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

ALAN CANTOR	:	CIVIL ACTION
	:	
v.	:	
	:	
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES	:	NO. 97-CV-5711

MEMORANDUM AND ORDER

J. M. KELLY, J. **APRIL 12, 1999**

Presently before the Court are the parties' objections to Magistrate Judge Thomas J. Rueter's Report and Recommendation, in which he recommended this Court should grant in part and deny in part Defendant's motion for partial summary judgment. More specifically, Judge Rueter recommended that the Court deny Defendant's motion for summary judgment on Plaintiff's bad faith claim, but grant Defendant's motion with respect to Plaintiff's claim under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Cons. Stat. Ann. §§ 201-1 to 201-9.3 (West 1993 & Supp. 1998). For the reasons that follow, the Court will decline to adopt Judge Rueter's recommendation regarding Plaintiff's bad faith claim, but will follow Judge Rueter's recommendation that the Court grant Defendant's motion on the UTPCPL claim, although for reasons different than Judge Rueter stated.

I. FACTUAL BACKGROUND

Plaintiff, formerly employed as a options trader, purchased a disability insurance policy from Defendant in January 1987. After his son was diagnosed with a serious tumor in September 1989, Plaintiff became depressed and found himself unable to work. According to his physicians, Plaintiff had lost the ability to make the quick decisions an options trader makes

throughout the day. He therefore filed a claim under his disability policy, which Defendant paid from October 1989 to June 1997.

In 1992 Plaintiff's physician, Dr. Philip Milstein, reported to Defendant that Plaintiff's score on a Hamilton Test, which measures a patient's depression, was within the normal range. Defendant then sent Plaintiff to an independent medical examination, conducted by Dr. David Sachs, who found that Plaintiff still could not work as an options trader, but was receiving ineffective treatment. Dr. Bruce Miller thereafter began treating Plaintiff and diagnosed him as suffering from dysthemia, which is chronic mild depression. In August 1993 Dr. Miller informed Defendant that while Plaintiff could not resume employment as an options trader, he could be employed full-time in any other work. Later that year Defendant learned Plaintiff had been engaged as a financial consultant from 1991 to 1993.

Dr. Miller disclosed to Defendant in early 1994 that Plaintiff's concern for the health of his son, whose tumor was removed several years before, had begun to lessen and Plaintiff increasingly was able to function more effectively, although he still was unable to work as an options trader. Defendant then referred Plaintiff's claim to its psychological consultant, Mr. Paul Burgos, who began to investigate Plaintiff's condition. Based on the results of several inquiries, which revealed involvement with several businesses and extensive recreational activities, Burgos concluded yet another medical examination was necessary. Plaintiff accordingly submitted to an examination by Dr. Gary Glass. Dr. Glass interviewed Plaintiff, performed a test that gauges a patient's ability to function in everyday life, and reviewed Plaintiff's medical records. Dr. Glass reported in February 1997 that Plaintiff could return to work as an options trader.

Dr. David McDowell, Defendant's in-house psychological expert, agreed with Dr. Glass.

Dr. McDowell found that Plaintiff was able to function as well as he could before his son's illness. Specifically, Dr. McDowell noted that Plaintiff had suffered from dysthemia before his son's illness, and still had been able to work as an options trader. Based upon Mr. Burgos's, Dr. Glass's, and Dr. McDowell's opinions, and the other information Defendant compiled, the claims adjuster assigned to Plaintiff's case recommended Defendant terminate Plaintiff's benefits, and the claims adjuster's manager concurred. Defendant then notified Plaintiff it no longer would pay Plaintiff benefits under the policy.

Plaintiff filed suit against Defendant two months later and alleged Defendant breached its insurance contract with Plaintiff, acted in bad faith, and violated the UTPCPL. Defendant moved for summary judgment on the later two claims, and this Court referred the motion to Magistrate Judge Thomas Rueter, pursuant to 28 U.S.C. § 636(b)(1)(B). On February 25, 1999, Judge Rueter issued a Report and Recommendation in which he concluded Defendant's motion should be granted with respect to Plaintiff's UTPCPL claim, but denied with respect to Plaintiff's bad faith claim. Both parties have filed objections to the Report and Recommendation, and in consideration of those objections, and pursuant to 28 U.S.C. § 636 (b)(1)(C), the Court will review Judge Rueter's Report and Recommendation de novo.

