FST CV 09 5009591 S	JUDICIAL DISTRICT 2009 SEP 24 P 3:31	: SUPERIOR COURT
JOSEPH VINCOLI		: JUDICIAL DISTRICT OF STAMFORD/NORWALK
V.		: AT STAMFORD
HARTFORD UNDERWRITERS INS. CO.		: SEPTEMBER 24, 2009

MEMORANDUM OF DECISION
MOTION TO STRIKE # 106

Procedural History

The present action arises out of a motor vehicle accident in which the plaintiff, Joseph Vincoli, was struck and injured by an unidentified driver. On December 8, 2008, the plaintiff filed a three count complaint against the defendant, Hartford Underwriters Insurance Company, alleging the following facts. While operating a motor vehicle on the Merritt Parkway, an unidentified driver cut into the plaintiff's lane of travel and thereby caused the plaintiff to veer off the highway and into a tree. As a result of this accident the plaintiff sustained serious injuries, including fractures of the backbone, ribs and collarbone as well as the collapse and puncture of his lungs. A police investigation concluded that the accident was caused as a result of the plaintiff's need to take evasive action from the unidentified driver's unsafe lane change. The plaintiff alleges that he was insured by the defendant and is entitled to uninsured motorist coverage for the damages he sustained as a result of the accident. The defendant has denied the plaintiff's claims questioning the liability determination of the police as well as the existence of the unidentified driver.

Count one asserts a claim for breach of contract based on uninsured motorist benefits.

Count two alleges bad faith in the defendant's denial of coverage to the plaintiff. Count three presents a cause of action under CUTPA. The defendant has filed a motion to strike counts two and three, asserting that the plaintiff has pleaded only conclusory allegations and has failed to plead with any specificity the two respective counts.

Legal Discussion

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any [pleading] . . . to state a claim upon which relief can be granted." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "It is fundamental that in determining the sufficiency of a [pleading] challenged by a [party's] motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Gazo* v. *Stamford*, 255 Conn. 245, 260, 765 A.2d 505 (2001).

"A motion to strike . . . does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Internal quotation marks omitted.) *Faulkner* v. *United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). "[The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . [I]f facts provable in the [pleading] would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Sullivan* v. *Lake Compounce Theme Park, Inc.*, 277 Conn. 113, 117-18, 889 A.2d 810 (2006). "A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *Alves*, supra, 262 Conn. 498.

The defendant moves to strike count two alleging a breach of the covenant of good faith and fair dealing. The defendant argues that the allegations in the complaint do not give rise to a reference of bad faith. In response, the plaintiffs counter that they have alleged sufficient facts of bad faith to survive a motion to strike.

"[I]t is axiomatic that the . . . duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship. . . . In other words, every contract carries an implied duty requiring that neither party do anything that will injure the right of the other to receive the benefits of the agreement. . . . The covenant of good faith and fair dealing presupposes that the terms and purpose of the contract are agreed upon by the parties and that what is in dispute is a party's discretionary application or interpretation of a contract term. To constitute a breach of [the implied covenant of good faith and fair dealing], the acts by which a defendant allegedly impedes the plaintiff's right to receive benefits that he or she reasonably expected to receive under the contract must have been taken in bad faith." *Renaissance Management Co.* v. *Connecticut Housing Finance Authority*, 281 Conn. 227, 240, 915 A.2d 290 (2007). "[B]ad faith is defined as the opposite of good faith, generally implying a design to mislead or to deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties. . . . [B]ad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. . . . [I]t contemplates a state of mind affirmatively operating with furtive design or ill will. . . ." (Citation omitted; internal quotation marks omitted.) *Hutchinson* v. *Farm Family Casualty Ins. Co.*, 273 Conn. 33, 42 n. 4, 867 A.2d 1 (2005).

There is a split of authority among Superior Court decisions concerning which "factual allegations are sufficient to constitute the element of bad faith . . . The first line of cases requires specific allegations establishing a dishonest purpose or malice. In alleging a breach of the covenant of good faith and fair dealing, courts have stressed that such a claim must be alleged in terms of wanton and malicious injury [and] evil motive . . ." (Citation omitted, internal quotation marks omitted.) *Chapman* v. *Georgine Realty*, Superior Court, judicial district of New Haven, Docket No. CV 05 5001346 (August 29, 2008, *Bellis, J.*). The second line of cases generally holds parties to a less stringent standard requiring that a plaintiff need only allege sufficient facts or allegations from which a reasonable inference of sinister motive can be made. *Id.* Even where courts have used an inference analysis, however, they have looked to allegations that the conduct at issue was engaged in purposefully. See *Parnoff* v. *Mooney*, Superior Court, judicial district of Fairfield, Docket No. CV 04 4001683 (April 8, 2008, *Frankel, J.*) (a finding of breach of contract is not dispositive of bad faith as not all contracts are breached with sinister intent).

