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

DANIELLE WISE, Individually and as Administratrix of the Estate of William Wise	**:**	**CIVIL ACTION**
	:	**NO. 04-3711**
v.	**:**	
	:	
AMERICAN GENERAL LIFE INSURANCE COMPANY, et al.	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **March 22 , 2005**

In this diversity action, Plaintiff Danielle Wise ("Plaintiff") brings state law claims on behalf of herself and her late husband, William Wise ("Decedent"), alleging Breach of Contract (Count I), Bad Faith under 42 Pa. C.S.A. § 8371 (Count II), Breach of Fiduciary Duty (Count III), and violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201, et seq. (Count IV) against Defendants American General Life Insurance Company ("American General"), Intelliquote Insurance Services ("Intelliquote"), and Gary R. Lardy, based on American General's refusal to pay benefits under an alleged life insurance policy. Currently before the Court is American General's Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons stated below, the Motion will be granted.[1]

[1] In granting this Motion, the Court has considered Plaintiff's claims as administratrix of Decedent and, therefore, need not reach the separate question of which claims she has standing to bring on her own behalf.

I. Background

Viewed in the light most favorable to Plaintiff, the relevant facts are as follows. Plaintiff is the wife and legally appointed representative of the Estate of Decedent. Complaint ¶¶ 1, 6. On or about January 21, 2004, Decedent applied for life insurance through Intelliquote, using the company's website. Complaint ¶ 7. After submitting certain information, including age, gender, residence, and tobacco use, the site provided Decedent with a list of price quotes from different insurance companies. Complaint ¶¶ 8-9. Each of the quotes included a monthly and annual premium. Id. Through this site, Decedent selected American General as his service provider, and the company sent him an application for life insurance. Complaint ¶¶ 10-11. Decedent requested $500,000 in coverage, naming Plaintiff as the primary beneficiary. Complaint ¶ 14.

The American General application for life insurance submitted by Decedent had two sections, Part A and Part B. See Part A, attached as Exhibit A to American General's Motion to Dismiss ("Motion"); Part B, attached as Exhibit A to Complaint.[2] Part B of the application was apparently completed first, and signed by Decedent on February 2, 2004. This portion of the application requests certain personal, family, and medical information. See Part B at 1-4. As required for the application, on or about February 4, 2004, Decedent submitted to and passed a paramedical exam performed by Merle Apfelbaum of Portamedic Company. Complaint ¶ 12. Part A of the application was signed by Decedent in Pennsylvania on February 7, 2004. See Part

[2] In deciding a Motion to Dismiss, a court may consider factual allegations contained in the complaint, exhibits attached thereto, documents referenced therein, matters of public record, and undisputedly authentic documents attached to a defendant's motion, if the complaint is based on those documents. See, e.g., Wallace v. Sys. & Computer Tech. Corp., 1997 WL 602808, at *5 (E.D. Pa. Sept. 23, 1997). Accordingly, this Court may consider the entire insurance application.

A at 3. This section contained questions regarding Decedent's personal information, the requested insurance coverage, and the proposed beneficiaries. Id. at 1-3. The passage directly above Decedent's signature in Part B of the application included the following:

> I have read the above statements or they have been read to me. They are true and complete to the best of my knowledge and belief. I understand that this application: (1) will consist of Part A, Part B, and if applicable, related forms; and (2) shall be the basis for any policy issued.... **Except as may be provided in a Limited Temporary Life Insurance Agreement (LTLIA), I understand and agree that no insurance will be in effect pursuant to this application, or under any new policy issued by the Company, unless or until: the policy has been delivered and accepted; the full first modal premium for the issued policy has been paid; and there has been no change in the health of any proposed insured that would change the answers to any questions in the application.**[3]

Part B at 4 (emphasis in original). Similarly, directly above Decedent's signature in Part A, American General expressly provided:

> **...I understand and agree that no insurance will be in effect under this application, or any new policy issued by the insurer, unless or until: the policy has been delivered and accepted; the full first modal premium for the policy has been paid; and there has been no change in the health of the proposed insured that would change the answers to any questions in the application.**

Part A at 3 (emphasis in original). Decedent signed and dated both portions of the application.

