

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

NEW CONCEPT BEAUTY ACADEMY, : CIVIL ACTION  
INC. :  
 : NO. 97-5406  
v. :  
 :  
NATIONWIDE MUTUAL INSURANCE :  
COMPANY :

**MEMORANDUM AND ORDER**

YOHN, J.

November , 1997

In this diversity case arising under the law of Pennsylvania, plaintiff seeks damages for defendant's alleged bad faith breach of an insurance contract. Defendant Nationwide Mutual Insurance Company ("Nationwide") has filed a motion seeking to dismiss or strike each count of the complaint. For the reasons set forth below, defendant's motion will be granted as to the dismissal of plaintiff's Count IV. Defendant's motion will be denied in all other respects.

**STANDARD OF REVIEW**

For purposes of a motion to dismiss under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint, and must draw from them all reasonable inferences in the light most favorable to plaintiff. *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991). A motion to dismiss should be denied "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Graves v. Lowery*, 117 F.3d 723, 726 (3d Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102 (1957)). The likelihood that the plaintiff will ultimately prevail is not

material to the court's determination. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997). Therefore, dismissal under Rule 12(b)(6) is appropriate only where a plaintiff could not be granted relief "under any set of facts that could be proved consistent with the allegations." *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 71 (3d Cir. 1994) (quoting *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255-56, 114 S.Ct. 798, 803 (1994)).

## **BACKGROUND**

The following recitation of facts accepts as true the allegations contained in the complaint. Plaintiff New Concept Beauty Academy was insured by defendant Nationwide under commercial insurance policies providing business and personal property coverage, and business income coverage. Plaintiff paid all premiums that were due, and fulfilled all its obligations under the policies. The policies were in effect at all times relevant to the complaint.

On July 8, 1996, plaintiff sustained losses due to a broken water pipe in the basement of its business premises, and reported the claim to defendant the next day. Plaintiff submitted the amount of its losses in writing to defendant, requesting payment under its policies. Defendant has denied, delayed, or withheld payments due to the plaintiff, knowing plaintiff's claim to be valid. Despite repeated requests, defendant has refused to completely or reasonably investigate or process the claim, make payment, or otherwise satisfy the water loss claim. In addition, defendant misrepresented to plaintiff pertinent loss provisions and facts relating to the coverage under the insurance contracts.

## DISCUSSION

### 1. Count I—Breach of Good Faith and Fair Dealing

As the Supreme Court of Pennsylvania has pointed out, “the utmost fair dealing should characterize the transactions between an insurance company and the insured.” *Dercoli v. Pennsylvania Nat’l Mut. Ins. Co.*, 554 A.2d 906, 909 (Pa. 1989) (quoting *Fedas v. Insurance Co. of State of Pa.*, 151 A. 285 (Pa. 1930)). Pennsylvania has declined to recognize a cause of action under the common law of torts for a breach of this duty. *D’Ambrosio v. Pennsylvania Nat’l Mut. Ins. Co.*, 431 A.2d 966, 970 (Pa. 1981).<sup>1</sup> However, the supreme court has indicated that some plaintiffs may recover from an insurer based on a breach of the contractual duty of good faith and fair dealing. *See Miller v. Keystone Ins. Co.*, 636 A.2d 1109, 1112-13 (Pa. 1994) (contract damages unavailable against insurer absent evidence of fraud, intentional deception, misleading statements, or that insurer voluntarily acted as insured’s counsel); *Dercoli*, 554 A.2d at 909 (recognizing breach of duty where defendant insurer voluntarily assumed role of legal counselor). The court made it clear that a violation of the contractual duty of good faith and fair dealing will be found where: (1) there was some type of purposeful

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1. *D’Ambrosio* declined to create a common-law “cause of action *in tort* for breach of an implied covenant of good faith and fair dealing,” *id.* at 968 (emphasis added), finding that an adequate remedy existed in assumpsit. *Id.* at 972. In 1990, the legislature responded to *D’Ambrosio* by creating a statutory cause of action allowing punitive damages and attorney fees to be assessed for an insurer’s bad faith conduct. 42 Pa. C.S.A. § 8371; *see Lombardo v. State Farm Mut. Auto. Ins. Co.*, 800 F. Supp. 208, 213 (E.D. Pa. 1992).

misrepresentation, and (2) “the insurer voluntarily assumed to act as the insured's counsel.”  
*Miller*, 636 A.2d at 1112.<sup>2</sup>

