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

NORTH AMERICAN DEALER CO-OP, ET AL.	:	CIVIL ACTION
v.	:	
INTERSTATE INDEMNITY CO.	:	NO. 04-3609

MEMORANDUM

Padova, J. **November 16, 2004**

Presently before the Court in this diversity action is Defendant's Motion to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Motion is granted in part and denied in part.

I. BACKGROUND

The Complaint alleges the following material facts. Plaintiff North American Dealer Co-Op ("NADC") is a co-operative corporation whose members are new and used automobile dealers located throughout the United States. (Compl. ¶ 1.) NADC offers its members a vehicle service contract reimbursement guarantee program that members use to market extended vehicle service contracts to new and used automobile purchasers. (Id. ¶ 8.) The NADC program provides that if a member's customer purchases an extended vehicle service contract and does not file a claim during the required 48-month minimum term of the service contract, the customer would, if all other conditions precedent are satisfied, receive a full refund of the purchase price of the extended vehicle service contract. (Id. ¶ 9.) NADC members use this "money back" guarantee program to

increase their sales of extended vehicle service contracts by advising their customers that, if the extended service contract is not used, the customer can obtain a full refund of the purchase price for the service contract. (Id. ¶ 10.) NADC members pay NADC a fee for each vehicle service contract reimbursement guarantee issued, the amount of which is based upon the cost of the underlying extended vehicle service contract. (Id. ¶ 11.) NADC uses the fees its receives to purchase contractual liability insurance and maintain appropriate claim reserves, both of which are used to pay any and all claims that are made under the vehicle service contract reimbursement guarantee program. (Id. ¶ 12.)

By agreement with NADC, Plaintiff National Administrative Dealer Services, Inc. ("NADS") has sole responsibility for providing all management, financial and administrative services and functions necessary for NADC to operate and serve its members, including administering the NADC vehicle service contract reimbursement guarantee program. (Id. ¶ 13.) The NADC membership agreement requires NADC to maintain contractual liability insurance on behalf of all members to cover against losses resulting from the service contract reimbursement guarantee program. (Id. ¶ 14.) NADS obtained for NADC a "Vehicle Service Contract Reimbursement Guaranty Policy," policy number FFC-9000016 (the "Policy"), from Defendant Interstate Indemnity Company in order to provide contractual liability insurance for NADC's members. (Id. ¶¶ 15-

16.) The declarations page of the Policy was amended on one occasion. (Id. ¶ 17.) Defendant and/or its agents or representatives drafted the Policy language and the original and amended declaration pages. (Id. ¶ 23.) Pursuant to the Policy and the amended declaration page, the policy period was to run "FROM: April 1, 2001 TO: Continuous Until Cancelled." (Id. ¶ 18, Exs. 1-2.)

On December 9, 2003, Defendant sent a letter to NADS advising that "the policy for [NADC] is being cancelled effective April 1, 2004, per the terms of that contract." (Id. ¶ 33, Ex. 3.) The "Notice of Nonrenewal of Insurance" that accompanied the letter specifically stated that the "reason for nonrenewal is PROGRAM IS NO LONGER AVAILABLE." (Id. ¶ 34, Ex. 3.) This is not a permissible ground for cancellation under Section XVII(A) of the Policy.[1] (Id. ¶ 36.)

The Policy also specifically requires that any notice of

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[1] Section XVII(A) provides, in pertinent part, as follows:

> If this policy has been in effect for more than sixty (60) days, it may be cancelled by the Company only for one of the following reasons:
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> 1. Non-payment of premium;
> 2. Material increase in the risk;
> 3. Any fraudulent act, material misrepresentation or false statement knowingly made by the Named Insured, any Member, and/or the Program Administrator.

(Ex. 1, at 5).

cancellation or non-renewal of the Policy must be mailed to the "Named Insured," which is NADC. (Id. ¶ 37.) The December 9, 2003 cancellation letter and notice of non-renewal were not sent to the Named Insured, rather they were sent to NADS, the "Program Administrator." (Id. ¶ 38.) On April 15, 2004, NADC, by and through its counsel, wrote to Defendant to advise it that the purported cancellation/non-renewal was ineffective, null and void and demanded that Defendant reinstate the Policy. (Id. ¶ 39, Ex. 4.)

