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

JENNIFER HARNICK et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	:	NO. 08-5752

MEMORANDUM & ORDER

McLaughlin, J. March 5, 2009

The plaintiffs filed this class action suit against State Farm Mutual Automobile Insurance Company claiming that the defendant's practice of pro-rating the repayment of the plaintiffs' deductible following the defendant's successful subrogation claim against a third-party was improper under Pennsylvania law. The facts relating to the named plaintiffs' case involve the defendant's subrogation claim against a third party, with whom the plaintiffs' were involved in a car accident. On November 22, 2007, the plaintiffs' vehicle was damaged in an accident with another driver. Compl., ¶ 6. The plaintiffs' vehicle was insured under a policy issued by the defendant. This policy contained collision damage coverage with a deductible of $500. The defendants paid to the plaintiffs the agreed value of the loss incurred in the accident, reduced by the plaintiffs' $500 deductible. Id., ¶ 7.

The defendant then pursued a subrogation claim against the other driver involved in the accident. In pursuing that subrogation, the defendants and the third-party driver determined

that the driver of each vehicle shared fault for the accident in equal proportion. The defendant recovered an amount in excess of $500 through its subrogation claim. The defendant then paid to the plaintiffs $250, or fifty percent of their $500 deductible, as a pro-rated share of the plaintiffs' deductible.

The complaint alleges that the defendant has a uniform practice of repaying a prorated amount of their insureds' deductibles after recovering amounts in excess of those deductibles in the defendant's subrogation claims. The plaintiffs allege that this practice violates their right under Pennsylvania law to be "made whole" by their insurer. Id., ¶¶1-13. The plaintiffs claim that this right is incorporated into their insurance contract and that the proration of their deductible by the defendant constituted a breach of contract. The complaint also includes claims for bad faith, conversion and unjust enrichment under Pennsylvania law, as well as a claim for injunctive relief. Id., ¶¶ 27-51. The defendant has filed a motion to dismiss each of these claims.

In Bell Atlantic Corp. v. Twombly, the United States Supreme Court clarified the standard to be used to judge the legal sufficiency of a complaint. 550 U.S. 544, 127 S. Ct. 1955 (2007). The Court held that, to state a claim, a complaint must contain sufficient factual allegations "to raise a right to relief above the speculative level." Id. at 1965. In the

context of evaluating the legal sufficiency of a claim of antitrust conspiracy, the Court held that "stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made" and requires allegations that provide "plausible grounds to infer an agreement." Id. The United States Court of Appeals for the Third Circuit, in a decision extending Twombly outside the antitrust context, summarized Twombly as requiring "some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation." Phillips v. County of Allegheny, 515 F.3d 224, 234-35 (3d Cir. 2008).

The defendant argues that the plaintiffs' allegations fail to state a valid claim because the defendant's proration of the plaintiffs' deductibles was proper under Pennsylvania state insurance regulations. The defendant points to Pennsylvania Insurance Code Regulation 146.8 ("Standards for prompt, fair and equitable settlements applicable to automobile insurance"), which states:

> (c): Insurers shall, upon the request of the claimant, include the first-party claimant's deductible, if any, in subrogation demands. Subrogation recoveries shall be shared on a proportionate basis with the first-party claimant, unless the deductible amount has been otherwise recovered. A deduction for expenses can not be made from the deductible recovery unless an outside attorney is retained to collect the recovery. The deduction may then be for only a pro rata share of the allocated loss adjustment expense.

31 Pa. Code § 146.8(c). The plaintiffs argue that this regulation allows for the recovery of a deductible via an insurer's subrogation claim to be shared on a prorated basis. The Court agrees that this regulation grants State Farm the right to prorate the deductible precisely as they are alleged to have done in this case.

The plaintiffs assert that the existence of this regulation does not defeat their claim because it is invalid. The plaintiffs argue that the Pennsylvania Insurance Commissioner promulgated this regulation without a grant of authority from the Pennsylvania General Assembly. By exceeding the scope of any applicable enabling legislation, the Insurance Commissioner exceeded his powers and usurped the legislative power granted by the Pennsylvania Constitution solely to the General Assembly. Pls' Opp'n at 8-12.

In support of this position, the plaintiffs rely on a recent decision of the Supreme Court of Pennsylvania invalidating a separate regulation of the Insurance Department. Insurance Federation of Pennsylvania v. Commonwealth of Pennsylvania, 889 A.2d 550 (Pa. 2005) ("IFP"). IFP held that a statute requiring that all insurance policies be approved by the Insurance Commissioner did not give the Insurance Department the implied authority to mandate binding arbitration of all coverage disputes arising under uninsured motorist and underinsured motorist

provisions of insurance contracts. Id. at 554. The Court rejected the regulation requiring mandatory arbitration because it exceeded the Pennsylvania General Assembly's grant of authority to the Insurance Department to promulgate regulation for the approval of automotive insurance contracts. Id.

The legislative grants of authority at issue in IFP were (1) a section of the Insurance Department Act, 40 P.S. § 477b, requiring that all policies for insurance be approved by the Insurance Commissioner; and (2) the Motor Vehicle Financial Responsibility Law, stating in relevant part that "[n]o motor vehicle liability insurance policy shall be delivered or issued for delivery in this Commonwealth . . . unless uninsured motorist and underinsured motorist coverages are offered therein . . . ." 75 Pa. C.S.A. § 1731(a). The Court held that "the public policy underlying the enactment of the [Motor Vehicle Financial Responsibility Law] does not create an implied legislative mandate allowing the Insurance Department to change the normal course of judicial proceedings simply because arbitration is less costly and less time-consuming than traditional litigation." Id. at 555.