Following submission of the application, on or about March 3, 2004, American General issued a life insurance policy in the amount of $500,000. Complaint ¶ 15; see also American General Life Insurance Company Insurance Policy ("Policy"), attached as Exhibit B to Complaint. According to the terms of the policy, March 3 was to be the

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[3] Part A of the application explains that Limited Temporary Life Insurance is available only if the first premium payment is submitted with the application. See Part A at 3. Plaintiff does not allege that any payment was submitted with the application or that Decedent otherwise requested the limited, temporary coverage.

beginning of the annual pay period for all renewals and anniversaries of the policy. Complaint ¶ 17; Policy at 3-4. However, the cover letter from Intelliquote accompanying the Policy also cautioned that to place the coverage in force, Decedent was required to tender the first premium payment in the amount of $600 and sign and return the delivery receipt by March 26, 2004. See Policy. On or about March 9, 2004, Intelliquote mailed this policy to Decedent; it was received on March 10, 2004. Complaint ¶¶ 16-17. That same day, Decedent passed away. Complaint ¶ 25. On March 11, 2004, Plaintiff attempted to pay the first annual premium. Complaint ¶ 19. American General rejected this payment and, thereafter, on March 25, 2004, denied Plaintiff's claim for life insurance benefits. Complaint ¶ 21. Plaintiff avers that had the Policy been delivered prior to or on March 3, the premium would have been paid promptly. Complaint ¶ 24.

Plaintiff claims breach of contract, bad faith, breach of the insurer's fiduciary duty, and Pennsylvania statutory violations, based on American General's refusal to pay benefits and other actions in issuance of the policy. American General has moved to dismiss all Counts under Rule 12(b)(6), for failure to state claims upon which relief may be granted.

II. Legal Standard

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and must accept as true all well-pleaded allegations, viewing the facts in the light most favorable to the plaintiff. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.

1994); Angelastro v. Prudential- Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985).[4] A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts provable by plaintiff. See Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. Analysis

A. Breach of Contract (Count I)

Taking the allegations in the Complaint as true and making all inferences in favor of Plaintiff, it is clear that no insurance contract became effective.[5] Under Pennsylvania law, interpretation of contracts, including the question of whether a contract is in force, is a legal matter, suitable for determination by a court rather than by a jury. See Standard Venetian Blind Co. v. Am. Empire Ins. Co., 469 A.2d 563, 566 (Pa. 1983); Barrer v. Metro. Life Ins. Co., 151 F. Supp. 2d 617, 621 (E.D. Pa. 2001); Potts v. Metro. Life Ins. Co., 2 A.2d 870, 874 (Pa. Super. 1938). In such interpretation, a court must give effect to clear and unambiguous contractual language in attempting to ascertain the intent of the parties. See, e.g., Bensalem Township v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1309 (3d Cir. 1994) (quoting Standard Venetian Blind Co., 469 A.2d at 566).

Here, American General's documents repeatedly and unambiguously stated what was necessary for the effectiveness of the insurance agreement: formal acceptance and

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[4] See also n.2.

[5] In exercising diversity jurisdiction, this Court must apply the substantive law of the state in which it sits. Bensalem Township v. Int'l Surplus Lines Ins. Co., 38 F.3d 1303, 1308 (3d Cir. 1994). The insurance policy was delivered in the state of Pennsylvania, see Prusky v. Prudential Ins. Co. of Am., 2001 WL 34355665, at *21 (E.D. Pa. Oct. 30, 2001), and neither party disputes that Pennsylvania law applies.

delivery of the policy and payment of the first annual premium, prior to any change in health of the proposed insured. Thus, under the terms of the policy, American General's issuance and mailing of a particular policy was an offer of insurance, which Decedent could accept by signing his name and paying the first premium within a specified time. Cf. Recupito v. Inter-Ocean Ins. Co., 362 F. Supp. 577, 580 (D.C. Pa. 1973) (holding that issuance of written life insurance policy was merely proposal to contract and that there could be no actual contract until insured indicated definitive acceptance of policy); see also Kelly v. Allstate Ins. Co., 138 F. Supp. 2d 657, 662 (E.D. Pa. 2001) (ruling that payment of premium is the essence of an insurance contract and that such is frequently a condition precedent to, or at least concurrent with, insurer liability).

