

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

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| SIGMA SUPPLIES CORP., and FREEDOM MEDICAL SUPPLY, INC., individually and on behalf of others similarly situated, | : | AUGUST TERM, 2003 |
| | : | No. 02968 |
| Plaintiffs, | : | COMMERCE PROGRAM |
| v. | : | Control Nos. 012462, 012383 |
| PROGRESSIVE HALCYON INSURANCE, PROGRESSIVE NORTHERN INSURANCE CO., PROGRESSIVE CASUALTY INSURANCE CO., and CONSOLIDATED SERVICES GROUP t/a MED PATH, | : | |
| Defendants. | : | |

ORDER

AND NOW, this 23rd day of April, 2004, upon consideration of the Preliminary Objections of defendants, Progressive Halcyon Insurance, Progressive Northern Insurance Co., and Progressive Casualty Insurance Co. (“Progressive”) and the Preliminary Objections of defendant Consolidated Services Group t/a Med Path’s (“Med Path”) to the Amended Complaint, the plaintiffs’ responses in opposition, the respective memoranda, and all other matters of record, and in accord with the Opinion being filed contemporaneously, it is

ORDERED that the Preliminary Objections are **SUSTAINED, in part**, and that:

1. Counts II, III, IV, VII, IX, and XI of the Amended Complaint are hereby dismissed;
2. Counts V and XII of the Amended Complaint have been withdrawn by plaintiffs;
3. Plaintiffs’ requests for punitive damages and injunctive relief are dismissed;
4. Plaintiffs’ jury demand with respect to Counts I and VIII of the Amended Complaint is stricken; and
4. Med Path is dismissed as a party defendant.

It is further **ORDERED** that the remaining Preliminary Objections are **OVERRULED**.

Progressive shall file an Answer to the remaining counts of the Amended Complaint within thirty (30) days of the date of entry of this Order.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

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OPINION

Before the court are the Preliminary Objections of defendants, Progressive Halcyon Insurance, Progressive Northern Insurance Co., and Progressive Casualty Insurance Co. (“Progressive”), and Consolidated Services Group (“Med Path”), to plaintiffs’ Amended Complaint. Plaintiffs provided medical equipment to persons involved in auto accidents. Progressive was required to pay plaintiffs for the medical equipment under certain auto insurance policies issued by Progressive.

Plaintiffs allege that they were not paid the full amount to which they were entitled under those policies and the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S. § 1701 *et seq* (“MVFRL”). Plaintiffs also allege that Progressive hired Med Path to process the bills Progressive received, including those from plaintiffs, and as requested by Progressive, Med Path calculated the amounts that Progressive would agree to pay plaintiffs. Furthermore,

plaintiffs allege that Progressive improperly delayed paying them on the bills they submitted to Progressive.

Plaintiffs have brought claims against Progressive for violation of the MVFRL, breach of contract, bad faith, and breach of the duty of good faith and fair dealing. Progressive has raised objections to all claims. Plaintiffs have brought additional claims against Progressive and Med Path for conspiracy and conversion, and defendants have objected to both of those claims.¹ Defendants also object to plaintiffs' requests for punitive damages, injunctive relief, and a jury trial.

I. Defendant's Preliminary Objection to Count I for Breach of the MVFRL By Progressive Is Overruled.

Progressive objects that plaintiffs have not set forth their claim for violation of Section 1797 with sufficient specificity. This court disagrees. The exact amount of damages and the precise time period during which the damages were suffered should be fleshed out in discovery. If plaintiffs are unable to substantiate their claims, Progressive may file dispositive motions to address such issues.

II. Defendants' Preliminary Objections to Count II for Conspiracy to Violate the MVFRL By Progressive and Med Path Is Sustained.

Both defendants object that plaintiffs have not properly stated a claim against them for conspiracy to violate the MVFRL. "In order to state a cause of action for civil conspiracy, plaintiffs must show that two or more persons combined or agreed with intent to do an unlawful act." Skipworth v. Lead Industries Assoc., Inc., 547 Pa. 224, 235, 690 A.2d 169, 174 (1997). Furthermore, plaintiffs must allege facts to show malice, *i.e.* of each defendant's intent to injure plaintiffs. *See* Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 211, 412 A.2d 466, 472 (1979). In this case, plaintiffs allege that Med Path assisted Progressive in violating the

¹ Plaintiffs have withdrawn their claims for negligence and unjust enrichment.