In the present matter, the plaintiffs allege in count two that the defendant failed to conduct a reasonable investigation, failed to consider evidence, inappropriately accused the plaintiff of negligent conduct and refused to credit information from the plaintiff and the police as to the cause of the accident in question. "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of

the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." *Elm Street Builders, Inc. v. Enterprise Park Condominium Assn., Inc.*, 63 Conn. App. 657, 667, 778 A.2d 237 (2001). See *Landry* v. *Spitz*, 102 Conn. App. 34, 48, 925 A.2d 334 (2007) (bad faith may include conduct that evades the spirit of a contract and is unfaithful to its purpose). Viewing the allegations of the complaint in the light most favorable to the plaintiff, as the court must do for purposes of the motion to strike, the plaintiff has sufficiently pled facts which, if credited, could constitute a finding of bad faith. Accordingly, the defendant's motion to strike count two is denied.

The defendant moves to strike count three on the ground that the plaintiff has failed to properly plead a cause of action under CUTPA. Specifically, the defendant asserts that by simply alleging that the defendant has engaged in unfair settlement practices the plaintiff has insufficiently pled a general business practice as required under CUIPA.

It is well established that CUTPA affords a private cause of action to any individual who has suffered an ascertainable loss as a result of the employment of a prohibited practice. *Nazami* v. *Patrons Mutual Ins. Co.*, 280 Conn. 619, 625, 910 A.2d 209 (2006); Connecticut General Statutes § 42-110g(a). In *Mead* v. *Burns*, 199 Conn. 651, 663, 509 A.2d 11 (1986), our Supreme Court determined that a plaintiff may bring an action under CUTPA to enforce alleged CUIPA violations. "[A] CUTPA claim based on an alleged unfair claim settlement practice prohibited by § 38a-816(6) require[s] proof, as under CUIPA, that the unfair settlement practice had been committed or performed by the defendant with such frequency as to indicate a general business practice." (Internal quotation marks omitted.) *Lees* v. *Middlesex Ins. Co.*, 229 Conn.

842, 850, 643 A.2d 1282 (1994). "The term `general business practice' is not defined in the statute, so we may look to the common understanding of the words as expressed in a dictionary . . . `General' is defined as prevalent, usual [or] widespread . . . and `practice' means [p]erformance or application habitually engaged in . . . [or] repeated or customary action . . . ." *Grossman* v. *Homesite Insurance Co.*, Superior Court, judicial district of Stamford, Docket No. 07 5004413 (July 6, 2009, *Adams, J.*). "In requiring [such] proof . . . the legislature has manifested a clear intent to exempt from coverage under CUIPA isolated instances of insurer misconduct. . . . [Therefore] alleged improper conduct in the handling of a single insurance claim, without any evidence of misconduct by the defendant in the processing of any other claim, does not rise to the level of a general business practice as required by [CUIPA]. . . ." (Citation omitted; internal quotation marks omitted.) *Lees* v. *Middlesex Ins. Co.*, supra, 229 Conn. 849. Nonetheless, a CUTPA claim can stand independent of a plaintiff's inability to plead a CUIPA count, providing that the plaintiff has pleaded sufficient facts to establish unfair and deceptive trade practices. *Palmieri* v. *Nationwide Mutual Ins. Co.*, Superior Court, judicial district of Fairfield, Docket No. CV 07 5012326 (January 29, 2009, *Tobin, J.*).

"[General Statutes §] 42-110b(a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA the Supreme Court has adopted the criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise — in other words, it is within at least the

penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons] . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three. . . ." (Citation omitted; internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 18-19, 938 A.2d 576 (2008). "Further, the Supreme Court has determined that multiple acts of unfairness in dealing with the same claim do not establish a general business practice. Thus, the plaintiff must allege not only that [the defendant] engaged in unfair settlement practices with him, but other claimants as well to sufficiently allege a CUTPA violation." *Ambrose* v. *Golden Rule Ins. Co.*, Superior Court, judicial district of Danbury, Docket No. CV 07 5003730 (July 28, 2008, *Shaban, J.*).

Count three incorporates all of the facts pled in the previous counts and includes allegations that the defendant has refused to pay claims, compelled insureds to institute litigation simply to recover amounts due to them under their existing policies, has neglected to make good faith settlement of the plaintiff's claim and has failed to make settlement under similar circumstances of other policy holders' claims. Construed in a light most favorable to the plaintiff, these allegations satisfy the second prong of the cigarette rule, in that they are arguably indicative of "immoral, unethical, oppressive or unscrupulous" behavior to multiple policy holders. See *Telesis* v. *Health Resources*, Superior Court, judicial district of Middletown, CV 00 0597269 (February 28, 2001, *Gilardi, J.*) (pleading intent to hinder, delay or defraud sufficiently support the allegations of unfair deceptive, immoral, unethical, unscrupulous or

Superior Court, judicial district of New Haven, CV 05 4004795 (July 27, 2006, *Taylor, J.*) (misrepresentations made by the defendant were sufficient to create a cause of action under CUTPA); *Twin Summer Condominium Assoc., Inc.* v. *Travelers Indemnity*, Superior Court, judicial district of Waterbury, Docket No. 08 5010277 (April 3, 2009, *Eveleigh, J.*) (allegation of a general business practice is sufficient to withstand a motion to strike a CUTPA count). Accordingly, the defendant's motion to strike count three is denied.

Conclusion

For the foregoing reasons the defendant's motion to strike counts two and three is denied.

PAVIA, J.

Decision entered in accordance with the foregoing. All counsel and pro se parties notified 9/24/09.
K. Olsen, TAC