Just as with other contracts, insurance contracts require an offer, acceptance, and meeting of the minds between the parties; there is no indication in any of the documents of the company's intent to be bound prior to delivery of the policy, and no consideration was offered by Decedent from which liability might be inferred up to that point. See J.M.P.H. Wetherell v. Sentry Reinsurance, Inc., 743 F. Supp. 1157, 1170 (E.D. Pa. 1990); see also Prusky v. Prudential Ins. Co. of Am., 2001 WL 34355665, at *22 (E.D. Pa. Oct. 30, 2001) (interpreting similar insurance policy to offer coverage only after the application was accepted and the premium was paid, reasoning that neither party would want to be bound until each had a full opportunity to review the terms of the contract); Altimari v. John Hancock Variable Life Ins. Co., 247 F. Supp. 2d 637, 647 (E.D. Pa. 2003). Consequently, no insurance was in effect at the time of Decedent's sudden passing, as he had neither signed the document nor submitted any premium payment. See Connecticut Gen. Life Ins.

Co. v. Mullen, 197 F. 299, 301 (3d Cir. 1912).

Plaintiff asserts that the contract is ambiguous – despite numerous statements by American General of the conditions necessary to achieve a meeting of the minds – because the date of issue of the proposed policy was March 3 and the offer stated that it constituted the "contract" between the parties. Under Plaintiff's theory of the transaction, Decedent's application constituted an offer, which American General accepted on March 3, 2004 when it issued and mailed the policy. Even if there were some ambiguity in the proposed contract, Decedent would not be entitled to coverage because he could not reasonably have expected coverage before acceptance of the policy and payment of the first premium.[6] Indeed, Plaintiff makes no assertion that the parties had entered into a Limited Temporary Life Insurance Agreement, which the application indicates might have been available. See Part A at 3. Throughout the application process, the company's documents repeatedly informed Decedent that no coverage would take effect until his first premium was paid. This was stated clearly in both parts of the application (and reiterated in a letter accompanying delivery of the policy), in highlighted passages directly above Decedent's signature. Moreover, the documents confirmed that coverage would not be immediate by providing Decedent the option to pay his first premium with the application and possibly receive temporary life insurance. Finally, Collister v. Nationwide Life Insurance Company and its progeny do not support the inference of temporary coverage in this transaction

[6] When a contract is ambiguous, courts should construe the terms in favor of the insured and against the insurer, evaluating the totality of the circumstances surrounding the transaction to gauge the reasonable expectations of the insured. See Collister v. Nationwide Life Ins. Co., 388 A.2d 1346, 1353 (Pa. 1978); Dibble v. Sec. of Am. Life Ins. Co., 590 A.2d 352, 354 (Pa. Super. 1991); Altimari, 247 F. Supp. 2d at 644.

because central to those decisions was the fact that the plaintiff had paid a premium and therefore had a reasonable expectation of receiving something of value – i.e., temporary coverage – in return. See Collister, 388 A.2d at 1353; cf. Potts, 2 A.2d at 873. Here, there can be no claim that Decedent could have reasonably expected coverage prior to the delivery and acceptance of the contract and payment of the first premium. See Collister, 388 A.2d at 1355 (holding that to avoid the inference of temporary coverage, insurance company need only delay acceptance of insured's premium); see also Langer v. Monarch Life Ins. Co., 966 F.2d 786, 796 (3d Cir. 1992). Consequently, Decedent had no reasonable expectation of life insurance coverage at the time of his death.

Plaintiff next argues that, to the extent acceptance of the policy and payment were conditions precedent to formation of an insurance contract, American General waived these conditions when it failed to mail the policy to Decedent prior to the date of issue. According to Plaintiff, because the policy was mailed on or after March 3, 2004 (the stated date of issue in the policy), American General waived any right to have delivery and payment made prior to contract formation. As a result, Plaintiff argues, the conditions precedent were waived and the contract came into effect as of March 3.

Under Pennsylvania law, a contractual provision can be expressly or impliedly waived provided the intent to waive can reasonably be inferred. See McDermott v. Party City Corp., 11 F. Supp. 2d 612, 622 (E.D. Pa. 1998); Brodsky v. Equitable Life Assurance Soc'y of U.S., 1999 WL 637221, at *1 (E.D. Pa. Aug. 20, 1999), vacated on other grounds, Brodsky v. Equitable Life Assurance Soc'y of U.S., 1999 WL 755184 (E.D. Pa. Sept. 20, 1999). However, such waiver requires a clear, unequivocal, decisive act by the

waiving party, with knowledge and evidence of intent to surrender the right. See, e.g., Brown v. City of Pittsburgh, 186 A.2d 399, 401 (Pa. 1962). Here, American General took pains to inform Decedent that no coverage would be in effect until certain clearly stated conditions were met. See Brodsky, 1999 WL 637221 at *3. There is no legal requirement that an insurance contract be executed on its effective date, meaning that American General and Decedent could have executed the contract after the date of issue specified therein. See, e.g., Mut. Life Ins. Co. of New York v. Hurni Packing Co., 263 U.S. 167, 175-76 (1923) (holding that it is proper for parties to agree that the effective date of a life insurance policy should be one prior to its actual execution or issuance); Potts, 2 A.2d at 874.

