

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

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CHARLES WEINER, <i>et al.</i>	: AUGUST TERM, 2005
Plaintiffs,	: No. 1045
v.	: (Commerce Program)
MARKEL INTERNATIONAL INSURANCE COMPANY,	: Control Nos.
<i>et al.</i>	011397, 011398, 011399
Defendants.	

**ORDER**

**AND NOW**, this 25<sup>th</sup> day of April 2006, upon consideration of defendants' Preliminary Objections, the responses in opposition, all matters of record and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** as follows:

1. The Preliminary Objection to Count III (misrepresentation) is **sustained** and Count III is **dismissed** as to defendant Markel International Insurance Company.
2. The Preliminary Objections to Counts IV and V (bad faith) are **sustained** and these Counts are **dismissed** as to defendant McHenry Adjustment Company, Inc.
3. Defendants' Preliminary Objection to Count VI (Pennsylvania Unfair Trade Practices and Consumer Protection Law) is **sustained** and Count VI is **dismissed** in its entirety.
4. Defendants' Preliminary Objection to Count VII (conspiracy) is **sustained** and Count VII is **dismissed** in its entirety.

5. Defendants' Preliminary Objection concerning punitive damages is sustained and other than damages permitted pursuant to 42 Pa.C.S. § 8371, all references to punitive damages are stricken from the Complaint.

6. Defendants' Preliminary Objections relating to misjoinder of causes of action is sustained, in part. The claims relating to the Clock Bar Policy will proceed under this court, term and number and the existing Case Management Order. Plaintiffs' claims related to the Club Passion Policy are dismissed without prejudice and plaintiffs are directed to file a new complaint in connection with those claims, including the necessary and proper parties.

7. The remainder of defendants' Preliminary Objections are overruled.

**BY THE COURT:**

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**ALBERT W. SHEPPARD, JR., J.**

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**OPINION**

**Albert W. Sheppard, Jr., J. .... April 25, 2006**

Before the court are the separate Preliminary Objections of defendants, Markel International Insurance Company and Markel International Insurance Company as successor in interest to Terra Nova Insurance Company (collectively “Markel”)(Control No. 011397), defendants Certain Underwriters at Lloyd’s of London (“Underwriters”)(Control No. 011398) and defendant McHenry Adjustment Company Inc. (“McHenry”)(Control No. 011399). For the reasons discussed, the Preliminary Objections are sustained, in part.

## **BACKGROUND**

Plaintiffs Charles Weiner (“Weiner”) and 3649 Germantown Avenue, Inc. d/b/a Clock Bar purport to state causes of action against defendants for breach of contract, misrepresentation, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law and civil conspiracy arising from two different policies of insurance in connection with two separate losses.

With respect to the first claim, plaintiffs contend that there existed a policy of insurance between themselves and Markel under policy number #BSA-23423 (“Clock Bar Policy”). This policy covered real property located at 3649 Germantown Avenue, Philadelphia, Pennsylvania, which operated under the name “Clock Bar.” Weiner and 3649 Germantown Avenue, Inc. d/b/a Clock Bar were the named insureds under the Clock Bar Policy. According to the complaint, on or about August 4, 2004, Clock Bar’s building and its contents suffered damages as a result of vandalism. Plaintiffs filed an insurance claim in connection with this loss, which remains unpaid. The claim was adjusted by McHenry.

The complaint also sets forth facts involving another claim asserted by Weiner in connection with a different property located at 1643-47 Hunting Park Avenue, Philadelphia, Pennsylvania, which operated under the name “Club Passion.” This property was covered by a policy of insurance issued by Terra Nova Insurance Company and Underwriters (“Club Passion Policy”). The named insureds under the Club Passion Policy were Phase One, Inc. t/a Club Passion and Charles and Max L. Weiner. Phase One, Inc. and Max Weiner are not plaintiffs in this case. According to the complaint, on or about February 23, 2004, Club Passion’s building and its contents suffered damages as a result of a fire. A claim was filed in connection with this loss, which remains unpaid. The claim was adjusted by McHenry.

