider this document and the associated master policy despite the fact that they were not attached to the complaint. Order of Nov. 21, 2006 at 2 n.3. We may consider documents referenced in the complaint even if they are not attached so that we can "avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document." Lum v. Bank of America, 361 F.3d 217, 222 n.3 (3d Cir. 2004).

[3] This determination is significant because, once the block is closed, an insurer can no longer increase the pool of money available to cover claims by selling additional insurance. Thus, once closed, any shortfall in the pool must be covered through premium increases on the existing policyholders.

[4] These are the premiums applicable to Alvarez. The premiums applicable to other insureds, which began at different levels due to age and state of residence, have been raised accordingly.

Alvarez claims that INA knew at the time it issued his policy that it would have to raise premiums and that failure to notify him and the other purchasers of this fact was actual and constructive fraud and violated the District of Columbia's unlawful trade practices statute, D.C. Code § 28-3904.[5]

**Procedural History**

This case was originally filed in the United States District Court for the District of Columbia. By an August 21, 2006 order of that court, it was transferred to this Court effective September 20, 2006. Alvarez v. CIGNA, Civil Action No. 06-145 (D.D.C. August 21, 2006).

At the time of the transfer, defendants had filed two motions to dismiss and Alvarez had filed a motion for class certification. After additional briefing to address any impact of the transfer, we took the motions to dismiss under advisement. In our Order of November 21, 2006, we determined that the substantive law of the District of Columbia would apply to this case and we dismissed two counts of Alvarez's complaint. We also held that, in order to support a fraud or unlawful trade practice claim on the basis of failure to disclose, a plaintiff must show an affirmative duty to disclose. Because the parties had not fully briefed the existence of such a duty under D.C. law, we requested supplemental briefing on the question of whether INA

[5] Alvarez also claimed that INA had violated the common law covenant of good faith and fair dealing and included a separate count seeking punitive damages. We dismissed those claims in our Order of November 21.

had any duty to disclose future plans to increase premiums. Having received the requested briefs,[6] we now proceed to address the matter.

**Analysis**

Under District of Columbia law, a plaintiff seeking to establish a claim of fraud must show "(1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action ... taken in reliance upon the representation." Bennett v. Kiggins, 377 A.2d 57, 59 (D.C. 1977). Alvarez's case, however, arises not from an outright false statement, but from an alleged failure to disclose a material fact. Non-disclosure can, of course, be the false representation required for a fraud claim, but there is "no question that mere silence does not constitute fraud unless there is a duty to speak." Kapiloff v. Abington Plaza Corp., 59 A.2d 516, 517 (D.C. 1948). That duty may arise in two ways: from a partial disclosure that is misleading if additional information is withheld or from a confidential or fiduciary relationship. Id. at 118. Alvarez alleges that both situations apply here, and so we shall address each in turn.

Alvarez first alleges that, when INA claimed that the policies were "guaranteed renewable" and that premiums "may" change, it communicated misleading half-truths because INA "knew" that the policies were underpriced and that rate increases would

[6] We are grateful to counsel on both sides for taking to heart our admonition to limit the briefing to the question posed.

be necessary.[7] District of Columbia courts have acknowledged that "[a] half-truth may be as misleading as a statement wholly false." Tucker v. Beazley, 57 A.2d 191, 193 (D.C. 1948) (citing Restatement (Second) of Torts § 529). Even if INA may have been under no obligation to reveal that it could raise its rates, Alvarez claims that once it did so it "was bound by law to tell the whole truth without suppressing any material fact known to [it]." Id.

Though there is some surface appeal to Alvarez's argument, when we look at how the D.C. courts have applied this requirement to insurance companies, a rather different picture develops. In a case closely analogous to this one, Marjorie Burdetsky and her husband purchased health insurance under a plan her employer offered. Va. Acad. of Clinical Psychologists v. Group Hospitalization & Med. Servs., Inc., 878 A.2d 1226 (D.C. 2005). Their application was completed on December 1, 1997, and the insurer issued a policy effective January 1, 1998. Before completing her application, Burdetsky was given a directory of

