

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

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| TEMPLE UNIVERSITY HOSPITAL, INC., : | CIVIL ACTION |
| Plaintiff : | |
| : | |
| : | |
| v. : | |
| : | |
| GROUP HEALTH, INC., <i>et al</i> , : | |
| Defendants : | NO. 05-102 |

MEMORANDUM AND ORDER

Gene E.K. Pratter, J.

January 12, 2006

This counterclaim has been filed as part of a dispute initiated by Temple University Hospital (Temple). Temple is a large health system that is seeking to recover \$10,950,162.12, plus interest and costs, for the treatment of Fred Tremarcke from September 6, 2002 to November 26, 2003, and again from March 24, 2004 to April 28, 2004. (Temple Amended Complaint ¶¶ 18, 22, 28, 30).¹ Temple sued three health insurers or related companies, Oxford Health Insurance, Inc. (Oxford), Group Health, Inc. (GHI), and MultiPlan, Inc. (MultiPlan), that Temple asserts are obligated, but have refused, to reimburse Temple for the amounts charged for the treatment of Mr. Tremarcke.

Oxford filed its counterclaim against Temple on July 29, 2005 claiming Temple was unjustly enriched by billings already paid to Temple by Oxford for treatment and services rendered to Oxford members other than Mr. Tremarcke, and that Temple breached the implied covenant of good faith and fair dealing in relation to its billing practices concerning the treatment

¹ Although not specified in the pleadings, the medical treatment and services rendered to Mr. Tremarcke appear to relate primarily to an organ transplant. Trans. of Oral Argument at 44-45, Nov. 2, 2005.

and services rendered to Mr. Tremarcke as well as treatment and services rendered to other Oxford members. Temple seeks to dismiss Oxford's counterclaims. Temple argues (1) that Oxford's unjust enrichment counterclaim must be dismissed because of the existence of a contract that ostensibly gives Temple the right to collect for the services billed, (2) that Pennsylvania does not recognize an independent action for breach of an implied covenant of good faith and fair dealing, and (3) the court may not add terms to an express written agreement. Oxford responds by arguing that (1) it has sufficiently plead a claim for unjust enrichment in the alternative, and (2) it has sufficiently plead breach of the implied covenant of good faith and fair dealing, arguing, however, that if the Court finds otherwise, it should be granted leave to amend its counterclaim.

At this stage of the proceedings, it remains to be seen whether Oxford as counterclaimant could state a claim for breach of the implied covenant of good faith and fair dealing if alleged properly, and the Court will permit Oxford the opportunity to try to do so. Additionally, because alternative pleadings are permissible, it would be premature to dismiss Oxford's counterclaim of unjust enrichment at this time.

I. FACTUAL BACKGROUND

Inasmuch as the issue before the Court concerns a motion to dismiss Oxford's counterclaim, the summary of facts presented below are the facts as alleged by Oxford in its affirmative pleading. See Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984).

Oxford and MultiPlan entered into a contract entitled "HMO Cost Savings Agreement" on September 1, 1992. Counterclaim ¶ 3. Subsequently, Oxford and MultiPlan amended the

HMO Cost Savings Agreement seven (7) times between September 1, 1992 and January 1, 2004 (collectively, as amended, the “Access Agreement”). Id. ¶ 4. MultiPlan then contracted with various providers of healthcare services (each a “MultiPlan Provider”) for discounted rates for services rendered to insureds of its clients. Id. ¶ 5.

Temple claims that it provided medical treatment and services to Mr. Tremarcke during the period from September 6, 2002 to November 26, 2003, and that the “charges” for the treatment and services totaled \$10,458,016.58. Id. ¶ 15. Temple also claims that it provided medical treatment and services to Mr. Tremarcke during the period from March 24, 2004 to April 28, 2004, and that the “charges” for the treatment and services for that period totaled \$492,145.54. Id. ¶ 16. Temple further claims that based on the Access Agreement involving Oxford and MultiPlan, Oxford is obligated to pay for the billed services that Temple allegedly rendered to Mr. Tremarcke during the periods Mr. Tremarcke was treated by Temple and his insured group was covered by Oxford, namely March 1, 2003 through April 28, 2004. Id. ¶ 17.

Under the terms of the Access Agreement, MultiPlan undertook to provide Oxford’s eligible group health plan participants (“Participants”) with access to MultiPlan’s Providers at discounted rates negotiated by MultiPlan. Oxford could elect whether or not to use the Access Agreement to pay for services rendered to its Participants by MultiPlan Providers. Id. ¶ 6. MultiPlan Providers billed Oxford for those services provided to Oxford Participants. If Oxford elected to use the Access Agreement to pay for such services, it sent the claim to MultiPlan, and MultiPlan repriced the claim to indicate the amount Oxford owed the MultiPlan Provider at the MultiPlan discount price. Id. ¶ 7. In exchange for granting Oxford access to the negotiated rates under the Access Agreement, Oxford was obligated to pay a fee to MultiPlan

when it elected to pay such claims pursuant to the Access Agreement. In most cases, the fee was based on a percentage of the costs that Oxford saved by using MultiPlan's Providers. Id. ¶ 8.

