IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

JOHN R. GREGG, M.D., and VINCENT J. DISTEFANO, M.D.,	**:** DECEMBER TERM, 2000
Plaintiffs	**:** No. 3482
v.	**:**
INDEPENDENCE BLUE CROSS, QCC INSURANCE COMPANY, KEYSTONE HEALTH PLAN EAST, INC., AMERIHEALTH HMO, INC., and AMERIHEALTH, INC.,	**:**
Defendants	**:** Control No. 031599

O R D E R

AND NOW, this 14th day of June 2001, upon consideration of defendants' Preliminary Objections, plaintiffs' opposition thereto, the respective memoranda, all other matters of record, having heard oral argument and in accord with the Opinion being filed contemporaneously with this Order, it is hereby **ORDERED** that the Preliminary Objections are **Sustained**.

It is further **ORDERED** that plaintiffs shall file an Amended Complaint within twenty-two (22) days of the date of this Order.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J

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O P I N I O N

Sheppard, Jr., J. ..... June 14, 2001

Presently before this court are the Preliminary Objections of defendants, Independence Blue Cross ("IBC"), QCC Insurance Company, Keystone Health Plan East, Inc., Amerihealth HMO, Inc. and Amerihealth, Inc. (collectively "defendants" or "IBC") to the Complaint of plaintiffs, John R. Gregg, M.D. ("Dr. Gregg") and Vincent J. DiStefano, M.D. ("Dr. DiStefano").

For the reasons set forth, the Preliminary Objections are **sustained**.

BACKGROUND

The operative facts, as pleaded in the Complaint, are as follows.[1] Plaintiffs, Drs. Gregg and DiStefano, are orthopaedic surgeons who have been and continue to be authorized "providers" with defendants. Compl. at ¶¶ 1-2, 13. As such, Drs. Gregg and DiStefano provided medical services to defendants' insureds and requested payment pursuant to their respective provider agreements, or such requests for payment were treated as if they were submitted pursuant to these agreements. Id. at ¶ 13. Defendants, IBC and its subsidiaries and/or affiliates (the other named defendants) own, operate, underwrite and/or administer group health insurance plans known as health maintenance organizations ("HMOs"), preferred provider organizations ("PPOs"), and point of service health plans ("POs"). Id. at ¶ 8.

Plaintiffs provide orthopaedic, surgical and other medical services to health insureds, "members" and/or "subscribers" to the various IBC health plans. Id. at ¶ 15. Approximately fifty to sixty percent of all patients treated by plaintiffs are insured by health plans owned, operated and/or administered by defendants. Id. at ¶ 11. Plaintiffs have provided medical services to defendants' members and subscribers for in excess of ten (10) years. Id. at ¶ 19. Plaintiffs bill IBC for services rendered to members and subscribers based upon the American Medical Association's Physicians' Current Procedural Terminology ("CPT") coding. Id. at ¶ 16. Defendants reimburse their providers based upon fee schedules established by defendants which assign a particular dollar amount to each particular service identified by its CPT code.

[1]The Complaint is attached as Exhibit A to defendants' Preliminary Objections as well as plaintiff's Response. References in this Opinion to "Exhibits" are those exhibits attached to the Preliminary Objections, plaintiff's Response and/or the Complaint.

Id. at ¶ 17. The reimbursement schedule was purportedly never provided to plaintiffs, despite defendants' representation that they would supply it. Id. at ¶ 18.

Defendants allegedly engaged in the pattern and/or practice of improperly denying reimbursement or improperly reducing the amount of reimbursement due to plaintiffs for surgical and other medical services through strategies including "downcoding" and "bundling." Id. at ¶¶ 20-21. As alleged, "downcoding" occurs when defendants wrongfully disregard the CPT code submitted by plaintiffs and unilaterally and arbitrarily change the CPT code to an inapplicable code which provides for a lower reimbursement rate, in order to reduce the payments due to plaintiffs. Id. at ¶ 22. "Bundling" occurs when defendants fail to reimburse plaintiffs for two or more separate procedures performed simultaneously on the same patient; i.e., defendants either reimburse plaintiffs for less expensive procedures and fail to reimburse for the more expensive ones, or they reimburse fully for one procedure and partially reimburse for the subsequent procedures at amounts below the contracted amount. Id. at ¶ 23. Defendants' purportedly attempted to justify this reimbursement reduction by claiming: (1) that the "service" is not eligible for "separate" reimbursement; (2) that the "allowance" was based upon "multiple surgical payment guidelines"; and/or (3) that payment for a procedure is included in payment for other surgical services performed on the same day by the same provider. Id. at ¶ 24. See Compl., Exhibit B. However, none of these justifications appears in the provider agreements to state a basis for reduction or denial of payment of reimbursement amounts. Id. at ¶ 25. See Compl., Exhibit A.

Under this background, plaintiffs filed their Complaint, asserting counts for breach of contract, unjust enrichment, conversion, fraud, violation of the Quality Health Care Accountability and Protection Act ("QHCAP Act"), 40 P.S. §§ 991.2101 et seq., and declaratory judgment. Defendants filed

Preliminary Objections, asserting that all counts are insufficiently specific, setting forth a demurrer to each count, and moving to strike the demand for punitive damages.[2] Plaintiffs voluntarily withdrew their claim for violation of the QHCAP Act in Count V. See Pl. Response, at ¶¶ 90-92. Therefore, this court need not consider the objection to Count V.

LEGAL STANDARD

A. Demurrer

Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure [Pa.R.C.P.] allows for preliminary objections based on legal insufficiency of a pleading or a demurrer. When reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). Preliminary objections, whose end result would be the dismissal of a cause of action, should be sustained only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazara, 746 A.2d 642, 643 (Pa.Super.Ct. 2000)(citation omitted). However, the pleaders' conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinions are not considered to be admitted as true. Giordano v. Ridge, 737 A.2d 350, 352 (Pa.Commw.Ct. 1999), aff'd. 559 Pa. 283, 739 A.2d 1052 (1999), cert. denied, 121 S.Ct. 307 (U.S. 2000).

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[2]Defendants also set forth a demurrer to any claims on behalf of the Children's Surgical Associates. However, the only allegation referring to this organization is that Dr. Gregg is employed by it and it is allegedly an authorized provider with defendants. Compl. at ¶ 13. There does not appear to be a claim on behalf of the Children's Surgical Associates. Therefore, there is no further need to address this issue.

B. Insufficient Specificity

Preliminary objections may also be brought based on insufficient specificity in a pleading. Pa.R.C.P. 1028(a)(3). Rule 1019(a) requires the plaintiff to state "[t]he material facts on which a cause of action . . . is based . . . in a concise and summary form." Pa.R.C.P. 1019(a). This rule requires that the complaint give notice to the defendant of an asserted claim and synopsize the essential facts to support the claim. Krajsa v. Keypunch, Inc., 424 Pa.Super. 230, 235, 622 A.2d 335, 357 (1993). In addition, "[a]verments of time, place and items of special damage shall be specifically stated." Pa.R.C.P. 1019(f).

To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the facts alleged are "sufficiently specific so as to enable [a] defendant to prepare [its] defense." Smith v. Wagner, 403 Pa.Super. 316, 319, 588 A.2d 1308, 1310 (1991)(citation omitted). See also, In re The Barnes Foundation, 443 Pa.Super. 369, 381, 661 A.2d 889, 895 (1995)("a pleading should formulate the issues by fully summarizing the material facts, and as a minimum, a pleader must set forth concisely the facts upon which [the] cause of action is based."). "In this Commonwealth, the pleadings must define the issues and thus every act or performance to that end must be set forth in the complaint." Estate of Swith v. Northeastern Hosp. of Philadelphia, 456 Pa.Super. 330, 337, 690 A.2d 719, 723 (1997).

DISCUSSION

A. Count I - Breach of Contract

Defendants set forth both a demurrer to Count I and object to this count for lack of specificity. This court sustains the objections to Count I based on insufficient specificity.

To establish a cause of action for breach of contract, the plaintiff must allege (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa.Super. 1999)(citations omitted). Further, "[w]hile not every term of a contract must be stated in complete detail, every element must be specifically pleaded." Id. at 1058.

Here, plaintiffs alleged the existence of a Provider Agreement between themselves and defendants, under which "plaintiffs are entitled to reimbursement at the contracted rate for each and every service performed by them on behalf of defendants' members and subscribers." Compl. at ¶ 29. Plaintiffs also generally alleged that they performed all conditions precedent to their agreements, but that defendants breached these agreements by wrongfully denying plaintiffs the compensation to which they are entitled where defendants engage in "downcoding" or "bundling." Id. at ¶¶ 30-32. Plaintiffs also alleged damages which will continue in the form of financial injuries resulting from not being properly compensated for services performed on subscribers.

Despite these allegations, plaintiffs failed to meet the specificity requirements required by Pa.R.C.P. 1019. First, plaintiffs fail to set forth the specific time period for when either plaintiff was in a contractual relationship with the defendants, notwithstanding that the attached provider agreements were executed by each plaintiff on separate dates in 1997 and each agreement includes an internal "term" provision which provides for automatic renewal after the initial one (1) year term. See Compl., Exhibit A at ¶ 4.1. Plaintiffs also alleged that they had been in a business relationship with the defendants for in excess of ten (10) years. Compl. at ¶ 19. However, it is unclear precisely when the alleged "downcoding" or "bundling" occurred and whether the provider agreements were in place during this alleged misconduct. The Complaint leaves

open the question of whether the downcoding occurred during the entire ten-year relationship or over some shorter time in the interim.

It is also unclear exactly which of plaintiffs' claims for reimbursement were subject to this alleged misconduct. Plaintiffs did not set forth whether every claim for reimbursement was subject to "downcoding," or the specific circumstances underlying these claims and when precisely they arose. Simply attaching sample "Explanation of Benefit" forms to demonstrate defendants' attempts to justify their alleged "wrongful" activities is not sufficient to give defendants notice of which medical services were or were not provided, when they were provided, under which health care plan the services were provided or to whom they were provided. See Compl. at ¶ 24; Compl., Exhibit B. Plaintiffs contend that "[b]ecause of the large number of patients treated by plaintiffs who are insured by [IBC], to attach all explanation of benefit forms for every patient, the complaint would not be in a concise and summary form." Pls. Mem. of Law, at 11. Even though it may not be necessary to attach each and every denial or reduction of a claim for reimbursement, plaintiffs should set forth more specific circumstances of this conduct; i.e., the time period during which the denials occurred, what treatment was provided, under which health care plan the claim was submitted, etc.

Further, plaintiffs do not allege exactly upon which contract provision(s) they are relying to show defendants' breach. While this court recognizes that they are most likely referring to the "compensation" provisions listed in section 3 of the provider agreement, plaintiffs should, at a minimum, re-plead this count to state upon which provision(s) they are relying and how those provisions were breached. Moreover, it is not sufficient to plead that plaintiffs "performed all conditions precedent to their provider agreements with defendants." Compl. at ¶ 30. Rather, such an allegation is a mere conclusion of law without setting forth

what conditions plaintiff actually performed, which contract provisions plaintiff actually followed, or whether the contract placed any conditions on reimbursement distributions.

For these reasons, the court sustains the Preliminary Objections to Count I without prejudice in order that plaintiffs may amend their allegations.

B. Count II - Unjust Enrichment

Defendants demur to Count II on the grounds that a claim for unjust enrichment is inapplicable where the relationship is founded on a written agreement. Defendants also object that the allegations are insufficiently specific. The objection to Count II based on insufficient specificity is sustained.

Unjust enrichment is a quasi-contractual doctrine based in equity which requires plaintiffs to establish the following: (1) benefits conferred on defendants by plaintiffs; (2) appreciation of such benefits by defendants; and (3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendants to retain the benefit without payment of value. Wiernik v. PHH U.S. Mortgage Corp., 736 A.2d 616, 622 (Pa.Super.Ct. 1999), appeal denied, 561 Pa. 700, 751 A.2d 193 (2000).

The Pennsylvania Rules of Civil Procedure permit plaintiffs to plead causes of action in the alternative. See Pa.R.C.P. 1020(c). Further, the complaint is not defective merely because the causes of action are inconsistent or conflicting. Baron v. Bernstein, 175 Pa.Super. 608, 610, 106 A.2d 668, 669 (1954). Plaintiffs may properly plead causes of action for breach of contract and unjust enrichment in the same complaint. See, e.g., J.A. & W.A. Hess, Inc. v. Hazle Township, 465 Pa. 465, 468, 350 A.2d 858, 860 (1976)(holding that trial court erred in refusing to consider unjust enrichment claim along with breach of contract claim); Lampl v. Latkanich, 210 Pa.Super. 83, 88, 231 A.2d 890, 892 (1967). However, it

is true that plaintiffs cannot recover on a claim for unjust enrichment if such claim is based on a breach of a written contract. See Birchwood Lakes Community Ass'n v. Comis, 296 Pa.Super. 77, 442 A.2d 304, 308 (1982); Hershey Foods Corp. v. Ralph Chapek, Inc., 828 F.2d 989, 999 (3d Cir. 1987).

Here, plaintiffs alleged that they were authorized providers for defendants for over ten years and rendered medical services for defendants' insureds over that time period, but were not always covered by a written agreement during that time period. Compl. at ¶¶ 35-36. Plaintiffs also allege that defendants received a financial benefit by failing to reimburse plaintiffs for services rendered and that it would be inequitable for defendants to retain such monies or continue to be unjustly enriched. Id. at ¶¶ 37-40.

It is true that if no contract is extant, plaintiffs may recover on an unjust enrichment claim in the alternative. However, plaintiffs need to more specifically set forth when the written contracts were in place. Further, plaintiffs should specifically plead whether defendants' alleged misconduct occurred during a time when no written contract was in place, and during which time plaintiffs provided specific medical services for defendants' insureds but were not reimbursed for such services.

For these reasons, the court sustains the Preliminary Objections to Count II without prejudice for plaintiffs to file an amended complaint.

C. Count III - Conversion

Defendants also demur to Count III on the grounds that plaintiff's claim for conversion is merely another way of stating their breach of contract claim and must be dismissed in order to preserve the lines between contract and tort. This court agrees.

Conversion is defined under Pennsylvania law as: "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." McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 659 n.3 (Pa.Super.Ct. 2000)(quoting Stevenson v. Economy Bank of Ambridge, 413 Pa. 442, 451, 197 A.2d 721, 726 (1964)). Accord, L.B. Foster Co. v. Charles Caracciolo Steel & Metal Yard, Inc., 2001 WL 515071, at *5 (Pa.Super.Ct. Apr. 30, 2001). The party claiming conversion must have had actual or constructive possession of a chattel or an immediate right to possession of a chattel at the time of the alleged conversion. Chrysler Credit Corp. v. Smith, 434 Pa.Super. 429, 434, 643 A.2d 1098, 1100 (1994)(citation omitted). "Money may be the subject of conversion." McKeeman, 751 A.2d at 659 n.3 (quoting Shonberger v. Oswell, 365 Pa.Super. 481, 484-85, 530 A.2d 112, 114 (1987)). However, "failure to pay a debt is not conversion." Bernhardt v. Needleman, 705 A.2d 875, 878 (Pa.Super.Ct. 1998)(citing Petroleum Marketing v. Metropolitan Petroleum Corp., 396 Pa. 48, 52, 151 A.2d 616, 619 (1959)).

Pennsylvania courts allow for a claim in conversion for money or property where the rights to this money originally belonged to the plaintiff and the defendant wrongfully appropriated this property which had been entrusted to the defendant. For instance, in McKeeman, defendant Corestates had allegedly wrongfully seized $4,700.00 from the bank account of plaintiff Rose Chendorian who was not involved in the loan transactions surrounding the sale and settlement of the other plaintiff's property. 751 A.2d at 659. The Pennsylvania Superior Court affirmed the demurrer of the other defendant, the title insurance company, since only Corestates had access to the bank account and the subsequent ability to "deprive" Chendorian of her rights to this account in order to show conversion. Id. at 660. Similarly, in Shonberger, a retail supplier of women's clothing brought a conversion claim against a consignment store owner who

would sell the supplier's goods, keep a percentage of the proceeds and remit the remainder to the supplier. 365 Pa.Super. at 484, 5530 A.2d at 113. The defendant had allegedly used all of the proceeds from the sale of the plaintiff's merchandise for his own business and for himself, though the goods and proceeds belonged to the plaintiff. Id. at 486, 530 A.2d at 114-115. The appellate court upheld the finding that the necessary elements for the tort of conversion were present, but that the theory of recovery was deficient on other grounds. Id. The Shonberger court relied in part on Pearl Assurance Co. v. National Ins. Agency, Inc., 151 Pa.Super. 146, 155, 30 A.2d 333, 337 (1943), which found that a fraudulent conversion claim required that "the money or property so fraudulently withheld or converted by the defendant must have belonged to the party so injured." The court also stated the following with regard to this tort:

> [i]t did not apply to one who borrowed money, even though he may have had no intention of paying the loan, for by the act of lending, the money became the property of the borrower . . .; nor to articles or property transferred to the defendant with the purpose and intent of passing to him the property and title; nor is it to be applied as a means of collecting a mere debt; nor to assignment of a debt. It does apply, however, where the money, securities, or property belonging to A. are intrusted [*sic*] to the defendant to deliver to B., or to sell or dispose of the same, and to collect and pay the money received or the net proceeds arising from such sale or disposal to A., and instead he fraudulently applies the same to his own use . . . .

Id. at 155, 30 A.2d at 337 (citations and internal quotations omitted).

Additionally, federal cases, applying Pennsylvania law, are persuasive for the proposition that conversion claims are disallowed where such claims are based on the same facts as the contract claim and the proper remedy lies in breach of contract. See Phoenix Four Grantor Trust #1 v. 642 North Broad Street Assocs., 2000 WL 876728, at *9 (E.D.Pa. Jun. 29, 2000)(counterclaim plaintiffs have claim for breach of contract where rights to excess rents were created by contract rather than claim for conversion);

Mountbatten Surety Co., Inc. v. AFNY, Inc., 2000 WL 375259, at *6-7 (E.D.Pa. Apr. 11, 2000)(no conversion claim where rights to the issued bonds were governed by enforceable contract); Peoples Mortgage Co., Inc. v. Federal Nat'l. Mortgage Ass'n., 856 F.Supp. 910, 928-929 (E.D.Pa. 1994) (any rights to servicing income are defined by letter agreement and plaintiff cannot sue in tort for conversion of that income). As the Peoples court noted, "[t]o hold otherwise would be to blur one reasonably bright line between contract and tort, and hence introduce needless confusion into the judicial process, a step that Pennsylvania's state and federal courts alike have refused to take." Id. at 929. See also, Northcraft v. Edward C. Michener Assocs., Inc., 319 Pa.Super. 432, 447, 466 A.2d 620, 628 (1983)(conversion action must be limited to chattels of an existing nature, i.e., those whose existence is ascertainable by some concrete proof; absent such proof, the circumstances are more amenable to a cause of action for breach of contract).

Here, plaintiffs allege that they have repeatedly attempted to recover the full amount of the reimbursements owed to them for services rendered to defendants' insured. Compl. at ¶ 42. Plaintiffs also allege that despite their attempts to recover these reimbursements, defendants have withheld and continue to withhold monies owed to plaintiffs. Id. at ¶ 43. Defendants allegedly wrongfully withheld these monies based upon their strategy to deny plaintiffs the compensation for medical care and services performed without plaintiffs' authority or consent. Id. at ¶¶ 44-45. Thus, plaintiffs have allegedly suffered and will continue to suffer financial losses by not being properly compensated and defendants' conduct was purportedly in conscious and/or reckless disregard of the degree of harm which plaintiffs might suffer. Id. at ¶¶ 46-47.

Even taking these allegations as true, this court finds that plaintiffs have not stated a cause of action for conversion or alleged anything more than a contract or quasi-contract claim. Rather, plaintiffs' allegations sound more like the failure to pay a debt to which plaintiffs feel they are entitled. Such failure does not provide a cause of action for conversion. See Bernhardt, 705 A.2d at 878. Any rights which plaintiffs might have to reimbursements appear to derive from the provider agreements and/or the business relationship between the parties. No conversion action would lie in this instance under the facts alleged. Admittedly, "parties are liberally granted leave to amend their pleadings." Frey v. Pennsylvania Elec. Co., 414 Pa.Super. 535, 538, 607 A.2d 796, 797 (1992); However, it is difficult to see how plaintiffs will be able to plead facts to sustain a cause of action in conversion.

For these reasons, the demurrer to Count III will be sustained.

D. Count IV - Fraud

Similarly, defendants demur to Count IV on the ground that plaintiffs' fraud claim is barred by the "gist of the action" doctrine. Alternatively, defendants argue that the fraud claim is insufficiently specific. This court agrees with both arguments.[3]

To establish a cause of action for fraudulent misrepresentation, the plaintiff must allege the following elements:

> (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and

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[3]Defendants also argue that any alleged misrepresentations made prior to the execution of the provider agreements would be barred by Pennsylvania's parol evidence rule in that the agreements contain an "integration" clause at section 6.5. Since this court is dismissing the fraud count on other grounds, it need not address this argument at this juncture.

(6) the resulting injury was proximately caused by the reliance.

Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999)(citing Gibbs v. Ernst, 538 Pa. 193, 207, 647 A.2d 882, 889 (1994).[4] Under Pa.R.C.P. 1019(b), allegations of fraud must be pled with particularity. See also, Martin v. Lancaster Battery Co., 530 Pa. 11, 18, 606 A.2d 444, 448 (1992)(an allegation of fraud must "explain the nature of the claim to the opposing party so as to permit the preparation of a defense" and be "sufficient to convince the court that the averments are not merely subterfuge.").

The "gist of the action" doctrine bars claims for allegedly tortious conduct where the gist of the conduct sounds in contract rather than tort. Redevelopment Auth. of Cambira v. Int'l. Ins. Co., 454 Pa.Super. 374, 391, 685 A.3d 581, 590 (1996); Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa.Super. 221, 228, 663 A.2d 753, 757 (1995). As noted in Phico, the doctrine holds that:

> [T]o be construed as a tort action, the wrong ascribed to the defendant must be the gist of the action with the contract being collateral. In addition, . . . a contract action may not be converted into a tort action simply by alleging that the conduct in question was done wantonly. Finally, . . . the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.

Id. at 229, 663 A.2d at 757.

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[4]Similarly, a cause of action for fraud requires evidence of "(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will act; (4) justifiable reliance by the recipient upon the misrepresentation; and (5) damages to the recipient as the proximate result." Sevin v. Kelshaw, 417 Pa.Super. 1, 8, 611 A.2d 1232, 1236 (1992). See also, Smith v. The Windsor Group, 750 A.2d 304, 307 (Pa.Super.Ct. 2000)(noting that "the elements of fraud and fraudulent misrepresentation are essentially identical.").

Courts have generally invoked the gist of the action doctrine to bar a tort claim where the defendant negligently or intentionally breached a contract. See Redevelopment Auth, 454 Pa.Super. at 391, 685 A.2d at 590 (holding that doctrine barred claim of negligent performance of contractual duties); Phico, 444 Pa.Super. at 228, 663 A.2d at 757 (same); Grode v. Mutual Fire, marine and Inland Ins. Co., 154 Pa.Commw. 366, 373, 623 A.2d 933, 937 (1993)(same); Sunquest Info. Sys. v. Dean Witter Reynolds, Inc., 40 F.Supp.2d 644, 651 (W.D.Pa. 1999)(holding that gist of the action doctrine barred claim of fraudulent inducement to form a contract); Factory Mkt., Inc. v. Schuller Int'l Inc., 987 F.Supp. 387, 394-95 (E.D.Pa. 1998)(holding that doctrine barred fraud claim based on a failure to honor guarantees contained in a contract); Peoples Mortg. Co., 856 F.Supp. at 856 (holding that gist of the action doctrine barred conversion claim based on false billing under a contract). On the other hand, courts have generally not applied the doctrine where the defendant not only breached the contract, but also made misrepresentations about the breach in order to deceive the unsuspecting plaintiff into continuing the contractual relationship or to not assert its contractual rights against the defendant. Greater Philadelphia Health Servs. II Corp. v. Complete Care Servs., L.P., June 2000, No. 2387, slip op. at 4 (C.P. Phila. Nov. 20, 2000)(Herron, J.)(citing Northeastern Power Co. v. Backe-Durr, Inc., 1999 WL 674332, at *12 (E.D.Pa.); Polymer Dynamics, Inc. v. Bayer, 2000 WL 1146622, at *6-7 (E.D.Pa.); American Guarantee & Liability Ins. Co. v. Fojiani, 90 F.Supp.2d 615, 623 (E.D.Pa. 2000); Fox's Foods, Inc. v. Kmart Corp., 870 F.Supp. 599, 609 (M.D.Pa. 1994)).

Here, the allegations in Count IV are clearly based on the statements in the provider agreement regarding compensation and a "fixed fee schedule" referenced by the agreement. Compl. at ¶¶ 49-50. Plaintiffs also allege that "[i]n entering into the provider agreement with defendants and in thereafter

providing medical treatment to [IBC's] insureds, plaintiffs justifiably relied on defendants' misrepresentations relative to the reimbursement for services rendered contained in the provider agreement." Id. at ¶ 51. Further, plaintiffs allege that defendants entered into the provider agreements with no intention of adhering to the reimbursement schedule referenced in the agreements and knew they would thereafter apply fraudulent methods to reduce or deny plaintiffs the compensation to which they were entitled. Id. at ¶ 52. There is no allegation that any representation was made independent of the provider agreement. Rather, plaintiffs are seemingly attempting to substitute a tort claim for what really is a contract action. Such a claim is disallowed by the gist of the action doctrine.

Moreover, it is unclear exactly what the misrepresentations were, when they were made, by whom they were made and to whom they were made. There is also no allegation that defendants made a representation with the intention of deceiving the plaintiffs into relying on it. These defects preclude defendants in preparing a defense or stating a cause of action for fraud.

For these reasons, the demurrer to Count IV will be sustained.[5]

E. Count VI - Declaratory Judgment

Defendants demur to Count VI on the grounds that plaintiffs' declaratory judgment claim seeks nothing more that a declaration of anticipated future rights and damages in the event of some future occurrence. They argue that such a declaration is beyond the scope of the Declaratory Judgment Act because (1) the claim is not ripe; (2) declaratory judgment would not end the uncertainty or controversy giving rise to this proceeding; (3) plaintiffs may not recover future damages or attorney fees for such a

[5]As with the conversion claim, this court cannot envision that plaintiffs will be able to make out a cause of action for fraud if amendment were permitted.

claim; and (4) plaintiffs are not entitled to a jury trial on this claim. This court agrees that plaintiffs have failed to state a cause of action under the Declaratory Judgment Act.

The Declaratory Judgment Act gives the court "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." 42 Pa.C.S.A. § 7532. Any person with an interest in a contract may bring a declaratory judgment action to have determined any question of construction or validity arising under the contract. 42 Pa.C.S.A. § 7533. The Act provides that "[a] contract may be construed either before or after there has been a breach thereof." 42 Pa.C.S.A. § 7534. The Act is remedial and is to be liberally construed and affords "relief from uncertainty and insecurity with respect to rights, status, and other legal relations." 42 Pa.C.S.A. § 7541. See also, Juban v. Schermer, 751 A.2d 1190, 1193 (Pa.Super.Ct. 2000). To bring an action under the Declaratory Judgment Act, the plaintiff must demonstrate that an actual controversy exists, is imminent or inevitable, as well as a direct, substantial and present interest. Pennsylvania Turnpike Comm'n. v. Hafer. 142 Pa.Commw. 502, 507, 597 A.2d 754, 756 (1991); Wagner v. Apollo Gas Co., 399 Pa.Super. 323, 327, 582 A.2d 364, 366 (1990); Greater Philadelphia Health, slip op. at 6. However, a declaratory judgment is not appropriate to determine rights in anticipation of events which may never occur. Hafer, 142 Pa.Commw. at 507, 597 A.2d at 756. Additionally, courts are not authorized to reform contracts through a declaratory judgment action, but courts must construe the existing contracts. New London Oil Co., Inc. v. Ziegler, 336 Pa.Super. 380, 383-84, 485 A.2d 1131, 1133 (1984)(citing Baskind v. Nat'l. Surety Corp., 376 Pa. 13, 15, 101 A.2d 645, 646 (1954)).

See also, Smith v. Weaver, 445 Pa.Super. 461, 476, 665 A.2d 1215, 1222 (1995)("Recovery for past present and future damages should be brought in conjunction with the specific claims which are to be

presented before a jury. It is not appropriate to seek to recover for future losses in a separate declaratory judgment action.").

In Count VI, plaintiffs set forth the following allegations:

> 63. Pursuant to the terms of the provider agreements between the parties, which were in effect at various times during plaintiffs' relationship with defendants, defendants agreed to pay a fixed fee for various medical services provided by plaintiffs to the defendants' members and subscribers.
>
> 64. As the plaintiffs were parties to their individual provider agreements with defendants, and as the services provided by plaintiffs to defendants' members and subscribers were all to be paid for by defendants, plaintiffs are entitled to payment for the medical services provided to defendants' members and subscribers.
>
> 65. Despite repeated demands by plaintiffs for reimbursement and/or payment of the amounts owed under the provider agreements, defendants have refused to provide payment for the treatment provided to their members and subscribers in violation of the terms of the provider agreements.

Compl. at ¶¶ 63-65. In the "wherefore" clause to this count, plaintiffs request relief in the form of a declaration that:

> (a) Defendants shall reimburse plaintiffs the full contracted amount for all future medically necessary, covered medical services provided to defendants' members and subscribers for the remainder of the term of the provider agreements; and
>
> (b) Attorneys' fees and costs of suit incurred in the prosecution of this declaratory judgment action, and such other relief and this Honorable Court may deem proper.

Id. In their brief, plaintiffs argue that their claim seeks a declaration regarding the validity and/or construction of their contract with defendants. Pls. Mem. of Law, at 24. Plaintiffs also maintain that they are entitled to a declaration that defendants' reimbursement methods are violative of the contract and that plaintiff may seek to prevent defendants from engaging in the same conduct when reimbursing the plaintiffs for medical services rendered in the future. Id. Despite these arguments, the actual allegations in the

Complaint do not reflect that plaintiffs are seeking a declaration regarding defendants' breach or asking the court to construe a specific term of the provider agreements. Rather, plaintiffs seek a declaration as to future damages for medical services to be rendered some time in the future. Declaratory judgment for future damages is not appropriate. See Hafer, 142 Pa.Commw. at 507, 597 A.2d at 756.

Moreover, plaintiffs may not recover attorneys' fees under the Declaratory Judgment Act which does not explicitly provide for such fees. Further, the plaintiffs have not cited a contract provision or other exception which would provide for such fees. See Merlino v. Delaware County, 556 Pa. 422, 425, 728 A.2d 949, 951 (1999)(attorneys' fees may not be recovered from an adverse party "absent an express statutory authorization, a clear agreement by the parties or some other established exception."). Additionally, this court previously held that plaintiffs are not entitled to a jury trial for a declaratory judgment action. Greiner v. Erie Ins. Exchange, February 2000, No. 3052, slip op. at 16 (C.P. Phila. Nov. 13, 2000)(Herron, J.)(stating "[i]ndeed, declaratory judgments specifically are to be determined by a judge, not a jury")(relying on Pa.R.C.P., Explanatory Cmt. -- 1979).

For these reasons, the court sustains the demurrer to Count VI.

F. Motion to Strike Demand for Punitive Damages

Since the court has sustained the objections to the tort counts of the Complaint, that is the counts for conversion and fraud, plaintiffs have no right to punitive damages. Punitive damages are not available for a mere breach of contract. Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 370 Pa.Super. 461, 469-70, 536 A.2d 1357, 1367 (1987). Thus, the motion to strike the demand for punitive damages is granted.

CONCLUSION

For the reasons set forth, this court is entering a contemporaneous Order, sustaining the Preliminary Objections to Counts I, II, III, IV and VI of the Complaint. Additionally, this court grants the motion to strike the demand for punitive damages as to the conversion and fraud claims. Plaintiffs shall have twenty-two (22) days within entry of this Opinion and contemporaneous Order to file an Amended Complaint.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J