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

ELLEN WEDEMEYER	:	CIVIL ACTION
	:	
v.	:	
	:	
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, et al.	:	NO. 05-6263

MEMORANDUM

Dalzell, J. March 6, 2007

Plaintiff Ellen Wedemeyer alleges that defendants The United States Life Insurance Company in the City of New York and Disability Reinsurance Management Services, Inc. wrongfully terminated benefits owed to her under a long term disability insurance policy. Before us now are the defendants' motions for summary judgment.

I. Factual Background

On April 19, 2001, then thirty-three-year old Ellen Wedemeyer was involved in a rear-impact car accident. Parties' Stipulation of Facts ("Stip.") ¶ 6, Ex. 3 Chester Co. Hosp. Emer. Dep't Records. She was then a principal for the Chester County Intermediary Unit, Stip. ¶ 7, at the Center for Alternative Secondary Education ("CASE"), Wedemeyer Dep. 54:3-10.[1] CASE enrolls students who have been expelled from their school districts or have other serious problems with discipline issues,

[1] Wedemeyer's deposition was taken over the course of three days -- September 7, 2006 and December 5 and 6, 2006 -- and the deposition transcripts' page numbers carry over into the succeeding days.

weapons violations, drugs, or assault. Wedemeyer Dep. 450:3-451:13.

Through her employer, Wedemeyer was covered by a group Disability Insurance Policy (the "Policy") that was issued by The United States Life Insurance Company in the City of New York ("US Life"). The Policy included long term disability ("LTD") benefits. Stip. ¶ 1, Ex. 1 Group Ins. Plan. She began receiving LTD benefits for the accident in October of 2001.

A. The Policy

The Policy provides LTD benefits for insureds who "become disabled and continue to be so disabled." Group Ins. Plan at G-19001 LTDB-1(B). "Disability" is defined as "total and/or partial disability." Id. The Policy defines total and partial disability:

> TOTAL DISABILITY means during the waiting period and thereafter, your complete inability to perform the material and substantial duties of your regular job. "Your regular job" is that which you were performing on the day before total disability began.
>
> The total disability must be a result of an injury or sickness. To be considered totally disabled, you must also be under the regular care of a physician.
>
> PARTIAL DISABILITY means that you are not able to perform the material and substantial duties of your regular job, but you are able to perform:
>
> - at least one of these duties on a part-time basis, or
> - at least one, but not all, of these duties on a full-time basis.

> "Your regular job" is that which you were performing on the day before disability began.
>
> The partial disability must be a result of an injury or sickness.

Id.

Disability Reinsurance Management Services, Inc. ("DRMS") provided various services to US Life pursuant to a 2003 Agreement for Group Long Term Disability Claims Adjudication (the "Adjudication Agreement"). Stip. ¶ 4, Ex. 2; see also DRMS Supp. Decl., Feb. 22, 2007, Adjudication Agreement.[2] DRMS provided the services as an independent contractor and not as an employee or partner of US Life. Stip. ¶ 5. DRMS is not a party to the Policy nor did it ever issue any policy of insurance to Wedemeyer, either directly or through her employer. Id. at ¶¶ 2-3.

The Adjudication Agreement provides for the adjudication of claims in the following manner:

> i. DRMS shall make a determination with respect to each Claim (as defined in Exhibit A) whether such Claim is valid and payable under the terms of the applicable Coverage (as defined in Exhibit A) and promptly advise

[2] This was not the first contract between the defendants. On January 1, 1994, US Life entered into a reinsurance agreement with Phoenix Home Life Mutual Insurance Company of Enfield, Connecticut ("Phoenix") (whose successor is Transamerica) through DRMS, the underwriting manager for Phoenix, the reinsurer. Pl.'s Mem. of Law in Opp'n to Defs.' Mots. for Summ J. ("Pl.'s Opp'n") Ex. 53. This agreement and its amendments provided that Phoenix would be paid a fixed percentage of the premiums that US Life charged. Id. at DRMS01614-18, 01630-32.

> [US Life] of such recommendation, in the manner reasonably specified by [US Life].
>
> ii. DRMS has full authority to determine whether a claim is payable provided, however, [US Life] reserves the right as to coverages underwritten by it to disregard the determination of DRMS.

Adjudication Agreement 1-2. It further provides that DRMS is to be compensated by "a percentage of the premium paid by [US Life] for reinsurance with respect to those policies for which DRMS is providing services." Id. at Exhibit B.

On October 23, 2001, DRMS informed Wedemeyer by letter that her claim for LTD benefits had been approved because she was unable "to perform the duties of [her] occupation." Stip. Ex. 5. The benefits were retroactively payable as of May 19, 2001, and would continue while she remained "contractually disabled but not beyond the maximum benefit period provided by the policy or its limitation provisions." Id. The letter also advised that "[w]e will require periodic updates regarding the status of your condition from you and your attending physician." Id.

B. Post-Accident Activities

Other than several half-days in May of 2001, Wedemeyer has not returned to work since the accident. Stip. ¶ 9. She did not request an opportunity to return to work at Chester County Intermediary Unit after May of 2001, nor did she ever ask that the school make any accommodations for any disabilities. Id. at ¶¶ 10-11. She also made no effort to secure employment as a school principal for any other school district. Id. at ¶ 12.

At the time of the accident, Wedemeyer was enrolled in a doctoral program at Immaculata College (now Immaculata University), taking her last "classroom" course of the program, "Orientation to Doctoral Research." Id. at ¶¶ 16-17, Ex. 8 Immaculata Univ. Tr. She took a "Dissertation Research Seminar" in the summer of 2001, "Dissertation I" in the fall of 2001, and "Dissertation II" in the spring of 2002. See Immaculata Tr. When deposed, Wedemeyer said, "[i]t took a whole year to write all five chapters," beginning in the summer of 2001 when she submitted her first chapter. Wedemeyer Dep. 202:8-20. She also stated, in an affidavit prepared after her deposition, that by "write" she meant the final editing and organizing into chapter form of all the material she had been gathering, researching, and drafting during the previous three years. Wedemeyer Aff. ¶ 2, Dec. 21, 2006. Throughout the year in which she "wrote" the dissertation, Wedemeyer would draft one chapter at a time, send it to her dissertation committee members, revise it based on their critiques, resubmit it to them, and continue this "back and forth" until everyone agreed that she could start the next chapter. Wedemeyer Dep. 140:11-141:10, 202:1-7. When she completed the final chapter in the spring of 2002, she defended the dissertation before a panel Immaculata College appointed and received a Doctorate of Education degree. Stip. ¶¶ 18, 20, Immaculata Univ. Tr.

Wedemeyer had also taken a class at St. Joseph's University in the fall of 2002, and continued taking classes in

2003, 2004, and 2005, eventually earning a Masters of Business Administration. Stip. ¶¶ 25, 31. She drove twenty-five minutes each way to attend the University. Wedemeyer Dep. 390:23-391:3. She also talked to professors about accommodations due to her disability, and all except one made various allowances for her. Id. at 468:4-469:7.

