ROBERT SMALANSKAS AND ESTHER SMALANSKAS, His Wife	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiff	:	CIVIL ACTION – AT LAW
vs.	:	NO. 04 CV 2394
INDIAN HARBOR INSURANCE COMPANY, FLOREY INSURANCE AGENCY AND AMERICAN CLAIMS SERVICE, INC.	:	
Defendants	:	

MEMORANDUM AND ORDER

NEALON, J.

Defendants have filed motions for summary judgment seeking to dismiss the contract, tort and statutory claims filed against them by the plaintiffs Robert Smalanskas and Esther Smalanskas ("Smalanskas"). Even when the record is examined in the light most favorable to Smalanskas as the non-moving party, Smalanskas has clearly failed to establish a triable issue of fact with respect to the requisite elements of the claims asserted in this action, including the necessity of a denial of insurance benefits by the defendants or their breach of a recognized duty. Thus, for the reasons set forth below, the defendant's motions for summary judgment will be granted.

I. FACTUAL BACKGROUND

The material facts are not in dispute. In 1996, Smalanskas sold a bar and restaurant, Long Pine Inn, to David Salazar and entered into a financing agreement for the sale of that

property. (Deposition of Robert Smalanskas dated 6/22/05, pp. 13, 18-19). Mr. Salazar later defaulted on the financing agreement, and on May 29, 2001, Smalanskas foreclosed on the Long Pine Inn property. (Id., pp. 24, 41; Defendant Indian Harbor/American's Motions for Summary Judgment, Exhibit P, p. 5).

On June 15, 2001, Smalanskas presented himself to the Florey Insurance Agency ("Florey") to purchase a commercial general liability insurance policy for the Long Pine Inn property. (Smalanskas depo., p. 41). Smalanskas provided Florey with a $400.00 check and was furnished with an insurance binder reflecting an effective date of June 16, 2001. (Defendants' Motions, Exhibits D, F). The declarations pages for Smalanskas' commercial property coverage and commercial general liability coverage, as well as the cover sheets for the policies themselves, all indicate a policy coverage period beginning 6/16/01. (Id., Exhibits I, J, K). During his discovery deposition in this case, Smalanskas admitted under oath that the binder he received on June 15, 2001 bears an effective coverage date of June 16, 2001. (Smalanskas depo., p. 59).

On October 15, 2001, Randy Everetts instituted a personal injury action, Everetts v. Smalanskas t/d/b/a Long Pine Inn, No. 2001-1078 (Wyoming County), against Smalanskas and averred in his complaint that he was injured on June 15, 2001 while removing a freezer from the Long Pine Inn property at the direction of Smalanskas. (Defendants' Motions, Exhibit J). Upon being notified of that suit, defendant Indian Harbor Insurance Company's third party administrator, defendant American Claims Service, Inc. ("American"), retained McHenry Adjustment Co., Inc. ("McHenry Adjustment") to secure a recorded statement from Smalanskas. On November 20, 2001, Smalanskas provided a transcribed recorded interview during which time he stated that he had witnessed Mr. Everetts injure his foot

while moving the freezer on June 16, 2001, not June 15, 2001 as alleged in the complaint. (Id., Exhibit P, pp. 10, 12-15). Based upon Smalanskas' representation regarding the date of the alleged injury, Indian Harbor/American retained the law firm of O'Malley, Harris, Durkin and Perry, P.C. ("O'Malley & Harris"), to defend Smalanskas/Long Pine Inn in the Everetts litigation. (Id., Exhibit Q).

On May 24, 2002, Smalanskas forwarded a letter to McHenry Adjustment and again affirmatively represented that the freezer moving incident had occurred on June 16, 2001. (Id., Exhibit T). Approximately one week later, McHenry Adjustment transmitted a letter to Smalanskas which stated:

> This confirms our phone conversation in which you stated that you are absolutely, positively sure, without a shadow of a doubt, that the incident did not take place on Friday, June 15, 2001 but on Saturday, June 16, 2001.

