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

KRYSTYNA SECKEL and BUSINESS LOAN CENTER	:	CIVIL ACTION
v.	:	
THE MINNESOTA MUTUAL LIFE INSURANCE CO.	:	NO. 99-2834

MEMORANDUM

Dalzell, J. March 1, 2000

This action is based on Minnesota Mutual's refusal to pay proceeds under a lapsed life insurance policy. Currently before us are the parties' cross-motions for summary judgment. For the reasons that follow, we will grant Minnesota Mutual's motion and deny plaintiffs' motion.

Facts

On March 28, 1979, Krystyna Seckel's husband, Marinus B. Seckel ("Seckel"), bought from Minnesota Mutual an Adjustable Life Policy in the face amount of $125,000 ("the policy"). See Am. Compl. ¶ 6. Krystyna Seckel was the sole original beneficiary. In 1990, Seckel assigned up to $100,000 of the proceeds to Business Loan Center as collateral for a loan.

From November 28, 1989 through November 28, 1996, Seckel paid premiums through the policy's Automatic Premium Loan provision ("APL"). See Def.'s Ex. E. The APL feature loaned the amount of the quarterly premiums from the available cash value of the policy to prevent a lapse if the insured did not pay the premium within the thirty-one day grace period. The APL provision reads as follows:

> **Can you arrange for automatic premium loans to keep your policy in force?**
>
> Yes, if you asked for this service in your application . . . .
>
> If you have this service and you have not paid the premium that is due before the end of the grace period, we will
>
> (1) use any dividend accumulations you left with us to pay the premium, and
>
> (2) if necessary, we will make a policy loan to pay the balance of the premium.
>
> There must be enough dividend accumulations and loan values[1] to pay at least a quarterly premium, and if there are enough values, we will pay premiums up to the next policy anniversary. If the dividend accumulations and loan values are not enough to pay at least a quarterly premium, your policy will lapse.

Pls.' Ex. A, at 10-11 (emphasis in original) (footnote added). The policy paid an annual dividend, on the anniversary date, that Seckel elected to use to increase the cash value and extend the protection period.[2] See id. at 7.

Interest on an APL was payable in advance to the next anniversary date and annually in advance of each anniversary

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[1] The "loan value" of a policy is "its cash value . . . minus any indebtedness." Id. at 11. The "cash value", as of the date on which all premiums due have been paid, is "the cash value shown for that date in the Table of Policy Values plus the cash value of any paid-up additional insurance and the value of any policy improvement." Id. at 9.

[2] The anniversary date of a policy is "the same day and month as [the] policy date for each succeeding year [the] policy remains in force." Id. at 3. The "policy date" is the "effective date of coverage under th[e] policy and the date from which policy anniversaries, policy years, policy months and premium due dates are determined." Id.

thereafter. See id. at 11. If the insured elected not to pay the interest when it came due, the unpaid interest was added to the balance of the loan. See id.

On August 28, 1996 (the anniversary date), Seckel's policy had a net cash value of $846.69. See id. Ex. F. Prior to that date, Minnesota Mutual sent Seckel notice that the $160.56 quarterly premium was due, along with $385.02 in interest on his outstanding loan (for a total amount due of $545.58). See id. Ex. I. Seckel did not pay the premium and interest before the expiration of the grace period, so on October 7, 1996, the APL provision loaned Seckel the amount due and assessed an additional interest payment of $43.60 to cover the new loan. See Def.'s Ex. E. That same day, Minnesota Mutual issued an APL Statement advising Seckel that the loan account had been adjusted by a $160.56 policy loan to pay the premium through November 28, 1996 and an additional $428.42 to pay loan interest through August 28, 1997. See id. Ex. H.