In March of 2003, she traveled to China, Singapore, and Thailand as part of a three-credit course entitled "International Marketing Study Tour" at St. Joseph's University. Stip. ¶¶ 27-28, Ex. 12 St. Joseph's Univ. Tr. This course was not required for her MBA program. Childs Dep. 34:7-12, Nov. 30, 2006. During the two-week overseas trip, she participated in many, but not all, of the activities, using a cane and occasionally a wheelchair to get around. Wedemeyer 166:8-171:11. On two or three days she stayed in her hotel room because of pain. Id. at 167:21-168:1.

Defendants first learned of Wedemeyer's studies at St. Joseph's University and her class trip to China, Singapore, and Thailand when they deposed her on September 7, 2006. Wedemeyer testified in her deposition that she did not mention her work at St. Joseph's University to DRMS because it was not very important to her and she did not think it would be important to DRMS. Wedemeyer Dep. 390:3-10. She described it as a reason to get out of the house, talk to others, and help fight her depression. Id. at 388:17-20.

C. Administration of the Claim

In the course of administering Wedemeyer's claim, DRMS sought and received updated information directly from her and her treating medical providers, periodically performed medical reviews of her claim file, and engaged doctors to perform independent medical examinations ("IME") of her.

1. Information Updates From Claimant

In a November 6, 2002 letter, DRMS asked Wedemeyer to provide information about certain medical matters and her Social Security disability benefits application, and it reminded her that "proof of continued disability is required" for her benefits. Stip. Ex. 16. DRMS also explained that it had learned she was pursuing her doctorate at Immaculata College, and it asked her to supply detailed information about the classes, including how she could attend the classes yet not be able to work, and how the course requirements differed from her job activities. Id.

When Wedemeyer failed to respond, DRMS again wrote to her on January 27, 2003, asking for the information sought in its November 6 letter. Stip. Ex. 17. Wedemeyer then responded in a February 1, 2003 letter, supplying the requested medical and Social Security information. Stip. Ex. 18. She also stated that she was not taking classes at Immaculata College as of November of 2002 and therefore could not provide the requested information about classes. Id.

In a March 19, 2003 letter, DRMS acknowledged receipt of Wedemeyer's February 1, 2003 letter and stated:

> Thank you for advising me that you were not taking classes as of the date of my November letter. Please allow me to be more specific. Kindly advise me of any classes taken over the past two years. Please be sure to include the name of each class taken, the dates it was taken and the date that you received any degree and/or certification. Further, please respond to my previous inquiry . . . "how are you able to attend classes and fulfill all the requirements involved with attending school, but still feel unable to work. How do these requirements differ from the activities of your job? Please provide a detailed explanation."

Stip. Ex. 19.

Wedemeyer wrote back ten days later. Stip. Ex. 20. She explained that she did not "formally attend" her spring of 2001 class after her accident, but took an "incomplete" and finished her work by e-mail. Wedemeyer Ltr. of Mar. 29, 2003. The college gave her "latitude to work on [her] dissertation at [her] own pace and on [her] own time table" and chose a committee to help her by phone, mail, and e-mail. Id. Wedemeyer stated that this type of work allowed her to see her doctors, take medication, and get treatment, in contrast to her stressful job as a principal that had required fifty- to sixty-hour work weeks overseeing a school for disruptive youths in grades five through twelve who had been expelled from their school districts for weapons violations, drug charges, or serious assault. Id. That

job had also involved a thirty-eight-mile commute each way over five -- and sometimes six -- days a week. Id.

In a July 11, 2003 letter, DRMS requested that Wedemeyer fill out the enclosed supplemental claim forms, which she did within two weeks. Stip. Ex. 22, 23. She complained of severe neck and back pain, headaches, nerve damage to her arms and legs, TMG, and concentration and memory problems. Stip. Ex. 22. She described her daily activities as "determined by my degree of pain," which some days confined her to bed and other days permitted her to do errands. Id. She would "drive short distances and only on days I feel some relief from the pain and am not overwhelmed by the medication." Id. At no point did Wedemeyer disclose to DRMS her course work at St. Joseph's University.

2. Medical Reviews, Reports, and IMEs

On October 19, 2001, Richard Herman, M.D. conducted the first medical records review, wherein he stated that three examiners believed Wedemeyer could not work. Stip. Ex. 4. He also raised a number of questions and suggested further investigation into certain matters. Id. Four days later DRMS approved Wedemeyer's LTD benefits.

While Wedemeyer was receiving LTD benefits, DRMS had several doctors conduct medical reviews of her file. Dr. Herman reviewed her file again on May 27, 2002. Stip. Ex. 10. Thomas Reeder, M.D. reviewed her file on July 25, 2003 and again on

October 18 of that year. US Life Mem. of Law in Supp. of Mot. for Summ. J. ("US Life Mot.") Ex. DRMS00377-379; Stip. Ex. 26. Board certified neuropsychologist Milton Jay, Ed.D. reviewed her records on June 18, 2003, US Life Mot. Ex. DRMS00377-379, and filed an addendum on November 19, 2003, commenting on the neuropsychological evaluation of Wedemeyer by Dr. Carl Bradford, and finding inadequate support for Dr. Bradford's diagnosis of post-traumatic cognitive deficits, Stip. Ex. 28.[3]

Wedemeyer's file contained, inter alia, five appraisals from her treating medical providers. The first included reports of neuropsychological evaluations from October 25, 2001[4] and June 24-25, 2003 by Carl Bradford, Ph.D., ABPN, Director of Neuropsychology at the Neurobehavioral Group, concluding that Wedemeyer showed neuropsychological impairment. Stip. Exs. 6, 37. There was also a November 19, 2002 report of an evaluation

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[3] DRMS hired Dr. Jay through one of its vendors, University Disability Consortium ("UDC"), a company that DRMS uses for peer reviews. Reeder Dep. 45:25-46:11, July 26, 2006. Dr. Peter Strang, the founder of UDC, estimated that his company reviewed about fifty cases for DRMS in 2006. Strang Dep. 11:15-23, Dec. 1, 2006. The one hundred or so doctors working at UDC do chart reviews and independent medical evaluations, and while UDC takes case referrals from both plaintiffs and defendants, about ninety-five percent of its investigations are for defendants. Id. at 12:13-13:13, 20:23-24:16, 35:2-4. Dr. Strang also testified that UDC discounts its fees for organizations that refer a large volume of cases and that those business discounts have no bearing on its doctors' medical findings. Id. at 33:8-34:23.

[4] Dr. Bradford's October 25, 2001 report was not yet in the file when Dr. Herman reviewed it on May 27, 2002. See Herman Review, May 27, 2002, at 1. Dr. Herman noted it was missing and stressed the importance of getting it. Id.

by David Webner, M.D. -- submitted on behalf of Brian Shiple, D.O., Wedemeyer's main treating physician -- assessing that Wedemeyer had right lateral thigh pain, somatic dysfunction, lumbosacral strain/sprain, neck pain, and T 12 and twelfth rib dysfunction. Stip. Ex. 11. There was, third, a January 21, 2003 re-examination report from chiropractor Raymond Wisdo, D.C., of Delaware County Pain Management stating that Wedemeyer presented with daily headaches that were sometimes severe, constant right arm and leg pain with weakness, numbness and tingling in her right upper and lower extremities, and constant bilateral cervical, thoracic and lumbar spine pain. Stip. Ex. 21. There was also an August 11, 2003 patient summary report from Dr. Shiple, who is a board certified sports medicine specialist and Director and Division Chief of Sports Medicine in the Crozer Keystone Health System. Stip. Ex. 25. Lastly, the file contained Dr. Bradford's November 12, 2003 letter, wherein he commented on, inter alia, Dr. Jay's June 18, 2003 neuropsychological records review by disputing that his own psychiatric testing was too limited, agreeing that certain testing he did in 2001 had "questionable validity" because Wedemeyer "likely failed to put forth maximal effort in 2001". Stip. Ex. 39. Dr. Bradford also noted that his 2003 reevaluation (performed after Dr. Jay's June 18, 2003 review) showed neuropsychological impairment and stated that Dr. Jay conflated two indexes and referred to a test's "standard age-based norms" that Dr. Bradford did not think existed. Id.

