

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

LOUIS J. GRINGERI, D.O., P.C., : CIVIL ACTION
ET AL., :
 :
 Plaintiffs :
 :
 v. :
 :
 MARYLAND CASUALTY COMPANY, :
 :
 Defendant : NO. 97-7373

M E M O R A N D U M

Plaintiffs, Louis J. Gringeri, D.O., P.C. ("Dr. Gringeri") and Robert Kelly ("Mr. Kelley") bring this action against Defendant, Maryland Casualty Company ("MCC") to recover medical benefits allegedly due Plaintiffs for treatment rendered to Mr. Kelley after certain automobile accidents. Presently before the Court is Defendant's Motion for Partial Summary Judgment on Count II (Bad Faith) and Count III (Unfair Trade Practices and Consumer Protection Law) of the Complaint. Defendant asserts that the Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. § 1797 (West 1996) ("MVFRL"), provides the exclusive remedy to an insured provider for failure to pay first party medical benefits based on a peer review for medical necessity and that such a failure to pay insurance benefits is mere non-feasance, rather than malfeasance, and therefore is not actionable under Pennsylvania's Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann. tit.73, § 201-1 et seq. (West 1993 & Supp.

1997)("CPL"). For reasons set forth below, the Motion will be granted.

I. BACKGROUND¹

Mr. Kelley is insured by MCC. After sustaining injuries in two separate automobile accidents which occurred on April 24, 1992 and October 8, 1994, Mr. Kelley was treated by Dr. Gringeri. MCC paid some but not all of the medical bills submitted to it by Dr. Gringeri for the treatment of Mr. Kelley following the second accident. MCC had referred Mr. Kelley's case to a Peer Review Organization ("PRO") following the October 8, 1994 accident. On June 20, 1996, the PRO determined that Dr. Gringeri's treatment of Mr. Kelley after March 14, 1995 was medically unnecessary.² MCC thus declined to pay the bills submitted by Dr. Gringeri for treatment provided after that date.

In Count I of their Complaint, Plaintiffs seek payment of first party benefits which were allegedly unreasonably denied by MCC. Defendant does not challenge Count I in this Motion. In

¹ The background facts are based on the Complaint, the Answer, and the parties' Stipulation and Order, signed by the Court on December 22, 1997.

² The PRO determination, attached to Defendant's Motion as Exhibit 1, indicates that David Miller, the author of the Report, was provided with Dr. Gringeri's office medical notes and billing statements for treatment of Mr. Kelley from October 10, 1994 thru April 4, 1996, in addition to other documents, to assist with his review.

Count II of the Complaint, Plaintiffs seek punitive damages for MCC's alleged bad faith under 42 Pa. Cons. Stat. Ann. § 8371. In Count III, Plaintiffs allege MCC violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann. tit.73, § 201-1 et seq., and seek treble damages. Defendant however, asserts that Plaintiffs' Complaint comprises nothing more than a series of allegations "revolving around MCC's exercise of its statutory prerogative to request a PRO determination and its refusal to pay for medical treatment deemed medically unnecessary by the PRO." (Def's. Mot. For Part. Sum. Jud. at 4.) Because MCC's refusal to pay first party benefits is based on a PRO determination for medical necessity, Defendants argue, Plaintiffs cannot recover under 42 Pa. Cons. Stat. Ann. ¶ 8371 (Count II) or the CPL (Count III).

II. LEGAL STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

248, 106 S. Ct. 2505, 2510 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the nonmoving party, a factual dispute is "material" only if it might affect the outcome of the case. Id. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "showing -- that is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S. Ct. at 2552.

III. DISCUSSION

A. Count II - Bad Faith

Plaintiffs claim that Defendant wrongfully denied payment of benefits for services Dr. Gringeri provided to Mr. Kelley as a

result of the 1992 and 1994 automobile accidents. Specifically, "it is the plaintiff's position that the defendant, MCC, has not timely or properly followed the peer review procedures." (Pls.' Mem. in Opp. to Sum. Jud. at 5.) Accordingly, Plaintiffs assert, they are entitled to recover for Defendant's alleged bad faith pursuant to 42 Pa. Cons. Stat. Ann. § 8371. Defendant contends that neither Plaintiff may recover under § 8371 because the MVFRL provides the exclusive remedies for denial of first party benefits based on a peer review for medical necessity and reasonableness.