A copy of the December 9, 2003 cancellation letter and notice of non-renewal was also sent by Defendant to the President of Western General Group ("Western General"), which acts as an agent for NADC and sells the vehicle contract reimbursement program to new and used automobile dealer members throughout the United States. (Id. ¶¶ 50-51.) Western General is the single largest producer of new agreements for the NADC vehicle service contract reimbursement program in the country, producing approximately one-third of all contracts received by NADC. (Id. ¶ 52.) Based solely on Defendant's wrongful cancellation of the Policy, Western General notified all of its agents on April 12, 2004 that NADC no longer had insurance and advised the agents that "Western General will not be endorsing or recommending use of the program." (Id. ¶ 53; Ex. 6.) Based solely on Defendant's wrongful cancellation of the Policy, NADC members and other agents who sell the NADC product

have refused to participate in the vehicle service contract reimbursement guarantee program. (Id. ¶ 54.)

Pursuant to the Policy, a premium is paid by NADC to Defendant for each vehicle service contract. (Id. ¶ 55.) Eighty percent (80%) of the amount of each premium paid is set aside by Defendant for claims reserves. (Id. ¶ 56.) Each year, Defendant provides a refund of reserves and/or premiums to NADC. (Id. ¶ 57.) NADS receives an initial set-up fee from each dealer member, as well as a share of income and reserve or premium refunds received by NADC, as compensation for its services in administering the NADC program. (Id. ¶ 58.) Defendant, NADC, and NADS agreed that a share of the income from administration of the reimbursement guarantee program, including premium and/or reserve funds, would be paid to NADS and that NADS would directly benefit from, and be an intended beneficiary of, the Policy. (Id. ¶ 59.) In addition, Defendant, NADC, and NADS agreed that Defendant would pay NADS 2.5% of the premiums earned each calendar year. (Id. ¶ 60, Ex. 7.) Defendant has failed to pay NADS its 2.5% share of the premiums earned each calendar year. (Id. ¶ 65.) NADC and NADS have each lost considerable sales of vehicle service contract reimbursement guarantees as a direct result of the wrongful cancellation of the Policy by Defendant. (Id. ¶¶ 61, 63.) NADC and NADS will continue to suffer lost revenues and profits and other damages as long as NADC is without contractual liability insurance for the vehicle

service contract reimbursement guarantee program. (Id. ¶¶ 62, 64.)

The Complaint alleges three counts against Defendant. In Count I, Plaintiffs seek a declaration that: (1) the letter of cancellation dated December 4, 2003[2] and accompanying non-renewal notice are unauthorized, in breach of the Policy, and null, void and ineffective; (2) the Policy issued by Defendant has been and continues to be in full force and effect and there was no lapse of coverage under the Policy on or after April 1, 2004; and (3) the Policy may only be cancelled or terminated in accordance with the cancellation provisions set forth in Section XVII(A) of the Policy. In Count II, Plaintiffs assert three claims for breach of contract. Plaintiffs allege that Defendant wrongfully cancelled the Policy pursuant to the cancellation provisions set forth in Section XVII(A) of the Policy. Plaintiffs alternatively allege that Defendant breached the Policy by failing to comply with the notice of non-renewal provisions set forth in Section XVII(B) of the Policy.[3] Plaintiffs further assert a breach of contract claim based on Defendant's failure to pay NADS 2.5% of the premiums

[2] Although the cancellation letter is dated December 4, 2003, the cancellation letter and notice of non-renewal were not mailed until December 9, 2003. (Ex. 3.)

[3] Section XVII(B) provides, in pertinent part, as follows: "This policy may be non-renewed by the Company by mailing written notice of such non-renewal to the Named Insured at the address shown in Item 1 of the policy Declarations at least ninety (90) days prior to any policy expiration or anniversary date." (Ex. 1, at 5.)

earned annually by Defendant under the Policy. In Count III, Plaintiffs allege that Defendant acted in bad faith in terminating the Policy.

Defendant moves to dismiss Plaintiffs' Complaint in its entirety for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. LEGAL STANDARD

When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all well pleaded allegations in the complaint and view them in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Documents "integral to or explicitly relied upon in the complaint" and related matters of public record may be considered on a motion to dismiss. In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997).

III. DISCUSSION

This Court has diversity jurisdiction over this action pursuant 28 U.S.C. § 1332. In diversity actions, the Court must

apply the choice of law rules of the forum state. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Under Pennsylvania's choice of law principles, an action arising on an insurance policy is governed by the law of the state in which the policy was delivered. CAT Internet Servs., Inc. v. Internet Supply, Inc., 333 F.3d 138, 141 (3d Cir. 2003); Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 745-46 (3d Cir. 1999). The parties agree that the Colorado law applies to this dispute because the insurance policy at issue was delivered to Plaintiffs' offices in Colorado. (Compl. ¶¶ 1, 3.)

