

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

M. PENNY LEVIN	:	CIVIL ACTION
	:	
	:	NO. 01-1717
Plaintiff,	:	
	:	
v.	:	
	:	
GREAT AMERICAN INSURANCE	:	
COMPANY	:	
	:	
Defendant	:	

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**MEMORANDUM AND ORDER**

YOHN, J. DECEMBER \_\_\_\_, 2001

Plaintiff, M. Penny Levin (“Levin”), commenced this action against defendant, Great American Insurance Company (“Great American”), on March 7, 2001 in the Court of Common Pleas of Philadelphia County, alleging bad faith (Count I), breach of contract (Count II), and breach of good faith and fair dealing (Count III). Defendant subsequently removed the action to this court on the basis of diversity.

Presently before the court is defendant’s motion for partial summary judgment on plaintiff’s claim of bad faith.<sup>1</sup> As there is record evidence sufficient for a reasonable jury to find that Great American acted in bad faith, I will deny Great American’s motion for partial summary

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<sup>1</sup> Defendant does not indicate that this motion for summary judgment is a partial one, yet defendant only argues for summary disposition of plaintiff’s bad faith claim. I interpret defendant’s silence as to plaintiff’s breach of contract and breach of good faith and fair dealing claims to indicate that defendant is not seeking summary judgment on these claims.

judgment.

## BACKGROUND

Defendant, Great American, issued plaintiff, Levin, an insurance policy that provided up to \$100,000 in coverage if Levin was injured in a motor vehicle accident involving an uninsured driver. Compl. ¶ 5. This policy was in effect, on May 20, 1993, when Levin was involved in a motor vehicle accident in Philadelphia, Pennsylvania during which she injured her back and neck. Compl. ¶ 6. Levin subsequently brought a third party claim against the driver of the other motor vehicle, but the driver's insurance company filed for bankruptcy on the eve of trial. Comp. ¶ 7. As a result, on January 19, 1998, Levin brought an uninsured motorist claim against Great American. Compl. ¶ 8.

Levin, through her attorney, S. Stacy Mogul ("Mogul"), demanded the limits of her uninsured motorist policy. Compl. ¶¶ 12, 13. Levin's demand for maximum benefits was supported by two medical experts who opined that Levin's injuries were caused by the May 1993 accident.<sup>2</sup> Ptf.'s Mem. Opp'n Summ. J. (Doc. 7), Ex. E & K. These medical opinions were contradicted by the opinions of other medical experts that plaintiff's injuries pre-dated the automobile accident.<sup>3</sup> There were also three medical experts who found that the exact age of

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<sup>2</sup> Dr. William Simon, an orthopaedist, examined plaintiff in August 1993 and he opined "with reasonable medical certainty that [plaintiff's injury] is due to the trauma of May 20, 1993." Doc. No. 7, Ex. K. Dr. Michael Brooks, a radiologist, reviewed plaintiff's x-rays and images in September 1999, and similarly concluded that plaintiff's disc herniations were "directly related to the traumatic event" of May 20, 1993. Doc. No. 7, Ex. E.

<sup>3</sup> Dr. Leonard Brody, an orthopedist retained by the third party carrier, concluded in February 1997, that the spinal herniations were degenerative in nature and not caused by the accident. Doc. No. 6, Ex. G. Dr. Herbert Goldberg, similarly opined that plaintiff's disc

plaintiff's injuries could not be precisely determined.<sup>4</sup>

Great American's Casualty-Claim Committee evaluated Levin's claim for insurance coverage to be worth \$60,000.<sup>5</sup> As a result, Mark Newton ("Newton"), the claims adjuster, was authorized to offer plaintiff \$45,000 to settle her insurance claim. Doc. No. 7, Ex. D at 146. Newton was also instructed on numerous occasions to settle the case with plaintiff but he never made an offer of settlement. Id. at 154-55, 193-94. Because no settlement had been reached, plaintiff's claim was submitted to arbitration. Philip Yamplosky ("Yampolsky") served as plaintiff's counsel throughout the arbitration process. Doc. 6 at ¶ 11. On December 15, 1999, Levin received an arbitration award for an amount in excess of the \$100,000 policy limit. Compl. ¶ 17.