II. DISCUSSION

A. The Summary Judgment Standard

Summary judgment is appropriate if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue of fact is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and the applicable substantive law determines what facts are

material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The substantive law also delegates each party's burden of proof at trial, which a court must consider when disposing of a summary judgment motion. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Accordingly, the moving party is entitled to judgment as a matter of law when the nonmoving party has failed to show it will be able to sustain its burden of proof at trial. Id. at 323.

B. Plaintiff's Bad Faith Claim

Plaintiff claimed in his complaint that Defendant acted unreasonably and in violation of the insurance contract when it terminated the disability benefits, and alleged that these actions constituted bad faith under 42 Pa. Cons. Stat. Ann. § 8371. The standard for a bad faith claim requires that a plaintiff show two elements: (1) the insurer lacked a reasonable basis to deny benefits under the insurance policy; and (2) the insurer knew or recklessly disregarded its lack of a reasonable basis. Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997); Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 307 (3d Cir. 1995); Quaciari v. Allstate Ins. Co., 998 F. Supp. 578, 581 n.3 (E.D. Pa.) (finding defendant insurance companies can prevail on summary judgment motions by affirmatively demonstrating a reasonable basis to deny benefits, and noting many bad faith claims are disposed of at the summary judgment stage), aff'd, No. 98-1290, (3d Cir. Nov. 25, 1998) (table). Further, the plaintiff's burden of proof is enhanced: the plaintiff must prove these two elements by clear and convincing evidence. Id.

Defendant moved for summary judgment on this claim, arguing that Plaintiff could not meet his burden of proof, but Judge Rueter disagreed. Judge Rueter stated that genuine issues of material fact existed that precluded summary judgment because a jury could find Defendant acted unreasonably in any of three ways: (1) by beginning an investigation after receiving Dr. Miller's

opinion; (2) by failing to fully understand the pressures of options trading; or (3) by inappropriately equating the work Plaintiff performed while receiving disability benefits with that of an options trader. Defendant has objected to this ruling.

The Court finds Judge Rueter's analysis was too exacting; Defendant's burden to prevail on its summary judgment motion is less than Judge Rueter found it to be. Courts repeatedly have held that an insurance company's substantial, thorough investigation, based upon which the insurance company refuses to make or continue benefit payments, establishes a reasonable basis that defeats a bad faith claim. See, e.g., Seidman v. Minnesota Mut. Life Ins. Co., No. 96-CV-3191, 1997 WL 597608, at *3 (E.D. Pa. Sept. 11, 1997) (finding even where some testing may have been inadequate, and physicians disagreed whether the plaintiff still as disabled, the insurance company had a reasonable basis to terminate disability benefits); Parasco v. Pacific Indem. Co., 920 F. Supp. 647, 655-56 (E.D. Pa. 1996) (finding a thorough investigation provided a reasonable basis); Montgomery v. Federal Ins. Co., 836 F. Supp. 292, 298 (E.D. Pa. 1993) (finding an insurance company's extensive investigation was sufficient to establish a reasonable basis). What these cases show is that for an insurance company to show it had a reasonable basis, an insurance company is not required to demonstrate its investigation yielded the correct conclusion or even that its conclusion more likely than not was accurate. The insurance company also is not required to show the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion. Rather, an insurance company simply must show it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action.

Defendant's investigation certainly was sufficiently thorough. Beginning in 1992,

Defendant received reports from two of Plaintiff's physicians, Dr. Milstein and Dr. Miller, that showed Plaintiff was recovering from his depression and increasingly was able to work. Defendant then turned to its own resources, two physicians and a psychological consultant, who conducted their own investigations and who agreed with Plaintiff's doctors that Plaintiff's depression now was sufficiently manageable so that Plaintiff could work. These three also found that Plaintiff could resume his work as an options trader in view of the activities Plaintiff assumed, their own testing, and the fact that Plaintiff's history of depression previously had not prevented him from working as an options trader. Defendant's claims adjuster reviewed the reports of these four physicians and one consultant and recommended Defendant terminate Plaintiff's benefits. The claims adjuster's supervisor reviewed all of these materials and came to the same conclusion.

Defendant has shown its investigation was sufficiently thorough and substantial to allow it to form a reasonable basis to terminate Plaintiff's benefits. Defendant's decision to terminate Plaintiff's benefits came after a methodical five year investigation, during which Defendant compiled and considered reports from four doctors, two of whom Plaintiff selected, that were based on personal interviews, tests, and medical record reviews. Defendant also conducted a comprehensive inquiry into Plaintiff's work and recreational activities. In so doing, Defendant accumulated more than enough information to establish a reasonable basis for terminating Plaintiff's benefits. Accordingly, Defendant's objection to the Report and Recommendation is sustained, and the Court will enter summary judgment in favor of Defendant on Plaintiff's bad faith claim.