DRMS used a vendor, Physician Appointment Services ("PAS"), to arrange for two outside consultants to perform IMEs on Wedemeyer. DRMS requires that the consultants PAS selects have Board certification, academic affiliation, specific specialty, and geographic proximity to the claimant. Lawsure Dep. 15:2-13, July 26, 2006. Sarah Lawsure, the DRMS employee who selects its vendors, described PAS's service as "valuable" because they gave "quality IMEs, they were fair and objective, they answered the questions, . . . and they provided excellent service turnaround times." Lawsure Dep. 12:17-20, 14:2-9. She judged "fair and objective" based on "whether their conclusions could be correlated to the -- the data in the examination." Id. at 14:10-13. She said she would not be surprised or concerned if she learned that a physician who examined Wedemeyer did over ninety-five percent of his IMEs, depositions, or courtroom testimony for insurance companies, defendants in lawsuits, or lawyers for those insurance companies or defendants. Id. at 19:13-23.

PAS scheduled IMEs for Wedemeyer with I. Howard Levin, M.D., and Sandra Koffler, Ph.D., ABPP. Dr. Levin, a board certified neurologist at Albert Einstein Medical Center in Philadelphia, performed an IME and submitted an April 15, 2004 report, as well as a May 12, 2004 letter update. Stip. Exs. 29, 30. Dr. Levin concluded that Wedemeyer was "not suffering from any neurologic, neurocognitive or physical impairment that would prevent her from returning to work on a full-time basis." Levin

IME Report, Apr. 15, 2004, at 11. Clinical neuropsychologist Dr. Koffler, an Associate Professor and Director of Neuropsychology at Drexel University's College of Medicine, did an IME and submitted an April 22, 2004 report. Stip. Ex. 40. She concluded that there were "no neurocognitive issues that would preclude Ms. Wedemeyer returning to the workplace" and gave a "primary diagnosis . . . of depression." Koffler IME Report, Apr. 22, 2004, at 17.

On June 9, 2004, Dr. Reeder reviewed the two IME reports and the rest of Wedemeyer's medical records. Stip. Ex. 31. He then wrote to Dr. Angela Brown, Wedemeyer's treating physician, on June 16, 2004 and told her there was no current evidence of neurologic, physical, or psychological impairment. Stip. Ex. 32. He asked Dr. Brown to respond with her opinion within ten days and assured her that DRMS would reimburse her for her time. Id. When Dr. Brown did not respond, DRMS wrote Wedemeyer a letter on August 4, 2004. Stip. Ex. 33. DRMS asked Wedemeyer to have Dr. Brown respond within two weeks, and cautioned that if she did not, DRMS would make its decision based on the information in her claim file. Id. DRMS received only the final page of Dr. Brown's response before making its decision, although it repeatedly tried to get a complete copy. See Stip. Ex. 41 DRMS Letter of Dec. 22, 2004 at unnumbered p.2; Stip. Ex. 44 DRMS Letter of May 23, 2005 at unnumbered p.2; Kelly Dep. 19:4-20:1, July 26, 2006; Theriault Dep. 14:4-24, July 26, 2006.

D. Termination of Benefits and Appeal

In a December 22, 2004 letter, DRMS notified Wedemeyer that it was terminating her LTD benefits. Stip. Ex. 41. Bethany Theriault, the disability analyst who was handling Wedemeyer's claim, also called her to deliver the news. Theriault Dep. 11:6-25. The letter outlined DRMS's review of the claim and concluded that she no longer qualified as disabled under the Policy. DRMS Letter of Dec. 22, 2004. DRMS further informed Wedemeyer that within ninety days she could request a re-evaluation, and, if she did so, DRMS would re-evaluate the claim in its totality, including all previously submitted information, relevant policy provisions, and previously reached conclusions. Id. Also, a new analyst, one who had not worked on her claim before, would conduct the review. Id.

Wedemeyer submitted a letter of appeal on January 5, 2005. Stip. Ex. 44, DRMS Letter of May 23, 2005 at unnumbered p.2. DRMS assigned the matter to Sarah Kelly, an appeals analyst who had no previous involvement with Wedemeyer's claim. Kelly Dep. 4:8-11, 6:12-17. Through a vendor, BMI, DRMS commissioned independent file reviews from Board certified neurologist Brian Krasnow, M.D., and Board certified neuropsychologist Cris Johnston, Ph.D. Kelly Dep. 7:3-22; DRMS Mem. of Law in Supp. of Mot. for Summ. J. ("DRMS Mot.") Ex. 49. They issued a report on April 11, 2005. DRMS Mot. Ex. 49. They reviewed the claim file, including medical records, treating doctors' consultation notes, the job description and physical requirements of the principal's

position, and correspondence from Wedemeyer and her attorney. Krasnow & Johnston Report, Apr. 11, 2005, at 2-10. Dr. Krasnow concluded "there are no functional limitations to her occupation," and Dr. Johnston found "no convergent, clinical support for neurocognitive impairment that would lead to limitations and restrictions." Id. at 14-15.

DRMS forwarded this report to Wedemeyer's treating physicians, Dr. Ziegler and Dr. Shiple, on April 13, 2005 and May 11, 2005, respectively. Stip. Exs. 42, 43. DRMS asked the doctors if they disagreed with the medical reviewers' findings, and, if so, to "comment on the apparent nature and degree of symptoms as well as any restrictions and/or limitations that are present." Id. Dr. Ziegler did not respond, and Dr. Shiple responded by telephone on May 11, 2005, advising he would stand on his letter report of August 11, 2003. See DRMS Letter of May 23, 2005 at unnumbered p.3; Kelly Dep. 18:20-19:3. That report summarized Wedemeyer's symptoms and treatment from November of 2002 through July of 2003, but did not opine on any restrictions on her ability to work. See Stip. Ex. 25.

Wedemeyer had also submitted, along with her appeal letter, a complete copy of Dr. Brown's response to Dr. Reeder's June 16, 2004 letter. See DRMS Letter of May 23, 2005 at unnumbered p.2. When DRMS rendered its December 22, 2004 decision, it had received only one page of Dr. Brown's response, so Theriault had not considered it in her evaluation. Id.; Kelly Dep. 19:4-20:1. But upon receipt of Dr. Brown's full response,

Dr. Reeder commented on it and Kelly weighed it in her appeals decision. Kelly Dep. 20:2-23.