On March 7, 2001, Levin brought this action in the Court of Common Pleas of Philadelphia County, alleging that Great American's frivolous and unfounded delay in paying Levin proceeds under her insurance policy amounted to bad faith. On April 6, 2001, Great American removed this action to the United States District Court for the Eastern District of Pennsylvania on the basis of diversity.

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herniations pre-dated the automobile accident of May 20, 1993. Doc. No. 6, Ex. J.

<sup>4</sup> Great American's medical expert, Dr. Todd Siegal, examined plaintiff on or about March 18, 1998 and found the age of plaintiff's spinal herniations to be indeterminable. Doc. No. 6, Ex. H. Similarly, Dr. Richard Katz, a neurologist, was unable to render a precise diagnosis of plaintiff's spinal injuries. Doc. No. 6, Ex. L. Dr. Ronald Abraham of the United Therapy Center was also unable to determine the age of plaintiff's spinal herniations. Doc. No. 6, Ex. K.

<sup>5</sup> The value of plaintiff's claim was later increased by defendant to \$76,000 when it was determined that Levin was not contributorily negligent.

## STANDARD OF REVIEW

Either party to a lawsuit may file a motion for summary judgment, and it will be granted “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 a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “Facts that could alter the outcome are “material”, and disputes are “genuine” if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” *Ideal Dairy Farms, Inc. v. John Lebatt, LTD.*, 90 F.3d 737, 743 (3d Cir. 1996) (citation omitted). When a court evaluates a motion for summary judgment, “[t]he evidence of the non-movant is to be believed.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Additionally, “all justifiable inferences are to be drawn in [the non-movant’s] favor.” *Id.* However, “[s]ummary judgment may not be granted . . . if there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed.” *Ideal Dairy*, 90 F.3d at 744 (citation omitted). At the same time, “an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat entry of summary judgment.” *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990). The nonmovant must show more than “[t]he mere existence of a scintilla of evidence” for elements on which he bears the burden of production. *Anderson*, 477 U.S. at 252. Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citations omitted).

## DISCUSSION

Plaintiff asserts a claim for bad faith pursuant to 42 Pa. C.S.A. § 8371.<sup>6</sup> Great American contends that its conduct does not rise to the level of bad faith under Pennsylvania law, and therefore summary disposition of the bad faith claim is appropriate. Doc. No. 6 at 13.

Although “bad faith” is not defined in the statute, courts applying section 8371 have utilized the following definition:

Bad faith on the part of an insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct 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. and Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994) (citing Black’s Law Dictionary 139 (6th ed. 1990)). To succeed on a claim under section 8371, the insured must establish that (1) the insurer did not have a reasonable basis for denying benefits, and (2) the insurer knew or recklessly disregarded its lack of reasonable basis. An allegation of bad faith must be proved by clear and convincing evidence. *Id.*

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<sup>6</sup> Section 8371 provides that:

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 claim from the date the claim was made by the insured in an amount equal to the prime rate plus 3%;
- (2) Award punitive damages against the insurer;
- (3) Assess court costs and attorneys fees against the insurer.

42 Pa. C.S.A. § 8371.

## **I. Lack of Reasonable Basis for Denying Benefits**

Plaintiff contends that Great American acted in bad faith by denying payment of plaintiff's insurance benefits.<sup>7</sup> Compl. ¶ 19(a)-(p). Great American counters that its denial of plaintiff's benefits was not unreasonable. Therefore, Great American maintains that plaintiff has not established an actionable claim of bad faith.

