

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

ERIC SLATER : CIVIL ACTION
 :
 v. :
 :
 LIBERTY MUTUAL INSURANCE CO. : NO. 98-1711

MEMORANDUM ORDER

Presently before the court is plaintiff's motion for leave to amend his complaint in this insurance bad-faith case.

Plaintiff has alleged that defendant acted in bad faith in handling plaintiff's first-party underinsured motorist claim. He asserted a claim pursuant to 42 Pa. C.S.A. § 8371.

Discovery in this action has been rather contentious, requiring court intervention in situations which counsel ordinarily are able to resolve without court involvement. Plaintiff now seeks to amend his complaint to add a further allegation of bad faith conduct by defendant based on its alleged discovery abuses in the instant litigation. Plaintiff complains specifically that defendant withheld material documents, raised insupportable objections to discovery requests, delayed in producing discoverable material, failed to produce pertinent material within the discovery deadline and failed to produce materials within the time promised by defense counsel.

Motions for leave to amend are committed to the sound discretion of the trial court. See Foman v. Davis, 371 U.S. 178,

182 (1982). While leave to amend is generally given freely, it may be denied when the proposed amendment would be futile. Id.

The Pennsylvania legislature enacted § 8371 to provide a cause of action against insurers for bad faith conduct. See Polseli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 750 (3d Cir. 1994). The statute, however, does not contain a definition of "bad faith." Bad faith claims are generally predicated on an insurer's failure to pay the proceeds of an insurance policy. The statute is implicated, however, by any bad faith breach of a fiduciary or contractual duty owed to an insured by an insurer by virtue of the issuance of an insurance policy. It is quite another matter to permit a recovery under § 8371 for discovery abuses by an insurer in a bad-faith action in which the insurer and the insured are legal adversaries.

Plaintiff relies on Cowden v. Aetna Cas. and Surety Co., 134 A.2d 223 (Pa. 1957) and Weiner v. Targan, 100 Pa. Super. 278 (1930) to argue that the performance or competence of counsel is relevant to a claim that an insurer breached a duty to act in good faith. Plaintiff's reliance is totally misplaced. Those cases involved the performance of counsel appointed to represent an insured by an insurer in fulfilling its duty to defend the insured. They do not involve the performance of counsel for the insurer in defending a claim asserted against it by an insured.

Plaintiff also relies on cases in which an attorney has been characterized as an agent of his client. As a general proposition, this is true. As a result, a client may often be bound by acts or representations of his lawyer. This, however, has nothing to do with the capacity in which an insurer confronts an insured or the reach of § 8371.¹

Section 8371 provides a remedy for bad-faith conduct by an insurer in its capacity as an insurer and not as a legal adversary in a lawsuit filed against it by an insured. The court is confident that the legislature did not contemplate a potentially endless cycle of § 8371 suits, each based on alleged discovery abuses by the insurer in defending itself in the prior suit.²

Insofar as the Court in Rottmund v. Continental Assur. Co., 813 F. Supp. 1104, 1109 (E.D. Pa. 1992) suggested that discovery abuse by an insurer in bad faith litigation may itself support a § 8371 claim, this court cannot agree essentially for the reasons set forth in Shoemaker v. State Farm Mut. Automobile

¹ It is also worth noting that a client generally is not liable for his attorney's abuses in conducting litigation unless the client himself is at fault. See, e.g., Republic of the Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 (3d Cir. 1994).

² To the extent discovery delays or abuses increase the cost of litigating a § 8371 claim, of course, the insured may be compensated. See 42 Pa. C.S.A. § 8371(3); Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 236 (3d Cir. 1997).

Ins. Co., No 44998 S 1990, 118 Dauph. Co. 193 (Com. Pl. Dauphin Co. 1998). The Court in Shoemaker denied the plaintiffs' motion to amend their § 8371 complaint to add a claim for bad faith discovery abuses during the pending litigation. The Court noted that the alleged bad faith in conducting discovery was "independent of the contract of insurance," and did not arise from the parties' "insurer-insured relationship" but from their "relationship as litigants." Id. at 197.³ See also Tina Oberdorf, Bad Faith Insurance Litigation in Pennsylvania: Recurring Issues Under Section 8371, 33 Duq. L. Rev. 451, 467-68 (1995) (§ 8371 is directed at bad faith conduct in context of fiduciary relationship between insurers and insureds and does not encompass sanctionable litigation tactics of insurer in defending itself in action initiated by insured).

The court believes that the Pennsylvania Supreme Court would not hold that § 8371 permits a recovery for discovery abuses by an insurer or its lawyer in defending a claim predicated on its alleged prior bad faith handling of an insurance claim.

ACCORDINGLY, this day of March, 1999, upon consideration of plaintiff's Motion to Amend the Complaint to

³ This does not mean that an insurer cannot be liable for bad faith conduct arising in the insurer-insured relationship which happens to occur during the pendency of an action, or for initiating an action against an insured in a bad faith effort to evade a duty owed under a policy.

Include Allegations of Continuing Bad Faith in the Form of
Defense Counsel's Discovery Practices in This Case (Doc. #48),
and defendant's response thereto, **IT IS HEREBY ORDERED** that said
Motion is **DENIED**.

BY THE COURT:

JAY C. WALDMAN, J.