Nonetheless, Nationwide argues that Count I must be dismissed because there is no common law remedy against an insurer for bad faith. In support, defendant cites *Greater New York Ins. Co. v. North River Ins. Co.*, 872 F.Supp. 1403, 1409 (E.D. Pa. 1995), *aff'd*, 85 F.3d 1088 (3d Cir. 1996). *Greater New York* points out only that “[t]here is no common law tort action for bad faith.” *Id.* (emphasis added); *accord D'Ambrosio*, 431 A.2d at 967-68 (action in tort will not lie for insurer's bad faith conduct).<sup>3</sup> Plaintiff’s claim in the instant case seeks no punitive damages, but only damages for an alleged breach of contract. Pl.’s Compl. at ¶¶ 11, 12. “*Miller* and *Dercoli* stand for the proposition that an action will, in some circumstances, lie in *contract* for breach of the duty of good faith and fair dealing. The court is

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2. District courts have been inconsistent in their interpretation of *Dercoli* and *Miller*. One approach is to read these cases as creating a narrow exception to the exclusion of common-law claims announced in *D'Ambrosio*. *E.g.*, *Falbo v. State Farm Life Ins. Co.*, No. 96-5540, 1997 WL 116988, at \*6 (E.D. Pa. Mar. 13, 1997) (dictum). Another approach has been to read them as falling outside the scope of *D'Ambrosio*'s exclusion, and as simply “defin[ing] a specialized subset of the circumstances in which the duty applies,” *Parasco v. Pacific Indem. Co.*, 870 F.Supp. 644, 646 (E.D. Pa. 1994) (“Parasco I”). Rather than limiting the scope of the duty of good faith to cases where an insurer undertakes to provide counsel, these courts find that “[t]he duty of fair dealing under Pennsylvania law requires the insurer to conduct its investigation in a fair and objective manner, and to deny an insured's claim only if good cause exists to do so.” *Parasco v. Pacific Indem. Co.*, 920 F.Supp. 647, 656 n.6 (E.D. Pa. 1996) (“Parasco II”) (citing *Diamon v. Penn Mut. Fire Ins. Co.*, 372 A.2d 1218, 1226 (Pa. Super. Ct. 1977)).

3. Defendant also cites for this overly broad proposition a footnote in *Johnson v. Beane*, 664 A.2d 96 (Pa. 1995), a case dealing with claims against an alleged tortfeasor’s insurer by a third party, not the insured. The *Johnson* footnote announces itself as pure dictum. It notes “we are thus precluded from deciding the case on this basis,” before stating, “There is no common law remedy in Pennsylvania for bad faith on the part of insurers.” *Id.* at 99 n.3. The Pennsylvania Supreme Court’s opinion in *Johnson* makes no reference to *Dercoli* or *Miller*, and there is nothing to indicate that the *Johnson* court intended to overrule those decisions.

therefore convinced that the duty of good faith and fair dealing must arise from a contractual duty, not a tort duty.” *Falbo*, 1997 WL 116988, at \*7 (emphasis in original). Because defendant’s motion to dismiss Count I relies upon a mischaracterization of plaintiff’s claim as sounding in tort, the motion will be denied.<sup>4</sup>

## **2. Count II—Breach of Fiduciary Duties**

Nationwide cites *Wood v. Allstate Ins. Co.*, No. 96-4574, 1996 WL 637832, at \*2 (E.D. Pa. Nov. 4, 1996), and *Greater New York*, 872 F.Supp. at 1409, in support of its argument that plaintiff fails to state a claim upon which relief can be granted because Pennsylvania courts do not recognize a common law tort against an insurance company for breach of fiduciary duty.

In dealing with punitive damages, the *Wood* and *Greater New York* courts agree that “[t]he Pennsylvania Supreme Court treats the breach of contractual duty of good faith and breach of fiduciary duty synonymously in the context of insurance cases,” and that “[t]here is no common law tort action for . . . breach of fiduciary duty. The ‘bad faith’ statute provides the sole remedy for punitive damages for insureds . . . who allege bad faith or breach of fiduciary duty by an insurer.” *Wood*, 1996 WL 637832, at \*2 (quoting *Greater New York*, 872 F.Supp. at 1409).

In *Greater New York*, a claim for common law breach of fiduciary duty was “dismissed insofar as it alleges a tort or seeks punitive damages.” *Greater New York*, 872 F.Supp. at 1409.

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4. Plaintiff’s complaint appears to allege the type of purposeful misrepresentation required to set forth a claim for the breach of the duty of good faith and fair dealing. *See* Pl.’s Compl. at ¶ 10(g)-(i). Defendant’s motion to dismiss fails to raise the issue of whether plaintiff’s allegations suffice to support an inference that Nationwide voluntarily assumed to act as counsel. Because of this, and in light of the possible applicability of this court’s decisions in *Parasco I* and *Parasco II*, I will not deny plaintiff the opportunity to present evidence clarifying the factual record.