In a May 23, 2005 letter, Sarah Kelly informed Wedemeyer's attorney that DRMS was upholding its decision to deny Wedemeyer's claim. Stip. Ex. 44. The letter summarized the record and explained DRMS's reason for denying the claim. Kelly also testified that the decision was based on the totality of information. Kelly also reported that the factor that weighed most heavily was the medical evidence, which "didn't support restrictions and limitations that would preclude her from performing her occupation." Kelly Dep. 13:2-6, 17:6-11.

E. <u>This Litigation</u>

On December 5, 2005, Ellen Wedemeyer filed this lawsuit against US Life and DRMS, alleging that they wrongfully denied her disability benefits. She claims to be only partially recovered from her cognitive problems and totally disabled by her orthopedic injuries resulting from discs herniated during the accident. She sued the defendants for breach of contract (Count I), bad faith under 42 Pa.C.S.A. § 8371 (Count II), and violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Stat. Ann. § 201-1 et seq. (Count III). Before us now are defendants' motions for summary judgment, plaintiff's response, defendants' replies, and plaintiff's sur-replies, as well as the parties' stipulation of facts that attaches relevant documents as exhibits.

Besides the reports discussed in our factual background, supra, Wedemeyer has submitted three expert reports prepared for this litigation. First, Leonard Paul, Ed.D., P.C., a vocational psychologist and former school psychologist, evaluated Wedemeyer on December 13 and 28, 2005 and issued a report on March 20, 2006[5] wherein he concluded that Wedemeyer is vocationally disabled and there are no reasonable accommodations that could enable her to function productively. Pl.'s Opp'n Ex. 78.

Second, Wedemeyer submits a December 8, 2006 expert report by James Chett, an insurance claims and litigation consultant, who assessed the insurance claims handling practices in this case. DRMS Mot. Ex. 52. He concluded that defendants breached a duty of good faith and fair dealing. He found that US Life had maximum probable liability of $4,710.24 per month reduced by her Social Security payment of $1,442.00 per month, resulting in maximum probable liability of about $1,215,785 over the course of thirty-three years. Chett Report, Dec. 8, 2006, at 5. He deemed this to be the most significant pending claim under the Chester County Intermediate Unit's coverage, which contributed to its high loss ratio. Id. at 21. Mr. Chett further stated that insurers' medical investigations are

[5] Dr. Paul had seen Wedemeyer on May 13, 2003 and written a letter report to her attorney on August 17, 2003 stating his conclusion that she was vocationally disabled. Pl.'s Opp'n Ex. 77. It is unclear from the parties' submissions whether this document was part of her claim file.

typically done by using a physician or other licensed professional to perform an IME, and he opined that insurers need to hire an independent examiner who: "(1) routinely sees patients in a current medical practice; (2) balances his/her IME practice almost equally between claimants and insurers; (3) examines all pertinent medical records and is amendable to discuss the patient (with proper authorization) with the treating medical providers; (4) is of the same specialty as the treating provider; (5) is not principally in the business of performing IMEs." Id. at 6-7.

Finally, Wedemeyer submits another report by her main treating physician, Dr. Shiple, dated December 4, 2006. DRMS Mot. Ex. 51. Therein, Dr. Shiple explained prolotherapy, the injection-based treatment he was giving Wedemeyer to treat pain in her lower back and legs, and stated that such therapy justified treating Wedemeyer with narcotic medication, despite Dr. Levin's April 15, 2004 report finding that use of narcotic analgesics was inappropriate because Dr. Shiple's records did not suggest that the medications had improved her condition or functional status. Id. at 1-4. Dr. Shiple commented on Dr. Levin's conclusion that there were no neurologic, neuropsychologic or physical reasons for her symptoms by stating that: "I agree that she does not display the signs of nerve root impingement in her lumbar spine and I have, in my notes, attested to that. What I am treating and I have said all along that I am treating is myofascial pain and somatic dysfunction, which has been temporarily successful proving at least temporary efficacy

in the treatment we are rendering." Id. at 10. He also criticized aspects of Dr. Reeder's deposition testimony, summarized his September 5, 2006 exam of Wedemeyer, and opined that she is totally disabled because she has not had significant long-term pain relief from his treatments. Id. at 4-12.

II. Legal Analysis[6]

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as

[6] In this diversity action, the parties agree that Pennsylvania law applies, and we, too, find that Pennsylvania's law governs here.

a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

We now apply this standard to the three counts Wedemeyer asserts: bad faith, violation of the UTPCPL, and breach of contract.

A. Bad Faith

Wedemeyer contends that the defendants' investigation into her claim, and decision to stop paying benefits after more than three years of paying them, was unreasonable. She accuses them of having "a mindset of denial" throughout the investigation.

Pennsylvania's Bad Faith Insurance statute prohibits insurance companies from acting in bad faith toward insureds:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. § 8371.

The statute does not define "bad faith," but Pennsylvania courts have found it to be an insurer's "frivolous or unfounded refusal to pay proceeds of a policy," which "imports a dishonest purpose and means a breach of a known duty (i.e.,

good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith." Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994) (quoting Black's Law Dictionary 139 (6th ed. 1990) (citations omitted)). Also, Section 8371 can extend to the insurer's investigative practices. Condio v. Erie Ins. Exch., 899 A.2d 1136, 1142 (Pa. Super. Ct. 2006) (citation omitted).

A statutory bad faith claim has two elements: (1) "the insurer lacked a reasonable basis for denying benefits;" and (2) "the insurer knew or recklessly disregarded its lack of a reasonable basis." Booze v. Allstate Ins. Co., 750 A.2d 877, 880 (Pa. Super. Ct. 2000). The plaintiff insured has the burden of proving each element by clear and convincing evidence, and mere insinuation does not suffice. See Terletsky, 649 A.2d at 688; Condio, 899 A.2d at 1143. Thus, as the late Judge Rosenn summarized the Pennsylvania jurisprudence for our Court of Appeals, the plaintiff must show "that the evidence is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith." J.C. Penney Life Ins. Co. v. Pilosi, 393 F.3d 356, 367 (3d Cir. 2004) (citation omitted). Because a plaintiff must satisfy the clear and convincing evidentiary burden at trial, "[her] burden in opposing a summary judgment motion is commensurately high." Id.

The first element is objective, so if a reasonable basis exists for an insurer's decision, even if the insurer did not rely on that reason, there cannot be bad faith. See Livornese v. Med. Protective Co., 219 F. Supp. 2d 645, 648 (E.D. Pa. 2002), rev'd on other grounds, 136 Fed. Appx. 473 (3rd Cir. June 9, 2005); Williams v. Hartford Cas. Ins. Co., 83 F. Supp. 2d 567, 574 (E.D. Pa. 2000), aff'd, 261 F.3d 495 (3rd Cir. 2001) (table). Our courts have repeatedly held that an insurance company's substantial and thorough investigation of an insurance claim, which forms the basis of its refusal to make or continue making benefit payments, establishes a reasonable basis that defeats a bad faith claim. Mann v. UNUM Life Ins. Co. of America, No. 02-1346, 2003 WL 22917545, at *6 (E.D. Pa. Nov. 25, 2003) (citing cases); see also Montgomery v. Federal Ins. Co., 836 F. Supp. 292, 298 (E.D. Pa. 1993) (holding that defendant's denial of claim was not in bad faith where it conducted an extensive investigation and provided evidence to support its reasonable basis).