(Id., Exhibit R). However, in early June 2003, Everetts' counsel served discovery responses and produced Everetts' medical records which clearly reflected a date of injury of June 15, 2001. (Id., Exhibit W). As a result, American forwarded a "Reservation of Rights" letter to Smalanskas on June 20, 2003 which read:

> The effective dates of your policy are June 16, 2001 to January 16, 2002. The suit that has been filed against you states that the loss occurred on June 15, 2001. If the loss did occur prior to the inception of your policy, there is no coverage for this claim, and Indian Harbor Insurance Company will not indemnify you in connection with any litigation filed against you in this particular matter.
>
> This letter is written to notify you that Indian Harbor Insurance Company is reserving all its rights and defenses under the terms, conditions, provisions, and exclusions of the policy....

(Id., Exhibit X, p. 2). Nevertheless, Indian Harbor/American continued to provide a defense for Smalanskas in the Everetts case and furnished Smalanskas with counsel at no expense.

The law firm retained by Indian Harbor to defend Smalanskas ultimately succeeded in having the Everetts suit dismissed. (Id., Exhibit Z, p. 20).

On June 11, 2004, Smalanskas commenced the above-captioned personal injury action against Indian Harbor, American and Florey and asserted that American and Florey acted as Indian Harbor's agents during their dealings with Smalanskas. (Docket Entry No. 1, ¶¶3-4). Based upon that purported agency relationship, Smalanskas has pled causes of action against all three defendants for "Good Faith and Fair Dealings" (Counts I, IX, XVII), "Breach of Contract" (Counts II, X, XVIII), "Bad Faith/42 Pa. C.S.A. §8371" (Counts III, XI, XIX), "Negligent Misrepresentation" (Counts IV, XII, XX), "Breach of Fiduciary Duty" (Counts V, XIII, XXI), "Unfair Trade Practices and Consumer Protection Law" (Counts VI, XIV, XXII) and "Negligence" (Counts VII, XV, XXIII). In addition, Esther Smalanskas has advanced derivative claims for loss of consortium in Counts VIII, XVI and XXIV of the complaint. (Id., ¶¶36-126).

In the verified complaint that Smalanskas has filed in the pending litigation, Smalanskas avers that he "went to the Florey Insurance Agency, between 8:00 and 8:30 A.M." on June 15, 2001, where an agent of Florey "sold plaintiff Robert Smalanskas a policy of insurance as detailed by the attached Premium Finance Agreement (Exhibit "A") providing coverage beginning June 16, 2001." (Id., ¶¶10-11). Smalanskas now alleges that "[a]t approximately 12:00 Noon on June 15, 2001, while at the Long Pine Inn, a friend of Gus Salazar, Randy Everetts, allegedly hurt his leg while moving a chest freezer." (Id., ¶13). According to Smalanskas, upon receiving the Reservation of Rights letter from American on June 23, 2003, he contacted his assigned defense counsel, O'Malley & Harris. (Id., ¶¶21-22). Smalanskas contends that "[w]hile on the telephone with O'Malley & Harris, Mr.

Smalanskas began to slur his words, shake, experience facial contortions, and eventually stop breathing." (Id., ¶23). In the complaint, Smalanskas "demands compensatory, consequential and punitive damages" resulting from "syncope secondary to atrial fibrillation, uncontrolled hypertension, loss of consciousness requiring cardiopulmonary resuscitation, enlargement of the aortic root, mitral regurgitation, aortic insufficiency and possible seizure disorder" caused by the issuance of the Reservation of Rights letter. (Id., ¶¶23-25).

Indian Harbor, American and Florey have all filed motions for summary judgment seeking to dismiss all of Smalanskas' claims. The gravamen of the motions for summary judgment is that Smalanskas cannot identify a cognizable duty owed by the defendants, the breach of which caused recoverable damages under Pennsylvania law. The movants note that they never denied insurance coverage or benefits to Smalanskas, nor did they ever reject a claim presented by Smalanskas. In Smalanskas' submissions in opposition to those motions, Smalanskas maintains that the defendants breached their duty to conduct a timely and proper investigation of the Everetts' incident so as to have been able to confirm or deny coverage sooner than June 2003. Upon the completion of oral argument on February 11, 2008, the motions for summary judgment became ripe for disposition.

