

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

DOCKETED

DEC 15 2015

R. POSTELL  
COMMERCE PROGRAM

IMS HEALTH INCORPORATED, : April Term 2014  
Plaintiff, :  
v. : No. 2046  
ZURICH AMERICAN INSURANCE COMPANY, :  
ET. AL., : COMMERCE PROGRAM  
Defendants. :  
Control Nos. 15072856/15072978

ORDER

AND NOW, this 15<sup>th</sup> day of December 2015, upon consideration of Plaintiff

IMS Health Incorporated's Partial Motion for Summary Judgment (cn 15072978) and Defendant Zurich American Insurance Company's Partial Motion for Summary Judgment (cn 15072856), responses in opposition and the opinion issued simultaneously with this order, it hereby is

**ORDERED** as follows:

1. Plaintiff's partial motion for summary judgment is **denied**. Connecticut substantive law applies to any issue of recoupment of defense costs for non-covered claims in the Symphony action. Any recoupment claim is held in abeyance until a determination as to liability for any potentially non-covered claims is resolved.
2. Defendant's partial motion for summary judgment is **granted in part and denied in part** as follows:
  - a. Pennsylvania substantive law applies to count III (violation of 42 Pa. C. S. § 8371) but the partial motion for summary judgment is **denied**.
  - b. Pennsylvania substantive law applies to count II (breach of fiduciary duty) and the partial motion for summary judgment is **granted** and the claim is dismissed.

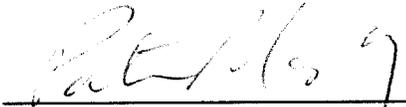
Ims Health Incorporated-ORDOP



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- c. Pennsylvania substantive applies to the count I (breach of contract) but the partial motion for summary judgment is **denied**.

**BY THE COURT,**



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**PATRICIA A. McINERNEY, J.**

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

IMS HEALTH INCORPORATED,	:	April Term 2014
Plaintiff,	:	
v.	:	No. 2046
ZURICH AMERICAN INSURANCE COMPANY,	:	
ET. AL.,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Nos. 15072856/15072978

**OPINION**

This is an insurance coverage dispute. Plaintiff IMS Health Incorporated (“IMS”) instituted this action against its insurer Zurich American Insurance Company (“Zurich”) alleging breach of contract, breach of fiduciary duty, and bad faith under Pennsylvania’s bad faith statute. IMS also seeks a declaration that Zurich has no right to seek recoupment of any defense costs for an underlying action filed in Federal court.<sup>1</sup> Presently before the court are the parties’ partial motions for summary judgment.

IMS, incorporated in Delaware, is a pharmaceutical data and analytics company operating throughout the world using pharmaceutical data secured from a worldwide network of suppliers in more than 100 countries. During the Zurich policy periods 2003 to 2006, IMS’s global headquarters were located in New York. During the Zurich policy periods 2007 to 2012, IMS’s global headquarters, including the offices of the senior executives was located in Connecticut. IMS has 23 facilities throughout the U.S., including four in Pennsylvania and one in New Jersey. IMS’s primary U.S. operations are based in Plymouth Meeting, Pennsylvania

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<sup>1</sup> IMS also sought a declaration that Zurich had a duty to defend it in the Federal court matter. On February 2, 2015, this court issued an order establishing that Zurich has a duty to defend IMS in the Federal court action until all the claims in that suit are confined to a recovery that fall wholly outside the coverage provided under the Zurich policies at issue.

which includes the President of the U.S. business operations and senior leaders in finance, sales, service, consulting, production, data management, statistical services, legal, and human resources. Pennsylvania is responsible for a majority of U.S. revenue generated directly from data provided or services managed in the U.S.<sup>2</sup> Over the policy periods, IMS had a significantly higher employee count, payroll and premium allocations in Pennsylvania than Connecticut.<sup>3</sup>