A. Breach of Contract

Defendant moves to dismiss Plaintiffs' breach of contract claims in Count II of the Complaint. Under Colorado law, the elements of a breach of contract claim are: (1) existence of a contract; (2) performance by plaintiff or some justification for nonperformance; (3) failure to perform the contract by defendant; and (4) damages to plaintiff. Western Distrib. Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992).

The Complaint alleges that Defendant wrongfully cancelled the Policy pursuant to the cancellation provisions contained in Section XVII(A) of the Policy. Section XVII(A) provides, in pertinent part, as follows:

> If this policy has been in effect for more than sixty (60) days, it may be cancelled by the Company only for one of the following reasons:

1. Non-payment of premium;
2. Material increase in the risk;
3. Any fraudulent act, material misrepresentation or false statement knowingly made by the Named Insured, any Member, and/or the Program Administrator.

(Compl. Ex. 1, at 5). Plaintiffs note that the Policy had been in effect for more than 60 days when Defendant sent the notice of cancellation to NADS. Plaintiffs further allege that no basis existed for Defendant to cancel the Policy on any of the grounds provided in Section XVII(A) of the Policy because, at all material times, NADC was current on its payment of any premiums due, there was no material increase in the risk which would justify cancellation, and neither NADC and its Members nor NADS committed any fraudulent act or made any material misrepresentation or false statement.

Defendant contends that Plaintiffs have failed to state a breach of contract claim based on wrongful cancellation under Section XVII(A) of the Policy because Defendant terminated the Policy in accordance with the non-renewal provisions set forth in Section XVII(B) of the Policy. Section XVII(B) provides, in pertinent part: "This policy may be non-renewed by the Company by mailing written notice of such non-renewal to the Named Insured at the address shown in Item 1 of the policy Declarations at least ninety (90) days prior to any policy expiration or anniversary date." (Id.) Defendant notes that the notice, which was plainly

entitled "**NOTICE OF NONRENEWAL OF INSURANCE**," was sent to NADS on December 9, 2003, which was nearly 120 days prior to the April 1, 2004 anniversary date of the Policy. (Compl. Ex. 3) (emphasis in original). In response, Plaintiffs maintain that Defendant was not permitted to non-renew the Policy under the non-renewal provisions set forth in Section XVII(B) because the declarations page expressly provided that the policy period was to run "FROM: April 1, 2001 TO: Continuous Until *Cancelled*." (Compl. Exs. 1, 2) (emphasis added). Thus, Plaintiffs contend that Defendant was only permitted to terminate the Policy in accordance with the cancellation provisions set forth in Section XVII(A) of the Policy.

The terms of an insurance policy are construed according to the general principles of contract interpretation. Thompson v. Maryland Cas. Co., 84 P.3d 496, 501 (Colo. 2004). The interpretation of a written contract and the determination of whether a contract is ambiguous are questions of law for the court. Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371, 374 (Colo. 1990). The primary goal of contract interpretation is to give effect to the intent of the parties, as expressed by the plain language of the contract. Cache Nat'l Bank v. Lusher, 882 P.2d 952, 957 (Colo. 1994). "The meaning of a contract is found by examination of the entire instrument and not by viewing clauses or phrases in isolation. Each word in an instrument is to be given meaning if at all possible." United States Fidelity & Guar. Co. v.

Budget Rent-A-Car Sys., Inc., 842 P.2d 208, 213 (Colo. 1992); see also Cyrpus Amax Minerals Co. v. Lexington Ins. Co., 74 P.3d 294, 299 (Colo. 2003) (noting that court is not permitted to rewrite, add, or delete provisions in interpreting insurance policy). The court must enforce the contract as written, unless there is an ambiguity in the contract. State Farm Mut. Auto. Ins. v. Stein, 940 P.2d 384, 387 (Colo. 1997). A policy provision is ambiguous if it is reasonably susceptible on its face to more than one interpretation. Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1091 (Colo. 1991). Mere disagreement between the parties about the meaning of a contract term does not create an ambiguity. Parrish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049, 1055 (Colo. 1994). Moreover, the mere potential for more than one interpretation of a contract term considered in the abstract does not create an ambiguity. Allstate Ins. Co. v. Juniel, 931 P.2d 511, 513 (Colo. App. Ct. 1996). While ambiguous language must be construed in favor of the insured and against the insurer who drafted the policy, "courts will not force an ambiguity in order to resolve it against an insurer." Kane v. Royal Ins. Co. of America, 768 P.2d 678, 683 (Colo. 1989).

Section XVII of the Policy, which is entitled "**CANCELLATION OF THE POLICY**," contains four subsections that set forth independent methods by which the Policy may be terminated by the insurer and the insured. (Compl. Ex. 1, at 5) (caps and emphasis in original).

The four subsections are entitled: (A) "Cancellation by the Company"; (B) "Non-Renewal by the Company"; (C) "Cancellation by the Insured"; and (D) "Non-Renewal by the Insured." (Id. at 5-6.) Thus, the Policy assigns a broad meaning to "cancellation" that encompasses both cancellation and non-renewal, as those terms are commonly defined in insurance parlance.[4] Reading Section XVII as a whole, the Court concludes that Defendant was permitted to "cancel" the Policy by complying with the non-renewal procedures set forth in subsection (B). See Dye Constr. Co. v. Indus. Comm'n of State of Colorado, 678 P.2d 1066, 1069 (Colo. App. Ct. 1983) ("Where no statute or rule of public policy controls, the parties to an insurance contract may make such agreement as they desire concerning the method of cancellation of the insurance policy, and where such contractual language is clear and unequivocal, the

[4] "There is a clear distinction between failure to renew a policy which has or soon will cease to exist, and the cancellation or termination of an existing policy." 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance, § 29:3 (3d ed. 1997). Cancellation refers to the termination of a policy prior to its expiration date, whereas non-renewal refers to termination of a policy as of its expiration date. Id. Thus, termination of the Policy by Defendant under Section XVII(A) could take effect on any date, assuming that the conditions and requirements specified therein were satisfied. (See Compl. Ex. 1, at 5.) By contrast, termination of the Policy by Defendant under Section XVII(B) could only take effect on the anniversary date of the Policy, assuming that the notice requirements specified therein were satisfied. (See id.) Although the Policy did not expressly designate an "anniversary date," it is well-established that the anniversary date of an insurance policy is a "yearly recurring date of the initial issuance date." Black's Law Dictionary 89 (6th ed. 1990). The issuance date of the Policy was April 1, 2001. Every subsequent April 1 was, therefore, an "anniversary date" of the Policy.

courts cannot make a new contract for the parties."). Plaintiffs' contrary interpretation reads subsection (A) in isolation and fails to give effect to the non-renewal provisions of the Policy. The Court cannot create an ambiguity in the Policy by ignoring the intent of the parties, as expressed in the plain language of the Policy. The Court further concludes that the December 9, 2003 termination notice unambiguously demonstrates that Defendant intended to non-renew the Policy. As Defendant permissibly sought to "cancel" the Policy pursuant to the non-renewal provisions set forth in Section XVII(B) of the Policy, the cancellation provisions set forth in Section XVII(A) are inapplicable to this case. Accordingly, the instant Motion is granted with respect to Plaintiffs' breach of contract claim based on Defendant's wrongful cancellation of the Policy under Section XVII(A).

The Complaint alternatively alleges that Defendant breached the Policy by failing to comply with the notice requirements of Section XVII(B) in non-renewing the Policy. Pursuant to Section XVII(B) of the Policy, Defendant was required to mail its notice of non-renewal to the "Named Insured," which is NADC. Instead, Defendant mailed its notice of non-renewal to NADS, the "Program Administrator" under the Policy. Defendant moves to dismiss this claim on several grounds. In particular, Defendant argues that NADC had actual notice of non-renewal because it and NADS have the same address and because NADC's attorney responded to the notice of

non-renewal on April 15, 2004. Defendant further argues that NADS was authorized to receive the non-renewal notice as NADC's agent.

Under Colorado law, insurers are required to strictly comply with the termination provisions of an insurance policy. Omni Dev. Corp. v. Atlas Assurance Co. of America, 956 P.2d 665, 667 (Colo. App. Ct. 1998); see, e.g., Geiger v. American Standard Ins. Co. of Wisconsin, Civ. A. Nos. 03-1418, 03-1735, 2004 WL 2138116, at *2 (Colo. App. Ct. Sept. 23, 2004) (holding that insurer breached contract by sending cancellation notice to wife, but not also to husband, where both resided at same address); Omni, 956 P.2d at 668 (holding that non-renewal notice purporting to terminate policy within 31 days was not effective until full 90 days required under policy had elapsed); see also 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance, § 29:6 (3d ed. 1997) ("When notice of non-renewal is required, the obligation may be absolute . . . .").