On November 7, 1996, Minnesota Mutual sent Seckel a notice advising him that another quarterly premium of $160.56 was due on November 28, 1996 to cover the period from that day until February 28, 1997. See id. Ex. I. Seckel did not pay this premium, and on January 7, 1997 (forty days after the November 28 due date), Minnesota Mutual issued a Notice of Policy Lapse and Option to Reinstate.[3] See id. Ex. J. Minnesota Mutual's

[3] Plaintiffs dispute that the notice was mailed on (continued...)

computer system had determined that there was insufficient cash value to cover an additional quarterly APL and automatically generated the notice of the lapse that became final at the expiration of the thirty-one day grace period, or December 29, 1996. See id. Ex. M, at 57.[4]

Two days after the notice, while the policy was lapsed, Seckel died. Minnesota Mutual later paid the "Paid Up Life Insurance" of $1,030 to Business Loan Center. On June 3, 1999, plaintiffs brought this action alleging breach of insurance contract and bad faith. Currently before us are the parties' motions for summary judgment.[5]

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[3](...continued)
January 7; however, they admit that, for the purposes of this motion, the dispute it not material. See Pls.' Br. in Supp. of Mot. for Partial Summ. J. (hereinafter "Pls.' Br.") at [5] n.3.

[4] The cash value of the policy on November 28, 1996 was $5,932.13, and the outstanding loan as of that date was $5,792.21, leaving $139.92 available for an APL. Because the amount due was $160.56, there was not enough loan available to cover the premium, and the policy lapsed. See Pls.' Ex. N.

[5] Under Fed. R. Civ. P. 56(c), a motion for summary judgment should be granted "if 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." The moving party bears the burden of proving that there is no genuine issue of material fact in dispute, see Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986), and we view all evidence in the light most favorable to the nonmoving party, see id. at 587. When responding to a motion for summary judgment, the nonmoving party "must come forward with specific facts showing there is a genuine issue for trial." Id.; see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (holding that the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial).

Count I: Breach of Insurance Contract

A. The Advance Interest Payment

In its premium due notice for August 28, 1996, Minnesota Mutual demanded interest of $385.02 in addition to the premium of $160.56. When Seckel did not pay the premium (opting instead to rely on an APL for payment), Minnesota Mutual charged the premium of $160.56 to the policy, plus $428.62 for advance loan interest. Plaintiffs argue that this assessment of an additional $43.60 in interest, without demand or notice, constituted a material breach of the policy.[6]

Plaintiffs apparently have misapprehended the way in which the loan provisions of the policy work. The policy requires an insured to pay advance interest on APLs:

> Interest is payable in advance to your next policy anniversary and annually in advance on each policy anniversary after that. If you do not pay the interest on your loan when it is due, the unpaid interest will be added to your loan and charged at the same rate of interest as your loan.

Pls.' Ex. A, at 11.

Minnesota Mutual's assessment of $385.02 in interest in the August 28, 1996 notice was based on interest Seckel owed on his existing loans and assumed that he would pay cash for the premium due. When he instead elected to use the APL feature to pay the premium, this increased the amount of interest due and

[6] The policy lapsed because of a $20.64 shortfall, and the small sum of $43.60 is therefore quite significant.

owing by $43.60, thus accounting for the discrepancy between the amount demanded in the notice and the amount actually charged.

On October 7, 1996, Minnesota Mutual sent to Seckel an APL statement reflecting the August 28 APL and the interest assessment. It stated that:

> YOUR LOAN ACCOUNT HAS BEEN ADJUSTED BY A $160.56 POLICY LOAN AND AN ADDITIONAL $428.62 INTEREST CHARGE.
>
> $160.56 HAS BEEN USED TO PAY PREMIUMS FROM 08 28 1996 TO 11 28 1996.
>
> $428.62 HAS BEEN USED TO PAY LOAN INTEREST FROM 08 28 1996 TO 08 28 1997.
>
> . . .
>
> YOUR LOAN BALANCE IS NOW $5,792.21 WITH INTEREST PAID TO 08 28 1997.

Id. Ex. J. There is no evidence that Seckel ever objected to this assessment of interest.

The two cases plaintiffs cite in support of their argument that Minnesota Mutual's actions constituted a breach, Senin v. Metropolitan Life Ins. Co., 34 A.2d 910, 912 (Pa. Super. 1943), and Walsh v. Aetna Life Ins. Co., 43 A.2d 102, 105 (Pa. 1945), are inapposite. Senin dealt with an insurer's cancellation of a life insurance policy based on the insured's failure to pay interest the insurer had demanded prematurely. By contrast, here Minnesota Mutual did not demand any premature interest, and it cancelled the policy for failure to pay premium, not interest. Senin therefore does not apply.