As one court explained:

> To defeat a bad faith claim, the insurance company need not show that the process used to reach its conclusion was flawless or that its investigatory methods eliminated possibilities at odds with its conclusion. Rather, an insurance company simply must show that it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action.

Mann, 2003 WL 22917545, at *7; see also Krisa v. Equitable Life Assur. Soc., 113 F. Supp. 2d 694, 704 (M.D. Pa. 2000) ("bad faith

is not established if there is any reasonable interpretation that supports a coverage determination favoring the insured"); Alexander v. Provident Life and Accident Ins. Co., No. 00-1405, 2003 WL 23757578, at *5 (M.D. Pa. Jan. 2, 2003) (holding that even though insurer's investigative methods may have been wanting, there was sufficient evidence to show its conclusion did not lack a reasonable basis); Cantor v. The Equitable Life Assurance Society of the U.S., No. 97-5711, 1999 WL 219786, at *2 (E.D. Pa. Apr. 12, 1999) ("insurance company is not required to demonstrate its investigation yielded the correct conclusion or even that its conclusion more likely than not was accurate . . . [or that its process] was flawless or that [its] investigatory methods . . . eliminated possibilities at odds with its conclusion.").

An insurer can rely on IMEs of qualified health professionals who examine claimants in a usual and customary manner. Seidman v. Minnesota Mutual Life Ins. Co., 40 F. Supp. 2d 590, 594 (E.D. Pa. 1997). The insurer must provide the examiners with all relevant documents. See Hollock v. Erie Ins. Exchange, 54 Pa. D.&C. 4th 449, 486-87, 527-28 (Pa. Com. Pl. Luzerne Co. Jan. 7, 2002) (finding bad faith where insurer purportedly relied on IME report that did not examine any medical records in insurer's possession or documents concerning claimant's job duties, yet rendered unsubstantiated conclusion attributing medical problems to claimant's job), aff'd, 842 A.2d 409 (Pa. Super. Ct. 2004), appeal dismissed as improvidently

granted, 903 A.2d 1185 (Pa. Aug. 22, 2006) (per curiam). When reviewing a disability claim, an insurer is not required to give greater credence to opinions of treating medical providers or to accept their findings at face value. Mann, 2003 WL 22917545, at *9.

Defendants contend that the record amply shows that DRMS conducted a substantial and thorough investigation that yielded a reasonable basis for denying the claim.[7] This record confirms that Dr. Herman, Dr. Reeder, and Dr. Jay performed medical record reviews. The claim file included medical updates and reports that DRMS had requested from Wedemeyer's treating medical providers, as well as information Wedemeyer herself supplied. DRMS also commissioned two outside consultants -- neurologist Dr. Levin and neuropsychologist Dr. Koffler -- to perform IMEs and submit reports. On appeal, DRMS assigned an appeals analyst who had no prior involvement in the claim, and it obtained independent file reviews from neurologist Dr. Krasnow and neuropsychologist Dr. Johnston. It sent copies of their report to Wedemeyer's treating physicians, Dr. Zeigler and Dr. Shiple, requesting their comments and review before making a decision on the appeal. Dr. Ziegler did not respond, and Dr. Shiple stated he would stand on his patient summary report, which

[7] DRMS also argues that it is not subject to 42 Pa.C.S.A. § 8371 because it is not an insurer. Wedemeyer vigorously disputes this, contending that DRMS is an insurer. We need not address this dispute, because, as discussed infra, even if we resolved it in plaintiff's favor, the record here cannot sustain a bad faith claim.

was by then twenty-one months old and offered no opinion as to restrictions and limitations on Wedemeyer's ability to work. Only after this extensive investigation did DRMS render a final decision on the claim.

Wedemeyer, in turn, asserts that defendants acted in bad faith while investigating and then when deciding to stop her disability benefits. She claims that DRMS failed properly to investigate the requirements of her job and Ph.D. program, that its medical reviews were defective, and that its doctors were biased.

First, Wedemeyer contends that DRMS could not assess her ability to work as a principal at a school for troubled children because they never sought her job description. She claims DRMS received her job description for the first time when her attorney faxed it to DRMS on February 17, 2006.[8] See Pl.'s Opp'n Ex. 67 Job Description (stamped received Feb. 21, 2006). But in 2001 US Life or DRMS sent to Wedemeyer's employer a job description form that asked a series of questions about her position, including its physical requirements. See DRMS Reply, Ex. 84 (DRMS00744-745). US Life received the completed description from her supervisor, Levi Wingard, on August 21,

[8] Plaintiff's supervisor testified that the job description Wedemeyer's attorney gave DRMS in 2006 was not the description in place when she was hired. Wingard Dep. 17:9-19:18, Dec. 7, 2006. Wingard believed that Wedemeyer assisted in preparing the 2006 description as part of a request for a position upgrade, but because that description did not have a notation indicating Board approval, it may or may not have ever been in effect. Id. at 85:7-88:22.

2001. See id. During discovery, DRMS produced that description from its records. See DRMS Mot. Ex. 84 "JOB DESCRIPTION" and "PHYSICAL JOB REQUIREMENTS" (DRMS00744-45). Also, the two independent consultants who reviewed the claim on appeal, Dr. Krasnow and Dr. Johnston, expressly stated that they reviewed the "Job Description and Physical Job Requirement for the position of Principal." DRMS Mot. Ex. 49 Report of Drs. Krasnow & Johnston, Apr. 11, 2005, at 10. Thus, the record shows that before it made a final decision on the claim, DRMS analysts had the job description and two external doctors considered it in their file review. Therefore, Wedemeyer has failed to show that defendants never sought her job description or that they ignored it.

Second, Wedemeyer stresses that her doctorate was "pivotal" to her claim determination, yet DRMS ignored her letters concerning her studies and it also failed to properly investigate because it did not speak with anyone at Immaculata to learn what she had done to earn her degree. She notes Dr. Reeder's recommendation in December of 2003 that DRMS investigate Wedemeyer's activities with respect to her Ph.D. -- a degree noted forty-three times in her claim file. Pl.'s Opp'n Ex. 71 Reeder Med. Referral Form, Dec. 15, 2003; Ex. 70 Claim file excerpts where Ph.D. is mentioned. Yet, when deposed, Dr. Reeder testified that he could not recall whether he had seen Wedemeyer's letters of February 1, 2003 and April 18, 2003 explaining how she obtained the degree. Reeder Dep. 40:3-43:22, July 26, 2006.

It is undisputed that DRMS asked her several times in letters to describe her work in the doctorate program and she did so in letters of February and April of 2003. Surely no one was better able to explain her work than Wedemeyer herself. Even if Dr. Reeder never saw those letters, he was only one of the reviewers and not the ultimate decisionmaker on the claim. The only record evidence is that each claims analyst made the decision to terminate benefits, and there is no evidence that they ignored Wedemeyer's letters. Sarah Kelly, the DRMS appeals analyst, testified in her deposition that Bethany Theriault decided to deny the claim in December of 2004, and that Kelly concluded that she was correct and upheld the decision based on the totality of information in the claim file. Kelly Dep. 6:18-24, 13:2-6. Dr. Reeder also testified that the disability claim analysts decided whether or not to accept and act upon his recommendations. Reeder Dep. 61:1-10.