Finally, because this Court concludes that there was no contract between the parties, there is no basis for Plaintiff's claim of a breach of the implied covenant of good faith and fair dealing. See Plaintiff's Response at 11 (conceding that Plaintiff must establish that a contract existed between the parties to press this claim); see also Berks Mut. Leasing Corp. v. Travelers Prop. Cas. a Member of Citigroup, 2002 WL 31761419, at *3 (E.D. Pa. Dec. 9, 2002); Southeastern Pennsylvania Transp. Auth. v. Holmes, 835 A.2d 851, 859 (Pa. Cmwlth. 2003). As a result, Plaintiff's breach of contract claim must be dismissed.

B. Bad Faith Under 42 Pa. C.S.A. § 8371 (Count II)

Plaintiff next asserts a claim under 42 Pa. C.S.A. § 8371. Section 8371 creates a private right of action whenever an insurer acts in "bad faith" towards the insured in an action arising under an insurance policy. See, e.g., Terletsky v. Prudential Prop. & Cas.

Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1994). Pennsylvania courts have found "bad faith" to include any frivolous or unfounded refusal to pay proceeds of a policy, regardless of whether such a refusal is fraudulent. See id. at 688; O'Donnell ex rel. Mitro v. Allstate Ins. Co., 734 A.2d 901, 905 (Pa. Super. 1999). More specifically, to claim bad faith under the statute, a plaintiff must present evidence that: (1) an insurer denied benefits under a policy without any reasonable basis; and (2) the insurer knowingly or recklessly disregarded its lack of reasonable basis for denying the benefits. Barrer, 151 F. Supp. 2d at 625 n.2; Kelly, 138 F. Supp. 2d at 662. Plaintiff has failed to plead these elements. See Booze v. Allstate Ins. Co., 750 A.2d 877, 880 (Pa. Super. 2000). Moreover, because no insurance contract ever became effective, certainly the company had a reasonable basis for denying the claim. See Altimari, 247 F. Supp. 2d at 649 (rejecting claim under § 8371 where no insurance contract actually existed between the parties); Barrer, 151 F. Supp. 2d at 625. Therefore, Plaintiff cannot sustain a legally cognizable bad faith claim under the statute based on the denial of benefits.

Rather than basing her claim specifically on the failure to pay benefits, however, Plaintiff has pled bad faith under § 8371 based on an alleged scheme to collect annual insurance premiums, while providing less than a full year of actual coverage. See Complaint ¶¶ 36-41. According to the Complaint, American General has violated the statute by pre-dating newly issued insurance policies, without prior notice to potential customers, thereby enabling the company to collect annual premiums for less than a full year of coverage and increase its own profits by 2%, 3%, or more. Id.

By the plain text of § 8371, the statute extends to actions "arising under an

insurance policy." 42 Pa. C.S.A. § 8371. Close examination of the language of the statute and the legislative intent, as detailed by Pennsylvania courts, makes clear that the statute was intended specifically to cover the actions of insurance companies in the denial of benefits under an existing contract; there is no indication that it was intended to extend to an insurer's actions in the solicitation of customers or to regulate the insurance industry more generally. See Gen. Accident Ins. Co. v. Fed. Kemper Ins. Co., 682 A.2d 819, 822 (Pa. Super. 1996) (ruling that the purpose of § 8371 was to provide a statutory remedy for the bad faith denial of insurance benefits); Ridgeway ex rel. Estate of Ridgeway v. U.S. Life Credit Life Ins. Co., 793 A.2d 972, 976-77 (Pa. Super. 2002) (same); cf. Toy v. Metro. Life Ins. Co., 863 A.2d 1, 14 (Pa. Super. 2004) (rejecting § 8371 bad faith claim based on theory of manipulative marketing of insurance policy); Berks Mut. Leasing Corp., 2002 WL 31761419 at *4-5 (rejecting argument that § 8371 applies to any bad faith conduct by insurer in the course of an insurance transaction and discussing why statute should be interpreted to apply only to insurer bad faith in denial of benefits); Jung v. Nationwide Mut. Fire Ins., 949 F. Supp. 353, 360 (E.D. Pa. 1997) (stating that the crux of a bad faith claim is the denial of benefits). Thus, even assuming the scheme pled by Plaintiff, Pennsylvania courts would not recognize this as a proper legal claim under § 8371. Accordingly, American General's Motion to Dismiss this Count will be granted.

