

11-1020

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

ROGER W. GOFF,

Plaintiff,

v.

Civil Action No.: 09-C-345-3
James A. Matish, Judge

PENN MUTUAL LIFE INSURANCE
COMPANY, a life insurance
Company, JENNIFER L. TOLER
OOTEN, and JEREMY TOLER,

Defendants.

**ORDER GRANTING WITHOUT PREJUDICE MOTION TO DISMISS OF THE
DEFENDANT, PENN MUTUAL LIFE INSURANCE COMPANY**

Presently pending before the Court is a Motion to Dismiss. On September 4, 2009, Defendant Penn Mutual Life Insurance Company ("Defendant Penn Mutual") filed The Penn Mutual Life Insurance Company's Answer, Affirmative Defenses and Interpleader wherein Defendant Penn Mutual requested that Plaintiff's Complaint be dismissed with prejudice. On September 29, 2009, Plaintiff filed Response of the Plaintiff, Roger W. Goff, to the Motion to Dismiss of the Defendant, Penn Mutual Life Insurance Company. On November 17, 2009, the Court held a hearing in this matter wherein it heard argument from the parties, through their respective counsel. The Court held its ruling on the Motion to Dismiss in abeyance, pending a further review of the applicable law and pending the submission of further supplemental briefings by counsel in this matter.

On December 7, 2009, Defendant Penn Mutual filed The Penn Mutual Life Insurance Company's Supplemental Memorandum of Law in Support of Motion to Dismiss. On December 16, 2009, Plaintiff filed his Supplemental Memorandum of Law of the Plaintiff, Roger W. Goff, In Response to the Motion to Dismiss of the Defendant, Penn Mutual Life Insurance Company. On January 12, 2010, Defendant Penn Mutual filed The Penn Mutual Life Insurance Company's Reply to Plaintiff's Supplemental Memorandum of Law in Response to Motion to Dismiss. On January 20, 2010, the Plaintiff filed a Second Supplemental Memorandum of Law of the Plaintiff to the Motion to Dismiss of the Defendant, Penn Mutual Life Insurance Company.

After reviewing the motions and memoranda in support thereof, the response, the supplemental memoranda, conducting a thorough examination of the record and reviewing pertinent legal authority, this Court concludes that the Defendant Penn Mutual's Motion to Dismiss is **GRANTED, but the dismissal should be without prejudice.**

Opinion

The Plaintiff's Complaint was filed on August 4, 2009. The Plaintiff alleges that Defendant Penn Mutual breached the statutory common law duty of good faith and faith dealing and operated to unreasonably deprive the Plaintiff of the benefits due pursuant to the insurance policy sold by Defendant Penn Mutual to Betty J. Toler. Betty J. Toler died on August 28, 2008. Defendant Penn Mutual argues that it should be dismissed from this case as the Plaintiff is alleging a

third-party bad faith claim; a claim which has been abolished by the West Virginia Legislature.

According to the West Virginia Supreme Court of Appeals, "a motion to dismiss should be granted only where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008), (citing *Murphy v. Smallridge*, 196 W.Va. 35, 36, 468 S.E.2d 167, 168 (1996) (additional citation omitted)). The court in *Forshey* also stated that, "motions to dismiss are viewed with disfavor, and we counsel lower courts to rarely grant such motions." 222 W.Va. at 749. Finally, the *Forshey* court noted that "for purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Id.*

Defendant Penn Mutual's Motion to Dismiss is based upon Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Rule 12(b)(6) provides for dismissal based upon "failure to state a claim upon which relief can be granted." As will be discussed below, the Court is of the opinion that Plaintiff's Complaint does not state a claim upon which relief may be granted against Defendant Penn Mutual as Plaintiff does not allege a first-party or third-party bad faith claim.

It must first be noted that "a third party claimant has no cause of action against an insurance carrier for common law breach of the implied covenant of good faith and faith dealing or for common law breach of fiduciary duty." See *Elmore v. State Farm Mutual Automobile Insurance Co.*, 202 W.Va. 430, 438, 504 S.E.2d 893, 901 (W.Va. 1998). Additionally, the language of the West

Virginia Code does not indicate that a primary beneficiary under a life insurance policy falls under the definition of “third-party claimant” as defined by West Virginia Code § 33-11-4a (j)(1).

The West Virginia Supreme Court of Appeals has not specifically addressed the situation where a primary beneficiary to a life insurance policy attempts to bring a statutory bad faith claim against an insurance provider. Accordingly, it is unclear whether a primary beneficiary suing to enforce the terms of a life insurance contract is a third-party claimant and therefore precluded under West Virginia Code § 33-11-4a(a) from asserting a bad faith claim against the insurance provider, or a first-party bad faith claimant.