Plaintiffs cite Walsh for the proposition that an insurer may not demand interest on a date other than the anniversary date unless the policy so provides. As we noted above, however, Minnesota Mutual did not assess intermediate interest -- it merely demanded interest for all of Seckel's loans as of the 1996 anniversary date, something it is allowed to do under the policy.

These two cases, therefore, provide no support for plaintiffs' arguments.[7]

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[7] Interestingly, the Pennsylvania Supreme Court in Walsh held that an insured has a duty to bring miscalculations to the attention of the insurer:

> The company asked for a tender of premiums on July 19, 1934 (when a premium was not in fact due,) and it said that if the premium was not paid then "the policy will cease." Upon receipt of this notice it was the insured's duty to call the company's attention to the error in its calculation and to challenge its statement as to the date the policy "will cease." Instead of doing this, the insured apparently accepted the company's calculations and conclusions and never thereafter tendered any premiums. . . . When after the receipt of the letter . . . the insured did nothing in respect to this policy the inference is legitimate that he considered it as terminating on July 19, 1934 and accepted the situation. If he had wished to keep his policy in force after the later date, he would have challenged the defendant's statement, and would have said that according to the loan value of this policy, it remains in force until a date subsequent to July 19, 1934 and at that subsequent date, the premium then due will be forthcoming.

Walsh, 43 A.2d at 106-07.

(continued...)

The provision regarding assessment of advance interest is clear and unambiguous, and Minnesota Mutual acted in accordance with it and did not breach the insurance contract. We therefore find that it is entitled to summary judgment on Count I of the complaint.

B. Plaintiffs' Other Arguments

Plaintiffs put forth three additional arguments in support of their motion for summary judgment on Count I. First, they argue that "including unaccrued interest in the calculation of policy cash values while excluding dividends is against public policy." Pls.' Br. at [9]. Plaintiffs accuse Minnesota Mutual of "manipulating" the interest charges and payments of dividends to its advantage. The policy, however, explicitly provides that dividends are credited on the policy anniversary. See Pls.' Ex. A, at 7 ("Each year we determine if your policy will share in our divisible surplus. We call your share a dividend and credit it to you on your policy anniversary . . . . "). The policy also explicitly and in simple English provides that interest is payable in advance. See id. at 11 ("Interest [on policy loans] is payable in advance to your next policy anniversary and

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[7](...continued)

In its October 7, 1996 APL statement, Minnesota Mutual clearly laid out the premium and interest charges that it had added to Seckel's loan. The statement included a telephone number and said "Please contact the servicing agency shown above if you have questions about this transaction." Pls.' Ex. J. Under Walsh, Seckel had a duty to bring any error to Minnesota Mutual's attention, something he apparently did not do.

annually in advance on each policy anniversary after that."). Seckel agreed to these clear terms when he purchased the policy. Minnesota thus did not "manipulate" the policy's terms to its advantage. Plaintiffs have produced no support for their argument that Minnesota Mutual's actions violated public policy, and we therefore reject it.

Next, plaintiffs argue that we must estop Minnesota Mutual from "asserting insufficient cash value on November 28, 1996, since it defeats the reasonable expectations of the insured." Pls.' Br. at [11]. Their argument is based on Minnesota Mutual's yearly policy reviews, which included the statement that "[w]hile the insured is living, [the] policy builds cash value and earns dividends." Pls.' Ex. C. They claim that, based on this statement, Seckel could reasonably expect that the cash value of the policy would continue to increase and would therefore contain sufficient value for future APLs. This argument fails for several reasons.

First, the Table of Policy Values, included in the policy at page 1B, clearly shows the policy's cash value going up and down. See id. Ex. A, at 1B. Thus, plaintiffs' statement that Seckel could reasonably have expected the base cash value of the policy to continue to increase is incorrect. Cf. Bensalem Twp. v. International Surplus Lines Ins. Co., 38 F.3d 1303, 1309 (3d Cir. 1994) (holding that, in most cases, "the language of [the] insurance policy will provide the best indication of the content of the parties' reasonable expectations").

