

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

ZURICH INSURANCE COMPANY : CIVIL ACTION  
 :  
v. :  
 :  
HEALTH SYSTEMS INTEGRATION, INC, :  
and THE COMPUCARE COMPANY : NO. 97-4994

**MEMORANDUM AND ORDER**

HUTTON, J.

April 28, 1998

Presently before the Court are the Plaintiff's Motion for Partial Summary Judgment, Severance of the Bad Faith and Misrepresentation Counterclaims and a Stay of Discovery on those Counterclaims (Docket No. 22), the Defendants' Response (Docket No. 27), and the Plaintiff's Reply (Docket No. 28). For the following reasons, the Motion is granted in part and denied in part.

**I. BACKGROUND**

In this action, Plaintiff Zurich Insurance Company ("Zurich") seeks a declaratory judgment that it is not liable to defend or indemnify its insureds, Health Systems Integration, Inc. ("HSII") and The Compucare Company ("Compucare"),<sup>1</sup> for claims brought against them in separate proceedings by Independence Blue Cross ("IBC"). In their First Amended Answer and Counterclaims, HSII and Compucare countersued (1) to establish Zurich's obligation under the insurance policies (Counts I through VI), and (2) under various

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<sup>1</sup> HSII is a wholly-owned subsidiary of Compucare.

theories of tort for Zurich's conduct in denying coverage (Counts VII through XI) (the "Bad Faith Counterclaims"). Zurich now moves for summary judgment as to the Defendants' counterclaim for common law bad faith denial of insurance coverage (Count VII),<sup>2</sup> and to sever, and stay discovery as to, the Bad Faith Counterclaims pending a determination of the underlying coverage issue.

## II. DISCUSSION

### A. The Bad Faith Denial of Coverage Claim

#### 1. Standard of Review

A court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion, the court must draw all inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Under the Rule 56 framework, the moving party bears the initial burden of proving that there exists no triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where it has done so, the burden shifts, and the

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<sup>2</sup> In its Motion, Zurich also seeks summary judgment as to Count IX of the Defendant's First Amended Answer and Counterclaims, an alleged violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. Ann. § 201-1, et seq. Since Zurich filed its motion, however, the parties stipulated to this count's dismissal, and the Court has dismissed it by Order dated March 5, 1998.

nonmovant must present affirmative proof that triable issues remain or else face summary judgment. Fed. R. Civ. P. 56(e). The non-movant cannot survive summary judgment merely by insisting on its interpretation of the facts, or by relying on unsubstantiated allegations, general denials, or vague statements. Id.; Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

## **2. Analysis of Claim**

Count VII of the Defendants' First Amended Answer and Counterclaims is a claim for bad faith denial of insurance coverage under Pennsylvania common law. In Count VII, the Defendants allege that "Zurich intentionally, frivolously, and for unfounded reasons refused to defend or indemnify HSII in the arbitration proceeding brought by IBC, and failed to settle that claim within Zurich's policy limits," and that "Zurich's bad faith and unreasonable failure to honor its contract in connection with the arbitration proceeding has caused HSII harm." (Def's First Am. Answer and Countercls. at 24). As a remedy for this harm, the Defendants demand compensatory damages, costs, interests, attorneys' fees, and any further relief as is deemed just and equitable. (See id. at 25).

Zurich argues that it is entitled to summary judgment on this count because no such cause of action exists under Pennsylvania common law. In response, the Defendants cite a number of cases in which Pennsylvania and Third Circuit courts have applied Pennsylvania law to award insureds attorneys fees against their

insurers for bad faith denial of coverage. See, e.g., Kiewit Eastern Co., Inc. v. L & R Construction Co., Inc., 44 F.3d 1194, 1206 n.36 (3d Cir. 1995); Asplundh Tree Expert Co. v. Pacific Employers Ins. Co., 1991 WL 147461, \*9 (E.D.Pa. July 25, 1991); Carpenter v. Federal Ins. Co., 637 A.2d 1008, 1013 (Pa. Super. Ct. 1994).

In fact, there is no conflict between these two positions. Although the Pennsylvania Supreme Court held that a common law action for bad faith denial would result in excessive deterrence in an area already governed by the Unfair Insurance Practices Act, 40 Pa. Cons. Stat. Ann. § 1171 (1998), see D'Ambrosio, 431 A.2d at 507,<sup>3</sup> subsequent courts have found that an award of fees and costs does not implicate the same concerns, see, e.g., Asplundh, 1991 WL 147461, \*9 (rejecting tort theory for punitive damages, but permitting claim for attorneys fees and costs). Therefore, while no independent common law tort of bad faith denial exists under Pennsylvania law, see Polsell v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 529 (3d Cir. 1997) (citing D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 431 A.2d 966 (1981)), an insured may obtain, upon a showing of bad faith, an award of costs and fees incurred in litigating the underlying coverage dispute, see Kiewit, 44 F.3d at 1206-07.