In *Wood*, where a plaintiff sought damages for a tortious breach of fiduciary duties while also pursuing a cause of action for bad faith under 42 Pa. C.S.A. § 8371, the court concluded that a bad faith claim “subsumes claims for breach of fiduciary duty,” and the separate cause of action for breach of fiduciary duty was stricken as redundant. *Wood*, 1996 WL 637832, at \*2.

As the Middle District of Pennsylvania recently explained, “In Pennsylvania, there is no separate tort-law cause of action against an insurer for . . . breach of fiduciary duty: such claims must be brought in contract.” *Ingersoll-Rand Equipment Corp. v. Transportation Ins. Co.*, 963 F.Supp. 452, 453-54 (M.D. Pa. 1997) (citing *Greater New York*, 872 F.Supp. at 1406, 1409). The court noted that “the gist of a claim for the breach of an insurer's duties under the contract of insurance (including both fiduciary duties and the duty to exercise due care) is essentially contractual in nature. Relief for such a breach therefore must lie in contract, not in tort.” *Id.* at 454. In the instant case, plaintiff seeks only contract damages in its claim for breach of fiduciary duties in Count II. Pl.’s Compl. at 4. Therefore, defendant’s motion to dismiss Count II will be denied.<sup>5</sup>

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5. “The mere fact that an insurer and an insured enter into an insurance contract does not automatically create a fiduciary relationship. . . . However, the contract and the duties it imposes can give rise to a fiduciary relationship between the parties.” *Garvey v. National Grange Mut. Ins. Co.*, No. 95-0019, 1995 WL 115416, at \*4 (E.D. Pa. Mar. 16, 1995) (quoting *Connecticut Indem. Co. v. Markman*, No. 93-799, 1993 WL 304056, at \*5 (E.D. Pa. Aug. 6, 1993)). In the context of liability coverage, “an insurer only assumes a fiduciary duty when it asserts a stated right under the policy to handle all claims brought against the insured.” *Markman*, 1993 WL 304056, at \*6. Pennsylvania law is undeveloped as to what may give rise to an insurer’s fiduciary duty regarding casualty coverage. While “[n]o Pennsylvania law establishes a fiduciary duty based on the duty of good faith and fair dealing,” *id.*, “if an insurance company holds itself out to the insured as a fiduciary, then the duty is imposed.” *Dearry v. Liberty Mut. Ins. Co.*, No. 95-6569, 1997 WL 129099, at \*6 (E.D. Pa. Mar. 17, 1997) (citing *Dercoli*, 554 A.2d at 909). Although plaintiff has set forth no facts that would tend to establish a fiduciary duty under Pennsylvania law, defendant did not raise this issue in its motion to dismiss. Therefore, the court  
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### 3. Count III—Bad Faith

Defendant contends that the complaint does not allege facts that state a claim for which relief may be granted as to a violation of Pennsylvania’s Bad Faith Statute, 42 Pa. C.S.A. § 8371. In *Klinger v. State Farm Mut. Auto. Ins. Co.*, 115 F.3d 230 (3d Cir. 1997), the Third Circuit recently clarified the standard under which the court must evaluate a bad faith claim under § 8371. A plaintiff must satisfy “a two-part test, both elements of which must be supported with clear and convincing evidence: (1) that the insurer lacked a reasonable basis for denying benefits; and (2) that the insurer knew or recklessly disregarded its lack of reasonable basis.” *Id.* at 233 (citing *Terletsky v. Prudential Property & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994)). The *Klinger* court explicitly rejected any additional requirement of a showing “that the insurer was motivated by an improper purpose such as ill will or self-interest.” *Id.*

Plaintiff has incorporated by reference into Count III a list of instances of wrongful conduct that allegedly breached Nationwide’s duty of fair dealing and good faith. Pl.’s Compl. ¶¶ 10, 16. This wrongful conduct included, *inter alia*, denying or withholding payments knowing that plaintiff’s claim was valid, *id.* ¶ 10(a)-(c). Taking the allegations in the complaint as true, and construing all possible inferences in the light most favorable to plaintiff, I conclude that plaintiff is entitled to offer evidence to support its bad faith claim under § 8371.<sup>6</sup>

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5. (...continued)  
will permit further development of the factual record.