Second, the cases plaintiffs cite in support of their argument deal with insurance coverage issues. Reliance Ins. Co. v. Moessner, 121 F.3d 895, 903 (3d Cir. 1997), concerned an exclusion in a policy for products liability claims based on carbon monoxide poisoning. Worldwide Underwriters Ins. Co. v. Brady, 1991 WL 125163 (E.D. Pa. June 26, 1991), dealt with a limitation clause in an automobile liability insurance policy. Notably, plaintiffs have cited no authority dealing with an insured's reasonable expectations with respect to the cash value of a life insurance policy.

Similarly, the leading Pennsylvania cases on this issue deal with issues of coverage. Collister v. Nationwide Life Ins. Co., 388 A.2d 1346 (Pa. 1978), concerned whether an insurer's receipt of an application for life insurance and the first premium payment resulted in coverage for the applicant, who died before the insurer issued the policy. And Tonkovic v. State Farm Mut. Auto Ins. Co., 521 A.2d 920 (1987), concerned an exclusionary clause that unilaterally limited the insured's scope of coverage. Furthermore, our Court of Appeals stated in Moessner that "the proper focus for determining issues of insurance coverage is the reasonable expectations of the insured", Moessner, 121 F.3d at 903 (emphasis added). As this matter does not deal with insurance coverage, but only with the duty to pay a premium when it is due, we find that plaintiffs have failed to demonstrate that the reasonable expectations doctrine applies.

Finally, because the insured is deceased, we have no evidence as to what his reasonable expectations actually were. The passage we quoted above from Moessner tells us, when determining issues of coverage, to look to the reasonable expectation of the insured. As that is impossible in this matter, plaintiffs cannot meet their summary judgment burden.

Plaintiffs then argue that Minnesota Mutual "failed to pay premiums to the next policy anniversary", as the policy allegedly required it to do. Pls.' Br. at [14]. This contention is based on the following policy provision:

> There must be enough dividend accumulations and loan values to pay at least a quarterly premium, and if there are enough values, we will pay premiums up to the next policy anniversary.

Pls.' Ex. A, at 10. They argue that this provision required Minnesota Mutual to pay all of Seckel's premiums from August of 1996 through August of 1997, because on August 28, 1996 Seckel had enough loan available to cover a quarterly premium. This argument is based on an unreasonable and tortured reading of this unambiguous provision, and we therefore reject it out of hand. The provision clearly states that, if there is sufficient value in the policy to cover a year's worth of premiums, Minnesota Mutual will loan the value of one year's premiums. Because there was not sufficient value in Seckel's policy for this to apply, the argument is meritless.

We therefore hold that Minnesota Mutual is entitled to summary judgment on Count I of plaintiffs' complaint.[8]

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[8] In subsection E of their brief in support of their motion for summary judgment, plaintiffs tersely set forth three disputed issues of fact for the jury to consider "if [we] cannot rule on [their other arguments] as a matter of law." Pls.' Br. at [15]. Because we have resolved all of their issues as a matter of law, and because we conclude that these so-called "disputed issues of fact" do not preclude summary judgment for Minnesota Mutual, we will not address them in detail. We will, however, give a brief explication of our rejection of the arguments.

Plaintiffs first argue that the reasonable expectations of the insured must be resolved by a jury if reasonable minds could differ. Based on our discussion of plaintiffs' reasonable expectation argument supra, we reject this argument without further analysis.

Next, plaintiffs argue that their actuarial expert, Gerald Rankin, opined that Minnesota Mutual should have used the 1980 CSO Mortality Table instead of the 1958 table to calculate Seckel's policy cash values, and that had it done so, there would have been sufficient loan value to cover the November 28, 1996 premium. To begin with, on its face Rankin's opinion does not meet the admissibility test of Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and we therefore cannot consider it in support of plaintiffs' opposition to Minnesota Mutual's summary judgment motion. Minnesota Mutual shows that Rankin's opinion (1) exceeds his authority as an actuary; (2) is equivocal, speculative, and lacks a solid foundation; (3) is without basis in Pennsylvania law, and (4) is self-contradictory. But much more to the point, the issue of which CSO table to apply is a legal one for decision by the Court. Indeed, the Pennsylvania General Assembly specifically provides in its Insurance Code statutory mortality table standards for "all ordinary policies of life insurance". 40 Pa. Cons. Stat. Ann. § 71(c)(1)(A)(i). We therefore conclude that this putative "issue of fact" will not preclude summary judgment for Minnesota Mutual.