In this case, Defendant did not strictly comply with the notice requirements of Section XVII(B) of the Policy in addressing and mailing the notice of non-renewal to NADS, and not to NADC. Even assuming that actual notice by the insured may excuse an insurer's technical non-compliance with the non-renewal provisions of an insurance policy under Colorado law,[5] the factual question of

[5] The Court notes that Defendant was not required under the Policy to provide NADC with actual notice of non-renewal, as "[a] Post Office Certificate of Mailing shall be sufficient proof of notice." (Compl. Ex. 1, at 5); see also Campbell v. Home Ins. Co., 628 P.2d 96, 99 (Colo. 1981) (holding that actual notice of

whether NADC had actual notice of non-renewal cannot be resolved by the Court on a motion to dismiss.[6] Cf. Littlefield v. Bamberger, 32 P.3d 615, 618 (Colo. App. Ct. 2001) (noting that whether property owner had actual notice of real estate encumbrance is question of fact). Furthermore, while NADS may have acted as NADC's agent in administering the Policy, the scope of NADS's authority in its capacity as NADC's agent is also a question of fact that the Court cannot resolve at this juncture. See Montoya v. Grease Monkey Holding Corp., 883 P.2d 486, 488 (Colo. App. Ct. 1994) (noting that the existence and scope of agent's authority is question of fact), aff'd, 904 P.2d 468 (Colo. 1995); 2 Couch on Insurance, § 46:21 ("The question of a[n] [agent's] implied authority to accept cancellation on behalf of the insured is primarily a question for the jury."). Accordingly, the instant Motion is denied with respect to Plaintiffs' breach of contract claim based on Defendant's failure to comply with the notice of

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insured's cancellation of policy is not required where policy provides that mailing of notice is sufficient proof of notice). The question of whether NADC had actual notice of non-renewal is potentially relevant only because Defendant failed to strictly comply with the notice requirements of Section XVII(B) in attempting to non-renew the Policy.

[6] Although NADC's counsel responded to Defendant's notice of non-renewal on April 15, 2004, the current record does not establish that NADC had actual notice of non-renewal *prior* to April 1, 2004, the date on which the Policy coverage was terminated. Indeed, as the purpose of the notice requirement is to provide the insured with sufficient time to procure new insurance before the existing coverage is terminated, Campbell, 628 P.2d at 99, actual notice after the termination of the policy is irrelevant.

non-renewal requirements under Section XVII(B) of the Policy.

The Complaint also alleges a breach of contract claim based on Defendant's failure to pay NADS a 2.5% share of the premiums earned annually by Defendant under the Policy. Defendant moves to dismiss this claim on the grounds that the Policy does not expressly provide for such an arrangement between Defendant and NADS. In a letter dated March 6, 2001, however, Defendant's vice president advised NADS's chief executive officer that "[w]e agree to pay you annually, on an earned basis, a share of the investment income. As discussed, this will be two and one-half percent (2.5%) of the premium earned each calendar year." (Compl. Ex. 7.) Although this agreement was not expressly incorporated into the Policy, the question of whether the parties intended the Policy to be a completely integrated agreement is a factual dispute that must be resolved in favor of Plaintiffs on a motion to dismiss. See Bell v. McCann, 535 P.2d 233, 235 (Colo. App. Ct. 1975) ("[W]hether a writing was intended by the parties as a complete expression of their agreement is a question of fact . . . ."). Accordingly, the instant Motion is denied with respect to Plaintiffs' breach of contract claim based on Defendant's failure to pay NADS a 2.5% share of the premiums earned annually by Defendant under the Policy.[7]

[7] Defendant also moves to dismiss Count I, in which Plaintiffs seek a declaration that: (1) the letter of cancellation dated December 4, 2003 and accompanying non-renewal notice are

B. Bad Faith

Defendant also moves to dismiss Count III of the Complaint, which alleges that Defendant acted in bad faith in terminating the Policy. "Under Colorado law, an insurer acts in bad faith when the insurer's conduct is unreasonable and the insurer knows that the conduct is unreasonable or recklessly disregards the fact that the conduct is unreasonable." Southwest Nurseries, LLC v. Florist Mut. Ins., Inc., 266 F. Supp. 2d 1253, 1255 (D. Colo. 2003) (citations and internal footnote omitted). Defendant argues that Count III must be dismissed in its entirety since Plaintiffs' underlying