II. DISCUSSION

(A) STANDARD OF REVIEW

The entry of summary judgment is appropriate where there is no genuine issue of material fact and it is clear that the moving party is entitled to judgment as a matter of law. Jones v. Levin, 2007 WL 4564233, *1 (Pa. Super. 2007). In considering the merits of a summary judgment motion, the court must view the evidence in the light most favorable to

the non-moving party, and resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Wimer v. Pennsylvania Employees Benefit Trust Fund, 2007 WL 453329 *5 (Pa. 2007). However, where the non-moving party bears the burden of proof on an issue, that party may not rely on its pleadings or answer in order to survive summary judgment; rather, the failure of the non-moving party to adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Jalapenos, LLC v. GRC General Contractor, Inc., 2007 WL 4439734, *2 (Pa. Super. 2007).

(B) TORT AND CONTRACT CLAIMS

Smalanskas' claims for breach of contract, negligence, breach of fiduciary duties, breach of the duty of good faith/fair dealings, negligent misrepresentation, and bad faith constitute tort or contract actions. As such, each of those claims require Smalanskas to establish the following four elements: (1) the existence of a legal duty on the part of the defendant; (2) a breach of that duty by the defendant; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual damage suffered by Smalanskas as a result. *See* Ash v. Continental Insurance Company, 593 Pa. 523, 932 A.2d 877, 883 (2007) ("...this Court has stated the bad faith insurance statute is concerned with the duty of good faith and fair dealing."); Bilt-Rite Contractors, Inc. v. The Architectural Studio, 581 Pa. 454, 470-471, 866 A.2d 270, 280 (2005) (analyzing tort of negligent misrepresentation and holding that every tort "requires allegations that establish the breach of a legally recognized duty or obligation that is causally connected to the damages suffered by the complainant."); Birth Center v. St. Paul Companies, 567 Pa. 386, 390, 787 A.2d 376-379 (2001) (stating that

where an insurer acts in bad faith in handling a third party claim against its insured, "it breaches its contractual duty to act in good faith and its fiduciary duty to its insured."); Pallometros v. Loyola, 932 A.2d 128, 133 (Pa. Super. 2007) (observing that every negligence action requires the existence of a duty, a breach of that duty, a causal connection between the breach and resulting injury, and actual loss or damage by the plaintiff); Ruthrauff, Inc. v. Ravin, Inc., 914 A.2d 880, 888 (Pa. Super. 2006) (party claiming breach of contract must establish a breach of a duty imposed by the contract, and resultant damages). The moving defendants maintain that they are entitled to summary judgment since Smalanskas cannot establish each of these elements as a matter of law.

Smalanskas predicates his tort and contract claims upon duties that insurers owe to insureds, which duties allegedly apply to American and Florey based upon their purported agency relationship with Indian Harbor. In the seminal case of Gedeon v. State Farm Mutual Automobile Insurance Company, 410 Pa. 55, 188 A.2d 320 (1963), the Supreme Court of Pennsylvania concluded that in connection with a third party claim that is filed against an insured, "the insurer undertakes three distinct types of obligations, each of which involve different elements of proof to establish breach thereof, and from the breach of which different measures of recovery result." Id., at 68, 188 A.2d at 321. The Gedeon court identified those three duties as: (1) a duty to indemnify the insured against liability for damage claims asserted against the insured; (2) a duty to defend the insured against any suits arising under the insurance policy; and (3) a fiduciary duty towards the insured which requires the insurer to act in good faith and with due care in representing the insured's interests. Id., at 58-59, 188 A.2d at 321-322. *Accord*, Brown v. Progressive Insurance Company, 860 A.2d 493, 500 (Pa. Super. 2004), *app. denied*, 582 Pa. 714, 872 A.2d 1197