6. Defendant has also moved to dismiss with prejudice all claims for punitive damages in  
(continued...)

#### 4. Count IV—Uniform Insurance Practices Act

It is firmly established that Pennsylvania’s Uniform Insurance Practices Act (“UIPA”), 40 Pa. C.S.A. § 1171.1 *et seq.*, does not provide a private cause of action. *Parasco I*, 870 F.Supp. at 647; *Boyce v. Nationwide Mut. Ins. Co.*, 842 F.Supp. 822, 825 (E.D. Pa. 1994); *Romano v. Nationwide Mut. Fire Ins. Co.*, 646 A.2d 1228, 1232 (Pa. Super. Ct. 1994). Instead, that statute “vests the Pennsylvania Insurance Commissioner with exclusive authority to determine whether a given defendant has violated UIPA.” *Falbo*, 1997 WL 116988, at \*8. The courts are not empowered to determine whether there has been a violation of the UIPA. *Id.*; *Parasco I*, 870 F.Supp. at 647.

Although a trial court lacks “the requisite jurisdiction to impose sanctions under the various provisions of the UIPA and insurance regulations,” *id.* (quoting *Romano*, 646 A.2d at 1233), it nonetheless may “consider the provisions of Pennsylvania’s [UIPA] when determining whether an insurer has acted in bad faith.” *Parasco II*, 920 F.Supp. 647, 655 (citing *Romano*, 646 A.2d at 1233); *Turner Constr. Co. v. First Indem. of America Ins. Co.*, 829 F.Supp. 752, 763 (E.D. Pa. 1993) (recognizing that “unfair and deceptive acts or practices” proscribed by UIPA constitute acts of “bad faith” for purposes of § 8371); *Coyne v. Allstate*

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6. (...continued)

Count III. In a bad faith claim under § 8371, punitive damages “are awarded to punish a defendant for outrageous conduct, which is defined as an act which, in addition to creating ‘actual damages, also imports insult or outrage, and is committed with a view to oppress or is done in contempt of plaintiffs’ rights.’ Both intent and reckless indifference will constitute a sufficient mental state.” *Klinger*, 115 F.3d at 235 (quoting *Delahanty v. First Pa. Bank, N.A.*, 464 A.2d 1243, 1263 (Pa. Super. Ct. 1983)) (citations omitted). In light of *Klinger*, and based on plaintiff’s allegations that Nationwide misrepresented pertinent facts and contractual provisions, Pl.’s Compl. ¶ 10(g)-(i), and withheld payments knowing plaintiff’s claim was valid, *id.* ¶ 10(a)-(c), it would be premature at this stage for the court to determine that no basis may exist for the award of punitive damages.

*Ins. Co.*, 771 F.Supp. 673, 678 (E.D. Pa. 1991). Accordingly, this court may consider conduct regulated by the UIPA in the course of evaluating the claim stated in plaintiff's Count III, to determine whether special damages may be appropriate under 42 Pa. C.S.A. § 8371.

However, because plaintiff's Count IV seeks independently to assert a private cause of action and state a claim for relief based upon defendant's alleged violations of the UIPA, defendant's motion to dismiss will be granted as to Count IV.

#### **5. Defendant's Motion to Strike**

Defendant has moved under Rule 12(f) to strike each count of the complaint. Under that rule, "the court may order stricken from any pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). In general, motions to strike are disfavored and infrequently granted. *King v. M.R. Brown, Inc.*, 911 F.Supp. 161, 169 (E.D. Pa. 1995); Wright & Miller, *Federal Practice & Procedure: Civil 2d* § 1380, at 647-49 (1990). Motions to strike are often denied in the absence of a showing of prejudice to the moving party. *Great West Life Assurance Co. v. Levithan*, 834 F.Supp. 858, 864 (E.D. Pa. 1993). Because defendant has failed to show that it will be prejudiced by the court's consideration of the surviving claims in the complaint, defendant's motion to strike will be denied.

#### **CONCLUSION**

Defendant's motion to dismiss will be granted as to plaintiff's Count IV, which improperly seeks to assert a private cause of action for violations of Pennsylvania's Unfair Insurance Practices Act, 40 Pa. C.S.A. § 1171.1 *et seq.* In all other respects, defendant's motion will be denied. An appropriate order follows.

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NATIONWIDE MUTUAL INSURANCE :  
COMPANY :

**ORDER**

AND NOW, this        day of November, 1997, upon consideration of defendant's motion to dismiss and strike, and plaintiff's response thereto, and for the reasons set forth in the accompanying memorandum, IT IS HEREBY ORDERED that the motion to dismiss is GRANTED as to plaintiff's Count IV only. In all other respects, the motion is DENIED.

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William H. Yohn, Jr., Judge