Temple claims that it is a MultiPlan Provider because on January 26, 1998, MultiPlan entered into a "Prompt Payment Discount Agreement Between Temple University Health System and MultiPlan, Inc." (the "Discount Agreement") which stated that Temple University Health System entered into the Discount Agreement on behalf of its "Member Providers," and included Temple as a Temple University Health System Member Provider in Attachment A of the Discount Agreement. Id. ¶¶ 10-11. Oxford alleges that the Discount Agreement does not specify either the type of rate or methodology Temple is permitted to use in determining the charges it submitted to MultiPlan's "clients" such as Oxford. Oxford asserts that the Discount Agreement simply provides that "[MultiPlan] shall reimburse [Temple] 90% of billed charges within thirty (30) days of receipt of claim or 100% of billed charges shall be due" and that the Discount Agreement does not define "billed charges." Further, Oxford claims that the Discount Agreement, as well as the Access Agreement, are ambiguous as to what type of rate or methodology Temple is permitted to use when determining its charges under the Discount Agreement. Id. ¶¶ 13-14.

Oxford claims that the amounts Temple billed for the treatment and services it allegedly rendered to Mr. Tremarcke are inflated, excessive, unreasonable, inaccurate, and not at negotiated rates. Id. ¶ 18. Oxford also claims that a number of the items Temple billed for were never in fact rendered to Mr. Tremarcke. Id. ¶ 19. Finally, Oxford claims that after Temple and MultiPlan entered the Discount Agreement, Temple increased its charged rates excessively and without a good faith basis, thereby defeating the purpose of the Discount Agreement. Id. ¶ 20.

Oxford claims Temple was unjustly enriched by billings already paid to Temple by Oxford for treatment and services rendered to Oxford members other than Mr. Tremarcke, and that if Oxford is required to pay the rates Temple demands for treatment and services rendered to Mr. Tremarcke, it would be paying substantially more than appropriate and reasonable for the services, thus unjustly enriching Temple. (Counterclaim Count I -- “Unjust Enrichment”).

Oxford further claims that there is an implied agreement in the contractual relationship outlined above that the items for which Temple billed were in fact rendered and that the charges for each item actually rendered were reasonable and appropriate, and not inflated excessively and without good faith basis. According to the Oxford counterclaim, over a number of years, Temple unilaterally and excessively and without good faith basis increased the rates charged to Oxford for the services allegedly rendered to Mr. Tremarcke and other Oxford members (Counterclaim Count II -- “Breach of the Covenant of Good Faith and Fair Dealing.”).

Temple moves to dismiss the counterclaim for failure to state a claim upon which relief can be granted. Oxford moves alternatively for leave to amend its counterclaim in the event Temple’s motion is granted.

II. DISCUSSION

A. The Legal Standard

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the pleading. Winterberg v. CNA Ins. Co., 868 F. Supp. 713, 718 (E.D. Pa. 2004). The Court must accept the complainant's allegations as true, Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984), and must consider “all reasonable inferences that can be drawn from them after construing them in the light most

favorable to the non-movant.” Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). A complaint or, in this instance, a counterclaim, may be dismissed “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon, 467 U.S. at 73. See also Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (“a complaint should not be dismissed for failure to state a claim unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

In addition to the question of whether a claim is cognizable under applicable law, the pleading standards against which Oxford’s counterclaim must be measured are those set out in the Federal Rules of Civil Procedure, most particularly Fed.R.Civ.P. 8(a) and (e), which call upon the pleader to present “a short and plain statement of the claim” where “each averment . . . shall be simple, concise, and direct.” The Supreme Court described the simplified pleading permitted by the Federal Rules as that which “will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Conley, 355 U.S. at 47.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing and Its Pleading Requirements

Temple argues that (1) Oxford’s claim of breach of the implied covenant of good faith and fair dealing should be dismissed because Pennsylvania does not recognize an independent cause of action for the breach of an “implied covenant of good faith and fair dealing,” and (2) that Oxford’s claim of breach of such an implied covenant would impermissibly graft implied covenants on matters specifically addressed in the contract itself.

Oxford responds by arguing that Temple’s billing practices were not in good faith and therefore violated a good faith interpretation of the contract provision obligating Oxford to pay

Temple its “billed charges” for medical services. Oxford also emphasizes that its pleadings should be read broadly to include a breach of contract claim based on the stated breach of implied covenant claim. Alternatively, if a liberal reading of the counterclaim fails to provide a basis for the claim, Oxford seeks leave to submit an amended counterclaim.