## **DISCUSSION**

## **I. Plaintiffs' Misrepresentation Claim Is Dismissed As To Markel**

Count III purports to state a claim for misrepresentation against McHenry and Markel in connection with a commercial insurance policy. Plaintiffs have also asserted a bad faith claim against Markel. In Pennsylvania, bad faith actions against an insurance company are governed by 42 Pa.C.S.A. § 8371. Because the statute does not define bad faith, Pennsylvania state courts (and federal courts applying Pennsylvania law) have adopted the following Black's Law Dictionary definition of bad faith in the insurance context:

'Bad faith' on part of 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.

Terletsky v. Prudential Property and Casualty Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (1994) (*quoting* Black's Law Dictionary 139 (6th ed. 1990)). This definition encompasses the claims set forth in Count III. As this court finds the relief demanded in Count III to be duplicative of plaintiffs' bad faith claims, Count III is dismissed as to Markel.

## **II. Plaintiffs Have Failed To State a Bad Faith Claim Against McHenry**

Counts IV and V purport to state bad faith claims against Markel, Underwriters and McHenry. However, such an action may not lie against McHenry, as it is not an insurer. An action for bad faith under 42 Pa. C.S.A. § 8371 can only be brought against an "insurer." The Judicial Code does not define "insurer." SEPTA v. Holmes, 2003 Pa. Commw. LEXIS 832, 835 A.2d 851, 856 (2003). The Insurance Department Act of 1921, as amended, 40 P.S. § 221.3, defines "insurer" as "any person who is doing, has done, purports to do, or is licensed to do an insurance business, and is or has been subject to the authority of, or to liquidation,

rehabilitation, reorganization or conservation by any insurance commissioner." Id. at 856-857; *see also* Brown v. Progressive Ins. Co., 2004 Pa. Super. 346, 860 A.2d 493 (2004). Clearly, McHenry does not fall within this definition. Since McHenry can not be liable to plaintiffs for bad faith as a matter of law, Counts IV and V are dismissed.

### **III. Plaintiffs Have Failed To State A Valid Claim Under The UTPCPL**

Count VI of the complaint purports to state a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. C.S.A. § 201-1 *et. seq.* A private right of action under the UTPCPL is available for "...a person who purchases or leases goods or services primarily for personal, family or household purposes..." 73 Pa.C.S.A. § 201-9.2. At bar, it is clear that the insurance policies in question were not purchased for "personal, family or household purposes" but rather for commercial establishments. As such, a claim under the UTPCPL can not lie here and Count VI is dismissed in its entirety.

### **IV. Plaintiffs Have Failed To State A Claim for Civil Conspiracy**

Count VII purports to state a claim for civil conspiracy against Underwriters, Markel and McHenry. To state a cause of action for conspiracy, plaintiffs must allege (1) a combination of two or more persons acting with a common purpose to do an unlawful act by unlawful means or for an unlawful purpose, (2) an overt act done in furtherance of the common purpose, and (3) actual legal damage. Baker v. Rangos, 229 Pa. Super. 333, 324 A.2d 498, 506 (1974).

Plaintiffs' conspiracy claim fails for several reasons. First, the law is well-settled in Pennsylvania that one can not conspire with their own agents as a matter of law. Grose v. Procter & Gamble Paper Products, 2005 Pa. Super. 8, 866 A.2d 437 (2005). In the complaint, McHenry is alleged to be both an agent of Underwriters (¶ 40) and Markel (¶ 15). Moreover, Plaintiff must demonstrate that each defendant entered into an unlawful agreement for the

express purpose of committing either a criminal act or an intentional tort. Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 278, 505 A.2d 973 (1981). Proof of malice, or an intent to injure, is an “essential part” of this cause of action. GMH Assoc. v. Prudential Realty Group, 2000 Pa. Super. 59, 752 A.2d 889 (2000). Plaintiffs have failed to plead such facts here; bald, conclusory allegations are insufficient to support a claim for conspiracy. Accordingly, Count VII is dismissed in its entirety.

#### **V. Plaintiffs Are Not Entitled To Punitive Damages**

Defendants have also moved to strike plaintiffs’ demand for punitive damages. A court may only award punitive damages where the described conduct was “malicious, wanton, reckless, willful or oppressive.” G.J.D. v. Johnson, 552 Pa. 169; 713 A.2d 1127 (1998). Plaintiffs have failed to set forth sufficient facts to warrant the imposition of punitive damages other than those specifically permitted in connection with 42 Pa.C.S. § 8371. Accordingly, all other references to punitive damages are stricken from the Complaint.

