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

Frances Connolly	:	CIVIL ACTION
	:	
v.	:	03-5444
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Reliastar Life Ins. Co., Inc.	:	
	:	
and	:	
	:	
Madison National Life Ins. Co.	:	
	:	
and	:	
	:	
Leonard Conrad c/o Reliastar Life Ins. Co., Inc.	:	
	:	

MEMORANDUM AND ORDER

Joyner, J. **November 13, 2006**

Presently before the Court is Defendants Reliastar Insurance Company, Inc.'s ("ReliaStar"), Madison National Life Insurance Company's ("Madison"), and Leonard Conrad's ("Conrad") (collectively "Defendants") Motion for Summary Judgment ("D. Mot.") (Doc. No. 12), Plaintiff Dr. Frances Connolly's ("Dr. Connolly") response ("Pl. Mot.") (Doc. No. 13), and Defendants' reply thereto ("D. Rep.") (Doc. No. 14). For the reasons below, the Court GRANTS Defendants' Motion.

Background[1]

[1] The factual background is drawn primarily from Defendants' Memorandum of Law in Support of Summary Judgment ("D. Memo.") and supporting materials. Plaintiff offered little by way of factual background and in most instances does not contest the events occurred in the manner and order as Defendants describe. Where the parties disagree, the Court aptly makes note.

This is a dispute between an insurer and an insured. But this is not an insurance dispute in the typical sense. Nor is it a contract dispute (though Plaintiff suggests that). Dr. Frances Connolly, Ph.D. is not claiming that her insurer (ReliaStar) or its administrator (Madison) or collection agent (Conrad) failed to pay her any benefits due or investigate her claim to coverage in a timely manner. Dr. Connolly does not allege that Defendants owe *her* any benefits. Indeed, it is ReliaStar who has claimed (in a separate action) that Dr. Connolly must reimburse it for receiving excess benefits. And it is Defendants' efforts to collect these alleged excess benefits that has led to this lawsuit.[2]

Dr. Connolly claims that Defendants' conduct to collect these monies has been "outrageous, harassing and [in] bad faith." Plaintiff's Memorandum of Law in Opposition ("P. Memo.") at 1. Specifically, her complaint alleges that Defendants' conduct constitutes: (1) breaches of fiduciary, contractual and statutory duties (Count I); (2) violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201 et seq., Unfair Insurance Practices Act ("UIPA"), 40 P.S. § 1171.1 et seq., Unfair Claims Settlement Practices Regulation ("UCSPR"), 31 Pa. Code § 146.1 et seq. (Count II);(3) deceit

[2] It shortly will become clear that Dr. Connolly did in fact receive excess benefits.

(Count III); and (4) bad faith in violation of 42 Pa. Con. Stat. Ann. § 8371 (Count IV).[3]

Until August 1999, Dr. Connolly was Director of Personnel for the William Penn School District ("William Penn"). See D. Memo. at 5. That month she left her employment after becoming highly distressed emotionally and filed a claim for long-term disability benefits. See id. ReliaStar was William Penn's long-term disability insurance carrier. Madison was the long-term disability plan's ("Policy") administrator. Madison granted Dr. Connolly's claim and paid her full benefits for nearly 24 months. See D. Memo., Ex. 3 ("Butters' Decl."), at ¶ 3. Dr. Connolly does not contest that ReliaStar or Madison promptly investigated, processed and paid her claim.

Under the Policy, covered employees who become disabled because of mental illness – the basis of Dr. Connolly's claim – are entitled up to 24 months of benefits. See D. Memo, Ex. 2 ("ReliaStar Plan") at Page 1 - Special Provisions. But these benefits are reduced if the beneficiary receives certain "Other Income Benefits." See ReliaStar Plan at p. 4. Included as "Other Income Benefits" is any income received from the Social Security Administration or state retirement fund. See ReliaStar Plan at p.

[3] Plaintiff originally filed this action on September 8, 2003 in Philadelphia County Common Pleas Court. Defendants removed it to this Court on September 29, 2003. See Doc. No. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1).

B(1) (defining "Other Income Benefits"). Because the Policy presumes that a claimant will receive "other income" in the form of Social Security disability income ("SSDI") and state teachers' retirement benefits, the Policy's administrator (Madison) is permitted to reduce benefits owed under the Policy by the estimated amount of these presumed benefits.[4]

To avoid this difficulty, Dr. Connolly entered into a Reimbursement Agreement with ReliaStar on December 14, 1999. See D. Memo. at 3; Ex. 1 ("Reimbursement Agreement").[5] This agreement was advantageous to Dr. Connolly because it allowed her

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[4] PRESUMPTION OF CERTAIN COVERAGES. It is presumed that all of the following are true:

1. You are covered under the Federal Social Security Act, and a state teachers retirement fund or a state retirement fund.
2.You agree to apply for those benefits and/or any income benefit to which you may be entitled.
3. You are getting periodic cash payments under such programs in an amount equal to the amount you or your dependents would receive were they receiving such payments.

If for any reason you are not eligible for Social Security, state teachers, or state retirement benefits, you must give notice with evidence of this at the time you file a claim. ReliaStar Plan at p. 5

[5] The Reimbursement Agreement states in full:

> I, Frances T. Connolly, hereby agree to reimburse ReliaStar Life Insurance Company for any overpayment of my claim that may result from retroactive benefits received from Federal Social Security Disability, State Retirement Benefits, or other income benefits that may be due me as described on Page B1 of my Certificate of Insurance. My spouse, heirs, or assignees agree to reimburse the Company for retroactive benefits in the event of my death.

to receive more than the Policy's minimum benefit of $100 per month in advance of receiving SSDI and state teachers' benefits. See D. Memo. at 4; Butters Decl. at ¶ 15. Once she received those "other income" benefits, Dr. Connolly was to reimburse ReliaStar/Madison for any overpayment of benefits. Dr. Connolly subsequently did receive SSDI and state teachers' retirement benefits.[6] When Madison learned that Dr. Connolly had received these other benefits it naturally sought reimbursement of the excess benefits per the Reimbursement Agreement. Madison informed Dr. Connolly by letter on three separate occasions that she needed to remit overpaid benefits based on her SSDI income. See D. Memo at 6; Ex. 7 ("Sept. 10, 2001 letter"); Ex. 8 ("Oct. 2, 2001 letter"); Ex. 9 ("Feb. 5, 2002 letter").[7] Defendants claim that Dr. Connolly refused to do so without justification. See D. Memo at 6. Having been unsuccessful in obtaining reimbursement directly from Dr. Connolly, Madison put the claim in collection with LHC Enterprises ("LHC") in March 2002 and

[6] Dr. Connolly was (and continues to be) a participant in the Pennsylvania Pubic School Employee Retirement System ("PSERS").

[7] Defendants apparently did not learn the exact amount of benefits PSERS paid Dr. Connolly until subpoenaing her records directly from the PSERS in October 2003. Nevertheless, in their Delaware County Common Pleas action (filed September 17, 2002), Defendants sought damages for unjust enrichment on the belief that Dr. Connolly received benefits from PSERS in addition to SSDI. See D. Memo, Ex. 11 ("Delaware Co. Compl."); see also D. Memo, Ex. 5 (Record of Dr. Connolly's PSERS benefits).

directed Defendant Conrad to determine if the debt could be collected.[8]

Conrad first tried contacting Dr. Connolly on March 14, 2002. See Conrad Decl. ¶ 5. Over the next week or so Conrad spoke or left messages for Dr. Connolly several times until March 19th when Michael Pansini, Esq. ("Pansini") then informed him by voice mail that Dr. Connolly had retained his services and to contact him regarding Madison's claim. See id. ¶ 6. That same day Conrad called Pansini to discuss the reimbursement demand, explaining among other things that the demand amount was uncertain and might be more than indicated by Madison's letters.[9] See id. ¶ 7. He also informed Pansini that he would be in Philadelphia in two days and would like to meet to resolve Madison's claim. See id. ¶ 8. Dr. Connolly describes the calls from Defendants as being threatening and harassing. See P. Memo., Ex. A ("Connolly Aff."), at ¶¶ 5-9 (Defendants would call before 7:30 a.m. and as late as 10:30 p.m., and threatened "to come to her residence to collect the money," "to have [her] arrested," "to seize her bank account," and "to impose liens against [her]

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[8] LHC is not a defendant in this action. Defendant Conrad is a principal of LHC. See D. Memo, Ex. 4 ("Conrad Decl."), at ¶ 2.