Zurich is a New York corporation with a principal place of business in Schaumburg, Illinois. Zurich issued nine general liability policies effective June 30, 2003 through June 30, 2012. The Zurich policies provide coverage for suits brought in the United States.<sup>4</sup> Scott French is IMS's Director of Risk Management who has held this position since 2006. French, located in New Jersey, reports to Jeff Ford in Connecticut, the Treasurer of IMS, on insurance issues. Ford has worked at IMS since 2004. French traveled to IMS's global headquarters in Connecticut approximately three to four times a year to meet with Ford and IMS management to present recommendations for IMS's insurance program. Ford was responsible for making final decisions on procuring insurance for IMS. Ford provided the authority on behalf of IMS to bind the Zurich primary policies, authorize the premium amounts proposed for the primary coverage and approve the premium payments for the coverage.

IMS purchased casualty insurance through its broker Aon. Aon has offices in New York and negotiated IMS's insurance policies with Zurich from its New York office. Aon's executives and chief officers are located in Connecticut. Zurich issued the policies from its New York

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<sup>2</sup> IMS's response to Motion for Summary Judgment Exhibit "29" affidavit of Clifford Farren ¶¶ 4, 5, 7, 8; "36", "37", "38".

<sup>3</sup> In 2006, IMS had over 1,000 employees in Pennsylvania and 54 in Connecticut. Its payroll was nearly \$107 million for Pennsylvania while it was \$12 million for Connecticut. In 2006, approximately 65% of the premium for the Zurich policy was allocated to Pennsylvania and only approximately 7% was allocated to Connecticut.

<sup>4</sup> IMS disputes whether the Zurich policies provide coverage worldwide.

office. IMS had little direct contact with Zurich in connection with underwriting the Zurich policies. On one occasion, French met with Zurich in Philadelphia at an annual Risk and Insurance Management Society conference. Zurich billed the premiums for the Zurich policies from its New York issuing office directly to Aon in New York. IMS made payment of the policy premiums from its Pennsylvania location and the payments were sent to Aon in New York. Aon then paid the premiums to Zurich. From 2004 to 2006, Aon delivered the 2004, 2005 and 2006 Zurich policies directly to French in New York and for the policy years 2007 to 2012 to French in New Jersey who then forwarded the policies to Connecticut.

On July 24, 2013, IMS was sued in *Symphony Health Solutions Corp, et. al. v. IMS*, an action filed in the United States District Court for the Eastern District of Pennsylvania, 13-4290 (“Symphony action”). The suit includes causes of action for tortious interference with contract and unfair competition under Pennsylvania common law. IMS initially engaged Cleary Gottlieb as its lead defense counsel and Pepper Hamilton as local co defense counsel. IMS later substituted Quinn Emanuel for Cleary Gottlieb as its lead counsel in late 2013.

On August 9, 2013, IMS tendered the Symphony action to Zurich for defense. On October 9, 2013, IMS agreed to defend IMS under a reservation of rights. Days after sending the reservation of rights letter, Zurich Claims Specialist Adam McCade raised in an internal email the “possibility of Zurich paying reasonable and necessary rates for IMS’s defense counsel with the insured picking up the difference.” McCade further requested that Zurich’s Regional Litigation Manager John A. Pearson begin developing a rate range for antitrust work that Zurich would consider reasonable. In early December, 2013, in an internal email from Pearson to McCade, Pearson wrote:

Per our conversation and pursuant to what rate bench-marking information we’ve been able to consider, we agreed that a rate structure in the range 525/325/175

would be appropriate given the unusual and complex nature of this Anti-trust litigation. It is my understanding that you will begin discussions with the insured at or below a rate structure of 500/300/150 so as to us [sic] a little room to negotiate.