1. Implied Covenant of Good Faith and Fair Dealing

Temple claims that its Discount Agreement with MultiPlan provided that Oxford would pay the “billed charges,” and that attempts by Oxford to read any additional meaning into the term “billed charges” other than any charges actually billed, is an attempt to rewrite the contract. Essentially, Temple’s position is that if a charge is billed, it is to be paid - virtually on a “no questions asked” basis. Temple relies on Pennsylvania case law which advances the proposition that “courts are not generally available to rewrite agreements or make up special provisions for parties who fail to anticipate foreseeable problems.” In re Estate of Hall, 535 A.2d 47, 56 n.7 (Pa. 1987). The Pennsylvania Supreme Court also has determined that “[t]he law will not imply a different contract than that which the parties have expressly adopted. To imply covenants on matters specifically addressed in the contract itself would violate this doctrine.” Hutchison v. Sunbeam Coal Corp., 519 A.2d 385, 388 (Pa. 1986) (citations omitted).

Oxford responds by arguing that Temple urges a misinterpretation of the term “billed charges” in order to charge unreasonable and excessive rates. Further, the upshot of Oxford’s argument is that Temple’s rejection of any inherent reasonableness component to the “billed charges” term makes the term ambiguous, and, therefore, subject to interpretation by the courts.

Pennsylvania has adopted the concepts of general duties of good faith and fair dealing in the performance of a contract as advanced in the Restatement (Second) of Contracts §205.

Creeger Brick & Building Supply Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153 (Pa. Super. Ct. 1989). A similar requirement has been imposed in Pennsylvania upon contracts for the sale of goods within the Uniform Commercial Code. See 13 Pa.C.S. §1203. Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992).

“Good faith” is “[h]onesty in fact in the conduct or transaction concerned.” Somers, 613 A.2d at 1213 (quoting the Uniform Commercial Code, 13 Pa.C.S. §1201). Examples of bad faith can include “evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.” Somers, 613 A.2d at 1213 (Pa. Super. Ct. 1992) (quoting Restatement (Second) of Contracts, §205 cmt. d (1981)). Oxford pleads in its counterclaim that Temple “unilaterally and excessively . . . increased the rates” it charged Oxford. Counterclaim ¶ 23. Undisclosed, inflated charges are not consistent with “honesty,” and may be an “abuse of a power to specify terms.”

Nonetheless, the Court must consider whether imposition of a covenant of good faith and fair dealing on the term “billed charges” constitutes “rewriting the contract,” or a lawful application of an implied covenant recognized by Pennsylvania law. If one advances the proposition that the term “billed charges” can not grant carte blanche to demand any price one desires, the question becomes what relationship Temple’s “billed charges” bear to commercially reasonable, disclosed and agreed upon or otherwise justifiable charges for the services rendered. This is a question that ought not be answered at this stage of the litigation.

Therefore, viewing the allegations against Temple as true at this stage in the litigation, as well as in a light most favorable to Oxford, claims of breaches of the implied covenant of good

faith and fair dealing are feasible and, as a result, would survive a motion to dismiss, if correctly alleged under the auspices of a breach of contract claim.

2. Pleading Requirements For Breach of the Implied Covenant of Good Faith and Fair Dealing.

Temple argues that a party must make a claim for breach of contract which includes the elements of such a claim in order to maintain an action for breach of an implied covenant of good faith and fair dealing. Temple relies primarily on Engstrom v. John Nuveen & Co., 668 F.Supp. 953, 958 (E.D. Pa. 1987), which advances Temple's argument in the context of a claim by an at-will employee. The Engstrom court explained the legal framework this way: "[t]here may be an express or implied covenant of good faith and fair dealing in any contract between the parties, but if so, its breach is a breach of contract rather than an independent breach of a duty of good faith and fair dealing." Id. Stated in the negative, and relying on a court of common pleas opinion, Temple points out that "Pennsylvania law does not allow for a separate cause of action for breach of either an express or implied duty of good faith, absent a breach of the underlying contract." Commonwealth v. BASF Corp., No. 3127, 2001 Phila. Ct. Com. Pl. LEXIS 95, at *36 (Phila. Ct. Com. P. March 15, 2001).

While Oxford emphasizes the factual distinctions between a claim based on employment at-will and its claim against Temple, the pleading requirement identified by Temple has broad application. "In Pennsylvania, a covenant of good faith and fair dealing is implied in every contract. Pennsylvania law does not, however, recognize an independent claim for breach of the implied covenant of good faith and fair dealing." Lyon Fin. Servs. v. Woodlake Imaging, LLC, No. 04-3334, 2005 U.S. Dist. LEXIS 2011, * 21 (E.D. Pa. Feb. 9, 2005) (citations omitted). This is not a novel or outlier concept:

A breach of such covenant is a breach of contract action. Therefore, in order to survive the Motion to Dismiss, Plaintiffs need only plead properly the elements of a cause of action for breach of contract: (1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages.