(2005). If the insurer breaches its duty to indemnify, the amount of recovery "is usually determined by the terms of the policy." Gedeon, 410 Pa. at 58, 188 A.2d at 321. Recovery for breach of the insurer's duty "to defend will ordinarily be the cost of hiring substitute counsel and other costs of the defense." Id., at 59, 188 A.2d at 322. *See also*, Photomedix v. St. Paul Fire & Marine Ins. Co., 2008 WL 324025, *9 n. 12 (E.D. Pa. 2008). Finally, if an insurer acts in bad faith in handling a liability claim against its insured, such "as where it negligently investigates the claim or unreasonably refuses an offer of settlement, it may be liable regardless of the limits of the policy for the entire amount of the judgment secured against the insured." Gedeon, 410 Pa. at 59-60, 188 A.2d at 322. *Accord*, Toy v. Metropolitan Life Insurance Company, 593 Pa. 20, 928 A.2d 186, 198 (2007); Gray v. Nationwide Mutual Insurance Company, 422 Pa. 500, 504, 223 A.2d 8, 9-10 (1966). Of course, the foregoing obligations on the part of the insurer "arise only if the insured can show that the policy was in force on the day of the accident in question." Gedeon, 410 Pa. at 58 n. 2, 188 A.2d at 321 n. 2.

It is undisputed that the defendants provided Smalanskas with a complete defense in the Everetts suit and that the assigned counsel secured a judgment in favor of Smalanskas. In his opposing brief, Smalanskas does not contend that the defendants breached any duty to defend or indemnify him in conjunction with Everetts' personal injury claim. Instead, Smalanskas argues that the defendants individually or collectively breached their fiduciary duty to act in good faith in representing Smalanskas' interests in that third party suit. More specifically, Smalanskas contends that the defendants failed to conduct a good faith investigation into the existence of insurance coverage for Everetts' claim and that

Smalanskas' personal injuries were proximately caused by defendants' alleged failure to confirm or deny coverage on a more timely basis. To that end, Smalanskas baldly asserts:

> The issue is not that [defendants] did not deny benefits. The issue is the lack of diligence and slacking off in the investigation of coverage, the willful rendering of imperfect performance, and the evasion of the spirit of the bargain.
>
> To do such a sloppy investigation, to do such a reckless investigation, constitutes evidence of bad faith. To then send a Reservation of Rights letter based on that type of investigation constitutes bad faith.

(Plaintiffs' Memorandum of Law in Opposition, p. 13).

Instantly, the defendants accepted as true Smalanskas' repeated representations that the Everetts' incident occurred on June 16, 2001, which was also the effective date of Smalanskas' coverage. Based upon Smalanskas' written and verbal representations as to the date of the loss, Smalanskas was furnished with a defense at no expense to him. Upon learning that Everetts' medical records clearly reflected a date of injury of June 15, 2001, the defendants did not deny coverage or refuse to defend Smalanskas. *Compare* Housing & Redevelopment Insurance Exchange v. Lycoming County Housing Authority, 58 D. & C. 4th 321, 323-324 (Lacka. Co. 2001) (insurer denied coverage and required insured to pay for own defense), *aff'd*, 809 A.2d 1096 (Pa. Cmwlth. 2002). Rather, Smalanskas was issued a Reservation of Rights letter, even though the defendants continued to defend him in a suit alleging an injury which occurred one day prior to the effective date of coverage reflected on Smalanskas' insurance binder, declarations pages and policy cover sheets.

In essence, Smalanskas appears to argue that in conducting an investigation of the matter of coverage, the defendants were required to disbelieve Smalanskas' affirmative representations concerning the date of injury. If the defendants had rejected Smalanskas' version of events, such action would have precipitated an earlier Reservation of Rights letter

or perhaps even an outright denial of coverage. In that event, the defendants arguably could have been charged with bad faith for refusing to accept the veracity of their insured's statements as to the date of loss. *See e.g.* Rutkowski v. Allstate Insurance Company, 69 D. & C. 4th 10 (Lacka. Co. 2004) (finding that insurer acted in bad faith in denying insured's property damage claim by, *inter alia*, discounting insured's assertion that car had collided with a deer). Moreover, assuming *arguendo* that Smalanskas' cardiac and neurological problems were proximately caused by his receipt of the Reservation of Rights letter, a more prompt and aggressive investigation of coverage would have yielded an earlier Reservation of Rights letter and have caused the alleged injuries to be suffered sooner.[1]

Even when examining the summary judgment record in the light most favorable to Smalanskas, the uncontested facts clearly establish that Smalanskas cannot demonstrate the breach of a contractual or common law duty by any of the defendants. The only alleged duty identified by Smalanskas in his briefs and at the time of oral argument is the fiduciary duty to conduct a good faith investigation while representing the insured's interests. Smalanskas has cited no authority which remotely suggests that in the discharge of their fiduciary duty to undertake a good faith investigation of a third party liability claim filed against an insured, insurers or their agents are required to disregard an insured's affirmative representation regarding the date of loss.