Finally, plaintiffs argue that there is a material issue of fact about whether Minnesota Mutual tried to notify Business Loan Center about the status of the policy, claiming that failure so to advise amounts to actionable negligence. However, plaintiffs failed to plead a claim for anything that could be construed as alleging such negligence, and, in any event, the two-year negligence statute of limitations would here

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Count II: Bad Faith

In Count II, plaintiffs allege that Minnesota Mutual acted in bad faith when it failed to pay the face amount of the policy. Under 42 Pa. Cons. Stat. Ann. § 8471, we may grant them relief if we find that Minnesota Mutual acted in bad faith in handling their claim. In Polselli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994), our Court of Appeals, quoting Black's Law Dictionary 139 (6th ed. 1990), stated that:

> "'Bad faith' on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e., good faith and fair dealing), through some motive of self-interest or ill will; mere negligence or bad judgment is not bad faith."

To recover under a claim of bad faith, a plaintiff must demonstrate by clear and convincing evidence that the insurer did not have a reasonable basis for denying a claim and that it knowingly or recklessly disregarded the lack of such reasonable basis. See Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997); Saracco v. Vigilant Ins. Co., 2000 WL 202274, at *7 (E.D. Pa. Feb. 22, 2000); Savadove v. Vigilant Ins. Co, 1999 WL 236602, at *10 (E.D. Pa. Apr. 21, 1999).

On this record, it is clear that plaintiffs cannot make out a bad faith claim. Minnesota Mutual had a basis on which to

[8](...continued)
bar such a claim.

deny the claim, i.e., Seckel's nonpayment of the November 28, 1996 premium. Furthermore, plaintiffs have produced no evidence that Minnesota Mutual engaged in any unfair or manipulative practices. We therefore will grant summary judgment to Minnesota Mutual on Count II of the complaint.[9]

[9] Plaintiffs have moved for sanctions against Minnesota Mutual for its alleged failure properly to prepare a corporate designee for deposition. On October 13, 1999, plaintiffs noticed the deposition of Minnesota Mutual's designee, stating that defendant should produce the person with the most knowledge about the policy, including calculations of its cash value. On November 11, Minnesota Mutual produced Linda Grendahl, who is the immediate supervisor of Shelley Livermore, a senior claims representative (whose deposition plaintiffs also noticed). Plaintiffs claim that Grendahl's knowledge of the policy was not significantly different from Livermore's and that she knew nothing about the policy's cash value calculations. They state that Minnesota Mutual's failure to prepare its designee forced them to depose a Minnesota Mutual actuary, Debra Ann O'Brien, and they therefore (without citation to any authority) ask us to sanction defendant for the cost of O'Brien's deposition ($228 for transcription and $600 in counsel fees).

Plaintiffs apparently are attempting to impose the costs of their discovery on Minnesota Mutual. A review of the deposition transcript reveals that Grendahl testified extensively about the policy and the facts surrounding the lapse in coverage. Because Grendahl felt that a Minnesota Mutual actuary could better testify about the calculation of cash values, the parties agreed on a date for O'Brien's deposition. O'Brien later testified as to cash value issues. There is nothing that is sanctionable about Minnesota Mutual's conduct, and we will deny plaintiffs' motion.

(continued...)

An Order follows.

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[9](...continued)

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KRYSTYNA SECKEL and BUSINESS LOAN CENTER	:	CIVIL ACTION
v.	:	
THE MINNESOTA MUTUAL LIFE INSURANCE CO.	:	NO. 99-2834

ORDER

AND NOW, this 1st day of March, 2000, upon consideration of the parties' cross-motions for summary judgment (docket entry nos. 16 and 17) and all responses thereto, and plaintiffs' motion for sanctions and defendant's response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendant's motion for summary judgment is GRANTED;

2. Plaintiffs' motion for summary judgment is DENIED;

3. JUDGMENT IS ENTERED in favor of defendant The Minnesota Mutual Life Insurance Co. and against plaintiffs Krystyna Seckel and Business Loan Center;

4. Plaintiffs' motion for sanctions is DENIED; and

5. The Clerk shall CLOSE this case statistically.

BY THE COURT:

_____
Stewart Dalzell, J.