MVFRL. However, Med Path is not among the class of entities that may be found liable under the MVFRL. *See* 75 Pa. C.S. § 1797(b)(4) (claims may be brought against “insurers”).

Therefore, the conspiracy claim against Med Path must be dismissed. Since there cannot be a conspiracy of one, the claim is also dismissed as to Progressive.

III. Defendants’ Preliminary Objections to Count III for Conversion Against Progressive and Med Path Is Sustained.

Defendants object that plaintiffs have not alleged that defendants converted any of plaintiffs’ property. “Conversion is the deprivation of another’s right of property in, or use or possession of, a chattel, or other interference therewith, without the owner’s consent and without lawful justification. . . . Money may be the subject of conversion, [but] failure to pay a debt is not conversion.” Bernhardt v. Needleman, 705 A.2d 875, 878 (Pa. Super. 1998). *See also* Gregg v. Independence Blue Cross, 2001 WL 1807400 (Phila. Co. Jun. 14, 2001) (failure of insurer to pay medical providers full amount due to them is breach of contract not conversion.) Plaintiffs’ allegation of conversion is in reality a claim for failure to pay what is owed. Thus, plaintiffs’ claim for conversion must be dismissed.

V. Defendant’s Preliminary Objections to Counts IV and IX for Bad Faith Against Progressive Are Sustained.

Defendants correctly point out that medical providers, such as plaintiffs, have no standing to sue under the Bad Faith Statute, and are instead limited to the remedies provided under the MVFRL. *See* Glick v. Progressive Northern Ins. Co. March Term, 2002, No. 01179 (Phila Co. Dec. 30, 2002); Taylor v. Nationwide Ins. Co., 35 Pa. D&C 4th 101 (Alleg. Co. 1997).

Therefore, plaintiffs’ bad faith claims must be dismissed.

VI. Defendant’s Preliminary Objections to Counts VII and XI for Breach of the Duty of Good Faith & Fair Dealing Against Progressive Are Sustained.

Progressive objects that plaintiffs may not assert a claim for breach of the duty of good faith and fair dealing against it. “The implied covenant of good faith does not allow for a claim separate and distinct from a breach of contract claim. Rather, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself.” JHE, Inc. v. SEPTA, 2002 WL 1018941 (Phila. Co. May 17, 2002). Since plaintiffs have already asserted a claim against Progressive for breach of contract, plaintiffs’ redundant claim for breach of the contractual duty of good faith and fair dealing must be dismissed.

VII. Defendant’s Preliminary Objections to Count VIII for Violation of the MVFRL Against Progressive Are Overruled.

Progressive objects that plaintiffs have failed to state a claim under Section 1716 of the MVFRL for Progressive’s alleged delay in making payment to plaintiffs. Section 75 states that “[b]enefits are overdue if not paid within 30 days after insurer receives reasonable proof of the amount of the benefits.” 75 Pa. C.S. § 1716. Plaintiffs allege that they submitted bills to Progressive and that Progressive then required a statement from the patients to whom plaintiffs purportedly provided medical services or products. Progressive refused to pay each plaintiff until it received the patient’s statement, which was often more than 30 days after Progressive had received plaintiff’s bill. This alleged factual scenario creates an issue as to the reasonableness of the proof submitted by plaintiffs which the court cannot resolve at this time.