C. Plaintiff's UTPCPL claim

Plaintiff also sued Defendant under the UTPCPL, and to have succeeded on this claim Plaintiff must have shown more than that Defendant failed to pay Plaintiff's claims; only malfeasance, the improper performance of a contractual obligation, is actionable under the UTPCPL. Horowitz, 57 F.3d at 307. Plaintiff cited extensively to Pennsylvania's Unfair Insurance Practices Act ("UIPA"), 40 Pa. Cons. Stat. Ann. §§ 1171.1-1171.15 (West 1992), in his response to Defendant's motion for summary judgment, and Judge Rueter found that because these citations were the only ones Plaintiff provided in support of his claim, and because an insured neither has a private right of action under the UIPA nor may use a violation of the UIPA as a basis for a UTPCPL claim, Plaintiff failed to meet his burden of proof on this claim. Plaintiff now objects to this finding, and claims Judge Rueter failed to recognize that these extensive citations were merely illustrative, and also failed to address the merits of his claim.

The Court is not persuaded by Plaintiff's objections. In the event Plaintiff actually did intend his exclusive UIPA citations to support his UTPCPL claim, Judge Rueter absolutely is correct that violations of the UIPA cannot be used to prove a defendant has violated the UTPCPL. See, e.g., Seidman, 1997 WL 597608, at *4; Smith v. Nationwide Mut. Fire Ins. Co., 935 F. Supp. 616, 622 (W.D. Pa. 1996); Lombardo v. State Farm Mut. Auto. Ins. Co., 800 F. Supp. 208, 212 (E.D. Pa. 1992). For the purposes of this motion, however, the Court will accept as true that Plaintiff cited the UIPA only to illustrate, although the Court's leniency does not help Plaintiff very much. First, only malfeasance, not nonfeasance, may be the actual basis for Plaintiff's UTPCPL claim. In determining what that actual basis is, courts have not hesitated to look beyond a plaintiff's characterizations to the substance of the claim and find the alleged

UTPCPL violation, if proven, would constitute nonfeasance rather than malfeasance. See, e.g., Caplan v. Fellheimer, Eichen, Braverman & Kaskey, 5 F. Supp. 2d 299, 302 (E.D. Pa. 1998) (finding the plaintiff's claim actually concerned nonfeasance, not malfeasance); Leo v. State Farm Mut. Auto. Ins. Co., 939 F. Supp. 1186, 1193 (E.D. Pa. 1996) (same), aff'd, 116 F.3d 468 (3d Cir. 1997) (table); Klinger v. State Farm Mut. Auto. Ins. Co., 895 F. Supp. 709, 718 (M.D. Pa. 1995) (same).[1] Looking beyond Plaintiff's characterization of his claim as alleging malfeasance, the Court finds when Plaintiff's position is reduced to its essence, Plaintiff is complaining about Defendant's failure to continue to pay disability benefits. This failure to pay is nonfeasance, not malfeasance, Horowitz, 57 F.3d at 307, and is not actionable under the UTPCPL.

Second, even if Plaintiff's claim accurately is characterized as malfeasance, the Court has found Defendant had a reasonable basis to terminate Plaintiff's benefits under the disability policy. Defendant therefore did not handle Plaintiff's claim improperly, and Plaintiff has failed to carry his burden on this claim. Accordingly, summary judgment in favor of Defendant is appropriate here.

An Order follows.

[1]The appeal of this case, cited earlier in this Memorandum, was not taken from the disposition of these summary judgment motions.

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SOCIETY OF THE UNITED STATES	:	NO. 97-CV-5711

O R D E R

AND NOW, this 12th day of April, 1999, upon consideration of Plaintiff's and Defendant's Objections to Magistrate Judge Rueter's Report and Recommendation, it is hereby

ORDERED:

1. Plaintiff's objections are **OVERRULED**;

2. Defendant's objection is **SUSTAINED**; and

3. Summary judgment is entered in favor of Defendant The Equitable Life Assurance Society of the United States and against Plaintiff Alan Cantor on Counts II and III.

BY THE COURT:

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JAMES McGIRR KELLY, J.