Wedemeyer counters that "the various young ladies in the claims department" -- Sarah Kelly, Sarah Lawsure, and Bethany Theriault -- "are women young enough to be Dr. Reeder's daughters, with relatively modest educational and training backgrounds compared to that of Dr. Reeder."[9] Pl.'s Sur-reply 7.

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[9] The record does not reveal the ages of the women, but it does show that they each had between four and nine years of experience in their profession. At the time of her deposition, Kelly had been a claims handler at DRMS for nine years. Kelly Dep. 10:8-12. Theriault had four years of experience at DRMS. Theriault Dep. 10-11. Lawsure is a registered nurse who was a medical reviewer at another company for two years before she (continued...)

Wedemeyer therefore argues that counsel must present to a jury the question of who had "real authority." Id. at 8.

But Wedemeyer must do more than simply declare that a dispute exists as to who in fact denied her claim. She must instead "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Absent specific facts suggesting that employees' ages or years of job experience affected their decision-making abilities, such factors are irrelevant. Wedemeyer offers no such specific facts -- only crude innuendo. She has thus failed to show that there is a genuine issue for trial as to who was the decisionmaker.

Moreover, as to the relative importance of the doctorate to the termination of benefits, the only record evidence is that Kelly considered the totality of information, and the factor that weighed most heavily was the medical evidence, which, according to Kelly, "didn't support restrictions and limitations that would preclude her from performing her occupation." Kelly Dep. 13:2-6, 17:6-11. In a claim file consisting of hundreds of pages, forty-two references to the Ph.D. does not rise to the level of creating a material dispute as to how Kelly weighed all the factors.

In sum, the decisionmakers had access to Wedemeyer's own description of her doctoral work, and there is no record

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[9] (...continued)
joined DRMS in 1997, and DRMS promoted her to medical services manager in 2002. Lawsure Dep. 5:13-7:6.

evidence that they ignored that description. Accordingly, we find that DRMS's reliance on Wedemeyer's own description of her doctoral program, instead of interviewing her professors, was reasonable and does not show that it acted in bad faith when investigating this matter.

The third major problem Wedemeyer alleges is flawed medical reviews, specifically those of Dr. Herman and Dr. Reeder. Pl.'s Opp'n 44-45. She first notes that Dr. Herman's October 19, 2001 review concludes she could not have lost consciousness at the time of her accident, and Dr. Reeder's February 5, 2003 review states the accident report contained no mention of loss of consciousness. Wedemeyer suggests that these conclusions are unwarranted because her file did not contain ambulance records, emergency room records, or statements from witnesses to the accident. DRMS, in turn, asserts that Wedemeyer's medical providers' records support the reviews' remarks. Dr. Herman's October 19, 2001 review specifies that he examined Wedemeyer's treating medical providers' records -- chiropractor Raymond Wisdo's records from April through August of 2001, and physiatrist William Murphy's records from June through September of 2001. Herman Review, Oct. 19, 2001, at 1. While Dr. Herman's October 19, 2001 review does not quote directly from those doctors' reports, Dr. Reeder's February 5, 2003 review does. See Pl.'s Opp'n Ex. 68 Reeder Review, Feb. 5, 2003. Dr. Wisdo's April 2001 records of treatment state that Wedemeyer "struck head on steering wheel upon impact but did not lose consciousness,"

and Dr. Murphy recorded in June of 2001 that Wedemeyer was "restrained" while stopped in traffic and "struck her head on the steering, but did not lose consciousness." Id. at 2-3. The accident report also does not mention loss of consciousness. Id. at 2. Dr. Reeder also discussed an October 25, 2001 report of a neuropsychological evaluation by psychologist Carl Bradford, Ph.D. -- issued after Dr. Herman's review -- noting that the only change in history he provided was that "the insured now stated that she had lost consciousness" and that "Dr. Bradford stated that he did review the Accident Report, yet he did not comment on this inconsistency." Id. at 4. On this record, we find that information from Wedemeyer's own treating physicians provided a reasonable basis for the reviewers' comments.

Wedemeyer alleges a further problem with Dr. Herman's May 27, 2002 review because he stated, "I am assuming she is not on any narcotic or strong medication at this time because chiropractors are not permitted to prescribe them." Herman Review, May 27, 2002, at 1. She claims this overlooks that her neurologist, with whom Dr. Herman knew she was being treated, could have prescribed narcotics. However, Dr. Herman expressly states that at the time of the May 27, 2002 review -- seven months after his previous review -- "[i]t would appear that Dr. Wisdo is the only care giver at this time." Id. at 1. He also noted the importance of getting medical records from a neuropsychological exam that Dr. Bradford was supposed to have done. Id. Because there is no indication that Dr. Herman knew

Wedemeyer was still treating with a neurologist, his comments about medication do not suggest that he ignored record evidence.

Wedemeyer also cites several deficiencies in Dr. Reeder's February 5, 2003 report. First, she suggests that he contradicts himself on the question of whether she suffered from nerve root irritation. According to Wedemeyer, Dr. Reeder concluded in his February 5, 2003 review that "none of [her] herniated discs could possibly cause nerve root irritation." Pl.'s Opp'n 44. But when deposed, he conceded that a herniated disc can irritate a nerve root without coming into direct contact with it. See Reeder Dep. 27:1-5. DRMS denies any contradiction on this issue. When Dr. Reeder reviewed the documents in the claim file, including cervical and lumbar MRIs, he found "no evidence of any cord or nerve root involvement in any of these studies that would support a diagnosis of radiculopathy or that would explain the insured's extreme pain complaints." Reeder Review, Feb. 5, 2003, at 2. Wedemeyer's attorney asked Dr. Reeder at his deposition whether it was "true that a herniated dis[c] can cause a disruption and an inflamation of the tissue around the -- the dis[c] and the nerve root without coming into direct contact with the nerve root?" to which Dr. Reeder responded, "Yes." Reeder Dep. 27:1-5. Thus, in his review Dr. Reeder opined on what the record supported, and in his deposition he answered a hypothetical question divorced from any concrete medical records. We therefore agree with DRMS that there is no inconsistency between Dr. Reeder's statements.

The second defect Wedemeyer identifies with Dr. Reeder's report is that he found it "suspicious" that Dr. Murphy reported on June 7, 2001 that Wedemeyer had "been able to work despite her symptoms" after her accident. Pl.'s Opp'n 45, Ex. 68 Reeder Review, Feb. 5, 2003. Wedemeyer points out that Dr. Reeder's deposition revealed Dr. Murphy did not describe the how much she had worked after the accident, Reeder Dep. 52:17-53:14, so Dr. Reeder apparently could not have known the intensity or frequency of her post-accident work.

As DRMS points out, Dr. Reeder wrote the February 5, 2003 review long before DRMS concluded its investigation, and the review itself reached no conclusions about her capacity to work. Instead, it raised questions and recommended a neurology evaluation at an academic head injury center. See Reeder Review, Feb. 5, 2003, at 5. Because medical file reviews are intended to identify relevant issues and ability to work is at the core of Wedemeyer's claim, Dr. Reeder was merely doing his job by commenting on the information Dr. Murphy provided.