The appropriate starting place is the language of the statutes themselves. Title 75 Pa. Cons. Stat. Ann. §§ 1701-1798 (West 1996), the MVFRL, provides a mandatory program of motor vehicle liability insurance. Under § 1797(b), the insurer can employ a peer review organization. Section 1797(b) provides in relevant part:

(1) Peer review plan.--Insurers shall contract jointly or separately with any peer review organization established for the purpose of evaluating treatment, health care services, products or accommodations provided to any insured person. Such evaluation shall be for the purpose of confirming that such treatment, products, services or accommodations conform to the professional standards of performance and are medically necessary. An insurer's challenge must be made to a PRO within 90 days of the insurer's receipt of the provider's bill for treatment or services or may be made at any time for continuing treatment or services.

(3) Pending Determinations by PRO.--If the insurer challenges within 30 days of receipt of a bill for medical treatment or rehabilitative services, the

insurer need not pay the provider subject to the challenge until a determination has been made by the PRO. The insured may not be billed for any treatment, accommodations, products or services during the peer review process.

(4) Appeal to court.--A provider of medical treatment may challenge before a court an insurer's refusal to pay for past ... medical treatment ..., the reasonableness or necessity of which the insurer has not challenged before a PRO. Conduct considered to be wanton shall be subject to a payment of treble damages to the injured party.

(5) PRO determination in favor of provider or insured.--If a PRO determines that medical treatment ... [was] medically necessary, the insurer must pay to the provider the outstanding amount plus interest at 12% per year on any amount withheld by the insurer pending PRO review.

(6) Court determination in favor of provider or insured.--If, pursuant to paragraph (4), a court determines that medical treatment ... [was] medically necessary, the insurer must pay to the provider the outstanding amount plus interest at 12%, as well as the costs of the challenge and all attorney fees.

75 Pa. Cons. Stat. Ann. § 1797(3)-(6). The Pennsylvania Department of Insurance has interpreted the MVFRL's procedure to mean that "once the PRO has decided whether the treatment was reasonable or necessary, the insurance company, provider, or insured may appeal the decision to a court." Jack A. Danton, D.O., P.C. v. State Farm Mutual Automobile Ins. Co., 769 F.Supp. 174, 176 (E.D.Pa. 1991) (citing 31 Pa.Code § 68.2(c)).

In addition to their claim under the MVFRL, Plaintiffs also seek relief for non-payment of first party benefits under 42 Pa.

Cons. Stat. Ann. § 8371. Section 8371 provides for recovery against insurers who act in bad faith. It reads as follows:

§ 8371 Actions on Insurance Policies

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 attorneys fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371.

Because on its face, the procedure for review and payment of claims provided in § 8371 appears inconsistent with the detailed procedures and remedies contained in the MVFRL, courts in this district have concluded that "the procedures developed in the [MVFRL] to handle first party claims against an insurance company are exclusive." Jack A. Danton, 769 F.Supp at 175; Elliot v. State Farm Mutual Automobile Insurance Co., 786 F. Supp. 487, 492 (E.D.Pa. 1992) ("Several courts have noted the inconsistency between § 8371 and the MVFRL and have concluded that a plaintiff may not seek § 8371 punitive damages for the alleged denial of first party benefits by an insurer"); Williams v. State Farm Mutual Automobile Insurance Co., 763 F.Supp 121, 127 (E.D.Pa. 1991); Schwartz, D.O. v. State Farm Insurance Co., No. CIV.A.96-160, 1996 WL 189839, at *4 (E.D.Pa. Apr. 18, 1996) ("insofar as § 1797 provides specific recoveries when charges for treatment are

challenged, its specific provisions have been deemed an exception to the general remedy for bad faith contained in 42 Pa. Cons. Stat. Ann. § 8371"). The Superior Court of Pennsylvania described the conflict in detail in Barnum v. State Farm Mutual Insurance Co., 635 A.2d 155, 158 (Pa. Super. Ct. 1993), rev'd in part, 652 A.2d 1319 (Pa. 1994):