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[1] Since the cause of Smalankas' alleged injuries involves a matter beyond the knowledge or expertise of the average layperson, Smalanskas must present competent medical expert testimony establishing, to a reasonable degree of medical certainty, that the defendant's actions in issuing the Reservation of Rights letter was because of the claimed injuries. *See* Brown v. Herman, 445 Pa. Super. 305, 312-14, 665 A.2d 504, 508 (1995), *aff'd*, 547 Pa. 352, 690 A.2d 232 (1997); Barcola v. Hourigan, Kluger & Quinn, P.C., 82 D. & C. 4th 394, 412-13 (Lacka. Co. 2006). At the time of oral argument, counsel for Smalanskas indicated that inasmuch as discovery is still pending, Smalanskas has not yet produced an expert report from a medical witness causally connecting his cardiac and neurological injuries to any wrongful conduct by the defendants.

Smalanskas has likewise failed to adduce sufficient evidence demonstrating a causal connection between the defendants' individual or collective breach of some duty and the onset of recoverable damages sustained by Smalanskas. As noted above, if the defendants had acted in the manner that Smalanskas asserts they should have acted, the defendants would theoretically have confirmed the absence of coverage at an earlier date. In that hypothetical event, the defendants would, at a minimum, have issued a Reservation of Rights letter sooner.[2] Since Smalanskas contends that his cardiac and neurological injuries were caused by his receipt of the Reservation of Rights letter, the defendants' conformity with the standard of conduct proffered by Smalanskas arguably would have resulted in Smalanskas suffering those injuries earlier than June 23, 2003. Hence, due to Smalanskas' failure to create an issue of fact concerning the defendant's breach of a recognized duty, Smalanskas' tort and contract claims must be dismissed.

The absence of a breach of a contractual or common law duty is fatal to Smalanskas' contract and tort claims in Counts I, IX, XVII ("Good Faith and Fair Dealings"), Counts II, X, and XVIII ("Breach of Contract"), Counts V, XVIII and XXI ("Breach of Fiduciary Duty"), and Counts VII, XV and XXIII ("Negligence"). Although Smalanskas' claims for statutory bad faith and negligent misrepresentation fail for the same reason, they will be addressed separately in the interest of completeness and finality. *See* Ash, 932 A.2d at 883 ("As previously noted, this Court has stated the bad faith insurance statute is concerned with

[2]In the alternative, Indian Harbor could have instituted a declaratory judgment action seeking an adjudication that it owed no defense to Smalanskas in the Everetts case since the complaint filed in that suit specifically averred a date of injury of June 15, 2001. *See* Donegal Mutual Ins. Co. v. Baumhammers, 938 A.2d 286, 290-91 (Pa. 2007) (holding that an insured's duty to defend is determined by the allegations of the third party's complaint).

the duty of good faith and fair dealing."); Bilt-Rite Contractors, Inc., supra (discussing duty element of negligent misrepresentation claim).[3]

(C) STATUTORY BAD FAITH

In addition to asserting a common law contract claim for third party bad faith, *see* Birth Center, 567 Pa. at 401-402, 787 A.2d at 386 (holding that Pennsylvania insureds may pursue common law contract actions for bad faith conduct of insurers in connection with third party liability claims), Smalanskas has also pled a statutory bad faith claim under 42 Pa. C.S. §8371. To succeed with such a bad faith claim, Smalanskas must prove by clear and convincing evidence that the defendants (1) did not have a reasonable basis for denying benefits under the insurance policy and (2) knew or recklessly disregarded their lack of a reasonable basis in denying the claim. Condio v. Erie Insurance Exchange, 899 A.2d 1136, 1142-43 (Pa. Super. 2006), *app. denied*, 590 Pa. 668, 912 A.2d 838 (2006); Terletsky v. Prudential Property & Casualty Company, 437 Pa. Super. 108, 125, 649 A.2d 680, 688 (1994), *app. denied*, 540 Pa. 641, 659 A.2d 560 (1995). Since none of the defendants ever denied Smalanskas any benefits under the insurance policy, Section 8371 cannot serve as the basis for a bad faith claim in this case.

But even if Section 8371 was somehow applicable, Smalanskas still may not recover damages for personal injuries under that statute. The Supreme Court has clearly held than an insured may not recover compensatory damages based on 42 Pa. C. S. §8371. Birth Center,

[3] American and Florey are also entitled to summary dismissal of Smalanskas' claims under 42 Pa. C.S. §8371 since that statute governs the conduct of insurers and does not apply to independent insurance brokers or claims investigation agencies. *See* Margaret Auto Body, Inc. v. Universal Underwriters Group, 2003 WL 1848560, * 1-2 (Phila. Co. 2003), *aff'd, and remanded on other grounds*, 885 A.2d 593 (Pa. Super. 2005); Ihnat v. Pover, 35 D. & C. 4th 120, 125 (Alleg. Co. 1997).

567 Pa. at 402, 787 A.2d at 386. Furthermore, although bad faith claims may extend to an insurance company's investigative practices, *see* Condio, 899 A.2d at 1142, the insurer's investigation need not yield the correct conclusion, nor must the process by which it reached its conclusion be flawless, in order to provide a reasonable basis for the insurer's denial of benefits. Blaylock v. Allstate Insurance Company, 2008 WL 80056, * 7 (M. D. Pa. 2008); Krisa v. Equitable Life Assurance Society, 113 F. Supp. 2d 694, 704 (M. D. Pa. 2000). An insured may prove that the insurer knew or recklessly disregarded its lack of a reasonable basis for denying a claim by showing that the insurer acted through some motive of self-interest or ill will. *See* Greene v. United Services Automobile Association, 936 A.2d 1178, 1190-91 (Pa. Super. 2007); Bombar v. West American Insurance Company, 932 A.2d 78, 90 (Pa. Super. 2007).

For the reasons set forth in the Section II(B) above, Smalanskas cannot demonstrate by clear and convincing evidence that the defendant acted in bad faith by ostensibly denying coverage for Everetts' third party claim. Indian Harbor/American continued to provide a defense to Smalanskas even after they received documentary evidence that the loss occurred prior to the effective date of coverage as reflected on Smalanskas' binder and policy. *See* Standard Venetian Blind Company v. American Empire Insurance Company, 503 Pa. 300, 306, 469 A.2d 563, 567 (1983) (where policy provision supporting denial of coverage is clearly worded and conspicuously displayed, insured may not avoid consequences of that provision by claiming that [s]he failed to read or understand it). Absent such a denial of coverage or benefits without a reasonable basis, Smalanskas' statutory bad faith claim must likewise be dismissed.

(D) NEGLIGENT MISREPRESENTATION

In Counts IV, XII, and XX of the complaint, Smalanskas alleges that the defendants are liable for negligent misrepresentation since "two years after the incident of June 15, 2001, [they] denied coverage with a reservation of rights." (Docket Entry No. 1, ¶¶49, 80, 110). Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Bortz v. Noone, 556 Pa. 489, 500, 729 A.2d 555, 561 (1999); Busy Bee, Inc. v. Wachovia Bank, N.A., 2006 WL 723487, *24 (Lacka. Co. 2006), *aff'd*, 932 A.2d 248 (Pa. Super. 2007).

In describing the elements of a claim for negligent misrepresentation, the Supreme Court of Pennsylvania has cautioned that "like any action in negligence, there must be an existence of a duty owed by one party to another." Bortz, 556 Pa. at 501, 729 A.2d at 561. As discussed in Section II (B) above, Smalanskas has not established the existence of a legal duty which has been breached by one of the defendants. Furthermore, Indian Harbor/American did not misrepresent a material fact by issuing the Reservation of Rights letter nor did Smalanskas suffer an injury acting in justifiable reliance on a misrepresentation. For all these reasons, Smalankas' claims for negligent misrepresentation are devoid of merit.