C. Breach of Fiduciary Duty (Count III)

Plaintiff states in her Response that she is not pursuing the claim for breach of fiduciary duty against American General. See Response at 5 n.1. Accordingly, Count III will be dismissed as to Defendant American General.

D. Violations of Pennsylvania's UTPCPL (Count IV)

Finally, Plaintiff alleges violations of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201, et seq. ("UTPCPL"), based on the scheme described above, whereby American General is guaranteed an annual premium for the first year of insurance coverage, while only actually providing coverage for a more truncated period (as a result of mailing policies to the insured after their effective date). In her Complaint, Plaintiff claims that this violates provisions (vii), (xiv), and (xxi) of the UTPCPL.

Section 201-9.2(a) of UTPCPL creates a private right of action for "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property" as a result of the seller's deceptive or unlawful actions. Plaintiff's allegations fall outside the reach of the plain language of the statute. While Decedent applied for insurance with American General, he never actually "purchased" a policy from the Company; as the Court explained above, no contract or reasonable expectation of insurance ever existed in this case, meaning that Plaintiff cannot proceed as a purchaser under the UTPCPL. See Lauer v. McKean Corp., 1989 WL 206448, at *2 (Pa. Com. Pl. June 12, 1989) (rejecting claim that UTPCPL extends to one who intends or seeks to purchase goods, but is prevented from doing so by a fraudulent trade practice); Bonacci v. Save Our Unborn Lives, Inc., 11 Pa. D. & C. 3d 259, 262 (Pa. Com. Pl. 1979) (declining to interpret UTPCPL to include persons who attempt to enter a bargain or exchange with defendant and are injured as a result); see also Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 55 (3d Cir. 1992) (explaining

limited nature of private right of action under UTPCPL).[7]

In addition, every plaintiff asserting a claim under the UTPCPL must plead and demonstrate justifiable reliance on the alleged misrepresentation or wrongful conduct of the seller. See, e.g., Toy, 863 A.2d at 11. Without an actual purchase, it is unclear what would form the basis of a plaintiff's reliance. Indeed, in this case, Decedent would be unable to claim reliance. Assuming all facts alleged in the Complaint, American General first stated an effective date of March 3, 2004 – the alleged misrepresentation – when it mailed the policy to Decedent, before he signed and accepted the policy and before he had made a single premium payment. At that point, he was in no way bound to the terms of the policy and could have rejected the offer to contract without penalty. Accordingly, American General's Motion to Dismiss will be granted as to this Count.

IV. Conclusion

For the foregoing reasons, American General's Motion to Dismiss will be granted as to all Counts of the Complaint. An appropriate Order follows.

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[7] This conclusion is supported by the fact that the primary remedy under the statute is an action by the state attorney general. See, e.g., Valley Forge Towers South Condo. v. Ron-Ike Foam Insulators, Inc., 574 A.2d 641, 644 (Pa. Super. 1990). Clearly, § 201-9.2 was drafted to provide a private right of action to a circumscribed class of consumers injured by unlawful or deceptive trade practices, relying on actions by the attorney general to remedy practices affecting other members of the public-at-large, including potential consumers. See Lauer, 1989 WL 206448 at *2.

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v.	**:**	
	:	
AMERICAN GENERAL LIFE	**:**	
INSURANCE COMPANY, et al.	**:**	

ORDER

AND NOW, this 22nd day of March, 2005, upon consideration of Defendant American General Life Insurance Company's Motion to Dismiss (docket no. 5), Plaintiff's Response thereto, Defendant's Reply, and Plaintiff's Sur-Reply, it is **ORDERED** that the Motion is **GRANTED**. Accordingly, all Counts of the Complaint shall be **DISMISSED** as to American General Life Insurance Company.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.