[9] Dr. Connolly points to Defendants' uncertainty as to the ultimate reimbursement amount as evidencing that they pursued their claim against her in bad faith. See P. Memo at 5 ("Indeed, Defendants admit that they continued to change the amount they sought from her.") (citing Conrad's declaration).

property and assets.").

The next day (March 20th) Conrad called Pansini's law office several times trying to schedule a meeting with Dr. Connolly and Pansini for March 21st. See id. ¶ 9. These calls were unsuccessful. A paralegal in Pansini's office informed Conrad that Pansini was going on vacation the next day and would likely not return his calls. See id. ¶ 10. Conrad informed her that if he did not hear from Pansini or one of his associates he would be forced to conclude that Pansini did not actually represent Dr. Connolly. See id. ¶¶ 10, 11. He also immediately faxed a letter to Pansini's law office to confirm this conversation. See D. Memo, Ex. 10 ("Conrad Letter"); see also Conrad Decl. ¶¶ 10, 11. This too went nowhere and Conrad again contacted Dr. Connolly, explaining that he had been unable to reach Pansini. Dr. Connolly, however, represented that Pansini was her attorney, and Conrad returned the reimbursement demand to Madison. ReliaStar (c/o Madison) then filed a collection action against Dr. Connolly on September 17, 2002 in Delaware County Common Pleas Court. See Delaware Co. Compl.

Complaint filed, Defendants[10] proceeded with discovery in their suit against Dr. Connolly. And, as it often is, discovery turned out to be a contentious affair between the parties. Defendants offer that it was Dr. Connolly's strategy to take the

[10] With, of course, the exception of Defendant Conrad.

position that would "make life hardest" on them to complete discovery. Id.; see also D. Memo, Ex. 12 ("10/22/03 Stephenson Letter"). Plaintiffs, of course, dispute this characterization and in the interim filed this suit.[11] See P. Memo, Ex. C, p. 5 ("10/23/03 Pansini Letter"). At the heart of the discovery dispute was scheduling Dr. Connolly's deposition.

Defendants claim that "Dr. Connolly made herself unavailable for discovery requests, and in particular for [her] deposition." D. Memo. at 8. They attempted to depose Dr. Connolly twice in October and November 2003 but each time she claimed to be unavailable for unspecified medical reasons. See D. Memo at 8. Defendants had asked Dr. Connolly for medical evidence to justify her refusals in order to have a demonstrable basis to reschedule their impending November 25, 2003 trial date. See id.; see also D. Memo, Ex. 14 ("Oct. 7, 2003 Stephenson letter"). Defendants never received any such evidence. Dr. Connolly claims that she had made an offer to being deposed at her counsel's office but Defendant's rejected this offer. See P. Memo at 5; see also Oct. 23, 2003 Pansini Letter.[12]

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[11] As noted earlier, Dr. Connolly filed suit on September 8, 2003 in Philadelphia County Court of Common Pleas, and Defendants removed the case to this Court on September 29, 2003.

[12] Plaintiff's characterization of this letter in their memorandum of law is misleading. The October 23, 2003 letter does not say that Dr. Connolly *will be* available for a deposition at Pansini's office. Rather, it provides: "I [Pansini] will suggest to her that she *attempt* to make herself available if the

Undeterred by Dr. Connolly's refusal to provide medical evidence, Defendants proceeded to obtain video surveillance of her in early November 2003 - about the time of her scheduled deposition. See D. Memo. at 9; Ex. 15 (DVD containing surveillance video). In the video, Dr. Connolly can be seen shopping without difficulty at a B.J. Club outlet store and leaving her home readily. See id. The Delaware County Common Pleas Court (Burr, J.) accepted this surveillance evidence and ordered Dr. Connolly to appear for a deposition no later than January 5, 2004. Although Plaintiff's counsel communicated his "outrage" over Defendants' decision to videotape Dr. Connolly, there is no evidence in the record that Plaintiff actually sought discovery sanctions in the Delaware County proceeding. See P. Memo, Ex. C at 2 ("Nov. 25, 2003 Pansini Letter").

On July 9, 2004, Dr. Connolly - *in open court* – settled for the *full amount* ReliaStar/Madison demanded. See P. Memo, Ex. D ("Del. Co. Tr.) at 3 ("The Court: I understand the parties have agreed to settle this case for the total amount[.]"); see also D. Memo at 9. Nevertheless, Plaintiff contends that Defendants behavior during this proceeding – seeking to have a judgment

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deposition would be conducted in my office." (emphasis added). Plaintiff does not offer any evidence, however, that she in fact agreed to being deposed at Pansini' s office. Indeed, Defendants indicate that on October 30, 2003, Pansini notified them that Dr. Connolly would not appear at a scheduled November 12, 2003 deposition. See D. Memo. at 9. Plaintiff does not contest this fact.

entered against Dr. Connolly – was further evidence of their bad faith.

Discussion

I. Is Summary Judgment Premature?

Dr. Connolly argues that ruling on Defendants' motion for summary judgment is premature because a stay in this case "has just recently been lifted and no time has been permitted for the parties to engage in any discovery." Pl. Memo. at 10. With an opportunity to conduct further discovery, Plaintiff believes that she will uncover additional "facts of bad faith behavior" on the part of Defendants to support her claims. Pl. Memo. at 10. Defendants argue that Dr. Connolly is not entitled additional time for discovery because she has failed to meet the requirements of Fed. R. Civ. P. 56(f). See D. Rep. at 8.[13] Defendants are correct; plaintiff will not have more time for discovery.

Federal Rule of Civil Procedure 56(f) provides:

> Should it appear **from the affidavits** of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

[13] Plaintiff neither filed a separate motion pursuant to Rule 56(f) nor cited it in her memorandum of law.

Fed. R. Civ. P. 56(f) (emphasis added).

The rule's language is clear. The party opposing summary judgment *must* file with the district court an affidavit detailing the reasons why it requires a continuance to conduct additional discovery. The Third Circuit has interpreted Rule 56(f) to require an affidavit that specifies: (1) the particular information sought; (2) how the information, if uncovered, would preclude summary judgment; and (3) why this information has not been previously obtained. See Pastore v. Bell Telephone Co. of Penn., 24 F.3d 508, 511 (3d Cir. 1994) (citing Dowling v. City of Philadelphia, 855 F.2d 136, 140 (3d Cir. 1988)).