### **A. Unreasonableness as Evidenced by Failure to Offer Settlement**

As plaintiff's insurance provider, Great American had a responsibility to pay plaintiff the benefits reasonably due to her under the insurance policy. *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 234 n.2 (3d Cir. 1997) (insurer has an obligation to honor its obligations under the insurance policy, one of which is to pay compensation when its insured is injured). Despite this responsibility, Great American never offered to settle plaintiff's claim. Certainly, if Great American had evaluated plaintiff's claim to be worthless, this failure to make an offer would have been reasonable. Plaintiff's claim, however, had been valued by Great American's Casualty-Claim Committee to be worth \$76,000, reduced to \$60,000 for plaintiff's potential contributory negligence.<sup>8</sup> Doc. No. 7, Ex. D. Because a settlement would ensure that a jury or a panel of arbitrators would not award plaintiff more than Great American's valuation of plaintiff's

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<sup>7</sup> Plaintiff also contends that the offensive conduct of defendant's attorney toward plaintiff amounts to bad faith on the part of Great American. Compl. ¶ 19(q). However, although Great American's attorney, Charles Harad ("Harad"), may have been rude and insensitive toward plaintiff, plaintiff has not pointed to any authority that Harad's bad lawyering constitutes Great American's bad faith.

<sup>8</sup> It was later determined that there was no contributory negligence on the part of the plaintiff.

claim, it was clearly in Great American's best interests to offer plaintiff a settlement of less than \$60,000.<sup>9</sup> Thus, a jury could reasonably find that Great American's failure to offer plaintiff a settlement to be a "frivolous or unfounded refusal to pay proceeds" and not a reasonable or prudent course of action.

Moreover, the numerous expert medical opinions do not provide Great American with a reasonable basis for denying plaintiff's benefits. From the time of the accident in May 1993 until the arbitration of plaintiff's claim in December 1999, numerous medical experts were consulted to evaluate plaintiff's condition and to opine as to the cause of her spinal injuries. The opinions of the medical community were far from uniform. The plaintiff's medical experts either opined that plaintiff's spinal disc herniations were directly related to the automobile accident or that the age of plaintiff's herniations could not be determined with any medical certainty. Similarly, Dr. Todd Siegal ("Siegal"), the first medical expert hired by Great American, found the age of plaintiff's injuries to be inconclusive. Doc. No. 6, Ex. H. It was not until December 1999, two months after arbitration was scheduled to begin and twenty-one months after Siegal's inconclusive opinion, that Great American's second medical expert, Dr. Herbert Goldberg ("Goldberg") gave an opinion that supported Great American's refusal to pay plaintiff benefits. Goldberg opined that plaintiff's disc herniations pre-dated the automobile accident of May 20, 1993. Doc. No. 6, Ex. J. As Goldberg's opinion was not received by Great American until December 1999 and was not widely supported in the medical community, Great American cannot

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<sup>9</sup> In fact, when plaintiff's claim was finally submitted to arbitration, plaintiff was awarded an amount in excess of the \$100,000 policy limits.

rely on it to establish a reasonable basis for failing to pay plaintiff benefits.<sup>10</sup>

Great American argues that not negotiating with plaintiff was reasonable because Great American believed that an offer of less than the policy limits would be futile. Great American contends that plaintiff's lawyers, Yampolsky and Mogul, had clearly indicated that plaintiff was seeking the policy limits and that any offer of a lesser amount would be summarily rejected. Doc. No. 6 at 14. The deposition testimony of plaintiff's lawyers, however, does not indicate an obstinate unwillingness to negotiate with Great American. Rather, both lawyers testified that if Great American had made an offer of settlement, the offer would have been presented to plaintiff for her review. Doc. No. 7, Ex. A, Yampolsky dep. at 36-41, 104-105, Ex. B, Mogul dep. at 88-89. Yampolsky further testified that when he assumed Levin's case from Mogul, he indicated to Harad that his client would possibly settle for less than the policy limits. Doc. No. 7, Ex. A, Yampolsky dep. at 40-43. Moreover, viewing Yampolsky's statements in the light most favorable to the plaintiff, it appears that by suggesting that settlement was an option, Yampolsky was attempting to trigger settlement negotiations with Harad. Great American disputes that this was the message Yampolsky wished to communicate. Thus, as to whether Yampolsky's comments indicated that an offer of anything less than the policy limits would be acceptable to plaintiff, there is clearly a material factual dispute.