The provisions of 75 Pa.C.S. § 1797, however, have specific application to claims for first party benefits under the Motor Vehicle Financial Responsibility Law. It is these claims which are subject to the PRO procedure. In such cases, if it is determined by a PRO or a court that medical treatment or rehabilitative services or merchandise for which the claim is made were medically necessary, the insurer can be made to pay interest at the rate of twelve (12%) percent and/or attorney fees as set forth in 75 Pa.C.S. § 1797(b)(5) and (6). If the insurer's conduct was wanton, moreover, it can be made to pay treble damages. These remedies clearly are at variance with and in conflict with the general remedies set forth in 42 Pa.C.S. § 8371.

. . .

The several sections of the statute here being examined cannot be reconciled. The damages specified by the legislature in the event of wanton or bad faith conduct by an insurer are different, and the rate of interest to be awarded is also different. The provisions of 75 Pa.C.S. § 1797 are narrowly limited to those situations in which a disputed claim is to be submitted to the PRO procedure. With respect to such claims, the procedure to be followed is set forth with specificity, and the remedy, whether the procedure is followed or not, is set forth with equal specificity. If the procedure is followed by an insurer, its liability cannot be greater than as therein set forth. If it follows the PRO procedure, it cannot be subjected to damages for bad faith.

Id. at 158-59. Accordingly, this Court agrees that a plaintiff may not seek punitive damages under § 8371 where he or she is complaining of the denial of first party benefits determined through the process outlined in § 1797.

However, as Plaintiffs point out to the Court, it is not the case that an insured covered by MVFRL can never recover § 8371 damages. Nothing in the cases which conclude that § 1797 provides the exclusive remedy for a denial of first party benefits "suggests that a bad faith insurance coverage claim under § 8371 is barred by § 1797 where the peer review process set out in § 1797, namely to determine the propriety of treatment and charges therefore, is not actually followed." Schwartz, 1996 WL 189839, at *4. For example, in cases in which an insurer has submitted a claim to a PRO seeking a finding that the treatment was not related to the automobile accident, bad faith claims would not be barred. See Pipchok v. State Farm Mutual Insurance Co., 140 Pitt. L.J. 185 (C.C.P. Allegheny 1992); Daumer v. Allstate Insurance Co., Civ. A. No. 91-7570, 1992 WL 57673, at *2 (E.D.Pa. Mar. 18, 1992). In addition, where a plaintiff could establish that the insurance company knew the claim was legitimate and submitted it to peer review nonetheless, a bad faith claim could go forward. See Moran v. State Farm Insurance Co., No. 94-SU-05150-01 (C.C.P. York County, Apr. 13, 1995).

Plaintiffs in the instant case have failed to put forth any evidence that Defendant's referral of the claim to the PRO was sufficiently outside the scope of § 1797 to sustain a bad faith claim under § 8371. Plaintiffs merely argue in their Opposition Brief that their bad faith claim is sustainable because Defendant's referral to the PRO was improper and untimely.³ However, Plaintiffs nowhere present evidence to support that in this case Defendant did "not actually follow[]" the peer review procedures set out in § 1797. See Schwartz, 1996 WL 189839, at *4. Instead, Plaintiffs rely entirely on their allegations that Defendant referred Mr. Kelley's claim to peer review "without good cause," based on "arbitrary criteria," and "with the intent to cut off benefits." (Compl. ¶ 15). Their allegations are devoid of any supporting evidence. In fact, when Defendant points to the PRO determination itself (Def's. Ex. 1.) as