It must also be noted that a “bad faith claim” and an “unfair claims settlement practice” are interchangeable terms. According to the West Virginia Supreme Court of Appeals, in *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (W.Va.1998),

The phrase “bad faith” is used to refer to the state’s “unfair settlement practices” statute. However, there is actually a technical distinction between a “bad faith” claim and an “unfair settlement practices” claim. The phrase “bad faith” was developed to describe the common law action against an insurer. The phrase “unfair settlement practices” was developed to describe the statutory action against an insurer. Because the statutory claim actually includes the elements of a cause of action for the common law claim, our cases use the two phrases interchangeably.

Light v. Allstate Ins. Co., 203 W.Va. 27, 31, 506 S.E.2d 64, 68 (W.Va.1998).

Accordingly, as these terms may be used interchangeably, the Court will refer to the Plaintiff’s claim as a bad faith claim.

It does not appear that Plaintiff’s claim is a first-party bad faith claim. Although the West Virginia Code does not define first-party claimant, the West

Virginia Supreme Court of Appeals has lent guidance on this issue. In *State ex rel. Allstate v. Gaughan*, 203 W.Va. 358 (1998), the Court held,

The terms “first-party” and “third-party” have distinctively different meanings in the context of bad faith settlement actions against insurers. For definitional purposes, a first-party bad faith action is one wherein the insured sues his/her own insurer for failing to use good faith in settling a claim brought against the insured or a claim filed by the insured. A third-party bad faith action is one that is brought against an insurer by a plaintiff who prevailed in a separate action against an insured tortfeasor. *State ex rel. Allstate v. Gaughan*, 203 W.Va. 358, 369 (1998).

In this case, Plaintiff is the named primary beneficiary of the life insurance policy issued by Defendant Penn Mutual. He is neither the insured nor the insurer and accordingly cannot fall into the definition of a first-party bad faith claimant as this requires that the insured sue the insurer.

While Plaintiff contends that the West Virginia Supreme Court of Appeals has implicitly stated that a beneficiary suing to enforce the provisions of a life insurance policy is a first-party claimant, there is no authority for this position. In *Romano v. New England Mutual Life Insurance Co.*, 178 W.Va. 523, 362 S.E.2d 334 (1987), it was stated that, “while group insureds are not policy holders and usually do not enjoy privity of contract with the insurer, it is recognized that they are beneficiaries of the insurance contract and may sue to enforce its provisions.”

In *Romano*, Mr. Romano's son brought a bad faith claim against the insurance company in his capacity as executor of his father's estate. The facts do not indicate that he also brought suit in his individual capacity or as a beneficiary of his father's life insurance policy. Accordingly, although *Romano* does indicate that group insureds are also beneficiaries and may sue to enforce the provisions of the life insurance contract, it does not stand for the proposition

that a beneficiary to a non group life insurance policy is also a first-party bad faith claimant. Rather, *Romano* indicates that an individual suing as a representative of the insured's estate (whose decedent was a member of the group policy) may stand in the shoes of the insured and bring a first-party bad faith claim.

In this case, the Plaintiff is the beneficiary of the life insurance policy issued by Defendant Penn Mutual and is not the executor of the insured's estate. Thus, *Romano* is wholly distinguishable from the present case and does not lend support to Plaintiff's argument that a beneficiary suing to enforce a life insurance contract is also a first-party bad faith claimant. Accordingly, it does not appear that the Plaintiff is a first-party bad faith claimant.

Plaintiff also relies upon *Jarvis v. Modern Woodmen of America*, 185 W.Va. 305, 406 S.E.2d 736 (1991), wherein the beneficiary of a life insurance policy was permitted to sue the insurance provider. Plaintiff claims that although the West Virginia Supreme Court of Appeals did not directly address beneficiary standing, it implicitly recognized that a beneficiary of a life insurance policy has the right to sue the life insurance carrier. Although this is true, the court in *Modern Woodmen* did not discuss whether the plaintiff was asserting a first-party bad faith claim. Further review of *Modern Woodmen* shows that a negligence cause of action, and not a bad faith claim, was brought against the insurance agent who advised the insured to omit certain health details on his life insurance application. 185 W.Va. at 308. Accordingly, the Court is of the opinion that the plaintiff in *Modern Woodmen* was not a first-party bad faith claimant.

Lending further interpretation on this issue, the United States District Court for the Northern District of West Virginia, in *Grubbs v. Westfield Insurance Co.*, 430 F.Supp.2d 563 (N.Dist. W.Va. 2006), stated that,

Although the court in *Modern Woodmen* never explicitly stated so, discussion in the case suggests that Jarvis's wife had pursued a negligence claim against Webb, not a common law bad faith claim. See *Hayseeds v. State Farm Fire & Cas.*, 177 W.Va. 323 (1986) (a common law bad faith claim requires finding a refusal to pay a claim accompanied by a malicious intent to injure or defraud).

Grubbs v. Westfield Insurance Co., 430 F.Supp.2d 563, 568-569 (N.Dist. W.Va. 2006).

As indicated by *Grubbs*, the plaintiff in *Modern Woodmen* was not a first-party bad faith claimant. Therefore, it is the opinion of the Court that the definition provided in *Gaughan* of first-party claimant is the only definition proffered by the West Virginia Supreme Court of Appeals. Accordingly, the Court **FINDS** that the Plaintiff in this case does not fall into the definition of a first-party bad faith claimant as he is only a beneficiary to the life insurance contract and is neither the insured nor the insurer.

In addition to not being a first-party bad faith claimant, the Court is also of the opinion that the Plaintiff is not a third-party bad faith claimant. As defined by the West Virginia Supreme Court of Appeals, "A third-party bad faith action is one that is brought against an insurer by a plaintiff who prevailed in a separate action against an insured tortfeasor." *State ex re. Allstate v. Gaughan*, 203 W.Va. at 370. It must be noted that the aforementioned definition was not overruled by the passing of West Virginia Code § 33-11-4a et seq., which abolished private

causes of action for third-party bad faith claims and provided a definition of a third-party claimant. According to West Virginia Code § 33-11-4a,

“Third-party claimant” means any individual, corporation, association, partnership or any other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract for the claim in question.

West Virginia Code § 33-11-4a(j)(1).

Taking into consideration both definitions, Plaintiff is not a third-party claimant. Although Plaintiff is an individual, Plaintiff is not asserting a claim against any entity insured under the insurance policy at issue in this case. Rather, Plaintiff is only asserting a claim against Defendant Penn Mutual; an entity not insured under the insurance policy at issue in this case. Additionally, Plaintiff did not prevail in a separate tort action against an insured tortfeasor. Accordingly, the Court **FINDS** that Plaintiff is not a third-party bad faith claimant as Plaintiff does not fall into the definition provided by West Virginia Code § 33-11-4a(j)(1) or the West Virginia Supreme Court of Appeals.

As Plaintiff is neither a first-party nor third-party bad faith claimant, the Court is of the opinion that Plaintiff has not stated a claim upon which relief may be granted. In *Southern West Virginia Paving, Inc. v. Elmo Greer & Sons, LLC., et al.*, 2009 WL 1867678, p. 3 (S.D. W.Va. June 29, 2009), after analyzing West Virginia precedent discussing first-party and third-party bad faith claims and applicable West Virginia Code, the Court held that “The relevant statute and the Supreme Court of Appeals clearly intended to prevent all but the insured from suing the insurer for unfair claims settlement practices.” As Plaintiff is neither

the insured nor the insured and only a primary beneficiary, it was the intention of the West Virginia Supreme Court of Appeals and the West Virginia legislature to prevent the Plaintiff from filing a bad faith claim. Therefore, the Court **FINDS** that Plaintiff is precluded from filing a bad faith claim and that Plaintiff's claim must fail as a matter of law as it does not state a claim upon which relief may be granted.

It must be noted that a dispute still exists as to who is entitled to the proceeds of the life insurance policy. Defendant Jennifer L. Toler Ooten and Defendant Jeremy Toler assert that they are entitled to the proceeds despite Plaintiffs contention that he is entitled to the proceeds. As a dispute exists, Defendant Penn Mutual deposited with the Circuit Clerk of Harrison County, West Virginia, a check in the amount of \$105,185.32 on December 4, 2009.

Accordingly, the Court **FINDS** that Plaintiff is neither a first-party or third-party bad faith claimant. Further, the Court **FINDS** that dismissal of Defendant Penn Mutual under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is appropriate in this case as Plaintiff does not state a claim upon which relief may be granted. It is therefore, hereby **ORDERED**, that the Defendant Penn Mutual's Motions to Dismiss is **GRANTED, without prejudice**.

It is, further, **ORDERED**, that the Circuit Clerk shall forward certified copies of this Order to the following:

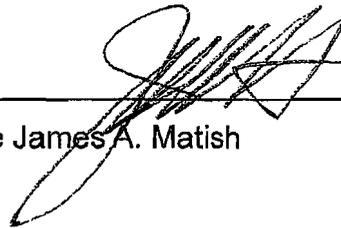
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ENTER: 05/25/2010



Judge James A. Matish

STATE OF WEST VIRGINIA

COUNTY OF HARRISON, TO-WIT

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th

Family Court Circuit of Harrison County, West Virginia, hereby certify the

Foregoing to be a true copy of the ORDER entered in the above styled action

on the 25th day of May, 2010.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 25th day of May, 2010.

Donald L. Kopp, II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia

NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ROGER W. GOFF,

Plaintiff,

v.

Civil Action No.: 09-C-345-3
James A. Matish, Judge

PENN MUTUAL LIFE INSURANCE
COMPANY, a life insurance
company, JENNIFER L. TOLER
OOTEN, and JEREMY TOLER,

Defendants.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE JAMES A MATISH, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2011, I served the foregoing **PETITION FOR APPEAL ON BEHALF OF PLAINTIFF, ROGER W. GOFF** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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