The third alleged problem with Dr. Reeder's report is that he described a "nonphysiologic" finding during Dr. Webner's Waddell test, which involves a person's response to compression on the top of the head. However, Dr. Shiple's report of December 4, 2006 found the response to be genuine and opined that Dr. Reeder did not understand the test. DRMS Mot. Ex. 51. Since Dr. Shiple's report was not part of the file when DRMS was evaluating the claim, it cannot be used to suggest that DRMS ignored

evidence contrary to Dr. Reeder's opinion, or that it unreasonably relied on Dr. Reeder's opinion. In fact, during Wedemeyer's appeal, DRMS invited Dr. Shiple to submit updated information, but he declined.

Finally, turning to Wedemeyer's assertions about the IMEs, she argues that PAS implicitly and improperly told Dr. Levin and Dr. Koffler to provide IME reports based only on objective signs and symptoms they observed and to pay no attention to subjective signs and symptoms that Wedemeyer might report. The January 15, 2004 appointment letters from PAS to the doctors state:

> **OBJECTIVES**
> This examination is for evaluation purposes only. *We do not authorize therapy, treatment or invasive testing.*
>
> **NARRATIVE REPORT**
> Please include the following information:
>
> 1. Patient's history and physical
> 2. Objective findings as per your examination and review of any medical records
> 3. Diagnosis and prognosis as they pertain to the Allowable Condition(s)
> 4. Limitations and restrictions (along with anticipated duration) relative to **OBJECTIVES**
> 5. Medication and/or treatment which, if continued or instituted, would facilitate recovery

DRMS Reply Ex. 87.

According to DRMS, Wedemeyer's argument focuses only on the second instruction and ignores the reality that the doctors would obtain subjective complaints through the patient's "history and physical", as the first instruction specified. Indeed, Dr. Levin's report details Wedemeyer's subjective complaints, see

Stip. Ex. 29 at 2-4, as does Dr. Koppler's report, see Stip. Ex. 40 at 2-11. Accordingly, there is no merit to Wedemeyer's claim that DRMS implicitly told the doctors to ignore subjective symptoms.

As to Wedemeyer's charge that Dr. Levin is biased, her evidence on this issue is inadmissible.[10] But even if we considered his earlier deposition testimony concerning what percentage of his reports were done for defendants, it would not create a material dispute of fact because Wedemeyer has not identified facts suggesting that either Dr. Levin or Dr. Koppler performed their IMEs in anything other than the usual and customary fashion. Accordingly, DRMS was entitled to rely on their reports. See Seidman v. Minnesota Mutual Life Ins. Co., 40 F. Supp. 2d 590, 594 (E.D. Pa. 1997) (holding it was not bad faith for insurer to rely on qualified health professionals' IMEs done in a usual and customary fashion, even though another doctor opined that better tests were available).

In conclusion, after DRMS considered many medical reports and medical file reviews -- including two done by independent consultants who considered a job description -- as

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[10] Wedemeyer tries to introduce one page from deposition testimony that I. Howard Levin, M.D., gave in an unrelated civil action in 2002. See Pl.'s Opp'n 26, Ex. 75 Levin Dep., June 20, 2002. Fed. R. Civ. P. 32(a) permits the use of deposition testimony, in accordance with the Rules of Evidence, "against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." Because neither US Life nor DRMS were parties to the other action or had notice of the June 20, 2002 deposition, that deposition is not admissible.

well as two reports from IMEs done by independent doctors -- it determined that Wedemeyer was no longer disabled within the meaning of the insurance policy. Wedemeyer's main treating physician declined to comment on this conclusion with anything other than information provided in a report that was by then twenty-one months old. Only then did DRMS render a final decision denying Wedemeyer's appeal of the initial termination of LTD benefits.

Even if we were to assume the investigation was imperfect and that there was some conflicting evidence as to Wedemeyer's alleged disability, any disputes do not rise to the level of material issues of fact that would preclude granting summary judgment here. There is ample record evidence showing that DRMS conducted a thorough investigation and had a reasonable basis for terminating Wedemeyer's LTD benefits.

In short, Wedemeyer falls far short in carrying the heavy burden Pennsylvania law imposes on her. The defendants are entitled to judgment as a matter of law on the bad faith claim.

B. The Unfair Trade Practices Consumer Protection Law

Pennsylvania's Unfair Trade Practices Consumer Protection Law ("UTPCPL"), 73 Pa. Stat. Ann. §§ 201-1 et seq., is a remedial statute that combats sellers' unfair or deceptive business practices by equalizing "the market position and strength of the consumer vis-a-vis the seller". See Commonwealth v. Monumental Properties, Inc., 329 A.2d 812, 815-16, 820 (Pa.

1974). The UTPCPL provides relief for misfeasance, not nonfeasance. MacFarland v. U.S. Fidelity & Guar. Co., 818 F. Supp. 108, 111 (E.D. Pa. 1993) (citation omitted). "[M]isfeasance is an improper performance of a contracted obligation, while nonfeasance is the mere failure to perform." Parasco v. Pacific Indem. Co., 870 F. Supp. 644, 648 (E.D. Pa. 1994) (internal quotations and citation omitted). An insurer's mere refusal to pay a claim is nonfeasance and therefore not actionable. Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 307 (3d Cir. 1995). Misfeasance can exist where an insurer conducted a post-loss investigation in an unfair and nonobjective manner or misrepresented the nature of its contractual obligations. Parasco, 870 F. Supp. at 648.

DRMS contends that Wedemeyer has no claim pursuant to the UTPCPL because there is no contractual relationship between them. Wedemeyer's briefing of her UTPCPL claim does not contest this argument. See Pl.'s Opp'n 50-52.

This court has addressed this issue. In Brownell v. State Farm Mut. Ins. Co., 757 F. Supp. 526 (E.D. Pa. 1991), the plaintiff's insurance company hired an external auditor to assess the need for and cost of services rendered by the plaintiff's doctor, id. at 529. As here, the plaintiff alleged that the auditor financially benefitted when it conspired with her insurance company to reject her claims. Id. The court explained that the UTPCPL targets "commercial transactions between consumers and sellers, or those in the chain of supply

who affirmatively mislead purchasers whose reliance was reasonable and specifically foreseeable." Id. at 533 (citing Valley Forge Towers v. Ron-Ike Foam Insulators, Inc., 574 A.2d 641, 647 (Pa. Super. Ct. 1990)); see also Monumental Properties, 329 A.2d at 820 (explaining that the UTPCPL's passage was prompted by "[a] perception of unfairness [that] led the Legislature to regulate more closely market transactions" and that "[t]he mischief to be remedied was the use of unfair or deceptive acts and practices by sellers"). The plaintiff in Brownell had purchased her insurance policy from State Farm and relied upon its promises of payment and representations about coverage. 757 F. Supp. at 533. The auditor, however, was not "in any trade or commercial relationship with plaintiff sufficient to render it liable to her under the ["UTPCPL"]." Id. (quoting Benjamin v. Nationwide Mut. Automobile Ins. Co., No. 266, slip op. (C.P. Phila. Dec. 12, 1987)). Accordingly, the Court dismissed the UTPCPL claim against the auditor.