³ Plaintiffs also appear to argue that Defendant has failed to comply with the "Peer Review Procedures" provided in 31 Pa. Code § 69.52 (West, WESTLAW through Feb. 1998), and that this alleged failure constitutes bad faith under 42 Pa. Cons. Stat. Ann. § 8371. However, this argument suffers from the same deficiency as all of Plaintiffs' other arguments: Plaintiffs present no factual support. Defendant submitted the affidavit of Greer Shorter, the MCC claims representative responsible for referring Plaintiffs' claim to a PRO, as evidence of MCC's compliance with § 69.52. (Def's. Ex. C.) Instead of responding with evidence to the contrary in order to sustain their burden, Plaintiffs merely point back at Defendant and state "Nowhere is it demonstrated in the defendant's Motion that Greer Shorter is a prudent person, familiar with PRO procedures, standards and practices." (Pls.' Mem. in Opp. to Sum. Jud. at 2.) Without any evidence, there simply is not a genuine issue of material fact sufficient to survive summary judgment.

evidence that it was proper, making conclusions as to medical necessity only, Plaintiffs provide no evidence to the contrary. In addition, although Plaintiffs assert that MCC's referral of their claim to the PRO was untimely, Plaintiffs again have failed to present any factual support. Instead, as to untimeliness, Plaintiff's state that, "Defendant's Motion does not delineate with specificity when the plaintiffs' medical bills were submitted, reviewed, or referred to a peer review organization, except as indicated in defendant's Exhibit '1'." (Pls.' Mem. in Opp. to Sum. Jud. at 3.)⁴

To survive summary judgment, a non-movant must raise more than a mere scintilla of evidence in its favor and may not merely rely on unsupported assertions, conclusory allegations or mere suspicions. Penchishen v. Stroh Brewing Co., 932 F.Supp. 671, 673 (E.D.Pa. 1996). Where the non-movant fails to rebut Defendant's assertion that there is an absence of evidence to support the non-moving party's case by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is appropriate. Celotex, 477 U.S. at 322, 106 S. Ct. at 2552. It is Plaintiffs in this case who bear

⁴ Plaintiffs do not appear to appreciate their burden in the Rule 56 context. It is Plaintiffs who would bear the burden of proof at trial, if this claim were allowed to go forward, that Defendant acted in bad faith. Accordingly, it is Plaintiffs who must put forth evidence of any alleged delay.

the burden of proof that Defendant's referral to the PRO was done in sufficient bad faith to sustain a claim under § 8371.⁵ They have presented no evidence to support such a claim. Accordingly, Plaintiffs' claim fails as a matter of law. Summary judgment will be granted as to Count II.

B. Count III - Unfair Trade Practices and Consumer Protection Law

Plaintiffs claim that MCC violated the CPL when it issued the automobile policy offering first party benefits and then failed to pay the medical bills submitted by Dr. Gringeri. Defendant maintains that neither Dr. Gringeri nor Mr. Kelley may recover under the CPL.

1. Dr. Gringeri

The CPL is a "specific statute intended to restrict fraud against consumers." Gemini Physical Therapy and Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance Co., 40 F.3d 63, 65 (3d Cir. 1994). The CPL provides in pertinent part:

Any person who purchases or leases goods or services for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment

⁵ In their Opposition Brief, Plaintiffs also summarily assert that the denial of benefits for the 1992 accident was not based on a PRO determination, and thus was done in bad faith. Again, Plaintiffs put forth absolutely no evidence to support this assertion.

of [unfair or deceptive acts or practices] may bring a private action, to recover [damages].

Pa. Stat. Ann. tit.73, § 201-9.2(a). Although providers may be indirectly injured by the conduct of insurance companies, the CPL intends to provide protection for consumers who are adversely affected by an unfair method of competition. Pa. Stat. Ann. tit.73,§ 201-2(4). “[C]learly the providers of health care for those who purchased an insurance policy are not those people who are protected under the CPL.” Jack A. Danton, 769 F.Supp. at 178; see also Gemini, 40 F.3d at 65 (“The CPL contemplates as the protected class only those who purchase goods or services, not those who may receive a benefit from the purchase”). The provider is not a member of the class protected by the statute by virtue of its status as an assignee under the insurance policy. See Gemini, 40 F.3d at 66.