The evaluation of the Claims-Committee, the contradictory medical opinions, the late

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<sup>10</sup> The report of Dr. Leonard Brody ("Brody"), an orthopedist retained by the third party carrier, is in line with Dr. Goldberg's opinion. Brody's February 1997 report concluded that the spinal herniations were degenerative in nature and not caused by the accident. Doc. No. 6, Ex. G. However, Brody's medical report is contradicted by the report of plaintiff's orthopaedist, Dr. William Simon. Great American can not reasonably base its complete denial of insurance benefits to plaintiff on Brody's disputed medical report.

receipt of Goldberg's supportive opinion, and the statements made by Yampolsky provide evidence from which a rational jury could find that Great American's complete denial of benefits to plaintiff was without reason. Although, Great American owed plaintiff a duty to accord her interests the same consideration as its own, it appears that Great American ignored this duty and improperly focused on its own interest of avoiding payment to plaintiff, rather than on plaintiff's interest of obtaining the insurance benefits to which she was entitled. *Hyde Athletic Indus., Inc. v. Cont'l Cas. Co.*, 969 F.Supp. 289, 307 (E.D.Pa. 1997). (insurer has a duty to consider the interests of its insured). Such self-motivated behavior evidences actionable bad faith pursuant to 42 Pa.C.S.A § 8371. *Terletsky v. Prudential Prop. and Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994).

#### **B. Unreasonableness as Evidenced by Delay in Arbitration**

Arbitration of plaintiff's claim was initially scheduled for September 28, 1999. However, Great American's delay in providing plaintiff with its list of experts caused the arbitration to be postponed for three months, until December 15, 1999. Plaintiff alleges that this delay unreasonably protracted the frivolous and unfounded denial of her insurance benefits. Doc. 7 at 9-10. Great American counters that the delay was not unreasonable, as the extension of time was necessary for Great American to investigate plaintiff's claim and prepare adequately for arbitration. Doc. 6 at 15.

Indeed, an insurance company does not act in bad faith by investigating legitimate issues of its coverage. *Hyde Athletic Indus.*, 969 F.Supp. at 307. The circumstances surrounding Great American's investigation, however, raise a genuine issue of whether a "dishonest purpose" or

“self-interest,” rather than the legitimate purpose of investigation, was the true motivation for the delay. As of August 27, 1999, one month before arbitration was scheduled to commence, plaintiff’s attorney, Mogul, had yet to receive the expert witness list from Great American’s counsel, Harad. At this time, Mogul requested the neutral arbitrator to compel Harad to provide its list of witnesses. Doc. No. 7, Ex. C, letter from Mogul to Shields dated August 27, 1999. Harad responded that it was his understanding that the plaintiff’s case was to be presented on September 28, 1999, but that defendant’s case was not scheduled for presentation until October 26, 1999. Doc. No. 7, Ex. C, letter from Harad to Shields dated September 8, 1999. Contrary to Harad’s belief, both parties were supposed to be prepared for arbitration in September; the October date was merely a back-up date if the arbitration was not completed in September. Doc. No. 7, Ex. C, letter from Mogul to Shields dated September 9, 1999. Great American has not presented any evidence to explain its confusion as to the date of arbitration. Harad’s claim that he had until October to prepare the case for arbitration is completely unfounded.