---

[7] Because this is a motion to dismiss, we must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Thus, because Alvarez has alleged that INA knew that it would need to increase rates, we must accept that allegation as fact for purposes of this motion. Further, even though there is a heightened pleading standard for claims of fraud, see Fed. R. Civ. P. 9(b), the rule allows intent or knowledge to be averred generally. Despite our incredulity, therefore, at Alvarez's claim that INA, knowing its policies were underpriced, nevertheless waited twelve years after closing the book to raise rates, we will assume for purposes of this motion that INA did precisely that.

participating physicians current as of October, 1997. The directory, as all such directories do, noted that the list of participating doctors was subject to change at any time. The insurer did not disclose that on November 24, 1997, just a week before Burdetsky completed her application, it had sent a letter to all its mental health providers stating that it would be reducing their reimbursement by 30-40%, effective January 1, 1998. The insurer knew[8] that many providers would leave the network as a result, but did not inform Burdetsky of this fact. Burdetsky sued, alleging, among other claims, fraudulent misrepresentation on the part of the insurer for failing to disclose the letter it had sent to the providers and its expected effect on the provider pool. The D.C. Court of Appeals affirmed a grant of summary judgment to the insurer on Burdetsky's fraud claim. The court found that the standard disclaimer on the list of doctors -- which said, inter alia, "[p]articipating providers may change," id. at 1237, n.14 -- was sufficient notification to Burdetsky that she could not rely on the continuing participation of any particular provider and that "the [insurer's] awareness of the possibility of adverse impact" of the letter was not sufficient "to have mandated disclosure of that information to Burdetsky in particular so as to be deemed to have engaged in fraudulent misrepresentation." Id. at 1237.

---

[8] There were, in fact, internal communications noting that the announcement would be a shock to providers and that the insurer was "going to have a lot of clean-up work to do." Id. at 1237 n.15. As noted above, we assume for purposes of this motion that similar "smoking gun" evidence exists of INA's intention to later increase rates.

We see no meaningful distinction between the matter at hand and Virginia Academy, and certainly none favorable to Alvarez.[9] If anything, the facts in Virginia Academy are worse than those Alvarez alleges. There, by the time Burdetsky's policy became effective, ten percent of the mental health providers covered by her plan had already left. Thus, the possibility contemplated in the disclaimer had already happened. Alvarez, by contrast, did not receive a premium increase for twelve years. Thus, the contingency mentioned in INA's disclaimer was then in the distant future. In all other material respects, these cases are similar: both focus on material information communicated in marketing materials to potential insureds that the insurer knows will change. Thus, at best, Alvarez's case is only as strong as Burdetsky's. If, according to the D.C. Court of Appeals, Burdetsky's claim is not sufficient, Alvarez cannot make out a claim on partial disclosure grounds.

Alvarez also claims that, under D.C. law, insurers and their insureds are bound by a confidential relationship that requires disclosure. In support of this claim he cites Messina v. Nationwide Mut. Ins. Co., 998 F.2d 2, 5 (D.C. Cir. 1993), which notes that "insurance contracts have special characteristics that warrant heightened liability." Applying that case here, however, is problematic for two reasons.

---

[9] Notably, Alvarez's brief does not mention Virginia Academy at all. Cf. Pa. R. Prof. Conduct 3.3(a)(2).

First, Messina dealt with the bad faith denial of an insurance claim, a tort that was committed after a relationship between insurer and insured had formed. Alvarez, by contrast, alleges fraud in inducing him to enter into that relationship, i.e., a wrongful act committed before the relationship began. Messina, in fact, expressly distinguished the situation where "there is no contractual relationship between the claimant and the insurer" and said it would not hold an insurer liable under those circumstances. Id. This is a sensible result given that "[a] confidential relationship is defined as a relationship in which one party has gained the 'trust and confidence' of the other, enabling the first party to exercise extraordinary influence over the other." Witherspoon v. Philip Morris Inc., 964 F.Supp. 455, 461 (D.D.C. 1997) (citing Goldman v. Bequai, 19 F.3d 666, 673-74 (D.C. Cir. 1994)). It would be odd, to say the least, for such "trust and confidence" to exist before the parties had entered into any sort of formal relationship.