The plaintiffs argue that the insurance regulation permitting proration of deductibles recovered by insurers through subrogation is similarly outside of the Insurance Department's scope of authority. To the contrary, the regulation fits

squarely within the scope of authority delegated by the General Assembly. First, the General Assembly created the Insurance Department and charged it with "the execution of the laws of this Commonwealth in relation to insurance." 40 P.S. § 41. The Pennsylvania Supreme Court has stated that an administrative agency is "invested with the implied authority necessary to the effectuation of its express mandates." IFP, at 554. Regulation 146.8(c) was promulgated to effectuate the purposes and intent of the Unfair Insurance Practices Act ("UIPA"), 40 P.S. § 1171.5. Section 1171.5(a)(10)(vi) of the UIPA states that it is an unfair claim settlement practice to "not [attempt] in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear."

The defendant argues that in promulgating Regulation 146.8(c) the Insurance Department defined the parameters of fair and equitable settlement of an insurance claim. The defendant also argues that this regulation does not fall outside of the scope of the legislative grant of authority given the Insurance Department to promulgate such regulations. The defendant notes the purpose of the UIPA, as stated in 40 P.S. § 1171.2, is "to regulate trade practices in the business of insurance . . . by defining or providing for the determination of all such practices in this state which constitute unfair methods of competition or

unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined."

The Court agrees that the regulation in question falls within the scope of authority granted by the General Assembly. The regulation at issue in IFP removed a claimant's right to a trial with respect to uninsured motorist and underinsured motorist claims. That portion of the regulation did not effectuate "the public policy underlying the enactment of the MVFRL," which was to ensure coverage for automobile accidents with uninsured and underinsured motorists. “[T]o change the normal course of judicial proceedings simply because arbitration is less costly and less time-consuming than traditional litigation" did not comport with the policy underlying the MVFVL. IFP at 555.

Unlike the regulation in IFP, Regulation 146.8(c) presents a regulation that fits squarely within the purpose of the UIPA. This regulation furthers the definitions of unfair insurance practices, just as the UIPA envisions. The regulation was promulgated by the Insurance Department within the scope of enabling legislation passed by the General Assembly. The regulation is valid.

The behavior complained of by the plaintiffs, which is specifically permitted by Pennsylvania's insurance regulations, cannot violate the common law “made whole” doctrine even assuming

that the doctrine would in fact support a claim like that of these plaintiffs.[1] Because the behavior does not violate the "made whole" doctrine, the plaintiffs have failed to state a basis on which the Court could find a breach of the parties' contract. The plaintiffs' first count must be dismissed.

The behavior does not stand as an act of bad faith by the defendant, as asserted in count two, because the defendant

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[1]The Court notes that the cases to which the plaintiffs cite in support of their construction of the "made whole" doctrine do not comport with the plaintiffs' characterization of that doctrine. The cases cited discuss the equitable right to subrogation. Pennsylvania requires that an insured must recover the full amount of his losses from a third-party before the insurer may claim any reimbursement from the insured. Gallop v. Rose, 616 A.2d 1027 (Pa. Super. 1992); see also, Nationwide Mut. Ins. Co. v. DiTomo, 478 A.2d 1381 (Pa. Super. 1984); Lexington Insurance Co. v. Q-E Mfr. Co., Inc., No. 06-CV-0437, 2006 WL 2136244 (M.D. Pa. Jul. 28, 2006) ("The 'made whole' doctrine provides that the subrogation right of an insurer is to be deemed secondary, or lower in priority, to all other claims against a source of compensation to the insured until the insured has been fully compensated."). This doctrine requires that an insured recover the full amount of his losses before his insurer may demand reimbursement for any payments previously made to the insured under an insurance policy.

"[T]he doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other, and to indemnify from the fund out of which should have been made the payment which he made." Lexington Ins. Co., 2006 WL 2136244 at *2 (quoting Grand Council Royal Arcanum v. Cornelius, 47 A. 1124, 1124-25 (Pa. 1901)). "The doctrine 'is a mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it . . . .'" Id. (quoting Bender v. George, 92 Pa. 36 (1879)). These cases do not describe a right of the insured to the recovery of the full amount of his contractually required deductible when the insurer recovers in subrogation from a third party.

acted in reasonable reliance on a valid state insurance regulation. Nor does the complaint state a claim for conversion, as asserted in count three, because under the terms of Insurance Regulation 146.8(c), the plaintiffs were not legally entitled to a full recovery of their insurance deductible. The complaint does not state a claim for unjust enrichment, as asserted in count four, because the defendants were entitled by law to a prorated amount of the deductible. Finally, the complaint's fifth count for injunctive relief fails to state a claim because the defendant’s behavior as alleged was permissible under Pennsylvania law.

An appropriate order follows.

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ORDER

AND NOW, this 5th day of March, 2009, upon consideration of the defendant's motion to dismiss (Docket No. 5), the plaintiffs' opposition, and the defendant's reply thereto, IT IS HEREBY ORDERED that the defendant's motion to dismiss is GRANTED for the reasons outlined in the attached memorandum. The Clerk of Court shall mark this case as closed.

BY THE COURT:

/s/Mary A. McLaughlin
MARY A. McLAUGHLIN, J.