

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

EUGENE J. RADER	:	MARCH TERM 2000
	:	
v.	:	No. 1199
	:	
TRAVELERS INDEMNITY COMPANY OF	:	Commerce Program
ILLINOIS et al	:	

MEMORANDUM OPINION

BACKGROUND

On March 14, 1998, a fire destroyed the Hoagie Hut -- the Media, Pennsylvania restaurant of plaintiff Eugene J. Rader. Defendant Travelers Indemnity Company of Illinois was the Hoagie Hut's insurer. Rader sued Travelers over Travelers' handling of the Hoagie Hut's insurance claims.¹ At issue now are Travelers' preliminary objections.

The complaint contains 5 counts against Travelers: (I) breach of duty of good faith and fiduciary duty; (II) violation of the Unfair Insurance Practices Act, 40 P.S. § 1171.1 et seq.; (III) bad faith, 42 Pa. C.S.A. § 8371; (IV) violation of the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq.; and (V) punitive damages. Travelers demurs to counts I, II, IV and V. Travelers does not object to Rader's § 8371 bad faith claim.

The court grants the preliminary objections in part.

¹ The Hoagie Hut's landlords are additional defendants in Rader's suit. Claims against those defendants are not at issue in these preliminary objections.

DISCUSSION

I. COUNT I PROPERLY STATES A CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY, BUT PUNITIVE DAMAGES ARE NOT AVAILABLE FOR THAT ACTION.

Count I is a legally sufficient claim of breach of duty of good faith and fiduciary duty because it alleges that Travelers (1) advised Rader in the processing of his claim, (2) advised Rader against retaining counsel, and (3) did not advise Rader of all the benefits available to him under the policy and, in the process. Miller v. Keystone Ins. Co., 535 Pa. 531, 636 A.2d 1109, 1112 (1994); Dercoli v. Pennsylvania Nat'l Mut. Ins. Co., 520 Pa. 471, 554 A.2d 906, 909 (1989).

Travelers argues that 42 Pa.C.S.A. § 8371 -- which Rader asserts as the basis for relief in Count III -- is Rader's sole remedy for bad faith, and that Rader cannot assert a separate, non-statutory cause of action for bad faith in Count I. D'Ambrosio v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 494 Pa. 501, 431 A.2d 966, 970 (1981). The court disagrees. Count I does not derive from good faith duties imposed by § 8371 or by the common law. Rather it arises from contractual fiduciary duties that Travelers voluntarily assumed.

In D'Ambrosio, the Pennsylvania Supreme Court held that an insured who had been denied coverage and who sought punitive damages for the insurer's bad faith conduct in denying his claim had no cause of action in tort for the bad faith claim. D'Ambrosio, 431 A.2d at 970. In 1990, the legislature enacted 42 Pa.C.S.A. § 8371, which created a statutory action for bad faith against insurers. Courts have since held that § 8371 is the only basis for a private action for bad faith against the insurer. See e.g., Terletsky v. Prudential Property and Cas. Ins. Co., 437 Pa.Super. 108, 649 A.2d 680, 688 (1994).

But an insurer may voluntarily assume contractual fiduciary duties to its insured upon which the insured may base a separate cause of action. These fiduciary duties include duties of good faith and fair dealing. Dercoli, 554 A.2d at 909, 911; Gray v. Nationwide Mut. Ins. Co., 422 Pa. 500, 223 A.2d 8, 11 (1966); Gedeon v. State Farm Mut. Auto. Ins. Co., 410 Pa. 55, 188 A.2d 320, 322 (1963). An insurer assumes these fiduciary duties in one of at least two ways. First, the insurer assumes fiduciary duties when it undertakes to assist and advise the insured in the processing of claims and, in the process, advises the insured against retaining counsel. Dercoli, 554 A.2d at 909, explained in Miller, 636 A.2d at 1112. Second, the insured assumes fiduciary duties when it asserts its rights under the policy to handle claims against the insured and to make a binding settlement. Gedeon, 188 A.2d at 321; Strutz v. State Farm Mut. Ins. Co., 415 Pa.Super. 371, 609 A.2d 569, 571 (1992); Hall v. Brown, 363 Pa.Super. 415, 526 A.2d 413, 415 (1987).

Count I properly alleges that Travelers voluntarily assumed fiduciary duties to Rader. See Miller, 686 A.2d at 1112; Dercoli, 554 A.2d at 909. Count I alleges that Travelers assured Rader “that his claims would be processed without the need for [him] to be independently represented,” that Rader reasonably relied on Travelers’ advice as to the nature and extent of benefits due to him, and that Travelers knew of his reasonable reliance and his lack of independent representation. Complaint ¶¶ 26, 27, 28. These allegations are almost identical to the allegations in Dercoli that the Supreme Court held to be legally sufficient. See Dercoli, 554 A.2d at 907.

Furthermore, Count I properly alleges that Travelers breached that duty by not informing him of the benefits available to him under the policy. Complaint ¶ 32; see Dercoli, 554 A.2d at 907.

Travelers argues in the alternative that, even if Rader may bring a separate fiduciary duty claim,

he cannot recover punitive damages on that claim. The court agrees. An insurer's voluntarily assumed fiduciary duty is a contractual duty. Gray, 223 A.2d at 11; Romano v. Nationwide Mut. Fire. Ins. Co., 435 Pa.Super. 545, 646 A.2d 1228, 1231 (1994).² Because punitive damages are not available for a mere breach of contract, the court must strike the demand for punitive damages. Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 370 Pa.Super. 461, 536 A.2d 1357, 1361 (1987), aff'd, 522 Pa. 80, 559 A.2d 914 (1989) (per curiam). This holding does not prevent Rader from pursuing his statutory claim for punitive damages in Count III. 42 Pa.C.S.A. § 8371; Nealy v. State Farm Mut. Auto. Ins. Co., 695 A.2d 790, 792-93 (Pa.Super. 1997).

The court sustains the preliminary objection in part and strikes the demand for punitive damages in Count I. The remainder of Count I must stand.

II. RADER HAS NO PRIVATE CAUSE OF ACTION FOR VIOLATION OF THE UNFAIR INSURANCE PRACTICES ACT.

Count II alleges that Travelers violated the Unfair Insurance Practices Act (UIPA). 40 P.S. 1171.1 et seq. Travelers demurs on the ground that there is no private right of action under the UIPA. The court agrees.³ D'Ambrosio, 431 A.2d at 969-70; Strutz, 609 A.2d at 571.

The court sustains the preliminary objection and dismisses Count II.

² Thus, the plaintiff in Dercoli brought her action in assumpsit. See Dercoli v. Pennsylvania Nat'l Mut. Ins. Co., 369 Pa.Super. 289, 535 A.2d 163, 164 (1987), rev'd, 520 Pa. 471, 554 A.2d 906 (1989).

³ Rader agrees that there is no independent right of action under the UIPA, but he argues that he may assert UIPA violations as evidence of unfair and deceptive practices under the Unfair Insurance Practices and Consumer Protection Law (CPL). 73 P.S. § 201-1 et seq. In light of the dismissal of the CPL claim in Count IV, the court does not address this argument.

III. RADER MAY NOT BASE AN UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW CLAIM ON A COMMERCIAL INSURANCE POLICY.

A person may bring a private action under the Unfair Trade Practices and Consumer Protection Law (CPL) for unfair trade practices in connection with the “purchase or lease of goods or services primarily for personal, family or household purposes.” 73 P.S. § 201-9.2(a). Though the definition of “goods and services” includes insurance policies, Pekular v. Eich, 355 Pa.Super. 276, 513 A.2d 427, 434 (1986), a commercial insurance policy is not purchased “primarily for personal, family or household purposes.” Trackers Raceway, Inc. v. Comstock Agency, 400 Pa.Super. 432, 583 A.2d 1193, 1196-97 (1990) (holding that purchaser of commercial insurance policy had no private right of action under the CPL). Therefore, there is no private right of action for violations of the CPL in connection with a commercial insurance policy. Id.

The policy at issue here is a commercial policy: Rader purchased it to insure his business, the Hoagie Hut. He may not assert a private action under the CPL based on that policy. The court sustains the preliminary objection and dismisses Count IV.⁴

IV. A REQUEST FOR PUNITIVE DAMAGES CANNOT STAND AS A SEPARATE COUNT.

Count V claims only punitive damages. Travelers argues that Count V is legally insufficient, and Rader concedes this argument. See Holl & Assocs. v. 1515 Market St. Assocs., May 2000, No.

⁴ Travelers argues in the alternative that the complaint alleges only nonfeasance and that Rader may not base a CPL claim on nonfeasance. In light of the dismissal of Count IV, the court does not address this argument.

1964, op. at 5 (C.P. Phila. August 10, 2000) (Herron, J.) (holding that “[a] request for punitive damages cannot stand as an independent cause of action.”).⁵ The court sustains this unopposed preliminary objection and dismisses Count V without prejudice to Rader to pursue punitive damages in Count III.

CONCLUSION

The court sustains the preliminary objections to Counts II, IV and V and dismisses those counts. The court sustains the preliminary objection to Count I in part and strikes the demand for punitive damages in that count. The remainder of Count I must stand. The court will enter a contemporaneous order in accordance with this memorandum opinion.

BY THE COURT:

JOHN W. HERRON, J.

DATE: September 25, 2000

⁵ This opinion is available at <http://courts.phila.gov>.

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ORDER

AND NOW, this 25th day of September 2000, upon consideration of the preliminary objections of defendant Travelers Insurance Company of Illinois and the response thereto of the plaintiff Eugene J. Rader, and in accordance with the court’s contemporaneously filed memorandum opinion, IT IS HEREBY ORDERED that the preliminary objections are SUSTAINED IN PART and OVERRULED IN PART as follows:

- (1) Travelers’ preliminary objections to Counts II, IV and V of the complaint are SUSTAINED, and those counts are DISMISSED;
- (2) Travelers’ preliminary objection to the demand for punitive damages in Count I is SUSTAINED, and the demand for punitive damages in Count I is STRICKEN.
- (3) The remainder of the preliminary objection to Count I is OVERRULED.
- (4) This order is without prejudice to Rader to pursue punitive damages in Count III.

BY THE COURT:

JOHN W. HERRON, J.