Second, Alvarez cannot explain why, if such a duty exists, the courts have not applied it in cases such as Virginia Academy. Indeed, the cases in which such a duty is discussed appear to be universally cases in which, as in Messina, it is the contractual relationship between insurer and insured that is at issue. See, e.g., Chase v. State Farm Fire and Cas. Co., 780 A.2d 1123, 1127 (D.C. 2001); see also Diamond Serv. Co. v. Utica Mut. Ins. Co., 476 A.2d 648, 656 (D.C. 1984) ("The relationship of insured and insurer presumes good faith on both sides.") (emphasis added). As we have already found, INA's decision to

raise premiums was no violation of its contract with Alvarez: the contract explicitly granted it the right to do so. See Order of Nov. 21 at 3. This case concerns what duty INA might have owed to Alvarez before he was insured under its policy. At that time, however, the parties were negotiating at arms' length and there is no reason to find that a relationship of trust and confidence existed. We hold, therefore, that INA owed no special duty to Alvarez when the alleged fraud took place.

Because neither partial disclosure nor a confidential relationship obligated INA to disclose its future rate plans[10] to Alvarez, we find that there is no support in the law for a fraud suit based on these facts.

Alvarez also seeks relief under the District of Columbia Consumer Procedures and Protection Act (CPPA), D.C. Code §§ 28-3901, et seq. In particular, Alvarez alleges a violation of D.C. Code § 28-3904(e)-(f), which prohibits any person from "misrepresent[ing] as to a material fact which has a tendency to mislead" or "fail[ing] to state a material fact if such failure tends to mislead." It appears that the analysis under CPPA is the same as that under common law fraud. The court in Witherspoon determined that the claims were "analogous" and applied the pleading standards of Fed. R. Civ. P. 9(b) to a CPPA claim. 964 F. Supp. at 464. In addition, both parties seem to

---

[10] If INA has no obligation to disclose its future rate plans, it certainly has no obligation to disclose the actuarial basis for its premiums, which is the other basis Alvarez asserts for his claim. That information would not only be of no use to all but the most financially sophisticated insureds, it would also require INA to disclose proprietary calculations.

agree that the claims are governed by the same standards. See Pl. Mem. Opp. at 22 ("[T]he CPPA ... require[s] proving the elements of common law fraud, including reliance."); Def. Supp. Mem. in Support at 8 (arguing that Alvarez's CPPA claim "is subject ... to the same analysis as his fraud by nondisclosure claim"). Though the CPPA also covers much activity that is well outside the boundaries of common law fraud, we agree with the parties that there is no cause for construing Alvarez's particular CPPA claim as requiring any different showing than his fraud claims. Thus, because we have determined that his fraud claims must be dismissed, we will also dismiss the claim under CPPA.

Because we find that Alvarez has failed to state a claim on which relief can be granted, we will grant defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Were we granting defendants' motion because of Alvarez's failure to meet the heightened pleading standards for fraud cases, we would generally grant leave to amend the complaint in an attempt to cure the defect. This would allow Alvarez an opportunity for further investigation so that he could state with more particularity the fraud he alleges. Here, however, we do not grant defendants' motion because Alvarez has failed to plead his claim specifically enough, a problem that further investigation and more detailed allegations might remedy. Instead, we find that, based on his allegations, Alvarez is not entitled to relief under the applicable law. Much as he might wish it otherwise, Alvarez cannot change the applicable law with

more artful pleading. We therefore find that no purpose would be served by allowing further pleadings in this action.

BY THE COURT:

/s/ Stewart Dalzell, J.

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

| | | |
|---|---|---|
| ROBERT ALVAREZ | : | CIVIL ACTION |
| v. | : | |
| INSURANCE CORP. of NORTH AMERICA, et al. | : | NO. 06-4326 |

ORDER

AND NOW, this 12th day of December, 2006, upon consideration of CIGNA's motion to quash (docket entry # 6), defendants' motion to dismiss (docket entry # 7), plaintiff's responses (docket entries 12 & 15),[11] the parties' supplemental memoranda (docket entries 4 & 5), defendants' reply (docket entry # 11), and the further briefs ordered November 21, 2006 (docket entries 21 & 22) and for the reasons articulated in the accompanying Memorandum of Law, it is hereby ORDERED that:

1. Defendants' motion to dismiss is GRANTED;
2. CIGNA's motion to quash is DENIED AS MOOT;
3. Plaintiff's complaint is DISMISSED; and
4. The Clerk of Court shall CLOSE this matter statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.

[11] Because this case was transferred from the U.S. District Court for the District of Columbia on September 20, 2006, the preceding docket entries refer to that court's docket. They are all included as part of our docket entry # 1.