(E) UNFAIR TRADE PRACTICES/CONSUMER PROTECTION LAW

Smalanskas also seeks to recover damages in Counts VI, XIV, XX of the complaint for alleged violations of the Unfair Trade Practices and Consumer Protection Law ("UTP/CPL"), 73 Pa. C.S. §201-1 *et seq*. The UTP/CPL provides a private right of action

for "any person who purchases...goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property" because the seller engaged in "unfair or deceptive acts or practices." 73 Pa. C.S. §§201-3, 201-9.2(a). The definition of "goods or services" under the UTP/CPL includes insurance policies, and an aggrieved insured may pursue a private cause of action against an insurer and its agent for unfair or deceptive acts. Pekular v. Eich, 355 Pa. Super. 276, 290, 513 A.2d 427, 434 (1986), *app. denied*, 516 Pa. 635, 533 A.2d 93 (1987).

However, cases are legion that the UTP/CPL applies only to insurance policies issued for personal, family or household purposes. *See* Novinger Group, Inc. v. Hartford Insurance, Inc., 514 F. Supp. 2d 662, 670 (M. D. Pa. 2007); Rader v. Travelers Indemnity Company, 2000 WL 33711045, * 2-3 (Phila. Co. 2000). For that reason, an insured under a commercial insurance policy may not maintain a cause of action under the UTP/CPL. Trackers Raceway, Inc. v. Comstock Agency, Inc., 400 Pa. Super. 432, 440, 583 A.2d 1193, 1197 (1990) (insured who purchased commercial policy failed to state claim under UTP/CPL); Perschau v. USF Insurance Company, 1999 WL 162969, * 4 (E. D. Pa. 1999) (purchaser of commercial property and liability policy for tavern has no right of action under UTP/CPL); Mechetti v. Illinois Insurance Exchange, 1998 WL 151024, * 2 (E. D. Pa. 1998) (insured who purchased policy for business purpose lacked standing to assert private cause of action under UTP/CPL); Britamco Underwriters, Inc. v. C. J. H., Inc., 845 F. Supp. 1096-97 (E. D. Pa. 1994) (insured who acquired policy for tavern business and premises failed to state claim under UTP/CPL since policy was not purchased for personal, family or household purpose), *aff'd*, 37 F. 3d 1485 (3rd Cir. 1994); Margaret Auto Body, Inc., supra. Inasmuch as

Smalanskas admittedly purchased the commercial insurance policy in question for his Long Pine Inn business property, he cannot state a private cause of action under the UTP/CPL.[4]

[4] Since Robert Smalanskas' causes of action lack viability, Esther Smalanskas' derivative claims for loss of consortium must likewise be dismissed, *See* Schroeder v. Ear, Nose and Throat Associates of Lehigh, 383 Pa. Super. 440, 444, 557 A.2d 21, 22 (1989), *app. denied*, 523 Pa. 650, 567 A.2d 653 (1989).

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vs.	:	NO. 04 CV 2394
INDIAN HARBOR INSURANCE COMPANY, FLOREY INSURANCE AGENCY AND AMERICAN CLAIMS SERVICE, INC.	:	
Defendants	:	

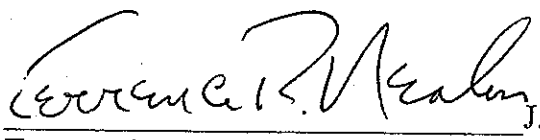
ORDER

AND NOW, this 15th day of February, 2008, upon consideration of the motions for summary judgment filed by defendants Indian Harbor Insurance Company, Florey Insurance Agency and American Claims Service, Inc., the exhibits and memoranda of law submitted by the parties, and the oral argument of counsel on February 11, 2008, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. Defendants' motions for summary judgment are GRANTED; and

2. The Clerk of Judicial Records is directed to enter judgment in favor of defendants and against plaintiffs in this matter.

BY THE COURT:



J.

Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Order has been provided to each party pursuant to Pa. R. Civ. P. 236 (a)(2) by mailing time-stamped copies to:*

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