#### **VI. Misjoinder of Causes of Action and Failure to Join Indispensable Parties**

Defendants have also filed preliminary objections on the grounds of misjoinder of causes of action and failure to join indispensable parties.<sup>1</sup> This court finds merit in these arguments. In the Complaint, plaintiffs are attempting to combine two claims arising from two separate policies

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<sup>1</sup> In considering these arguments, the court notes that following claims remain as part of this litigation: 1) Count I – Breach of Contract v. Markel (Clock Bar Policy); 2) Count II – Breach of Contract v. Markel and Underwriters (Club Passion Policy); 3) Count III – Misrepresentation v. McHenry (Clock Bar Policy); 4) Count IV – Bad Faith v. Markel (Clock Bar Policy); and 5) Count V – Bad Faith v. Markel and Underwriters (Clock Bar and Club Passion Policies).

of insurance that insure two different properties in connection with two unrelated losses. This is not allowed under the Rules. According to Pa.R.C.P. 2229 (b):

Persons may join as plaintiffs who assert any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the rights to relief of all such persons will arise in the action.

Pa.R.C.P. 2229 (b).

There is no such commonality here. Charles Weiner, individually, is the only plaintiff named as an insured on both policies. Plaintiff, 3649 Germantown, is not an insured on the Club Passion Policy. Moreover, the other named insureds on the Club Passion Policy, Phase One, Inc. t/a Club Passion and Charles and Max L. Weiner, are not plaintiffs in this case. Although plaintiffs used the same adjuster in connection with both claims, the claims do not arise out of the same transaction or occurrence, but rather relate to two different types of losses – vandalism and fire – which occurred on two separate dates at two different locations.

The court finds the joinder of these distinct claims in one complaint to be inappropriate. Plaintiffs' allegation that defendants mishandled both claims in the same manner does not change this fact. To allow the case to proceed as pled will unnecessarily complicate the trial - - the case will, in essence, amount to two separate cases. However, rather than dismiss the entire case, this court believes it would be more appropriate to sever the cases in accordance with Pa.R.C.P. 213 (b), which provides:

The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order a separate trial of any cause of action, claim, or counterclaim, set-off, or cross-suit, or of any separate issue, or of any number of causes of action, claims, counterclaims, set-offs, cross-suits, or issues.



Thus, the claims relating to the Clock Bar Policy will proceed under this court, term and number and the existing Case Management Order. Plaintiffs' claims related to the Club Passion Policy are dismissed without prejudice and plaintiffs are directed to file a separate complaint in connection with those claims making certain to include the necessary and proper plaintiffs.<sup>2</sup>

### **CONCLUSION**

For these reasons, defendants' Preliminary Objections are sustained as follows:

1. The Preliminary Objection to Count III (misrepresentation) is sustained and Count III is dismissed as to Defendant Markel International Insurance Company.
2. The Preliminary Objections to Counts IV and V (bad faith) are sustained and these Counts are dismissed as to Defendant McHenry Adjustment Company.
3. Defendants' Preliminary Objection to Count VI (Pennsylvania Unfair Trade Practices and Consumer Protection Law) is sustained and Count VI is dismissed in its entirety.
4. Defendants' Preliminary Objection to Count VII (conspiracy) is sustained and Count VII is dismissed in its entirety.
5. Defendants' Preliminary Objection concerning punitive damages is sustained and other than damages permitted pursuant to 42 Pa.C.S. § 8371, all references to punitive damages are stricken from the Complaint.
6. Defendants' Preliminary Objections relating to misjoinder of causes of action is sustained, in part. The claims relating to the Clock Bar Policy will proceed under this court, term and number and the existing Case Management Order. Plaintiffs' claims related to the Club Passion Policy are dismissed without prejudice and plaintiffs are directed to file a new complaint in connection with those claims, including the necessary and proper parties.

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<sup>2</sup> The court directs that the decisions explained in this Order should apply to the Club Passion case after it is filed.

7. The remainder of defendants' Preliminary Objections are overruled.

This Court will enter a contemporaneous Order consistent with this Opinion.

**BY THE COURT:**

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**ALBERT W. SHEPPARD, JR., J.**