VIII. Defendant’s Preliminary Objection to Count X for Breach of Contract Against Progressive Is Overruled.

Progressive objects that plaintiffs’ claim for breach of contract with respect to Progressive’s failure to make timely payments simply duplicates plaintiffs’ claim for breach of

Section 1716 of the MVFRL, which contains the requirement of timely payment. However, “the laws in force when a contract is entered into become part of the obligation of contract with the same effect as if expressly incorporated in [the contract’s] terms.” DePaul v. Kauffman, 441 Pa. 386, 398, 272 A.2d 500, 507 (1971). Therefore, plaintiffs are entitled to bring their claim for breach of contract based on Progressive’s alleged violation of Section 1716, which is a term of the contract between the parties.²

IX. Defendants’ Preliminary Objection to Plaintiffs’ Claims for Punitive Damages Is Sustained.

Defendants object that plaintiffs are not entitled to claim punitive damages. Plaintiffs may not recover punitive damages on their breach of contract and unjust enrichment claims. *See Eighth Floor, Inc. v. Terminal Industrial Corp.*, 2003 WL 23120186 (Phila Co. Dec. 29, 2003). Furthermore, since the MVFRL already provides for treble damages, interest, and attorneys’ fees, plaintiffs may not also recover punitive damages on their claims for breach of that statute. *See* 75 Pa. C.S. §§ 1716, 1797(b)(4). Since the tort claims have been dismissed, there is no basis for punitive damages.

X. Defendant’s Preliminary Objection to Plaintiffs’ Claims for Injunctive Relief Is Sustained.

Progressive objects to plaintiffs’ request for injunctive relief. Plaintiffs have asked the court to enjoin Progressive from further violation of Section 1797 of the MVFRL in connection with Counts I (Violation of the MVFRL) and VI (Breach of Contract). In order to receive a permanent injunction, plaintiffs must allege and show “an urgent necessity to avoid injury which cannot be compensated by damages.” Merchant v. Com., State Bd. of Medicine, 162 Pa. Commw. 332, 337, 638 A.2d 484, 487 (1994). “There is no basis for injunctive relief where the

² The contracts at issue were entered into between Progressive and its insureds. Plaintiffs are assignees of the insureds’ right to payment under the contracts.

purpose of such relief is solely to forestall potential future violations; injunctive relief is not available to eliminate a possible remote future injury or invasion of rights.” Jamal v. Com., Dept. Of Corrections, 121 Pa. Commw. 42, 549 A.2d 1369 (1988). In this case, plaintiffs clearly have an adequate remedy at law which they are presently pursuing, namely recovery for their damages caused by Progressive’s wrongful conduct, if any. Therefore, plaintiffs’ requests for injunctive relief must be dismissed.

XI. Defendant’s Preliminary Objection to Plaintiffs’ Request for a Jury Trial On Their MVFRL Claims is Sustained.

Progressive objects that plaintiffs are not entitled to a jury trial on their MVFRL claims. The MVFRL contemplates that a “court” rather than a jury will decide claims raised under Section 1797 of the statute. 75 Pa. C.S. § 1797(b)(4). In addition, there is no indication that the legislature intended for claims raised under Section 1716 of the MVFRL to be heard by a jury. *See id.* § 1716. Furthermore, plaintiffs have not cited to, nor has the court found, any legislative history indicating that the legislature intended for plaintiffs to get a jury trial. “Based upon the legislature's silence on the issue of the availability of a jury trial, together with the affirmative use of the term "court," and the lack of any legislative history to the contrary, we conclude that the General Assembly did not intend for a plaintiff to have a right to trial by jury for claims under the” MVFRL. *See Wertz v. Chapman Township*, 559 Pa. 630, 636, 741 A.2d 1272, 1275 (1999).

“In the absence of a statutory basis for a trial by jury, the next inquiry for a reviewing court is whether there existed the particular cause of action at the time of the adoption of the constitution, and if so, whether there existed a concomitant right to jury trial.” *Id.*, 559 Pa. at 639, 741 A.2d at 1277. Common law claims for breach of contract against insurers existed at the time the Pennsylvania Constitution was adopted. However, a cause of action for payment of

80% of a provider's usual fees and a cause of action for payment within thirty days did not exist until the legislature enacted the MVFRL. Therefore, plaintiffs are not entitled to a trial by jury on their MVFRL claims.

CONCLUSION

For all the foregoing reasons, defendants' Preliminary Objections to plaintiffs' Amended Complaint are sustained in part and overruled in part. An order consistent with this Opinion will be filed.

BY THE COURT:

ALBERT W. SHEPPARD, JR., J.

Dated: 4/23/04