In the ordinary case, which this is, failure to comply with Rule 56(f) is fatal to a party's claim for additional discovery. See Bradley v. United States, 299 F.3d 197, 206 (3d Cir. 2002) ("We have made clear that, in all but the most *exceptional* of cases, failure to comply with Rule 56(f) is fatal to a claim of insufficient discovery on appeal.") (emphasis added, citations omitted).[14] "Constructively complying" with Rule 56(f) is

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[14] In Miller v. Beneficial Management Corp., the Court of Appeals concluded that the district court prematurely granted summary judgment and exempted plaintiffs from Rule 56(f)'s affidavit requirement because they had relied detrimentally on the Magistrate Judge's ruling waiving the requirement. 977 F.2d 834, 846 (3d Cir. 1992). Application of that case has been limited to its facts, however. See Pastore, 24 F.3d at 511 n.4; see also Bates v. Tandy Corp., No. 05-3851, 2006 U.S. App. LEXIS 16284, at *7 n.2 (3d Cir. June 27, 2006) (non-precedential) (noting that the applicability of Miller has been limited to its

insufficient to meet the affidavit requirement of the rule. In other words, raising a Rule 56(f) objection in a memorandum opposing summary judgment does not satisfy its affidavit requirement. The rule demands an affidavit and the district courts will only accept an affidavit in support of a Rule 56(f) motion. See Pastore, 24 F.3d at 511 ("Rule 56(f) clearly requires that an affidavit be filed. The purpose of the affidavit is to ensure that the nonmoving party is invoking the protection of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition. An unsworn memorandum opposing a party's motion for summary judgment is not an affidavit.") (citation and internal quotes omitted). Because no affidavit accompanies Dr. Connolly's opposition, the Court rejects her vague and generalized request for additional time to complete discovery.[15] Defendants' motion

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facts). Miller is the lone case in which the Third Circuit has excused a party for failing to file an affidavit when moving pursuant to Rule 56(f).

[15] Even if this were the "exceptional case" in which the Court could excuse submission of an affidavit, Dr. Connolly's memorandum of law lacks the necessary specificity to justify a continuance. More damning to the Plaintiff, and troubling to the Court, however, is her outright misrepresentation that a court-issued stay prevented her from undertaking discovery until recently. See P. Memo. at 10 ("[D]espite the fact that this case was filed in 2003, it was placed in a stay pending the outcome of Defendants' [Delaware County Common Pleas Court] action against Plaintiff. The stay has just recently been lifted and no time has been permitted for the parties to engage in any discovery."). Judge Weiner never stayed discovery, however, while the case was pending before him. And this Court has not done so either.

for summary judgment is properly before this Court.

II. Standard of Review

In deciding a motion for summary judgment under Fed. R. Civ. P. 56, a court must determine "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Medical Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (internal citation omitted). Rule 56(c) provides that summary judgment is appropriate:

> . . . 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.

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). On a motion for summary judgment, "the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable

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Indeed, Judge Weiner's April 29, 2004 order (Doc. No. 4) stated explicitly that: "**This matter remains ACTIVE**. It is further ordered that **all discovery** and settlement discussions **will continue** and if intervention by the Court is needed or desired, the parties may ask . . . ." D. Rep., Ex. A ("Judge Weiner's Order) (emphasis in original and added). Plaintiff has had more than two years since Judge Weiner's order to conduct the necessary discovery for evidence supporting her claims. But she failed to do so. For her to now ask the Court to delay consideration of Defendants' motion is farcical.

inferences in [its] favor." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party bears the initial burden of demonstrating the absence of a disputed issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Upon such a showing, the burden shifts to the non-moving party to present "specific facts showing the existence of a genuine issue for trial." Fed. R. Civ. P. 56(e). In doing so, the party opposing summary judgment cannot simply rest on the allegations contained in its pleadings and must establish that there is more than a "mere scintilla of evidence in its favor." Anderson, 477 U.S. at 249. Showing "that there is some metaphysical doubt as to the material facts" is insufficient to defeat a motion for summary judgment. Matsushita Elec. Indus. Co., 475 U.S. at 586. If the non-moving party fails to create "sufficient disagreement to require submission [of the evidence] to a jury," the moving party is entitled to judgment as a matter of law. Anderson, 477 U.S. at 251-52.

III. Dr. Connolly's Claims

A. Count I – Breach of Contractual, Fiduciary, and Statutory Obligations to Dr. Connolly

Under Pennsylvania law,[16] a plaintiff successfully states a claim for breach of contract by demonstrating:(1) the existence of a valid and binding contract; (2) that she has complied with

[16] The parties agree that Pennsylvania contract law governs this dispute.

the contract and performed all of her own obligations under it; (3) fulfillment with all conditions precedent; (4) breach of the contract; and (5) damages. See, e.g., Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa. 1996).

To succeed there first then must be a contract. And so often the dispute is over whether a written agreement (or other communications) between the parties created a contract. This issue is not present, however. Dr. Connolly never took the first step of identifying any agreement, yet alone contract, that Defendants breached.

Count I states that Defendants breached contractual obligations. See Compl. ¶¶ 20-22. But which obligation(s) of which contract(s) is not clear from either Plaintiff's Complaint or her opposition to summary judgment.[17] Although the parties entered into two separate contracts (the Policy and Reimbursement Agreement), Dr. Connolly does not allege that Defendants breached their obligations under either. The Complaint does make mention of the long-term disability plan, noting that Plaintiff was entitled to benefits under the Policy and that all premiums were paid in full. See Compl. ¶¶ 8-10. But Plaintiff does not allege (or more importantly proffer any evidence) that Defendants failed to perform their obligations under the Policy. As for the

[17] Plaintiff's response did not address Defendants' arguments for dismissing the breach of contract claim. For this reason alone the Court could dismiss Count I.

Reimbursement Agreement, the Complaint is silent.[18] Defendants' obligation under this agreement was to advance Dr. Connolly disability benefits in exchange for the promise that she would repay those benefits upon receipt of her SSDI and PSERS income. Plaintiff does not allege that Defendants failed to do so. In sum, Dr. Connolly's breach of contract claim cannot be premised on Defendants' failure to perform their obligations under either of these contracts.

But there is possible recourse for Plaintiff. Elsewhere in her Complaint, Dr. Connolly broadly asserts that Defendants were dilatory and abusive in their claim handling and did not "provide a reasonable factual explanation" for their actions. Compl. ¶ 18. She claims that this conduct constitutes a breach of Defendants' duty of good faith and fair dealing. See id. ¶ 16-18.[19]

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[18] Plaintiff acknowledges that Defendants seek reimbursement payments but not that the Reimbursement Agreement is the basis for their claim. See Compl. ¶ 11.

[19] Defendants did not breach either contract, so it might seem logical that Dr. Connolly could not successfully maintain a breach of the implied duty of good faith and fair dealing claim. Yet, from reviewing cases decided in this district, there is some indication that this is not a settled issue of Pennsylvania contract law – especially in cases of insurers dealing with insureds. Compare Comcast Spectator L.P. v. Chubb & Son, Inc., No. 05-1507, 2006 U.S. Dist. LEXIS 55226, at *67 (E.D. Pa. Apr. 8, 2006) ("Comcast does not dispute that we must dismiss the claim for breach of implied duty of good faith and fair dealing if we dismiss the breach of contract claim.") with Berks Mut. Leasing Corp. v. Travelers Property Cas., No. 01-6784, 2002 U.S. Dist. LEXIS 23749, at *11 n.6 (E.D. Pa. Dec. 9, 2002) ("[D]efendant asserts that plaintiff's claim for breach of the covenant of good faith must fail because 'Pennsylvania does not

Pennsylvania law likely implies the duty of good faith and fair dealing into every contract. See, e.g., Onal v. BP Amoco Corp., 275 F. Supp. 2d 650, 659 (E.D. Pa. 2003) (citing Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 721-22 (Pa. Super. 1996)).[20] And it certainly does in the case of an insurance policy. See Berks Mut. Leasing Corp., 2002 U.S. Dist. LEXIS 23749, at * 7 (citing Fedas v. Insurance Co. of State of Pennsylvania, 151 A. 285, 286 (Pa. 1930)). But Pennsylvania does not allow parties to enforce this duty in all cases. See Parkway

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allow for a separate cause of action for a breach of an implied duty absent a breach of the underlying contract.' . . . [I]t is not entirely clear to me that this proposition is an accurate statement of the law[.]") (citations omitted). Because the Court concludes that Dr. Connolly cannot show that Defendants breached the implied duty of good faith and fair dealing, it does not decide the issue of whether this claim is unavailable, as a matter of law, absent a breach of the underlying contract.

[20] Kaplan cites Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 153 (Pa. Super. 1989), as its principal authority for the proposition that Pennsylvania has implied the duty of good faith into every contract by adopting Restatement (Second) of Contracts § 205. The Creeger Brick court did no such thing. Rather, it only noted that § 205 "*suggests* that '[e]very contract imposes upon each party a duty of good faith and fair dealing . . . .'" 560 A.2d at 153 (emphasis added). The court then observed that Pennsylvania has recognized this duty in "limited situations." Id. at 153-54 (cataloguing the few instances). But no language in Creeger Brick embraces the sweeping conclusion that every contract under Pennsylvania law contains the implied duty of good faith and fair dealing. Nevertheless, a majority of Pennsylvania and federal courts have interpreted Creeger Brick as going this far and this Court will as well with these observations in mind. See also Acad. Indus. v. PNC Bank, N.A., 2002 Phila. Ct. Com. Pl. LEXIS 94, at *17-22 (May 20, 2002) (observing the lack of consensus on the issue of whether every contract under Pennsylvania law contains an implied duty of good faith and fair dealing).

Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 701 (3d Cir. 1993). Insureds may do so against insurers, however. See id.

An insurer breaches its duty of good faith, for example, by: (1) failing to investigate claims in a fair and objective manner and denying the claim without good cause; or (2) failing to inform the insured, in certain instances, of all benefits and coverages. See Berks Mutual Leasing Corp., 2002 U.S. Dist. LEXIS 23749, at *8 (collecting cases). Because the Policy required Defendants to handle Dr. Connolly's disability claim, allegations that they were dilatory and unreasonable in doing so would breach the duty of good faith and fair dealing.

Plaintiff's claim nevertheless fails. Were the Court considering a motion to dismiss, Dr. Connolly's bare allegations would suffice. But on summary judgment, Plaintiff must introduce evidence that supports her claim. And she has not. There is nothing in the record even hinting that Defendants failed to promptly investigate, process and pay her disability benefits. The record is clear; Defendants fulfilled their contractual obligations under the Policy. See Butters Decl. ¶¶ 10-12.

But any party (insurer or insured) may also breach the implied duty of good faith "if it evades the spirit of the bargain, acts with a lack of diligence, wilfully renders imperfect performance, or exercises contractually authorized discretion in an unreasonable manner." Berks Mutual Leasing

Corp., 2002 U.S. Dist. LEXIS 23749, at *8-9 (citing Somers v. Somers, 613 A.2d 1211, 1213 (Pa. Super. Ct. 1992)). So quite possibly, Plaintiff is claiming that Defendants efforts to recover the excess payments breached the duty of good faith. Plaintiff's opposition to summary judgment supports this view as it focuses exclusively on Defendants' collection efforts. And if this is the case, then the contract at issue is the Reimbursement Agreement.

This raises an interesting question, however. While it is clear that all Pennsylvania insurance contracts contain an implied duty of good faith, it is not entirely clear whether every contract entered into between an insurer and insured must as well. The Reimbursement Agreement was not an insurance policy but was Defendants' means of ensuring that it was reimbursed for paying excess benefits. Should the fact that one of the parties to the Reimbursement Agreement was an insurer covert it automatically into an insurance contract? The cases suggest that it is the relationship (insurer-insured), rather than the nature of the contract that gives rise to this duty.

But resolving this issue here is ultimately unnecessary. Defendants' efforts to enforce the Reimbursement Agreement did not breach their duty (if any) of good faith and fair dealing. Given Dr. Connolly's refusal to reimburse Defendants in accordance with the Reimbursement Agreement, the only reasonable

expectation (and outcome) was that Defendants would eventually file suit to collect back the excess payments. This was absolutely their right.

One party to a contract may, unless limited by the contract itself, always sue another for breach of that contract.[21] Dr. Connolly's implication otherwise is preposterous. That she disputes Defendants' claim (or the amount) does not automatically imbue their efforts to collect it (directly, through a collection agency or litigation) with bad faith. The parties entered into a Reimbursement Agreement, and Dr. Connolly has never contested its validity. Because the Reimbursement Agreement expressly obligates Dr. Connolly to repay excess benefits, it should have come as no surprise that Defendants would hold her to the agreement. Her claims then that "Defendants acted frivolously and with reckless disregard" and "Defendants did not have a reasonable basis for harassing and threatening Plaintiff under the policy" are implausible. Compl. ¶¶ 13, 14.[22] Defendants did

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[21] Pennsylvania also permits insurers to "recover payments under a mistake of fact or as the direct result of fraud or misrepresentation." Pappas v. UNUM Life Ins. Co., 2000 U.S. LEXIS 11309, at *8 (E.D. Pa. Aug. 10, 2000) (citing Van Riper v. The Equitable Life Assur. Soc., 561 F. Supp. 26, 33 (E.D. Pa. 1982), aff'd 707 F.2d 1397 (3d Cir. 1983). Because Defendants had a good faith basis to sue Dr. Connolly for breach of contract, the Court does not consider whether her actions may have constituted fraud or misrepresentation as an alternative basis for Defendants' collection action.

[22] These allegations also make little sense in light of the fact that Defendants brought their collection action on the basis

not breach the duty of good faith and fair dealing by initiating collection proceedings.

Dr. Connolly also alleges, however, that Defendants's investigative methods before and during the litigation in pursuit of the excess benefits breached their duty of good faith and fair dealing. See Compl. ¶¶ 15, 16, 18(a); P. Memo. at 4, 9. Pennsylvania courts have recognized this as a viable theory of recovery for statutory bad faith claims. See O'Donnell v. Allstate Ins. Co., 734 A.2d 901, 906 (Pa. Super. 1999) ("[T]he broad language of Section 8371 was to remedy all instances of bad faith conduct by an insurer whether occurring before, during or after litigation."); accord Hollock v. Erie Ins. Exch., 842 A.2d 409 (Pa. Super. 2004); Ridgeway v. United States Life Credit Life Ins. Co., 793 A.2d 972 (Pa. Super. 2002). There is no apparent reason, however, why this theory of recovery should be limited to statutory bad faith claims. Bad faith is after all bad faith regardless of whether the theory of recovery is tort or

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of the Reimbursement Agreement and not the Policy. Moreover, Dr. Connolly's affidavit contradicts these allegations. See Connolly Aff. at ¶¶ 17, 18 ("The reason that I did not pay Defendants right away for the money that I allegedly owed was because the figures communicated by Defendants were wrong. Once Defendants got the numbers correct, I agreed to pay the full amount."). Dr. Connolly cannot seriously contend that Defendants did not have a "reasonable basis" for their claim if she was only disputing the amount owed and in the end agreed to pay the full amount demanded by Defendants. See Del. Co. Tr. at 3. This is not a minor inconsistency and raises significant questions as to the overall credibility of Dr. Connolly's allegations.

contract.[23] But of course stating a claim and succeeding on it are not the same thing. And Dr. Connolly's bad faith claim fails under an investigative bad faith theory as well.

Dr. Connolly's allegations of bad faith investigative conduct encompass mainly two sets of events.[24] The first

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[23] The Court notes that the Supreme Court of Pennsylvania has yet to decide whether statutory claims of bad faith under 42 Pa. Cons. Ann. § 8371 sound in tort or contract. See Mishoe v. Erie Ins. Co., 824 A.2d 1153, 1161 n. 11 (Pa. 2003) ("Proper characterization of section 8371 claims is a matter that is unsettled.") (citations omitted).

[24] There are other more minor incidents that Dr. Connolly points to as evidencing Defendants' bad faith: (1) ReliaStar's claim that Conrad was a contractor and therefore not liable for his actions; and (2) Defendants' alleged varying of the amount that Plaintiff owed. See Pl. Memo. at 5, 8; Ex. C at p. 1 ("Aug. 12, 2003 Letter"). Neither of these allegations support Dr. Connolly's bad faith claim. Plaintiff has offered no evidence that Defendant ReliaStar's position in August 2003 regarding Conrad's status was not made in good faith. Whether Conrad was or was not an agent of ReliaStar was a legally debatable proposition (perhaps he was acting outside the scope of his employment), and regardless ReliaStar was under no obligation to concede the issue of Conrad's status especially before Dr. Connolly filed suit. Moreover, Defendants have not "attempted to wash their hands clean from their own devious actions" because they do not advance the position that they were not subject to liability for Conrad's actions in their motion for summary judgment. P. Memo. at 8.

As for the allegation that Defendants "continued to represent that she owed differing amounts of money," Dr. Connolly cites two pieces of evidence to support this claim: (1) Conrad's declaration and (2) a July 2, 2004 letter from Pansini, Plaintiff's attorney. Conrad admits that he advised Pansini that the amount demanded was uncertain. See Conrad Decl. at ¶ 7. And this makes perfect sense. In March 2002, Defendants had yet to learn exactly how much in PSERS benefits Dr. Connolly had received. It is therefore clear that the total reimbursement amount she might owe could increase. The fact that Defendants gave notice of this to Plaintiff's attorney is not evidence of bad faith conduct. It's the exact opposite. Plaintiff's second

occurred in March 2002 when Conrad contacted her; the second in October and November 2003 when Defendants attempted to depose her. The Court addresses the latter (the alleged discovery abuses) first.

Without question, attempting to depose Dr. Connolly – *the defendant* in the collection action – was at the heart of the discovery process. Since this conduct was clearly part of Defendants' discovery practices, it cannot be used as "evidence of bad faith . . . because these practices [are] subject to an exclusive remedy under the [Pennsylvania] Rules of Civil Procedure." Hollock, 842 A.2d at 415 (citing O'Donnell, 734 A.2d at 909). If Dr. Connolly questioned Defendants' discovery tactics, the appropriate response was to file a motion for a protective order in the Delaware County Court of Common Pleas proceeding. See Hollock, 842 A.2d at 415. It was not to pursue a collateral remedy in a separate civil action. Not only did Dr. Connolly never ask the Court of Common Pleas for relief, but

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piece of evidence – the July 2, 2004 letter – is equally unhelpful to this allegation. This was a letter from Pansini to Defendants disputing the claim amount. See P. Memo.; Ex. C, at p. 3 ("7/2/04 Pansini Letter"). Nowhere in the letter, however, does Plaintiff identify when Defendants specifically made different representations about the amount Dr. Connolly owed. It is merely a letter from *Plaintiff's attorney* challenging the amount Dr. Connolly owed. There is an obvious difference between Plaintiff's counsel disagreeing with Defendants' demand and Defendants actually varying the demand amount. Dr. Connolly's insinuation that Defendants were manipulating the claim amount or otherwise is disingenuous at best.

Judge Burr in fact relied upon the video surveillance of Dr. Connolly in ordering her deposition. Dr. Connolly's allegations of discovery abuse are therefore not germane to her bad faith claim.[25]

As to Conrad's communications with her, these are the *only* specific allegations of bad faith conduct in Dr. Connolly's Complaint. See Compl. ¶ 15 ("On several occasions in March of 2002, Defendant Leonard Conrad . . . made several threatening and harassing phone calls to Plaintiff[.]"). The Complaint also includes vague (and repeated) allegations that Defendants made threats to collect the excess benefits but offers nothing by way of who made them or when they occurred.

In her response, however, Dr. Connolly provides a bit more color. She claims that Defendants (without specifically saying Conrad) would call her before 7:30 a.m. and as late as 10:30 p.m., and threatened "to come to her residence to collect the

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[25] Dr. Connolly's Complaint *does not* contain these allegations of discovery abuse. And she never amended her Complaint to incorporate these events. Dr. Connolly filed her Complaint in September 2003 but the alleged discovery abuses did not take place until October and November 2003. It would have been proper for the Court to ignore these allegations entirely. But because this conduct is not, as a matter of law, relevant evidence to establish bad faith the point is academic. Compare with Hollock, 842 A.2d at 415 (holding that conduct during discovery gives rise to a bad faith claim only if the conduct amounts to a blatant attempt to undermine the truth finding process by, for example, intentionally concealing, hiding or otherwise covering-up the insurer's conduct)(citation and quotes omitted).

money," "to have [her] arrested," "to seize her bank account," and "to impose liens against [her] property and assets." Connolly Aff. at ¶¶ 5-9. She also claims that Defendants attempted to continue to contact her even after explaining she was represented by counsel. See id. at ¶ 10. She never specifies when these threatening calls occurred, however. Between her Complaint and affidavit, the only specific time she claims Defendants threatened her was on "several occasions" in March 2002.

Conrad does not deny speaking with Dr. Connolly several times between the 14th and 19th in March 2002 before receiving a message from Pansini that he was representing Dr. Connolly and to contact him regarding Madison's claim. See Conrad Decl.. at ¶¶ 5-6. Conrad asserts that only after he failed to reach Pansini (after several attempts) did he again contact Dr. Connolly. See id. at ¶¶ 10-14. Indeed, he even faxed a letter to Pansini's law office informing him of his intention to contact Dr. Connolly if he did not receive confirmation that Pansini or one of his associates actually represented her. See id. at ¶ 14; Conrad Letter. Conrad admits that he contacted Dr. Connolly after not hearing from Pansini (or his firm) about representing her but that he returned the claim demand to Madison after Dr. Connolly told him that Pansini did in fact represent her. See Conrad Aff. at ¶ 17. Dr. Connolly does not allege that any Defendant

contacted her again after March 2002.[26] Notably, this alleged conduct did not occur during a pending litigation – Defendants did not sue her until September 17, 2002.

On summary judgment, the Court must view the evidence and draw all inferences therefrom in the light most favorable to the non-moving party – Dr. Connolly. But even applying this favorable standard to her claims, she does not, as a matter of law, demonstrate that Defendants breached the implied duty of good faith and fair dealing (i.e. acted in bad faith) in their investigation and prosecution of Madison's claim. The March 2002 threats and harassment cannot be viewed in isolation but must be considered in the entirety of Defendants' efforts to collect the excess benefits. And viewed from this perspective, these threats alone do not establish bad faith conduct on the part of Defendants.

Defendants initially sent three letters to Dr. Connolly seeking reimbursement. This effort was unsuccessful - the record is unclear why – either Dr. Connolly refused to honor Defendants' repeated demands without justification or she simply ignored the letters. It was only after the letters did not persuade Dr. Connolly that Defendants placed her claim with a collection agency. And it was then, and only then, that Dr. Connolly says

[26] Not, of course, until Defendants filed their collection action.

she received any phone calls - threatening or otherwise - from Defendants.

But Conrad did not contact Dr. Connolly without good reason; he was collecting a debt on behalf of Madison. And even if he was overzealous in his efforts to collect the debt as Dr. Connolly claims, these isolated and few instances of threats or harassment do not rise to the level of bad faith on the part of Defendants. Conrad's contact with Dr. Connolly was limited to one week of telephone calls in March 2002. Dr. Connolly emphasizes that Conrad not only harassed her with phone calls but contacted her after she retained counsel. But on the record before the Court this overstates Conrad's actions. He decided to contact Dr. Connolly after learning she had retained an attorney only when Pansini did not return his phone calls and his office would not acknowledge representing Dr. Connolly. It was simply not bad faith for Conrad to contact Dr. Connolly after receiving no further acknowledgment from Pansini that he represented her. That Conrad then ceased contact with Dr. Connolly when she informed him that Pansini was in fact her attorney further militates against finding that Defendants acted in bad faith. Dr. Connolly has offered no evidence to discredit or refute Conrad's explanation of these events. She also does not allege that Defendants threatened her again after March 20, 2002.

And while her affidavit suggests that Conrad may have

violated Pennsylvania's Fair Credit Extension Uniformity Act ("FCEUA"),[27] the Court holds that violating those statutes does not *per se* establish that Defendants acted in bad faith. The Third Circuit has already observed that violations of the UIPA or UCSPR do not establish *per se* bad faith conduct. See Diner v. United Services Automobile Assoc. Cas. Ins. Co., 29 Fed. Appx. 823, 827 (3d Cir. Jan. 24, 2002) (non-precedential). The Diner court explained that the UIPA (and UCSPR) "prohibit[] unfair methods of competition" or "deceptive acts or practices" in the insurance industry. But that violations of these statutes "did not have relevance to the question of whether or [not] the insurer had a reasonable basis for denying benefits," i.e. act in bad faith with respect to the insured. Id. Similarly, the FCEUA establishes "what shall be considered unfair methods of competition and unfair or deceptive acts or practices with regard to the collection of debts." 73 Pa. Stat. Ann. § 2270.2. The structure of the FCEUA and the UIPA/UCSPR therefore parallel one another. And if violations of the UIPA/UCSPR do not *per se* establish bad faith in the context of satisfying claim demands, likewise technical violations of the FCEUA do not establish *per se* bad faith investigative conduct. That Defendants might have

[27] The FCEUA delineates the type of conduct that constitutes unfair or deceptive acts or practices with regard to debt collection. See 73 Pa. Stat. Ann. §§ 2270.2, 2270.4. Dr. Connolly does not allege that Defendants violated the FCEUA.

violated the FCEUA on isolated occasions during a nearly three year effort to recoup the excess benefits does not mean that Defendants overall pursuit of their claim was not reasonable and in good faith.

Defendants aggressively pursued their claim against Dr. Connolly. They filed suit against her in September 2002. And after nearly three years, Defendants were willing to go to trial to recoup the overpaid benefits. At no point did Defendants abandon their claims against Dr. Connolly. Bad faith is such conduct that "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." Terletsky v. Prudential Property and Casualty Ins. Co., 649 A.2d 680, 688 (Pa. Super. 1994) (citing Black's Law Dictionary 139 (6th ed. 1990)) (emphasis added). Defendants did not act with a dishonest purpose or ill will toward Dr. Connolly. She owed them a debt and they pursued the recovery through diligent and legal means for nearly three years. It is inconceivable on this record to conclude that Defendants breached the implied duty of good faith and fair dealing – acted in bad faith – while investigating and prosecuting their claim against Dr. Connolly.[28]

[28] Pennsylvania's law of bad faith in the insurance context unfortunately lacks clarity and is not the straightforward inquiry one might hope for. There are three considerations that arguably pull in different directions. First, Pennsylvania recognizes the implied duty of good faith in all insurance

Plaintiff claims that Defendants violated fiduciary obligations as well. An insurer does not automatically owe a fiduciary duty to the insured under Pennsylvania law, however. See, e.g., Belmont Holdings Corp. v. Unicare Life & Health Ins.

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contracts. As such, insureds may bring a contract-based cause of action for breach of this duty. Second, Pennsylvania has a statutory cause of action for bad faith in the insurance context (42 Pa. Cons. Stat. Ann. § 8371) ("Section 8371"). Third, Pennsylvania courts disfavor allowing "an implied duty of good faith claim to proceed where the allegations of bad faith are identical to a claim for relief under an established cause of action." Northview Motors, Inc. v. Chrysler Motors Corp., 227 F.3d 78, 92 (3d Cir. 2000) (citing Parkway Garage, Inc., 5 F.3d at 701-702) (internal quotes omitted)). Thus, the apparent dilemma is whether a court should allow an contract-based good faith claim to proceed when the allegations supporting that claim mirror those supporting a statutory bad faith cause of action. And this is more than just semantics; for example, courts have consistently interpreted Section 8371 as limited to causes of action arising out of an insurer's denial of a claim or benefit. See, e.g,. See Ridgeway, 793 A.2d at 976. The burden of proof for each might also differ. Section 8371 requires clear and convincing evidence. See Keefe v. Prudential Prop. & Cas. Ins. Co., 203 F.3d 218, 227 (3d Cir. 2000) (citing Cowden v. Aetna Cas.& Surety Co., 134 A.2d 223, 229 (Pa. 1957). But a bad faith claim sounding in contract (i.e. breach of the implied duty of good faith and fair dealing) might only require a preponderance of evidence to succeed. See Snyder v. Gravell, 666 A.2d 341, 343(Pa. Super. 1995) (burden of proof for contract claims is by a preponderance of the evidence). The Court has not found a single case explicitly stating whether the burden of proof for a breach of the implied duty of good faith and fair dealing claim is by a preponderance of the evidence (because it is a contract claim) or by clear and convincing evidence (because it is essentially a bad faith claim). And further confusing the situation is the Supreme Court of Pennsylvania's holding in Birth Center v. St. Paul Caompanies, Inc., 787 A.2d 376 (Pa. 2001), that an insured may bring a bad faith action against the insurer as *both* a Section 8371 claim *and* a contract cause of action. The Court believes it is necessary to highlight these issues because of the frequency with which insureds bring bad faith claims in both federal and Pennsylvania courts.

Co., No. 98-2365, 1999 U.S. Dist. LEXIS 1802, at *10 (E.D. Pa. Feb. 5, 1999) ("Under Pennsylvania law, 'the mere fact that an insurer and an insured enter into an insurance contract does not automatically create a fiduciary relationship.'") (citation omitted). This duty only arises in limited circumstances such as where the insurer asserts a right to defend claims against the insured. See Smith v. Berg, No. 99-2133, 2000 U.S. Dist. LEXIS 4513, at * 15 (E.D. Pa. Apr. 10, 2000) (citation and quotes omitted). Because Defendants are in an adversarial position to their insured, Dr. Connolly, that type of limited circumstance does not present itself and Defendants do not owe Plaintiff a fiduciary duty in this case. With no duty, there is nothing to breach, and the Court dismisses this claim.

Plaintiff has also alleged that Defendants breached statutory obligations. But like her breach of contract claim, this too lacks a key element – a statute. With that piece missing, the Court accordingly dismisses her Count I statutory claim.

B. Count II – Violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, Unfair Insurance Practices Act, and Unfair Claims Settlement Practice Regulations

1. Unfair Trade Practices and Consumer Protection Law ("UTPCPL")

As a fraud prevention statute, the UTPCPL proscribes a wide range of "unfair or deceptive acts or practices.". 73 Pa. Cons.

Stat. § 201-2(4)("Section 201-2(4)") (defining "Unfair Methods of Competition and "Unfair or Deceptive Acts or Practices"); see also 73 Pa. Cons. Stat. § 201-3; Weinberg v. Sun Co. Ins., 777 A.2d 442, 446 (Pa. 2001). Its "purpose is to ensure fairness in market transactions and to place sellers and consumers on equal footing." Baker v. Family Credit Counseling Corp., 440 F. Supp. 2d 392, __, No. 04-5508, 2006 U.S. Dist. LEXIS 51833, at *49 (E.D. Pa. 2006) (citing Pennsylvania v. Monumental Properties., Inc., 329 A.2d 812, 816 (Pa. 1974)). And to effectuate this purpose, Pennsylvania courts interpret it liberally. See, e.g., Cavallini v. Pet City & Supplies, Inc., 949 A.2d 1002, 1004 (Pa. Super. 2004) (citations omitted).

Dr. Connolly did not identify which provisions of Section 201-2(4) Defendants allegedly violated. Courts find this a helpful and necessary detail because Section 201-2(4) prohibits varying forms of fraudulent behavior, including for example, false or misleading advertising (§ 201-2(4)(ii, ix, x, xii)), improper solicitations (§ 201-2(4)(xvii)), and certain incomplete disclosures in the sale of new motor vehicles (§ 201-2(4)(xx)). And ordinarily which provision(s) of Section 201-2(4) a plaintiff alleges that a defendant violated informs a court as to the facts a plaintiff needs to advance in order to maintain a UTPCPL claim. Instead, here the Court must to go the other way – first review Dr. Connolly's allegations and then decide if Section 201-2(4)

reaches them.

Dr. Connolly makes a number of allegations that sound in fraud. She alleges that Defendants:

> (1) acted with the motive of self interest by engaging in improper insurance practices toward Plaintiff by engaging in behavior which includes . . . [k]nowingly and intentionally having and/or permitting its employees, agents, representative and/or assigns to lie and use falsehood when attempting to collect monies allegedly due from their insureds, including Plaintiff (Compl. ¶¶ 18(f), 26(ix));
>
> (2) [m]isrepresented pertinent facts, policy or contract provisions relating to disputes at issues (Compl. ¶ 26(i)); and
>
> (3) willfully and/or recklessly misrepresented . . . the nature and extent, terms, conditions and duration of the coverage (Compl. ¶ 28).

These allegations could fit either section (v), which prohibits "represent[ations] that goods or services have . . . benefits . . . that they do not have," or section (xxi), which acts as a catch-all anti-fraud provision and prohibits "any fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding." 73 Pa. Cons. Stat. § 201-2(4)(v), (xxi).

But whichever section (if not both) applies has no substantive bearing on the Court's analysis, because to successfully state a claim under either requires satisfying the traditional common law elements of fraud. See Piper v. American National Life Ins. Co. of Texas, 228 F. Supp. 2d 553, 560 (M.D. Pa. 2002) (section (xxi)(citation and internal quotes omitted); Weisblatt v. The Minnesota Mutual Life Ins. Co., 4. Supp. 2d 371,

385 (E.D. Pa. 1998) (section (v)). And Dr. Connolly cannot do this.

In Pennsylvania, the elements of common law fraud are: (1) misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the defrauded party; and (5) damages proximately caused by the fraud. See, e.g., Piper, 228 F. Supp. 2d at 560 (citing Prime Meats v. Yochim, 619 A.2d 769, 773 (Pa. Super. 1993)). A plaintiff must establish each element with clear and convincing evidence. See, e.g., Weisblatt, 4 F. Supp. 2d at 378 (citations omitted).

Dr. Connolly has offered no evidence supporting her allegations. She does not identify which terms Defendants allegedly misrepresented. She does not describe the nature of these alleged misrepresentations. She does not explain how she relied upon these alleged misrepresentations (which are never revealed to Defendants or the Court) when either signing up for the Policy or agreeing to the terms of the Reimbursement Agreement. She also alleges no damages that resulted from her reliance on these unidentified misrepresentations made by Defendants. In a word her claim is meritless. Plaintiff has not made the slightest effort to proffer any evidence to support these very serious allegations. The Court therefore dismisses Dr. Connolly's frivolous UTPCPL claim.

2. Unfair Insurance Practices Act ("UIPA") and Unfair Claims Settlement Practice Regulations

Dr. Connolly also claims Defendants' actions violated Pennsylvania's UIPA, Pa. Stat. Ann. §§ 1171.1, et. seq., and Unfair Claims Settlement Practices Regulations ("UCSPR"), 31 Pa. Code §§ 146, et. seq. The case law is abundantly clear that there is no private cause of action under the UIPA or UCSPR. See, e.g., Kornafel v. United States Postal Service, No. 99-6416, 2000 U.S. Dist. LEXIS 711, at *11-12 (E.D. Pa. Jan. 28, 2000) (citing Smith v. Nationwide Mutual Fire Ins. Co., 935 F. Supp. 616, 619-20 (W.D. Pa. 1996)). The Court accordingly dismisses Plaintiff's UIPA and UCSP claims.[29]

C. Count III – Deceit

The elements of deceit mirror those of common law fraud in

[29] It perplexes the Court why Plaintiff continued to pursue direct relief under the UIPA and UCSPR even after Defendants' memorandum of law indicated (with citation) that no private cause of action exists. Indeed, Judge McLaughlin made the point of observing (as of *1996*) the large number of federal and Pennsylvania decisions holding that there was no private right of action under the UIPA or UCSPR. See Smith, 935 F. Supp. at 620 (citing Leo v. State Farm Mut. Automobile Ins. Co., 908 F. Supp. 254(E.D. Pa. 1995); MacFarland v. U.S. Fidelity & Guarantee Co., 818 F. Supp. 108, 110 (E.D. Pa. 1993); Lombardo v. State Farm Mut. Auto Ins. Co., 800 F. Supp. 208, 212 (E.D. Pa. 1992); Henry v. State Farm Ins. Co., 788 F. Supp. 241, 245 (E.D. Pa. 1992); Williams v. State Farm Mut. Auto Ins. Co., 763 F. Supp. 121, 124 (E.D. Pa. 1991); Romano v. Nationwide Mut. Fire Ins. Co.,646 A.2d 1228, 1232 (Pa. Super. 1994); Strutz v. State Farm Mut. Ins. Co., 609 A.2d 569, 571 (Pa. Super. 1992), appeal denied, 615 A.2d 1313 (Pa. 1992); Gordon v. Pennsylvania Blue Shield, 548 A.2d 600, 603 (Pa. Super. 1988); Hardy v. Pennock Ins. Agency, Inc., 529 A.2d 471, 475, 478 (Pa. Super. 1987)).

Pennsylvania. See Brickman Group, Ltd. v. CGU Ins. Co., 865 A.2d 918, 929 (Pa. Super. 2004) ("The essential elements of a cause of action for fraud or deceit are a misrepresentation, a fraudulent utterance thereof, an intention to induce action thereby, justifiable reliance thereon and damage as a proximal result.") (quoting Wilson v. Donegal Mut. Ins. Co., 598 A.2d 1310, 1315 (Pa. Super. 1991)). Because Dr. Connolly did not establish fraud for her UTPCPL claim, she obviously cannot prove deceit either, and the Court dismisses this claim.

D. Count IV – Bad Faith under 42 Pa. Cons. Stat. Ann. § 8371 ("Section 8371")

Dr. Connolly's final cause of action is for statutory bad faith under Section 8371. For several reasons, this claim too fails.[30] Section 8371 provides:

> In an action arising *under an insurance policy*, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.

[30] The Court has already concluded that Defendants' conduct with respect to the Policy and Reimbursement Agreement did not breach the implied duty of good faith and fair dealing. And without breaching this duty, it is for all intents and purposes impossible to show that Defendants acted in bad faith. But rather than simply resting on that analysis, the Court offers here additional reasons why Plaintiff's *statutory* claim must fail as a matter of law.

(3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371 (emphasis added).

Section 8371 claims therefore require an insurance policy. Dr. Connolly's allegations of bad faith conduct, however, focus squarely on Defendants' efforts to enforce the Reimbursement Agreement. But this was not an insurance policy. It required Defendants to neither investigate claims nor provide any benefits or coverages to Dr. Connolly. It was a contract that required Defendants to advance benefits owed under the Policy (which they did) and Dr. Connolly to in turn reimburse these advanced benefits upon receiving SSDI and state retirement benefits (which she eventually did after litigation). Because the Reimbursement Agreement was not an insurance policy, Dr. Connolly cannot state a Section 8371 claim based on Defendants' conduct to enforce it. See Ridgeway, 793 A.2d at 976 ("[T]he phrase 'in an action arising under an insurance policy' means that the insured's cause of action must originate from a writing setting forth an agreement between the insured and insurer that the insurer would pay the insured upon the happening of certain circumstances.") (citing Black's Law Dictionary 1157 (Sixth Ed. 1990)).[31]

[31] Because Section 8371 does not define the term "insurance policy," the Ridgeway court employed the plain meaning and ordinary usage method of statutory interpretation to settle on a definition. See 793 A.2d at 796; 1 Pa. Cons. Stat. Ann. § 1903(a).

As to the Policy - Dr. Connolly has introduced no evidence that Defendants acted in bad faith in investigating, processing and satisfying her disability claim. She has pointed to no instances in which Defendants refused to recognize her claim or delayed her disability insurance benefits. Without evidence of bad faith conduct, the Policy can also not form the basis of a Section 8371 claim.

And, in any event, to succeed on a Section 8371 claim, a plaintiff must establish an insurer's bad faith with clear and convincing evidence. See, e.g., Northwestern Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 (3d. Cir. 2005) (citing Terletsky, 649 A.2d at 688. Clear and convincing evidence is that which is "'so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith.'" J.C. Penney Life Ins. Co. v. Pilosi, 393 F.3d 356, 367 (3d Cir. 2004) (quoting Bostick v. ITT Hartford Group, Inc., 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999)). Plaintiff has certainly not met this evidentiary standard. She has proffered scant evidence of Defendants' conduct to leave this Court with a "clear conviction" that the Defendants acted in bad faith. More accurately, the record reflects a desire by Plaintiff to avoid her obligations under the Reimbursement Agreement. That Plaintiff capitulated in open court and paid Defendants the full amount they demanded further belies her claim

that they acted in bad faith.[32]

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[32] Plaintiff also introduced an affidavit from Barbara Sciotti in support of her bad faith claim. See P. Memo, Ex. B ("Sciotti Aff."). She presents Sciotti as a "highly recognized expert in the field of bad faith." P. Memo. at 6. Assuming, without deciding, that Sciotti qualifies as a "bad faith expert," the Court concludes that her opinion is insufficient to either create a genuine issue of material fact as to whether Defendants' conduct was in bad faith or establish by clear and convincing evidence that they in fact did.

First, Sciotti improperly describes Defendants' collection action as a subrogation action. See Sciotti Aff. ("By way of a preliminary opinion . . . the defendants have demonstrated bad faith conduct in the handling of this subrogation action."). It was in fact not. As is crystal clear from the record, Defendants sued Dr. Connolly for breach of contract and unjust enrichment for her refusal to honor the Reimbursement Agreement. That Plaintiff's so-called expert completely misapprehends the nature of the litigation between Defendants and Dr. Connolly casts doubt on whether she carefully reviewed the factual record before rendering an opinion. Second, and equally problematic, is Sciotti's improper (and inadmissible) opinion on the ultimate legal issue of whether Defendants acted in bad faith. See id. It is well settled that this type of expert opinion is inadmissible. See, e.g., Gallatin Fuels, Inc. v. Westchester Fire Ins. Co., 410 F. Supp. 2d 417, 422 (E.D. Pa. 2006) (citing Kubrick v. Allstate Ins. Co., No. 01-6541, 2004 U.S. Dist. LEXIS 358, at *53-54 (E.D. Pa. Jan. 7, 2004), aff'd, 121 Fed. Appx. 447 (3d Cir. 2005) (non-precedential)). Third, she opines that Defendants violated the UIPA (§ 1171.5(a)(10)(i)) and UCSPR (§ 146.4(b)) as evidence that Defendants pursued their claim in bad faith. This is, of course, improper because Sciotti is here too merely stating a legal conclusion. But equally questionable about this particular conclusion is the lack of any factual support or analysis. For example, Section 146.4(b) requires "[a]n insurer or agent . . . to fully disclose to first-party claimants benefits, coverages or other provisions of an insurance policy or insurance contract when the benefits, coverages or other provisions are pertinent to a claim." 31 Pa. Code § 146.4(b). Sciotti, however, never identifies any benefits, coverages or other provisions that Defendants failed to inform Dr. Connolly about with respect to the Policy. This is not surprising because Defendants provided Dr. Connolly with all appropriate disclosures. Sciotti therefore offers only a fact-starved conclusion rather than a reasoned opinion. And since an expert's opinion "does not necessarily defeat a summary judgment motion when it is unsupported by

Conclusion

For the foregoing reasons, the Court GRANTS Defendants' Motion for Summary Judgment and DISMISSES Plaintiff's Complaint with PREJUDICE.

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sufficient facts," it certainly will not when it is not supported by a single fact. Kosierowski v. Allstate Ins. Co., 51 F. Supp. 2d 583, 595 (E.D. Pa. 1999). Fourth, Sciotti's opinion as to the appropriateness of Defendants' discovery efforts is irrelevant. Because Sciotti's alleged expertise is in neither legal ethics nor discovery practices, the Court is not interested in her thoughts on the subject. While it would have been appropriate for Sciotti to opine on Defendants' methods in the context of generally accepted insurance industry standards and practices, her affidavit fails to provide this necessary context to make her opinion helpful or relevant. Whether or not Defendants' discovery practices were unreasonable (or sanctionable) was for a trial court to decide. Finally, Sciotti does not take into consideration Dr. Connolly's relevant conduct of not responding or acknowledging Defendants' attempts to collect the excess benefits. See Leo v. State Farm Mut. Auto Ins. Co., 939 F. Supp. 1186, 1192 n.9 (E.D. Pa. 1996) (discounting expert report because opinion ignored the reasons presented by the insurer for its actions in bad faith claim).

The net effect of Sciotti's affidavit is zero - at best. It consists of generally inadmissible or factually unsupported conclusions, as well as fails to consider Plaintiff's own conduct in this matter. In short, Sciotti's opinion is insufficient to advance Dr. Connolly's claim of bad faith past summary judgment.

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

Frances Connolly	:	CIVIL ACTION
	:	
v.	:	03-5444
	:	
Reliastar Life Ins. Co., Inc.	:	
	:	
and	:	
	:	
Madison National Life Ins. Co.	:	
	:	
and	:	
	:	
Leonard Conrad c/o Reliastar Life Ins. Co., Inc.	:	
	:	

ORDER

AND NOW, this 13th day of November, 2006, upon consideration of Defendants Reliastar Insurance Company, Inc.'s ("ReliaStar"), Madison National Life Insurance Company's ("Madison"), and Leonard Conrad's ("Conrad") (collectively "Defendants") Motion for Summary Judgment ("D. Mot.") (Doc. No. 12), Plaintiff Dr. Frances Connolly's ("Dr. Connolly") response ("Pl. Mot.") (Doc. No. 13), and Defendants' reply thereto ("D. Rep.") (Doc. No. 14), the Court GRANTS Defendants' Motion for Summary Judgment and DISMISSES Plaintiff's entire complaint (Counts I, II, III, IV) with PREJUDICE.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.