Even if Great American was not scheduled to present its case until October, Harad was still obligated to provide Mogul with a list of his witnesses prior to the arbitration on September 28, so that Mogul could adequately prepare plaintiff’s case. Doc. No. 7, Ex. C, letter from Shields to Mogul dated September 9, 1999. Harad did not provide Mogul with the names of defendant’s witnesses until October 27, 1999. Doc. No. 7, Ex. C, letter from Harad to Mogul dated October 27, 1999. Great American has not attempted to justify its delay in providing plaintiff with a list of its experts. Great American simply maintains that the length of its investigation was not unreasonable. Doc. 6 at 15. Although generally the period of Great American’s investigation may not be unreasonable, the fact that the investigation extended

beyond the date that arbitration was scheduled to begin raises this court's suspicions. Despite numerous attempts to observe plaintiff engaged in physical activities, Great American's surveillance of plaintiff was to no avail. Doc. No. 7, Ex. D at 172, 184, 188, 207, 210, 213, 224. At the point that arbitration was delayed, Great American had not uncovered any evidence which would justify its continued investigation of plaintiff's claim.

In addition, at the time that the arbitration was initially scheduled to begin plaintiff had been evaluated by numerous physicians who opined either that her injuries were caused by the accident or that the age of her injuries could not be determined with medical certainty. It was not until after the initial arbitration date that Great American retained Goldberg to evaluate plaintiff, and it was not until December that Goldberg rendered his opinion that plaintiff's injuries predated her automobile accident. Thus, it is indisputable that the postponement of arbitration from September 1999 until December 1999 provided Great American with time to obtain a medical opinion supporting its denial of plaintiff's benefits. The tardiness of Goldberg's medical opinion leads this court to suspect Great American's motives for delaying the arbitration. A reasonable jury could find that Great American's delay of arbitration was inspired more by the undisclosed purpose of belatedly finding a medical expert to negate Great American's potential liability to plaintiff, than the legitimate purpose of investigating the merits of plaintiff's claim for benefits which it had already had twenty months to complete. Doc. No. 6 Ex. J.

## **II. Knowledge or Reckless Disregard of Lack of Reasonable Basis**

Great American was aware that it had some liability to plaintiff. After all, Great American's own Casualty-Claim Committee estimated the value of plaintiff's case to be worth at

least \$60,000 (later \$76,000). In addition, Great American knew that there was not a consensus in the medical community as to the cause of plaintiff's injuries and that some medical experts had opined that plaintiff's injury was in fact caused by the 1993 automobile accident. However, despite its clear liability, Great American never made an offer to settle plaintiff's claim.

In the face of clear liability, the failure to make an offer is illustrative of an insurer's knowledge or reckless disregard of a lack of reasonable basis for denying payment of benefits. *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230, 235 (3d Cir. 1997). In *Klinger v. State Farm*, the Third Circuit found that a rational jury could conclude that an insurance company, in failing to make an offer of compensation to its insured for the insured's injuries, knowingly or recklessly acted without a reasonable basis. *Id.* Thus, Great American's failure to offer plaintiff a settlement provides evidence from which a rational jury could find that Great American possessed the requisite mental state to support an action for bad faith pursuant to 42 Pa.C.S.A. § 8371.

## **CONCLUSION**

There is record evidence to support plaintiff's allegation of bad faith. Plaintiff has demonstrated that Great American did not have a reasonable basis for totally denying benefits and Great American's failure to make any settlement offer to plaintiff illustrates that Great American knowingly or recklessly disregarded its lack of reasonable basis. As a rational jury may find clear and convincing evidence of Great American's bad faith, I will deny defendant's motion for summary judgment on Count I of plaintiff's complaint.

An appropriate order follows.



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

M. PENNY LEVIN,

Plaintiff,

v.

GREAT AMERICAN INSURANCE COMPANY

Defendant.

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: CIVIL ACTION  
:  
: NO. 01-1717  
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Order

And now, this                    day of October, 2001, upon consideration of the plaintiff's complaint (Doc. 1); defendant's motion for summary judgment (Doc. 6); and plaintiff's response (Doc. 7); it is hereby ORDERED that defendant's motion for summary judgment as to Count I of plaintiff's complaint is DENIED.

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William H. Yohn, Jr., Judge