Plaintiffs have presented no evidence demonstrating that in this action Dr. Gringeri is anything other than a provider of medical services to an insured and an assignee of the insured’s right to receive payment under the insurance policy. As a medical provider, the cases are clear that Dr. Gringeri is not protected by the CPL. Id.; Jack A. Danton, 769 F.Supp. at 178; see also Klitzner Industries Inc. v. H.K. James & Co., 535 F. Supp. 1249, 1258 (E.D.Pa. 1982). Thus, while Defendant’s assertion that Dr. Gringeri does not have a private right of action under the CPL may have been raised more appropriately at

the dismissal stage, at this juncture, the Court finds that reading all the pleadings in the light most favorable to Plaintiffs, they have failed to identify any facts demonstrating that Dr. Gringeri is an exception to the general rule, and therefore have failed to establish an element essential to their case. Accordingly, as a matter of law, summary judgment in favor of defendant is appropriate as to Dr. Gringeri's claim under the CPL.

2. Mr. Kelley

Plaintiff Mr. Kelley argues that MCC's handling of his claim constituted unfair or deceptive acts or practices under the CPL. Specifically, Mr. Kelley asserts that he "is entitled to a recovery under the CPL for the defendant's failure to pay and its termination of his benefits for the accidents of 1992 and 1994." (Pls.' Mem. in Opp. to Sum. Jud. at 6.)

In Pennsylvania, only malfeasance, the improper performance of a contractual obligation, raises a cause of action under the CPL.⁶ Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300 (3d Cir. 1995). An insurer's promise to pay benefits it has no intention of paying constitutes malfeasance. See Parasco v. Pacific Indemnity Co., 920 F.Supp 647, 656 (E.D.Pa. 1996). However, the mere failure to pay a claim is considered

⁶ "Misfeasance" and "malfeasance" are used interchangeably in the relevant case law. For the purpose of consistency, only "malfeasance" will be used herein.

nonfeasance; and as such, it is not actionable under the CPA.
Gordon v. Pennsylvania Blue Shield, 378 Pa.Super. 256, 548 A.2d
600, 604 (1988).

Plaintiff Mr. Kelley argues that he is entitled to relief under the CPL because MCC stopped paying his medical benefits for treatment provided by Dr. Gringeri. Although in the Complaint Plaintiff includes allegations that MCC had no intention of paying him his medical benefits from the outset, Plaintiff has failed to put forth any facts in support of those allegations.⁷ Instead, the conduct that Plaintiff identifies as malfeasance is, in essence, conduct that tends to show only that MCC failed "to pay insurance benefits in a timely manner." See Leo v. State Farm Mutual Automobile Insurance Co., 939 F.Supp. 1186, 1193

⁷ Such allegations include that MCC:

(a) Represent[ed] that plaintiff, Robert Kelley, purchased certain defined medical benefits, when in fact said promise was illusory;

(b) Purport[ed] to offer certain defined medical benefits, when in fact defendant failed to provide said amount of medical coverage;

(c) Charg[ed] a premium based upon certain defined medical benefits, when in fact defendant purposely avoided fulfilling its contract with plaintiff, Robert Kelley; [and]

(d) Represent[ed] that plaintiff, Robert Kelley purchased certain defined medical benefits, when in fact defendant without justification refused to pay said benefits.

(Compl. ¶ 20.)

(E.D.Pa. 1996) (citing Klinger v. State Farm Mutual Automobile Insurance Co., 895 F.Supp 709, 718 (M.D.Pa. 1995)). Such a claim does not amount to malfeasance, and MCC should be granted summary judgment with respect to Count III.

An appropriate Order follows.

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O R D E R

AND NOW, this day of April, 1998, upon consideration of Defendant's Motion for Partial Summary Judgment (Doc. No. 6) and Plaintiff's Response (Doc. No. 7), it is **HEREBY ORDERED** that Defendant's Motion is **GRANTED**. Counts II and III of the Complaint are **DISMISSED**.

BY THE COURT:

JOHN R. PADOVA, J.