On December 9, 2013, Zurich proposed a blended rate structure to IMS of \$500 per hour for partners, \$300 per hour for associates and \$150 per hour for paralegals. IMS's defense counsel charged significantly higher rates which Zurich did not agree to pay. IMS negotiated a ten percent rate reduction from its defense counsel. Despite the ten percent reduction negotiated by IMS between it and the law firms, the rates charged by the law firms were still above the Zurich reimbursement rates. On December 16, 2013, French proposed that Zurich consider a dual rate structure utilizing Zurich's proposed rates for Pepper Hamilton but using higher rates for Quinn Emanuel and Cleary Gottlieb. By email dated December 18, 2013, French proposed that Zurich pay \$750/hour for partners for Quinn Emanuel and Cleary Gottlieb but provided no proposal for associates.

In January 2014, upon receiving no response from Zurich, IMS requested that Zurich pay its proposed blended rate to Pepper Hamilton while still seeking higher rates for the other two firms. Zurich did not respond to the proposal. Instead, on April 1, 2014, Zurich filed a declaratory judgment action in the United States District Court for the District of Connecticut seeking declaratory relief regarding its respective coverage obligations under the Zurich policies; the reasonableness of the attorney rates charged by the defense firms retained by IMS in the Symphony action; an allocation of cost incurred in the defense of the non-covered claims and the potentially covered claims; and recoupment from IMS of the payments Zurich made and continues to make for the defense of the non-covered Sherman Act claims. While the Connecticut Federal Action on the reasonable rates was pending, Zurich unilaterally began to apply the rate it originally proposed of \$500 per hour for partners and \$300 per hour for

associates for the Cleary Gottlieb and Quinn Emmanuel firms. Zurich also unilaterally lowered its proposed reimbursement rate for Pepper Hamilton to \$425/\$250/\$125 respectively.

On April 18, 2014, IMS filed the instant action including a claim for indemnity which has been stayed. On May 23, 2014, Zurich emailed IMS and Aon to explain Zurich's bill review system and payment process including the application of the 10% discount. IMS accepted the reimbursements but reserved its right to object to Zurich's partial payments. On June 4, 2014, Zurich wired the first payment to IMS. In June 2015, IMS challenged Zurich's application of the 10% discount as being applied twice in Zurich's favor.

On February 12, 2015, this court granted IMS motion for partial summary judgment with respect to the duty to defend. After the issuance of the February 12, 2015 order, Zurich voluntarily dismissed the Connecticut action. Presently pending before the court are the parties partial motions for summary judgment.

## **DISCUSSION**

### **Plaintiff's Partial Motion for Summary Judgment**

#### **I. A question of fact exists as to Zurich's application of the ten percent discount.**

IMS seeks partial summary judgment on the application of the ten percent discount. IMS argues that Zurich's application of the 10% discount on already reduced rates predetermined by Zurich to be reasonable constitutes a breach of the duty to defend and is bad faith. Upon review of the record, the court finds that summary judgment is not appropriate at this time on the 10% application. The record presents a question of fact as to whether Zurich applied the discount improperly. For instance, in an email dated May 23, 2014 Adam McCabe, Zurich adjuster assigned to the Symphony action wrote to Scott French, Director of Risk Management for IMS and said as follows: "Please note, Zurich's bill review system requires inputting the invoices at

the fully-billed amount, so for those invoices where a firm discount applied, we had to audit based on the ‘full price’ of the invoice and then factor the 10% discount back into the final amount after deductions were taken.”<sup>5</sup> The record also shows that counsel for IMS asserts that Zurich applied the ten percent discount twice.<sup>6</sup> The record however fails to include any invoices or audits for this court to determine whether Zurich’s application of the discount was proper. Based on the forgoing, a genuine issue of material fact exists and IMS’s partial motion for summary judgment is denied.

## **II. Connecticut law applies to any claim for Recoupment by Zurich.**

Zurich, in its answer and new matter, raises recoupment of attorney fees for non-covered claims as a defense. In Pennsylvania, an insurer is not entitled to recoup defense costs absent an express provision in the insurance contract.<sup>7</sup> Connecticut law, on the other hand, recognizes a cause of action for recoupment.<sup>8</sup> IMS, in its motion for summary judgment, asks this court to declare which law, Pennsylvania or Connecticut, would apply in the Symphony action if non-covered claims exist. Pennsylvania employs a two-step hybrid framework to choice of law questions. Under the first step of this analysis, the court must determine whether a real conflict exists between the respective laws. Where a conflict exists, a court must proceed to the second step of the conflict inquiry to determine whether the conflict is “true,” “false,” or “unprovided for.” A real conflict exists only where the application of each state's substantive law produces a contrary result. If the same result would ensue under the laws of the forum state and those of the foreign jurisdiction, then no conflict exists and the court may avoid the choice of law question

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<sup>5</sup> IMS’s Motion for Partial Summary Judgment Exhibit “48” page 15.

<sup>6</sup> IMS’s Motion for Partial Summary Judgment Exhibit “49” and “50”.

<sup>7</sup> *American and Foreign Ins. Co. v. Jerry’s Sport Center, Inc.*, 606 Pa. 584, 2 A.3d 526 (2010).

<sup>8</sup> *Security Ins. Co. of Hartford v. Lumbermen Mut. Cas. Co.*, 264 Conn. 688, 826 A.2d 107 (2003).

altogether.<sup>9</sup> Here, this court is faced with a true conflict of laws and must decide which state's law should be used if such a situation arises.

Pennsylvania applies a flexible, interest/contacts methodology under the *Restatement (Second) Conflict of Laws*, to contract choice of law questions, "bearing in mind that 'we are concerned with the contract of insurance' and not the underlying tort."<sup>10</sup> Pennsylvania applies § 193 of the *Restatement (Second) of Conflict of Laws* when the insured has a principal place of insured risk, stating "the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy ...."<sup>11</sup> When the insured has no principal place of risk, as is the case here, Pennsylvania courts apply § 188(2) of the *Restatement (Second) of Conflict of Laws*, to determine which state has greater contacts with the contract at issue.<sup>12</sup> Section 188(2) provides as follows:

(2) In the absence of an effective choice of law by the parties, . . . the contacts to be taken into account . . . to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and

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<sup>9</sup> *McDonald v. Whitewater Challengers, Inc.* 116 A.3d 99 (2015). See also, *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 886 (Pa. Super. 2006).

<sup>10</sup> *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 232–33 (3d Cir. 2007).

<sup>11</sup> *Specialty Surfaces Intern. Inc. v. Continental Cas. Co.*, 609 F.3d 223, 233 (3d Cir.2010).

<sup>12</sup> While § 193 of the *Restatement (Second) Conflicts of Law* addresses the validity of and rights created by fire, surety, and casualty insurance contracts, the policies at issue here provide coverage in many states and countries. Since there is no "principal location of the insured risk," contrary to IMS assertion, § 193 is inapplicable. See, *Hammersmith supra.* at 480 F.3d at 233.

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.<sup>13</sup>

These contacts must be weighed on a qualitative scale according to their relation to the policies and interests underlying the issue.<sup>14</sup> The court will address these factors in turn.

In regard to the first factor, place of contracting, “An insurance contract is made in the state where it is delivered.”<sup>15</sup> The undisputed record shows that Zurich issued the insurance policies from its New York office and delivered the policies to Aon, IMS’s broker in New York. Aon subsequently forwarded the policies to French from 2003 to 2006 to New York and from 2007 to 2012 to French in New Jersey. French testified that he then forwarded the policies to his superior in Connecticut. The declaration page of the policies from 2003 to 2012 support the testimony of French. For instance, the declaration page for the policies years 2003 to 2006 show IMS’s mailing address as New York and for the policy years 2007 to 2012 as Connecticut. Based on the foregoing, the place of contracting, i.e. the state in which the insurance contract was delivered, is Connecticut. This conclusion comports with the presumption that delivery is presumed to have occurred where the insured is located.<sup>16</sup>

As to the place of negotiation, the facts of record show that the insurance policy renewals were negotiated in New York and Connecticut. Aon in New York was the face of the negotiations and would communicate directly on behalf of IMS with Zurich’s New York office.

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<sup>13</sup> *Restatement (Second) Conflict of Laws* § 188 (1971).

<sup>14</sup> *Specialty Surfaces Intern. Inc. v. Cont. Cas. Co.*, 609 F.3d 223, 234 (3d. Cir. 2011).

<sup>15</sup> *Hammersmith*, *supra*. 480 F.3d at 233.

<sup>16</sup> *See Travelers Prop. Cas. Co. of Am. v. Chubb Custom Ins. Co.*, 864 F.Supp.2d 301, 310 (E.D.Pa.2012) (“In the absence of proof of the place of delivery, there is a presumption of delivery at the insured's residence.”) (citing *Crawford v. Manhattan Life Ins. Co. of N.Y.*, 208 Pa.Super. 150, 221 A.2d 877, 881 (Pa.Super.Ct.1966)); *see also Hammersmith*, 480 F.3d at 234 (finding the place of delivery as New York based, in part, on the insured's headquarters being located in New York).

However, Aon in New York did not act alone. While the Aon New York office engaged in the day to day discussions with Zurich, Edward Dadakis, senior account executive at Aon for the IMS account located in Connecticut played a substantial role in overseeing negotiations of the Zurich policies and dealt directly with IMS executive officers including French and his superior, Ford located in Connecticut. These individuals were copied on all communications between Aon in New York and Zurich. French and Ford were heavily involved in the negotiations, including the scope and structure of the insurance provided to IMS.<sup>17</sup> Ford reviewed each proposed renewal and the policies were not bound until he approved the terms.<sup>18</sup> There is no evidence that any negotiations took place in Pennsylvania. Hence, the negotiation of the policy favors New York and Connecticut.

With respect to the place of performance of the contract, the insured performs in the state in which the premiums are received.<sup>19</sup> In the instant case, Zurich issued the premium invoices from its New York office to Aon's New York office. Aon then forwarded the invoice to French who would then forward the invoice to Ford for approval of the premium amount. IMS wired the premium payment to Aon and then payment was forwarded to Zurich. Zurich received the premium payments in Illinois.<sup>20</sup> Since the parties do not seek to apply Illinois law, this factor is neutral.<sup>21</sup>

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<sup>17</sup> See, Zurich's Partial Motion for Summary Judgment - Exhibits "B" at 31-32, 87-89, 94-95., "F" & "G".

<sup>18</sup>Zurich's Partial Motion for Summary Judgment- Exhibit "F".

<sup>19</sup>*Armotek Industries Inc. v. Employers Ins. of Wausau*, 952 F.2d 756, 761 (3d Cir.1991).

<sup>20</sup> IMS's Partial Motion for Summary Judgment Exhibit "14"-although this exhibit does not provide the full picture for all the policy years, it is sufficient for proof that the premium payments were received in Illinois.

<sup>21</sup>Generally, an insurance contract is performed where the premiums are received. *Hammersmith, supra.*, at fn 13.

The fourth factor, the subject matter of the contract, does not favor the application of either Pennsylvania or Connecticut law. The Zurich policies provided nationwide coverage to IMS.<sup>22</sup> Lastly, the fifth factor is the domicile, residence, nationality, place of incorporation and place of business of the parties. IMS is a Delaware corporation with global offices in Connecticut and 23 facilities throughout the United States, including four in Pennsylvania and one in New Jersey. Additionally, IMS's primary U.S. operations are based in Plymouth Meeting, Pennsylvania. Zurich is a New York corporation with its principal place of business in Illinois. The Zurich policies from 2003 to 2012 identify IMS as the named insured and list the address of IMS from 2003 to 2006 as New York and 2007 to 2012 as Connecticut. The policies further provide that the Connecticut headquarters were the sole agent for each insured for giving instructions for, or accepting changes to, the Zurich policies and payment of premium.<sup>23</sup> Additionally, IMS entered into a One-Way Non-Disclosure Agreement with Zurich in connection with a proposed business relationship pertaining to the presentation of an insurance proposal that listed IMS's address as Connecticut.<sup>24</sup> Based on the foregoing, this court finds that the fifth factor favors Connecticut.

Connecticut has the greater contacts based on the conflict of law analysis. Pennsylvania had no involvement in the making of the insurance contract, negotiation of the insurance contract and the performance of the insurance contract. Pennsylvania may be the regional headquarters for IMS, employ the most employees in the U.S. and generates the most income, but these facts do not play a role when conducting a conflicts of law analysis for contract disputes. Based on

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<sup>22</sup> *Hammersmith*, supra at 234.

<sup>23</sup> IMS's Partial Motion for Summary Judgment Exhibit "4" pg. 32.

<sup>24</sup> Zurich's response to Plaintiff IMS's Motion for Summary Judgment Exhibit "S" p. 2.

the foregoing, it is clear that Connecticut has more significant contacts with the insurance policies and therefore Connecticut law applies to the issue of recoupment of defense costs for non-covered claims. Zurich's right of recoupment, however, does not accrue until a determination as to the liability for potentially non-covered claims is resolved.<sup>25</sup>

### **Defendant's Motion for Summary Judgment**

#### **A. Pennsylvania law applies to IMS's bad faith claim.**

In the case *sub judice*, IMS purports to state a statutory bad faith claim under Pennsylvania's bad faith statute codified at 42 Pa. C. S. § 8371. Specifically, IMS alleges Zurich through its claims handling and its non-payment of defense costs for the Symphony action has violated 42 Pa. C. S. § 8371.<sup>26</sup> Zurich argues that Connecticut law should apply to the bad faith claim, while IMS argues that Pennsylvania law should apply. Applying the test set forth above in the recoupment discussion of this opinion, a true conflict exists between the laws of Connecticut and Pennsylvania on a claim for bad faith. Connecticut recognizes a common law bad faith claim based on breach of an implied covenant of good faith and fair dealing as well as a statutory claim based on a violation of the Connecticut Unfair Insurance Practices Act<sup>27</sup> and the Connecticut Unfair Trade Practices Act<sup>28</sup>. Connecticut does not recognize a tort of bad faith based on claims mishandling.<sup>29</sup> Pennsylvania law, however, provides for a private cause of action for bad faith insurance disputes under 42 Pa.C.S. § 8371 which includes a bad faith claim

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<sup>25</sup> See this court's order and opinion dated February 12, 2015.

<sup>26</sup> IMS complaint ¶¶ 80-90.

<sup>27</sup> Conn. Gen. Stat. § 38 a-815 et. seq.

<sup>28</sup> Conn. Gen Stat. § 42-110a et. seq.

<sup>29</sup> See *Capstone Building Corporation v. American Motorists Insurance Company*, 308 Conn. 760, 67 A.3d 961 (2013).

for claims handling.<sup>30</sup> Therefore, since Connecticut law does not recognize a bad faith insurance claim based on claims handling and Pennsylvania law does, a real conflict exists. The court must now engage in the next step in the conflict of law analysis and decide which state has the greater interest in the application of its law, including which state had the most significant contacts or relationship to the action.<sup>31</sup>

An action for bad faith under the Pennsylvania statute, 42 Pa. C.S. § 8371 is a statutorily created tort action.<sup>32</sup> Since the statutory bad faith claim is a tort, *Restatement (Second) of Conflict of Laws* § 145 applies setting forth the list of contacts to consider when determining the applicable body of law for a tort claim. These relevant contacts include, but are not limited to: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (4) the place where the relationship, if any, between the parties is centered.<sup>33</sup>

The place of injury plays an important role because persons who cause injury in a state should not ordinarily escape liabilities imposed by local law.<sup>34</sup> Here, the injuries which prompted the instant bad faith claim occurred in Pennsylvania. The Symphony action is filed in the Eastern District of Pennsylvania and the defense must be conducted in Pennsylvania. This court has already held that Zurich has a duty to defend IMS in the Symphony action under the Zurich policies. An insurer is obligated to fulfill its duty to defend where the underlying lawsuit is

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<sup>30</sup> See, 42 Pa.C.S. § 8371.

<sup>31</sup> *Sheard v. J.J. DeLuca Co.*, 92 A.3d 68, 76 (2014).

<sup>32</sup> See *Ash v. Continental Ins. Co.*, 593 Pa. 523, 932 A.2d 877, 884–85 (2007)(Action under bad faith insurance statute is a statutorily created tort action and subject to a two year statute of limitations.).

<sup>33</sup> Restatement (Second) Conflicts of Law § 145.

<sup>34</sup> Id. cmt. e.

filed.<sup>35</sup> Any attorney fees at issue are being assessed by the litigation occurring in Pennsylvania. Although, Zurich is paying attorney fees, a dispute exists as to whether those fees paid are reasonable. The fees are directly related to the work being performed on the case filed in Pennsylvania. As such, the first factor weighs in favor of Pennsylvania.

The second factor, the place where the conduct occurred, is particularly significant when, as is the case here, the issues in the litigation involve standards of conduct. As discussed *supra*, the injurious behavior occurred in Pennsylvania. Zurich's obligation to defend IMS in the Symphony action arose in Pennsylvania and its alleged bad faith conduct includes underpaying and delaying payment to IMS for the defense work occurring in Pennsylvania. As such, this factor weighs in favor of Pennsylvania. The third factor, location, residence, and domicile of the parties weighs in favor of Connecticut. Although, IMS has its primary U.S. Headquarters in Pennsylvania where the majority of its employees and revenue in the United States is generated, IMS's global headquarters and corporate offices are located in Connecticut. The Zurich policies identify the IMS's global headquarters as IMS's mailing address and therefore this contact weighs in favor of Connecticut. The last factor, the place where the relationship between the parties is centered favors Pennsylvania. Presently, the parties' relationship is centered on the Symphony action filed in Pennsylvania. Even though there are contacts in New York and Connecticut among the parties, the center of the parties' relationship is Pennsylvania.

Based on the foregoing, Pennsylvania is the choice of law for IMS's statutory bad faith claim.<sup>36</sup> Pennsylvania has an interest in applying its bad faith statute to "curtail certain bad faith

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<sup>35</sup> *Specialty Surfaces Int'l Inc. v. Continental Cas. Co.*, 609 F.3d 223, 233 (3d Cir. 2010).

<sup>36</sup> Notwithstanding the choice of law analysis, Pennsylvania law should apply to IMS's statutory bad faith claim since it is a claim arising under Pennsylvania law.

acts by insurers” by “formally imposing a duty of good faith on insurers based on the apparent determination that such a provision was necessary to deter bad faith”.<sup>37</sup> As such, Pennsylvania has a greater interest in protecting insureds doing business in Pennsylvania. Here, IMS’s bad faith claim is predicated on Zurich’s claims handling as it pertains to the payment of attorney’s fees particularly the delay in payment, the reasonableness of the rate as well as the application of a ten percent discount. At this time, the court finds that genuine issues of material fact exist as to whether Zurich’s claims handling amounted to bad faith. As such, Zurich’s partial motion for summary judgment as to this claim is denied

**B. Zurich’s Motion for Summary Judgment on the Breach of Fiduciary Duty Claim is Granted.**

Zurich also moves for summary judgment on IMS’s claim for breach of fiduciary duty.<sup>38</sup> Under Pennsylvania law, the mere fact an insurer and an insured enter into an insurance contract does not automatically create a fiduciary relationship.<sup>39</sup> Pennsylvania law does not recognize a separate tort-law cause of action for breach of fiduciary duty against an insurer except in those instances where the insurer assumes the responsibility to handle claims, control settlement or otherwise conduct litigation on behalf of the insured.<sup>40</sup> Pennsylvania courts have dismissed claims for breach of fiduciary duty in the insurance context as duplicative of statutory bad faith

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<sup>37</sup> *Continental Cas. Co. v. Diversified Industries, Inc.*, 884 F. Supp. 937, 952 (1995).

<sup>38</sup> A choice of law analysis is not necessary for IMS’s claim for breach of fiduciary duty and breach of contract since the laws of Pennsylvania and Connecticut are the same and therefore a false conflict exists.

<sup>39</sup> *Keppol v. State Farm Ins.*, 2013 WL 300742, at \*3-4 (E.D. Pa. Jan. 25, 2013).

<sup>40</sup> *Millwood v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 291168, at \*5 (W.D.Pa. Feb.5, 2009) (citing *Gedeon v. State Farm Mut. Auto. Ins. Co.*, 410 Pa. 55, 188 A.2d 320, 322 (Pa.1963)); *see also Gedeon*, 188 A.2d at 322 (“[B]y asserting in the policy the right to handle all claims against the insured, ... the insurer assumes a fiduciary position towards the insured ....”).

claims.<sup>41</sup> Here, IMS's claim for breach of fiduciary duty arises from Zurich's claim handling, i.e. Zurich's delay in paying attorney fees, failure to pay reasonable attorney rates and application of a ten percent discount. Since IMS's breach of fiduciary duty claim is based upon the same allegations of misconduct as its claim for bad faith, the claim for breach of fiduciary duty is redundant of the bad faith claim and is dismissed.<sup>42</sup>

## CONCLUSION

Based on the foregoing, upon consideration of Plaintiff IMS Health Incorporated's Partial Motion for Summary Judgment (cn 15072978) and Defendant Zurich American Insurance Company's Partial Motion for Summary Judgment (cn 15072856), it hereby is **ORDERED** as follows:

1. Plaintiff's partial motion for summary judgment is **denied**. Connecticut substantive law applies to any issue of recoupment of defense costs for non-covered claims in the Symphony action. Any recoupment claim is held in abeyance until a determination as to liability for the potentially covered claims is resolved.
2. Defendant's partial motion for summary judgment is **granted in part and denied in part** as follows:
  - a. Pennsylvania substantive law applies to count III (violation of 42 Pa. C. S. section 8371 but the partial motion for summary judgment is **denied**).

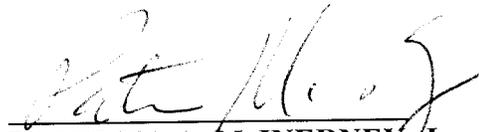
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<sup>41</sup>*Keppol v. State Farm Ins.*, No. CIV.A. 12-5350, 2013 WL 300742, at \*3 (E.D. Pa. Jan. 25, 2013), citing *Belmont Holdings Corp. v. Unicare Life and Health Ins.*, 1999 WL 124389, at \*4 (1999); *Wood v. Allstate Ins. Co.*, Civ. A. No. 96-4574, 1996 WL 637832, at \*2 (E.D.Pa. Nov.4, 1996); see also *Greater N.Y. Mut. Ins. Co. v. N. River Ins. Co.*, 872 F.Supp. 1403, 1409 (E.D.Pa.1995) ("The Pennsylvania Supreme Court treats the breach of contractual duty of good faith and breach of fiduciary duty synonymously in the context of insurance cases.").

<sup>42</sup> As for the breach of contract claim, this court is denying Zurich's partial motion for summary judgment since genuine issues of material fact exist as to the reasonableness of the rates, delay in payment and application of the 10% discount.

- b. Pennsylvania substantive law applies to count II (breach of fiduciary duty) and the partial motion for summary judgment is **granted** and the claim is dismissed.
- c. Pennsylvania substantive applies to the count I (breach of contract) since there is no conflict of law but the partial motion for summary judgment is **denied**.

**BY THE COURT,**

  
**PATRICIA A. McINERNEY, J.**