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unauthorized, in breach of the Policy, and null, void and ineffective; (2) the Policy issued by Defendant has been and continues to be in full force and effect and there was no lapse of coverage under the Policy on or after April 1, 2004; and (3) the Policy may only be cancelled or terminated in accordance with the cancellation provisions set forth in Section XVII(A) of the Policy. At the October 18, 2004 preliminary pretrial conference, Plaintiffs' counsel advised the Court that NADC has obtained replacement coverage from another insurer. Based on this representation, it is unclear whether Plaintiffs still seek the requested declaratory relief. In any event, the Court will assume that Plaintiffs still seek the declaratory relief requested in Count I since they have not yet formally sought to withdraw Count I. In light of the Court's rulings on the breach of contract claims, Defendant's Motion to Dismiss the claims for declaratory relief alleged in Count I of the Complaint is granted in part and denied in part. Defendant's Motion is granted with respect to Plaintiffs' request for a declaration that the Policy may only be cancelled or terminated in accordance with the cancellation provisions set forth in Section XVII(A) of the Policy. Defendant's Motion is denied with respect to Plaintiffs' request for a declaration that (1) the cancellation letter and accompanying non-renewal notice are unauthorized, in breach of the Policy, and null, void and ineffective, and that (2) the Policy issued by Defendant has been and continues to be in full force and effect and there was no lapse of coverage under the Policy on or after April 1, 2004.

breach of contract claim for wrongful cancellation under Section XVII(A) of the Policy fails to state a claim upon which relief may be granted. The Court notes, however, that Plaintiffs have sufficiently alleged breach of contract claims based on Defendant's non-compliance with the notice of non-renewal provisions in Section XVII(B) of the Policy and Defendant's failure to pay NADS a 2.5% share of premiums earned annually under the Policy. Viewed in the light most favorable to Plaintiffs, these breach of contract claims could support a finding that Defendant acted in bad faith in terminating the Policy. Accordingly, the instant Motion is granted only inasmuch as Count III asserts a bad faith claim predicated on Defendant's wrongful cancellation under Section XVII(A) of the Policy.

IV. CONCLUSION

For the foregoing reasons, the Defendant's Motion is granted in part and denied in part. Defendant's Motion is granted with respect to Plaintiffs' claims for declaratory relief, breach of contract and bad faith based on Defendant's wrongful cancellation of Policy pursuant to Section XVII(A). Defendant's Motion is denied in all other respects.[8]

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[8] In sum, the following groups of claims survive the Motion to Dismiss:

1. The request in Count I for a declaration that: (1) the cancellation letter and accompanying non-renewal notice are unauthorized, in breach of the Policy, and null, void and ineffective; and (2) the Policy issued by Defendant has been and continues to be in full force and effect and

An appropriate Order follows.

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there was no lapse of coverage under the Policy on or after April 1, 2004.

2. The breach of contract claims in Count II based on (1) Defendant's non-compliance with the notice provisions of Section XVII(B) of the Policy and (2) Defendant's failure to pay NADS a 2.5% share of premiums earned annually under the Policy.
3. The bad faith claims in Count III based on (1) Defendant's non-compliance with the notice provisions of Section XVII(B) of the Policy and (2) Defendant's failure to pay NADS a 2.5% share of premiums earned annually under the Policy.

IN THE UNITED STATES DISTRICT COURT
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v.	:	
INTERSTATE INDEMNITY CO.	:	NO. 04-3609

O R D E R

AND NOW, this 16th day of November, 2004, upon consideration of Defendant's Motion to Dismiss Plaintiffs' Complaint (Doc. No. 7), Plaintiffs' Response thereto, and all attendant and responsive briefing, **IT IS HEREBY ORDERED** that said Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Defendant's Motion to Dismiss is **GRANTED** with respect to Plaintiffs' claims for declaratory relief (Count I), breach of contract (Count II) and bad faith (Count III) based on Defendant's wrongful cancellation of Policy No. FFC-9000016 pursuant to Section XVII(A) of that Policy, and those claims are **DISMISSED**.
2. Defendant's Motion to Dismiss is **DENIED** in all other respects.

BY THE COURT:

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John R. Padova, J.