McAllister v. Royal Caribbean Cruises, Ltd., No. 02-2393, 2003 U.S. Dist. LEXIS 24287, *14 (E.D. Pa. Sept. 30, 2003) (citing Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc., 246 F. Supp. 2d 394, 401 (E.D. Pa. 2002); J.F. Walker Co. v. Excalibur Oil Group, Inc., 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002)).

Here, Oxford has alleged that (1) it was a third party beneficiary of the Discount Agreement, (2) which included an implied duty to charge rates that were not inflated, excessive, or inaccurate, (3) a duty Temple allegedly breached, and (4) with damages to Oxford as a result. Counterclaim ¶¶ 31-35. But, as Oxford itself admits, Oxford “does not specifically indicate that the breach of the covenant of good faith and fair dealing is based upon Temple’s breach of the specific terms about ‘billed charges.’” Oxford’s Resp. at 11. Indeed, in the actual pleading, the claim itself is captioned “Breach of the Implied Covenant of Good Faith and Fair Dealing.” Therefore, Oxford’s counterclaim as presently configured does not include the technical breach of contract basis that is required in order to pursue a claim based on the breach of an implied covenant of good faith and fair dealing. Thus, Oxford fails to state a claim for breach of the implied covenant of good faith and fair dealing.

C. Oxford’s Crossmotion to Amend Its Counterclaim

Oxford urges that if the Court determines, as it has, that Oxford failed to state a claim concerning breach of the implied covenant of good faith and fair dealing, the Court should allow Oxford to amend its pleading.

Oxford argues that “[u]nder the liberal pleading philosophy of the federal rules as incorporated in Rule 15(a), an amendment should be allowed whenever there has not been undue delay, bad faith on the part of the [movant], or prejudice to the [nonmovant] as a result of the delay.” Long v. Wilson, 393 F.3d 390, 400 (3d Cir. 2004) (quoting Adams v. Gould Inc., 739 F.2d 858, 867-68 (3d Cir. 1984)). Amendment is not uncommon in situations such as that presented here. See e.g., Drysdale v. Woerth, No. 98-3090, 1998 U.S. Dist. LEXIS 18589, at *12 (E.D. Pa. November 18, 1998) (“As Plaintiffs’ claim for breach of covenant of good faith and fair dealing is subsumed by its claim for breach of contract, if Plaintiffs file a second amended complaint, Plaintiffs shall replead the allegations as a single count for breach of contract.”).

There is no suggestion that Oxford has proposed to amend its counterclaim in bad faith or that it will result in undue delay or impermissible prejudice to Temple. Therefore, Oxford’s motion to amend its counterclaim will be granted.

D. Unjust Enrichment and Alternative Pleading

Temple also argues that “[w]here an express contract already exists to define the parameters of the parties’ respective duties, the parties may avail themselves of contract remedies and an equitable remedy for unjust enrichment cannot be deemed to exist.” Villoresi v. Femminella, 856 A.2d 78, 84 (Pa. Super. Ct. 2004) (citation omitted).

Oxford responds by asserting that pleading in the alternative is permitted in federal court. In this regard Oxford is correct. Rule 8(e)(2) of the Federal Rules of Civil Procedure provides: “A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as the party has, regardless of consistency.” The

Third Circuit Court of Appeals straightforwardly observed: “This Rule permits inconsistency in both legal and factual allegations.” Independent Enters. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1175 (3d Cir. 1997).

At this stage of the litigation, the Court is not required to determine whether there is or is not a contract that governs the issue. Oxford is permitted to advance inconsistent theories pending maturation of the claims through pre-trial litigation, and Oxford must be allowed to proceed with alternative theories for relief.

III. CONCLUSION

For the reasons discussed above, the Court grants Temple’s Motion to Dismiss in part as to the counterclaim of breach of the implied covenant of good faith and fair dealing, denies the Motion in part as to the counterclaim for unjust enrichment, and grants Oxford’s Crossmotion to file an Amended Counterclaim. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

/s/ _____
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE

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ORDER

Gene E.K. Pratter, J.

January 12, 2006

AND NOW, this 12th day of January, 2006, upon consideration of Temple University Hospital's Motion to Dismiss (Docket No. 43), and the response thereto (Docket No. 50), it is hereby ORDERED that the Motion is DENIED in part as to the counterclaim for unjust enrichment and GRANTED in part as to the counterclaim of breach of the implied covenant of good faith and fair dealing, without prejudice to Oxford. It is FURTHER ORDERED that Oxford's Crossmotion (Docket No. 50) to file an Amended Counterclaim is GRANTED, and Oxford shall have ten (10) days from the date of this Order to file an Amended Counterclaim.

BY THE COURT:

/S/ _____

GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE