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

CODY MERTZ,	:	**Civil No. 3:20-CV-690**
	:	
Plaintiff,	:	
	:	**(Judge Mariani)**
v.	:	
	:	**(Magistrate Judge Carlson)**
MID-CENTURY INSURANCE COMPANY,[1]	:	
	:	
	:	
Defendant.	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of The Case

This case involves a dispute relating to a claim for under-insured motorist benefits under the plaintiff's automobile insurance policy. The plaintiff's complaint names Mertz's insurer, Mid-Century Insurance Company, as the defendant and brings two legal claims against Mid-Century, a claim of breach of an insurance contract between the parties, (Doc. 1, Count 1), and a companion claim of breach of a state statutory duty of good faith in investigating and paying this insurance claim

[1] The plaintiff's complaint initially identified Farmers Mutual Insurance Company as the named defendant, but the parties later stipulated to substitute Mid-Century as the named defendant. Thus, while the complaint excerpts cited in the Report and Recommendation allude to conduct by Farmers Mutual the parties have stipulated that these allegations pertain to Mid-Century, the current named defendant in this lawsuit.

in violation of 42 Pa. Cons. Stat. § 8371. (Doc. 1, Count 2.)

In support of these legal claims, the plaintiff's complaint contains a 7-page, 23-paragraph legal and factual recital. (Id., ¶¶ 1-23.) These well-pleaded allegations guide us in assessing the legal sufficiency of the complaint, and allege as follows with respect to the plaintiff's statutory bad faith claim:

Factual Predicate

> 5.On September 24, 2017, Cody Mertz was the driver of a vehicle stopped on U.S. Route 113 (Dupont Boulevard) in Milford, Delaware, when a vehicle driven by John Krohn crashed into the rear of Cody Mertz's vehicle.
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> 6.As a result of the aforestated automobile crash, Cody Mertz sustained injuries to his back and neck including disc herniation at L5-S1 with moderate left foraminal stenosis, disc bulging and protrusion from L2-3 through L4-5; anterior disc bulging at C6-7; joint hypertrophy at C3-4 and C4-5 which prevented Mr. Mertz from being able to work for a period of time, caused Mr. Mertz to receive significant medical treatment including multiple injections, and made Mr. Mertz a candidate for surgery.
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> 7.After the accident, Cody Mertz pursued a third party claim against John Krohn which resulted in the tender of $30,000.00 which was Mr. Krohn's liability policy limits.
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> 8.Before Cody Mertz accepted policy limits with Mr. Krohn's insurance company, he obtained consent to settle from Farmers.
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> 9.Thereafter, Cody Mertz pursued an underinsured motorist claim ("UIM") against Farmers and provided sufficient information for Farmers to evaluate the claim. Specifically, on December 5, 2019, Cody Mertz provided the following information:
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> (a)Police Crash Report;

(b)Emergency Room records from Milford Memorial Hospital;

(c)MRI report showing multiple level disc bulges and herniations in both the cervical and lumbar spine;

(d)Medical records from Dr. Eric Homa of Complete Injury Care;

(e)Medical records from Dr. Gene Levinstein of Pennsylvania Pain Specialists that reported multiple injections in the neck and lower back;

(f)Gross wage loss verification totaling $15,084.80;

(g)Unpaid medical bills totaling $16,688.90.

10.The aforementioned information provides sufficient evidence to establish that Cody Mertz suffered:

(a)a wage loss and out-of-pocket medical expense totaling $31,773.70;

(b) significant injuries to multiple levels of his neck and back which caused or aggravated herniated discs and required multiple pain injections.

11. After providing Defendant with sufficient evidence to evaluate Cody Mertz's UIM claim, Defendant offered $1,500.00 which is completely unreasonable and in bad faith.

(Doc. 1, ¶¶ 5-11).

In paragraph 22 of the complaint, Mertz added further particulars to this statutory bad faith claim, averring that Mid-Century acted in bad faith when it:

(a) Failed to promptly and reasonably respond to Plaintiff's counsel's demand for prompt payment of Plaintiff's underinsured motorist benefits after the Defendant had been provided with medical and wage loss documentation that clearly established an immediate payment of such underinsured motorist benefits which was justified and warranted;

(b)Unreasonable and vexatious delay in the payment of underinsured motorist benefits to Plaintiff when it was clear that immediate payment of underinsured motorist benefits was justified and warranted;

(c)Failing to make a reasonable settlement offer or payment to Plaintiff, thereby compelling Plaintiff to institute a lawsuit and incur additional costs to recover those benefits rightly due to him;

(d)Failing and/or refusing to pay the fair amount of Plaintiff's underinsured motorist benefits and damages without a reasonable foundation to do so;

(e)Failing to acknowledge or act promptly upon written communications from Plaintiff regarding the underinsured motorist claim under the foregoing automobile insurance policy;

(f)Failing to adopt and implement reasonable standards for the prompt investigation and payment of UIM claims arising out of Plaintiff's automobile insurance contract;

(g)Failing to pay Plaintiff's underinsured motorist claim within a reasonable time after supporting medical and wage loss documentation had been provided to the Defendant;

(h)Failing to attempt in good faith and to effectuate a fair, prompt and equitable settlement of Plaintiff's underinsured motorist claim;

(i)Failing to exercise the utmost good faith and discharge of its statutory and contractual duties to Plaintiff; and

> (j)Making an offer of $1,500.00 which was clearly unreasonable considering the injuries, out-of-pocket medical expenses and wage loss.

(Id., ¶ 22).

Presented with this complaint, Mid-Century moved to dismiss this statutory bad faith claim in its entirety, arguing that this Count of the complaint fails to state claim upon which relief may be granted. (Doc. 9). For his part, Mertz has responded to this motion to dismiss by arguing that this complaint sufficiently states a statutory bad faith claim under Pennsylvania law. This motion is fully briefed by the parties and is, therefore, ripe for resolution. For the reasons set forth below, we recommend that the motion to dismiss be denied without prejudice to submission of a motion for summary judgment upon a fully developed factual record.

II. Discussion

A. Motion to Dismiss–Standard of Review

A motion to dismiss tests the legal sufficiency of a complaint. Rule 12(b)(6) of the Federal Rule of Civil Procedure provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated, Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005), and dismissal is appropriate only if, accepting all of the facts alleged in the complaint as true, the plaintiff has failed

to plead "enough facts to state a claim to relief that is plausible on its face," Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The facts alleged must be sufficient to "raise a right to relief above the speculative level." Twombly, 550 U.S. 544, 555. This requirement "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of necessary elements of the plaintiff's cause of action. Id. at 556. Furthermore, in order to satisfy federal pleading requirements, the plaintiff must "provide the grounds of his entitlement to relief," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008) (brackets and quotation marks omitted) (quoting Twombly, 550 U.S. at 555).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis: "First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Id. at 1950. Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.' Id." Santiago v. Warminster Tp., 629 F.3d 121, 130 (3d Cir. 2010).

As the Court of Appeals has observed: "The Supreme Court in Twombly set

forth the 'plausibility' standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege 'enough facts to state a claim to relief that is plausible on its face.' Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings 'allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955). This standard requires showing 'more than a sheer possibility that a defendant has acted unlawfully.' Id. A complaint which pleads facts 'merely consistent with' a defendant's liability, [ ] 'stops short of the line between possibility and plausibility of "entitlement of relief." ' " Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011) cert. denied, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (U.S. 2012).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no

party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); see also, U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 382, 388 (3d Cir. 2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment."). However, the court may not rely on other parts of the record in determining a motion to dismiss. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

B. Legal Standards Governing Statutory Bad Faith Claims Under 42 Pa. Cons. Stat. § 8371

Pennsylvania law provides for a cause of action by insurance customers against insurance companies that engage in bad faith claims handling, stating that:

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

42 Pa. Cons. Stat. § 8371.

Under Pennsylvania law, "[b]ad faith is a frivolous or unfounded refusal to pay, lack of investigation into the facts, or a failure to communicate with the

insured." Frog, Switch & Mfg. Co., Inc. v. Travelers Ins. Co., 193 F.3d 742, 751 (3d Cir. 1999) (citing Coyne v. Allstate Ins. Co., 771 F.Supp. 673, 678 (E.D. Pa. 1991) (bad faith is failure to acknowledge or act promptly on the claims or refusing to pay without reasonable investigation of all available information); Romano v. Nationwide Mut. Fire Ins. Co., 646 A.2d 1228 (1994)). "Ultimately, in order to recover on a bad faith claim, the insured must prove: (1) that the insurer did not have a reasonable basis for denying benefits under the policy; and (2) that the insurer knew of or recklessly disregarded its lack of a reasonable basis in denying the claim." Nw. Mut. Life Ins. Co. v. Babayan, 430 F.3d 121, 137 (3d Cir. 2005). Case law sets exacting standards for any bad faith claim. As the Court of Appeals has observed:

> In the primary case construing bad faith under 42 Pa.C.S.A. § 8371, Terletsky v. Prudential Property & Casualty Co., the Superior Court of Pennsylvania explained:
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> > "Bad faith" on [the] part of [an] 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.
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> 437 Pa.Super. 108, 125, 649 A.2d 680, 688 (Pa. Super.

> Ct.1994) (quoting Black's Law Dictionary 139 (6th ed.1990)). Terletsky held that, "to recover under a claim of bad faith," the insured must show that the insurer "did not have a reasonable basis for denying benefits under the policy and that the insurer knew of or recklessly disregarded its lack of reasonable basis in denying the claim." Id. Thus, an insurer may defeat a claim of bad faith by showing that it had a reasonable basis for its actions. Horowitz v. Federal Kemper Life Assurance Co., 57 F.3d 300, 307 (3d Cir.1995). Our Court has described "the essence of a bad faith claim" as "the unreasonable and intentional (or reckless) denial of benefits." UPMC Health Sys. v. Metro. Life. Ins. Co., 391 F.3d 497, 506 (3d Cir.2004). Bad faith "must be proven by clear and convincing evidence and not merely insinuated." Terletsky, 649 A.2d at 688 (collecting cases). As the District Court noted, this heightened standard requires the insured to provide evidence "so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether or not the defendants acted in bad faith." Bostick v. ITT Hartford Grp., 56 F.Supp.2d 580, 587 (E.D. Pa. 1999) (citations omitted).

Amica Mut. Ins. Co. v. Fogel, 656 F.3d 167, 179 (3d Cir. 2011).

These same exacting standards apply to assessing the sufficiency of complaints alleging bad faith claims under § 8371. When considering whether a proposed statutory bad faith claim under § 8371 fails as a matter of law,

> Many federal district courts have recently been called upon to evaluate bad faith complaints in light of Iqbal and Twombly. Under these Supreme Court decisions, plaintiffs must plead sufficient facts to make out a plausible claim for relief against the defendant. See Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 557). In the bad faith context, district courts have required more than "conclusory" or "bare-

> bones" allegations that an insurance company acted in bad faith by listing a number of generalized accusations without sufficient factual support. See e.g., Liberty Ins. Corp. v. PGT Trucking, Inc., Civ. A. No. 11−151, 2011 WL 2552531, at *4 (W.D.Pa. Jun. 27, 2011); Pfister v. State Farm Fire & Cas. Co., Civ. A. No. 11−799, 2011 WL 3651349 (W.D.Pa. Aug. 18, 2011); Atiyeh, 742 F.Supp.2d at 599 ("However, these averments are merely conclusory legal statements and not factual averments.").

Palmisano v. State Farm Fire & Cas. Co., CIV.A. 12-886, 2012 WL 3595276 (W.D. Pa. Aug. 20, 2012). See Yohn v. Nationwide Ins. Co., 1:13-CV-024, 2013 WL 2470963 (M.D. Pa. June 7, 2013) (collecting cases).

Thus, the assessment of the sufficiency of a particular complaint often turns on the specificity of the pleadings and calls for recital of specific factual allegations from which bad faith may be inferred in order to defeat a motion to dismiss. Compare Sypeck v. State Farm Mut. Auto. Ins. Co., 3:12-CV-324, 2012 WL 2239730 (M.D. Pa. June 15, 2012) with Zimmerman v. State Farm Mut. Auto. Ins. Co., 3:11-CV-1341, 2011 WL 4840956 (M.D. Pa. Oct. 12, 2011). Where a complaint's § 8371 bad faith claim simply relies upon breach of contract allegations, coupled with a conclusory assertion that the failure to pay under an insurance policy was "unreasonable" or made in bad faith, courts have dismissed such claims, but typically have afforded litigants an opportunity to further amend and articulate their bad faith claims. See e.g., Wanat v. State Farm Mut., Auto. Ins. Co., 4:13-CV-1366,

2014 WL 220811 (M.D. Pa. Jan. 21, 2014); Cacciavillano v. Nationwide Ins. Co. of Am., 3:12-CV-530, 2012 WL 2154214 (M.D. Pa. June 13, 2012).

However, where resolution of a statutory bad faith claim calls for assessment of factual matters outside the pleadings, these claims may not be disposed of through a mo0tion to dismiss. Rather, such claims must be addressed through a summary judgment motion, where we may consider essentially undisputed facts. Insetta v. First Liberty Ins. Corp., No. CIV.A. 14-1890, 2015 WL 1279479, at *1 (E.D. Pa. Mar. 20, 2015).