Wedemeyer, through her employer, purchased insurance from an insurance company, US Life, and relied upon US Life's representations concerning coverage. There is no record evidence of a contractual or direct commercial relationship between Wedemeyer and DRMS. Therefore, consistent with Brownell and the Pennsylvania jurisprudence, the UTPCPL claim against DRMS must fail, and DRMS is entitled to judgment as a matter of law.[11]

[11] Even if Wedemeyer had argued she possessed the (continued...)

As to US Life, it asserts that DRMS's denial of Wedemeyer's claim is nonfeasance (i.e., "the mere failure to perform"), and thus not actionable under the UTPCPL. Wedemeyer, unsurprisingly, characterizes her claim as one for malfeasance (i.e., "an improper performance of a contracted obligation") arising from defendants' failure properly to investigate all facts relevant to her claim. But even if we accept Wedemeyer's characterization of her claim, the evidence does not support her allegation that the investigation was "unfair and nonobjective" or a "sham" whose results "were a foregone conclusion." Second Am. Compl. ¶¶ 25, 35. To the contrary, the defendants conducted a thorough and serious investigation. Cf. Guesnt v. Western Pacific Mut. Ins. Co., No. 97-4704, 1998 WL 150985, at *7 (E.D. Pa. Mar. 30, 1998) (denying insurer's summary judgment motion on UTPCPL claim where jury could infer from evidence that insurer acted unfairly and deceptively by trying to force upon insureds an improper solution that contravened the terms of the warranty policy at issue). The defendants did not handle Wedemeyer's claim improperly. See Cantor v. The Equitable Life Assurance Society of the U.S., No. 97-5711, 1999 WL 219786, at *5 (E.D. Pa. Apr. 12, 1999) (holding that plaintiff failed to carry his burden on UTPCPL claim where insurer had a reasonable basis to terminate

[11] (...continued)
necessary relationship with DRMS to bring a UTPCPL claim and prevailed on that argument, judgment for DRMS would still be proper for the same reasons the claim fails against US Life.

plaintiff's benefits). US Life is entitled to judgment on the UTPCPL claim as a matter of law.

C. Breach of Contract

To establish a breach of contract claim, a plaintiff must show: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). Only a party to a contract can be liable for breach of that contract. Electron Energy Corp. v. Short, 597 A.2d 175, 177 (Pa. Super. Ct. 1991). Moreover, where one's insurance company hires an insurance adjuster to handle her claim, there is no contractual privity between the insured and the insurance adjuster in the absence of separate contract between them. See Peer v. Minnesota Mut. Fire & Cas. Co., No. 93-2338, 1993 WL 533283, at *3 (E.D. Pa. Dec. 23, 1993) (citing Hudock v. Donegal Mutual Ins. Co., 264 A.2d 668 (Pa. 1970)).

The record is clear -- indeed, is undisputed -- that Wedemeyer never entered into a contractual relationship with DRMS. Accordingly, her breach of contract claim against DRMS must fail as a matter of law.

As to US Life, our inquiry on the breach of contract claim is materially different from our earlier inquiries into Wedemeyer's other two counts. We have already found that DRMS's decision to terminate benefits was the result of a thorough

investigation that gave a reasonable basis for finding that Wedemeyer was no longer disabled. However, even where an insurer's investigation and termination decision was not unfounded or frivolous, and therefore did not violate the bad faith statute, the insurer may nevertheless have in fact breached a contract to provide benefits. See, e.g., Kearns v. Minnesota Mut. Life Ins. Co., 75 F. Supp. 2d 413, 419-21 (E.D. Pa. 1999) (granting defendant insurer's summary judgment motion on bad faith and also granting plaintiff's summary judgment motion as to defendant's breach of contract for benefits due under the policy); Lieberson v. Chubb Life Ins. Co., No. 97-5716, 1998 WL 404537, at *2 (E.D. Pa. July 14, 1998) (same).

We turn now to whether there exists a genuine issue of material fact about US Life's violation of its contractual obligation to pay LTD benefits to Wedemeyer if she was totally or partially disabled. The Policy defines total disability as "your complete inability to perform the material and substantial duties of your regular job," which is "that which you were performing on the day before total disability began." Partial disability is an inability to "perform the material and substantial duties of your regular job," even though one can still perform "at least one of these duties on a part-time basis, or . . . at least one, but not all, of these duties on a full-time basis."

As rehearsed in our factual background, Dr. Shiple, Wedemeyer's main treating physician, and Dr. Paul, a vocational psychologist and former school psychologist, have submitted

reports in conjunction with this litigation opining that she continues to be disabled. US Life insists that she is not in fact disabled. Thus, there is record evidence of a material dispute that a jury must resolve.

III. Conclusion

For these reasons, we shall grant DRMS's motion for summary judgment as to all three counts and grant US Life's motion for summary judgment as to the counts for bad faith and violation of the UTPCPL. We shall also deny US Life's motion as to the breach of contract claim. An Order to this effect follows.

BY THE COURT:

/s/ Stewart Dalzell, J.

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

ELLEN WEDEMEYER	:	CIVIL ACTION
	:	
v.	:	
	:	
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, et al.	:	NO. 05-6263

JUDGMENT

AND NOW, this 6th day of March, 2007, the Court having granted defendant Disability Reinsurance Management Services, Inc.'s motion for summary judgment as to all claims, JUDGMENT IS ENTERED in favor of defendant Disability Reinsurance Management Services, Inc. and against plaintiff Ellen Wedemeyer.

BY THE COURT:

/s/ Stewart Dalzell, J.

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

ELLEN WEDEMEYER	:	CIVIL ACTION
	:	
v.	:	
	:	
THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, et al.	:	NO. 05-6263

ORDER

AND NOW, this 6th day of March, 2007, upon consideration of the parties' stipulation of facts, defendants' motions for summary judgment (docket entries # 60, 61), plaintiff's response thereto (docket entry # 66), defendants' motions for leave to file reply and the attached replies (docket entries # 73, 74), and plaintiff's motions for leave to file sur-reply and the attached sur-replies (docket entries # 76, 77), and in accordance with the accompanying memorandum, it is hereby ORDERED that:

1. Defendants' motions for leave to file reply are GRANTED and the Clerk shall DOCKET the replies attached to those motions;

2. Plaintiffs' motions for leave to file sur-replies are GRANTED and the Clerk shall DOCKET the sur-replies attached to those motions;

3. Defendant Disability Reinsurance Management Service's motion for summary judgment is GRANTED;

4. Defendant The United States Life Insurance Company in the City of New York's ("US Life") motion for summary judgment is GRANTED as to Counts II and III and DENIED as to Count I;

5. On March 20, 2007, trial shall COMMENCE on the remaining claim for breach of contract against US Life at 9:30 a.m. in Courtroom 10B; and

6. By March 13, 2007, in accordance with the attached order regarding pretrial submissions, plaintiff and defendant US Life shall SUBMIT a joint pretrial stipulation, requests for jury instructions, proposed jury verdict form, and any motions in limine, with responses to those motions due by noon on March 15, 2007.

BY THE COURT:

/s/ Stewart Dalzell, J.