In the present case, the Defendants have pled Count VII as an independent cause of action for bad faith denial. As no such cause

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<sup>3</sup> Of course, in 1990 the Pennsylvania Legislature rejected the D'Ambrosio Court's conclusion and enacted 42 Pa. Cons. Stat. Ann. § 8371, which establishes a private cause of action for bad faith denial.

of action exists under the common law, Zurich is entitled to summary judgment on this count. However, the Court notes, nothing precludes the Defendants from later seeking an award of costs and fees under the theory articulated in Carpenter, 637 A.2d at 1013, and Kiewit, 44 F.3d at 1206-07, as this remedy is available whenever an insured is forced to litigate insurance coverage and can demonstrate that its insurer denied coverage in bad faith.

**B. Severance and Stay**

Zurich next argues that the Bad Faith Counterclaims should be severed, and all discovery as to them stayed, pending a determination of the underlying coverage dispute. Its position is that these claims are legally distinct from the coverage issues, and that a determination of no-coverage will preclude liability under any of them as a matter of law. Therefore, it argues, these claims should be placed in suspense to save the parties the needless cost and acrimony associated with them until Zurich ultimately prevails on the coverage issue. Furthermore, Zurich argues, the claims should be severed and stayed because “[l]itigating the coverage issues together with the bad faith and misrepresentation claims will prejudice the determination of whether Zurich breached the terms of the insuring agreements.” (Pl.’s Mot. at 20).

Federal Rule of Civil Procedure 42(b) provides the district courts with authority to sever litigation and try it in separate stages. See American Nat’l Red Cross v. Travelers Indemn. Co., 924

F. Supp. 304, 306 (D.D.C. 1996). The Rule states:

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Fed. R. Civ. P. 42(b). The court is given broad discretion in exercising this power for the fairness and convenience of the parties. See Lis v. Robert Packer Hospital, 579 F.2d 819, 824 (3d Cir. 1978); Idzajtich v. Pennsylvania R.R. Co., 456 F.2d 1228, 1230 (3d Cir. 1972); In re Unisys Savings Plan Litigation, 1997 WL 299425, \* 2 (E.D.Pa. May 29, 1997) (Hutton, J.); Thompson v. Glenmede Trust Co., 1996 WL 529694, \*1 (E.D.Pa. Sept. 16, 1996) (Hutton, J.).

"A [party] seeking bifurcation has the burden of presenting evidence that a separate trial is proper in light of the general principle that a single trial tends to lessen the delay, expense, and inconvenience to the parties." Mangabat v. Sears Roebuck & Co., 1992 WL 211561, \*1 (E.D.Pa. August 26, 1992). Bifurcation is an "extraordinary remedy," id. at \*2, that "is not to be routinely ordered," Lis, 579 F.2d at 824, and in this case the Court declines to do so.

In its essence, Zurich's argument is premised upon the assumption that it will win the coverage issue. Accepting this

premise, it follows that Zurich should be granted its severance and stay, because any discovery and litigation concerning the Bad Faith Counterclaims would be a wasteful and pointless exercise. The Court cannot accept this premise, however, as it assumes the very thing that Zurich must prove.

Although some courts have seen fit to sever bad faith and misrepresentation counterclaims under these circumstances, see Travelers, 924 F. Supp. at 306-07, others have not, see Williams v. Treasure Chest Casino, 1998 WL 42586, \*9 (E.D.La. Feb 3, 1998) (denying insurer Zurich's motion to bifurcate in nearly identical circumstances) and no authority compels this Court to do so. Despite its efforts, Zurich has brought forward no creditable justification for either a severance or a stay. Accordingly, the motion for severance and stay is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
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v. :  
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HEALTH SYSTEMS INTEGRATION, INC, :  
THE COMPUCARE COMPANY, : NO. 97-4994  
and INDEPENDENCE BLUE CROSS :

O R D E R

AND NOW, this 28th day of April, 1998, upon consideration of Plaintiff's Motion for Partial Summary Judgment, Severance of the Bad Faith and Misrepresentation Counterclaims and a Stay of Discovery on those Counterclaims (Docket No. 22), the Defendants' Response (Docket No. 27), and the Plaintiff's Reply (Docket No. 28, IT IS HEREBY ORDERED that:

(1) Plaintiff's Motion for Summary Judgment as to Count VII of the Defendants' First Amended Answer and Counterclaims is **GRANTED**; and

(2) Plaintiff's Motion to Sever and Stay Discovery as to the tort counterclaims is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.