C. The Defense Motion Should be Denied Without Prejudice to Renewal of Any Dispositive Motion at the Close of Discovery.

Judged against these legal benchmarks, while we regard this as a close case, we recommend that this motion to dismiss be denied without prejudice to renewal as a motion for summary judgment upon the completion of discovery. In its motion to dismiss, Mid-Century asserts that the plaintiff's complaint fails to meet the exacting standard of pleading required for a statutory bad faith claim under § 8371. However, at this stage of the proceedings, where our review is cabined by the well-pleaded facts in the complaint, we are constrained to disagree.

In reaching this conclusion, we find that complaint, taken as a whole, goes beyond a mere boilerplate recital of the elements of the statute. Rather, as we

construe the complaint, it describes a scenario in which the plaintiff, Cody Mertz, suffered injuries that led to a confirmed and verifiable wage loss and out-of-pocket medical expense totaling $31,773.70. Mertz recovered $30,000 from the under-insured motorist's insurance carrier, but when he submitted proof of his losses to his own insurer, Mid-Century, he was offered only $1,500, a sum which, when combined with the $30,000 payment from the tortfeasor's insurance company, still fell below his verified wage and out-of-pocket medical expenses.

In our view, these averments, while spare, go beyond the type of mere boilerplate allegations that courts have found to be too conclusory to sustain a bad faith claim. Rather, they allege a failure to pay the full, verified value of the insured's claim. On this score, we recognize that a bad faith denial of an insurance claim may constitute a violation of § 8371, but in this setting, "[i]n order to show bad faith, a claimant must ultimately establish by clear and convincing evidence both that: 1) 'the insurer lacked a reasonable basis for denying benefits;' and 2) 'the insurer knew or recklessly disregarded its lack of reasonable basis.'" Padilla v. State Farm Mut. Auto. Ins. Co., 31 F. Supp. 3d 671, 675 (E.D. Pa. 2014) (quoting Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997) (citations omitted)).

While this is an exacting burden of proof, these bad faith determinations are often fact-bound decisions that are not amenable to resolution on the pleadings

alone. Instead, "[i]n deciding whether an insurer had a reasonable basis for denying benefits, a court should examine what factors the insurer considered in evaluating a claim. 'Bad faith claims are fact specific and depend on the conduct of the insurer *vis à vis* the insured.'" Padilla, 31 F. Supp. 3d at 675 (quotations and citations omitted).

Thus, while Mid-Century vigorously disputes these averments of bad faith and argues that the facts alleged by the plaintiffs support a prudent effort on its part to thoroughly examine and resolve a potentially meritless claim, this argument invites us to go beyond the pleadings themselves and resolve essentially factual questions. This is a task which, in our view, may not be performed on consideration of a motion to dismiss, where we must simply assess the adequacy of the pleadings. Accordingly, we should decline this invitation to resolve this bad faith claim as a matter of law on the pleadings but deny this motion without prejudice to renewal of any summary judgment motion at the close of discovery. See Baltzley v. State Farm Mut. Auto. Ins. Co., No. 3:18-CV-00959, 2018 WL 6977709, at *1 (M.D. Pa. Dec. 11, 2018), report and recommendation adopted, No. 3:18-CV-959, 2019 WL 122990 (M.D. Pa. Jan. 7, 2019) (denying motion to dismiss bad faith claim without prejudice to summary judgment consideration) (Mariani, J.) Indeed, we note that Insetta v. First Liberty Ins. Corp., No. CIV.A. 14-1890, 2015 WL 1279479, at *1 (E.D. Pa.

Mar. 20, 2015), one of the cases relied upon by Mid-Century in its motion to dismiss, underscores this very point since, in Insetta, the plaintiff's statutory bad faith claim was resolved through a motion for partial summary judgment, rather than a motion to dismiss.

In sum, when considering challenges to statutory bad faith claims, procedural context defines scope of review and often dictates substantive outcomes. In this case, we are considering a motion to dismiss. Our review, therefore, is limited to the well-pleaded facts in the complaint. In this case, those well-pleaded facts state a colorable bad faith claim since they recite a failure to pay the full amount of an actual verified loss. The question of whether the plaintiff can prove what he has alleged must therefore await another day, and another motion in the nature of a motion for summary judgment, where we enjoy a broader scope of review.

III. Recommendation

For the foregoing reasons, IT IS RECOMMENDED that Mid-Century's Motion to Dismiss, (Doc. 9), be DENIED without prejudice to renewal through a motion for summary judgment upon a fully developed factual record.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. §636(b)(1)(B) or making a recommendation for the

disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 8th day of December 2020.

S/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge