IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EDWARD F. PRICE, III	)	
	)	C.A. No. N11C-07-069-RRC
v.	)	
	)	
STATE FARM MUTUAL	)	
AUTOMOBILE INSURANCE	)	
COMPANY	)	
	)	

Submitted: February 15, 2013
Decided: March 15, 2013

Upon Defendant's Renewed Motion for Summary Judgment.
GRANTED.

MEMORANDUM OPINION

John S. Spadaro, Esquire, John Sheehan Spadaro, LLC, Hockessin, Delaware; Arthur M. Krawitz, Esquire and Tara Elizabeth Bustard, Esquire, Doroshow Pasquale Krawitz & Bhaya, Wilmington, Delaware, Attorneys for Plaintiff

Colin M. Shalk, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware, Attorney for Defendant.

COOCH, R. J.

INTRODUCTION

Defendant automobile insurance company moves for summary judgment against Plaintiff on its claims against it for uninsured motorist benefits and for "bad-faith breach of contract" stemming from an automobile collision with a "phantom" vehicle. After the collision, Plaintiff filed insurance claims with Defendant and then accepted payment from Defendant in a purported settlement of his uninsured motorist claim.

Defendant contends that summary judgment is warranted because Plaintiff's uninsured motorist claim was settled and because Defendant consistently acted in good faith. Plaintiff contends that summary judgment is inappropriate because the parties never agreed to settle the claim and because Defendant intentionally took advantage of Plaintiff's lack of sophistication about insurance coverage. Plaintiff also contends that Defendant acted in bad faith by delaying handling Plaintiff's claim and that Defendant breached the implied duty of good faith and fair dealing. Plaintiff also raises an issue of apparent first impression in Delaware: whether an insured can assert a claim for bad faith breach of contract following a settlement of the insured's underlying insurance claim.(although Plaintiff contends that there never was a valid settlement).

The Court finds that summary judgment for Defendant is appropriate because (1) Plaintiff's uninsured motorist claim was settled; (2) that established, as a matter

of law, a bad faith breach of contract claim cannot stand after an insurance settlement and (3) Plaintiff has not established sufficient facts that Defendant breached the implied duty of good faith and fair dealing. Therefore, Defendant's Motion for Summary Judgment is **GRANTED**. All other pending motions or applications are **DENIED AS MOOT**.

FACTUAL HISTORY

Edward F. Price, III ("Plaintiff") was injured in an automobile collision in New Castle, Delaware that is "best estimated"[1] to have occurred in late July 2008.[2] Plaintiff alleges that while stopped at a gas station, putting windshield wiper fluid into his car, a "phantom" vehicle backed into Plaintiff, pinning him between the "phantom" car and his own. Plaintiff repeatedly hit the car and yelled, hoping to get the driver's attention. The "phantom" driver sped off, freeing Plaintiff, but Plaintiff's knee was seriously injured.

Several months later, in February 2009, Plaintiff first reported this accident to his automobile insurance carrier, State Farm Automobile Insurance Company. Plaintiff reported the accident while paying a premium at his insurance agent's office. Plaintiff's insurance policy provided uninsured motorist ("UM") coverage

[1] Deposition of Gregory Bell, (State Farm Claims Representative) p. 9.

[2] Both parties are unclear on the exact collision date. Plaintiff could not recall the date and State Farm's records are unclear, but late July 2008 is the date alleged and estimated by Plaintiff in his amended complaint.

of $100,000 and Personal Injury Protection ("PIP") coverage. State Farm opened both UM and PIP claim files for Plaintiff.

A State Farm claims representative, Gregory Bell, was assigned to handle the uninsured motorist portion of Plaintiff's claim. Bell contacted Plaintiff to discuss the accident and Plaintiff's possible UM claim. Bell testified that he explained the difference between PIP and UM coverage.[3] Bell further stated that Plaintiff did not indicate any confusion between the two policies.[4] Bell and Plaintiff spoke twice during March 2009 to discuss claim paperwork and Plaintiff's knee injury treatment. Plaintiff initially opted for more conservative non-surgical treatment, including receiving cortisone injections.

Also, in March 2009, Plaintiff contacted State Farm about collecting lost wages through his PIP coverage. However, lost future earnings are not recoverable under PIP and are only recoverable under UM. State Farm concluded Plaintiff did not have a lost wages claim under PIP.[5]

State Farm maintained an activity log for all contact between State Farm claims representatives and Plaintiff. The activity log included notes from Plaintiff's conversations with State Farm regarding his UM and PIP inquiries. For Plaintiff's wage inquiry, the notes include few details regarding the inquiry,

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[3] Bell Dep. at p. 55.

[4] *Id*. at 59-60.

[5] Def's M. at Ex. C.

including very little regarding the lost wage duration or amount sought. The parties dispute whether Bell was aware that Plaintiff inquired regarding lost wages because Bell was only assigned to Plaintiff's UM claim, while another State Farm representative handled Plaintiff's PIP inquiry.[6]

Plaintiff elected to undergo a total knee replacement in June 2009. Bell and Plaintiff did not speak again until September 2009. In the interim, Bell had gathered Plaintiff's medical records to assess Plaintiff's claim. Bell also had investigated the subject gas station. Bell forwarded Plaintiff's medical records to a medical expert for assessment. In March 2010, the medical expert issued a report which stated that Plaintiff's knee replacement was successful and that further treatment was unnecessary. After reviewing this report, Bell determined that Plaintiff had completed treating his accident injuries.[7]

Section III of Plaintiff's policy, pertaining to Defendant's uninsured motorist coverage, provided, in pertinent part, that

> [State Farm] will pay damages for *bodily injury* and *property damage* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle*. The *bodily injury* or *property damage* must be caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle*. . .[8]

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[6] To the extent the parties dispute Bell's awareness of Price's lost wages inquiry, this Court finds that this factual dispute is immaterial and concludes that, as a matter of law, it is not dispositive to Plaintiff's claims.

[7] Bell Dep. at p. 31.

[8] Plaintiff's Insurance Policy at p. 13 (emphasis in original).

The policy did not explicitly indicate that the uninsured motorist coverage potentially included lost future earnings.

In May 2010, Bell offered Plaintiff $50,000. Plaintiff had never previously made any specific monetary demand. Bell said that he remembered Plaintiff being very excited about the $50,000 offer.[9] Conversely, Plaintiff testified that he remembered being frustrated by the delay and remarking to Bell something along the lines of "it's about time."[10] Plaintiff contends that he understood that this payment was only a portion of the funds he would receive and that more was forthcoming. Plaintiff stated he was aware that his UM coverage limits were $100,000.

Bell said that he explained to Plaintiff that the payment was to compensate Plaintiff for his injuries and settle his UM claim.[11] Bell testified that he did not explain to Plaintiff that by accepting the $50,000 offer, Plaintiff might surrender future medical expense reimbursement, nor did Bell explain the loss categories which comprise an uninsured motorist claim.[12] Furthermore, Bell testified that he

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[9] Bell Dep. at p. 19.

[10] To the extent the parties dispute whether Plaintiff responded with frustration or with excitement, this Court finds this factual dispute is immaterial because Plaintiff's conduct in its totality was sufficient to demonstrate his acceptance of the settlement offer.

[11] Bell Dep. at p. 33.

[12] *Id*. at 31-33.

did not explain why Defendant was offering less than the policy's full $100,000 limit. Conversely, there is no indication that Plaintiff ever affirmatively inquired regarding these factors.

On, May 18, 2012, Bell mailed Plaintiff a $50,000 check accompanied by what Bell said was State Farm's standard uninsured motorist settlement letter to its insureds. The letter read in part as follows:

> Per our discussion on May 18, 2010, enclosed is our draft in the amount of $50,000 to settle your Uninsured Motorist claim as a result of the above accident.
>
> Thank you for your cooperation.
>
> If you have any questions, please contact me at [telephone number]. . .

Bell testified that State Farm did not send a release to Plaintiff because State Farm's general practice was not to send releases for uninsured motorist claims to its own insureds. Plaintiff received the check on May 21, 2010 and deposited it. At no time during the claim or settlement process did Plaintiff retain legal counsel. Plaintiff's PIP claim or its resolution has not been disputed and is not a part of this case

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PROCEDURAL HISTORY

This case's procedural history has been complex. Plaintiff originally filed suit against State Farm for uninsured motorist benefits in July 2011. At that time, Plaintiff was represented only by Arthur M. Krawitz, Esquire and Tara Elizabeth Bustard, Esquire of Doroshow Pasquale Krawitz & Bhaya. Plaintiff's original complaint included no bad faith claim against State Farm and in what the Court finds to be a most unusual omission, made no mention of the $50,000 payment. State Farm answered the complaint in September 2011 and pled affirmatively that the claim was settled by "accord and satisfaction."

In March 2012, John S. Spadaro, Esquire, entered his appearance, also on behalf of Plaintiff and in April 2012, Defendant first moved for summary judgment. In that motion, Defendant argued that summary judgment was appropriate because of the settlement. In response, Plaintiff's counsel argued that Defendant had failed to establish the previously-pled affirmative defense of accord and satisfaction[13] and that a genuine issue of material fact existed regarding whether State Farm fulfilled the implied contractual duty of good faith and fair dealing.[14] At that time, Plaintiff had made no claim regarding good faith and fair

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[13] Pl's Answering Br. to First M. for Summary Judgment at p. 5.

[14] The Delaware Supreme Court has carefully attempted to draw a distinction between bad faith insurance cases and claims that an insurance company has breached the implied duty of good faith and fair dealing. See *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)("The case law frequently (and unfortunately) equates a lack of good faith with the presence of bad faith"); "Despite its evolution, the term "good faith" has no set meaning, serving only to "exclude a wide range of heterogeneous forms of bad faith." *Id*. at 441 (citing Robert S.

dealing. Plaintiff then sought relief to amend his complaint to include such a claim. The Court held oral argument on the preliminary motion for summary judgment in June 2012 and reserved decision. Shortly thereafter, Plaintiff formally moved to amend the complaint to include a claim for "bad faith-breach of contract."

On September 13, 2012, this Court granted Plaintiff's motion to amend the complaint and denied Defendant's motion for summary judgment, but without prejudice for Defendant's potential re-filing of the motion after the close of discovery.[15] This Court concluded that Defendant had not demonstrated sufficiently on an incomplete factual record how an amended complaint would be prejudicial.[16]

During briefing on the original summary judgment motion, and in support of Plaintiff's position that its bad faith allegation was an issue of material fact in dispute, Plaintiff claimed that State Farm had settled the UM claim below its true value. In part, Plaintiff relied upon the opinion of Roger D. Landon, Esquire of Murphy & Landon, who certified that

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Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code,* 54 VA L. REV. 195, 201 (1968). Where possible, this Court will attempt to honor that distinction, however, aware that the distinction is nuanced and that Plaintiff's arguments unclearly bridged both legal theories, conflation of the theories may be inevitable.

[15] *Price v. State Farm Mut. Auto. Ins. Co.,* 2012 WL 4478665 (Del. Super. Sept. 13, 2012).

[16] *Id*. at *3.

> Based on my knowledge, skill, and experience as a Delaware personal injury lawyer, it is my opinion that an injury resulting in a total knee replacement would have an approximate value of $100,000 for general damages only. . .[17]

In response, Defendant sought to depose Mr. Landon and Plaintiff's counsel moved for a protective order, which the Court denied in October 2012. In November 2012, Mr. Landon's law partner, Francis J. Murphy, Esquire was deposed in his capacity as a proffered expert for Plaintiff on the bad faith claim. In Plaintiff's expert disclosure for Mr. Murphy, pursuant to Superior Court Civil Rule 26(b)(4), in the section that provided the grounds for Mr. Murphy's opinions, the disclosure described a:

> survey that Mr. Murphy conducted of certain Delaware personal injury practitioners and mediators. This survey asked the respondents to offer their best estimate as to the value of an injury resulting in a total knee replacement (exclusive of special damages). The persons surveyed, and the values at which they arrived, are as follows:
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> -Hon. Vincent A. Bifferato, Sr.: $100,000.
> -Roger D. Landon: $100,000
> -Bernard A. Van Ogtrop: $150,000
> -Yvonne Takvorian Saville: $75,000
> -Michael I. Silverman: $150,000
> -David A. White: $100,000 to $150,000[18]

[17] Certification of Roger D. Landon, Esquire, Ex. H to Pl's Answering Br. (May. 11, 2012).

[18] Pl's Expert Disclosure: Francis J. Murphy, Esquire (Oct. 23, 2012).

At his deposition, Mr. Murphy also opined that State Farm should have offered payment no later than October 2009, but that it had improperly delayed processing the UM claim.[19]

Thereafter followed a series of discovery disputes which flooded the Court's docket between November 2012 and February 2013.[20] Defendant filed a renewed motion for summary judgment in January 2013 and briefing was completed in February 2013. The Court advised counsel by letter dated February 22, 2013 that it had decided to **GRANT** Defendant's Motion for Summary Judgment and that accordingly, the April 8, 2013 trial date would be canceled.

THE PARTIES' CONTENTIONS

I. Defendant's Contentions

Defendant first contends that summary judgment should be granted because Plaintiff settled his uninsured motorist claim before bringing this action. Defendant asserts that (1) Bell was the appropriate claims adjuster at State Farm for Plaintiff's uninsured motorist claim, (2) Bell made a settlement offer to Plaintiff, and (3)

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[19] Deposition of Francis J. Murphy, Esquire at p. 47-48.

[20] Included among the numerous letters, motions and purported emergency emails, which were replete with discovery disagreements, the parties filed two *Daubert* motions, two motions to compel, a motion for a protective order, four motions *in limine*, and cross appeals from a commissioner's decision. Each motion or application was responded to with little apparent effort by counsel to resolve disputes without court intervention.

Plaintiff accepted it. Defendant argues that even if Plaintiff believed additional funds were forthcoming, that belief was never expressed to Bell, and Bell never indicated that such was the case. Defendant contends that there is no reason to vacate the settlement.

Additionally, Defendant argues that summary judgment should be granted on Plaintiff's bad faith claim. Defendant contends that it acted appropriately at all times and that Plaintiff has not adduced a sufficient claim for bad faith in light of the limited Delaware jurisprudence for such a claim.

Defendant appears to contend that a bad faith claim cannot lie, as a matter of law, if the Court finds that there was a valid settlement. "The defendant requests that the Court grant summary judgment in its [sic] favor and failing that, grant summary judgment on the bad faith issues."[21]

II. Plaintiff's Contentions

Plaintiff contends that the "purported" settlement was invalid because no meeting of the minds occurred and therefore, while there may have been an offer from State Farm, Plaintiff's actions cannot be construed as an acceptance.

Alternatively, Plaintiff asserts that Defendant has failed to prove an accord and satisfaction because an accord and satisfaction requires a good-faith dispute regarding the amount owed, which Plaintiff contends is lacking. Plaintiff contends

[21] Def's M. for Summary Judgment at p. 19.

there was no dispute as to an amount owed and that State Farm did not act in good faith.

Moreover, Plaintiff argues that State Farm lacked good faith by including unclear and vague terms in its insurance policy. Plaintiff asserts that a parties' duty to read a contract does not include a duty to comprehend undefined or unclear terms. Plaintiff describes such unclear terms as "phantom" contract terms. Specifically, Plaintiff contends that the portion of the policy addressing uninsured motorist coverage provides unclear, sophisticated language that is "deceptive," and that it is unfair to expect insurance consumers to comprehend such complicated policy language. Plaintiff contends that the "purported settlement" cannot be valid and enforceable because it violated Delaware's unfair claims practices statute.

Plaintiff contends that genuine factual disputes remain regarding State Farm's claimed good faith and fair dealing in handling Plaintiff's claim. Specifically, Plaintiff contends that there is a reasonable dispute regarding State Farm's awareness that: (1) the claim was more valuable than the policy's $100,000 UM limit; (2) Plaintiff was ignorant of the fact that lost future earnings were covered by UM; (3) Plaintiff was relying on State Farm's fairness; and (4) Plaintiff was unrepresented. Plaintiff argues that if a jury concludes that State Farm was aware of those factors, it would be reasonable for that jury to conclude that Defendant "seized

on the circumstances to claim a $50,000 windfall at its own insured's expense."[22] Plaintiff contends that the fact that Plaintiff inquired regarding lost wages under his PIP coverage demonstrates Plaintiff's susceptibility to Defendant's advantage and that Plaintiff misunderstood his insurance policy.

Plaintiff contends that when an auto insurer settles a UM claim, the payment "must properly reflect either 1) the range of legal damages that a reasonable jury would likely award for injuries resulting in a total knee replacement, or 2) the settlement value that would likely be assigned such injuries within the Delaware legal community."[23] Plaintiff also contends that his damages easily exceeded the UM policy limits and that State Farm's unreasonably delayed handling his claim.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[24] On summary judgment, the Court must view the facts in the light most favorable to the non-moving party.[25] Once a moving party establishes that no material facts are disputed,

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[22] Pl's Response to Def's Motion at p. 18.

[23] Pl's Amended Complaint at. ¶7.

[24] Super. Ct. Civ. R. 56(e).

[25] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970).

the non-moving party bears the burden to demonstrate a material fact issue by offering admissible evidence.[26] The non-moving party must do "more than simply show that there is some metaphysical doubt as to material facts."[27]

DISCUSSION

I. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFF'S UNINSURED MOTORIST CLAIM BECAUSE PLAINTIFF EFFECTIVELY SETTLED HIS CLAIM.

Uninsured motorist coverage must be included in every auto liability policy for vehicles registered or principally garaged in Delaware unless rejected in writing.[28] UM coverage is for the "protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or hit-and-run vehicles for bodily injury, sickness, disease, including death, or property damage resulting from the ownership, maintenance, or use of such uninsured or hit-and-run motor vehicle."[29] 18 *Del. C.* §3902 ensures that an

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[26] See Super. Ct. Civ. R. 56(e); *Phillips v. Del. Power & Light Co.*, 216 A.2d 281, 285 (Del. 1966).

[27] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

[28] 18 *Del. C.* §3902.

[29] *Id*.

insured will have the same resources from which to seek compensation as if the accident had involved a motorist with the State's' minimum insurance coverage.[30]

Although an insurance carrier sells an uninsured motorist insurance policy to its insured, once a claim is filed under that provision, the insurer "stands in the shoes of the uninsured tortfeasor."[31] Therefore, a UM claim necessarily involves a somewhat adverse relationship between the insured and the insurer.

A. Plaintiff's Conduct Demonstrated his Acceptance of the Settlement.

"It is an elementary principle of contract law that an acceptance of an offer, in order to be effectual, must be identical with the offer and unconditional."[32] "The acceptance of a contract may be implied from the acts and conduct of the party to whom the offer is made."[33] "An overt manifestation of assent, not a subjective intent, controls the formation of a contract."[34] The unexpressed

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[30] *Humm v. Aetna*, 656 A.2d 716 (Del. 1995); *Banzsak v. Progressive Direct Ins. Co.,* 3 A.3d 1089 (Del. 2010).

[31] *Layton v. Hartford Fire Ins. Co.*, 2003 WL 22016865 (Del. Super. Apr. 7, 2003); *Williams v. Limpert*, 1997 WL 528268 (Del. Super. July 3, 1997).

[32] *Friel v. Jones*, 206 A.2d 232, 233 (Del. Ch. 1964), *a'ffd*, 212 A.2d 609 (Del. 1965) (citations omitted).

[33] *Montray Realty Co. v. Arthurs,* 30 Del. (7 Boyce) 168 (Del. 1918) (citations omitted).

[34] *Acierno v. Worthy Bros. Pipeline Corp.*, 693 A.2d 1066, 1070 (Del. 1997) (citing *"Industrial America", Inc. v. Pulton Industries, Inc.,* 285 A.2d 412, 415 (1971)).

subjective intention of a party is therefore irrelevant.[35] Acceptance of the consideration offered can be construed as an acceptance of the offer.[36]

In this case, Plaintiff argues that Bell's $50,000 offer was never "confirmed as accepted" by Plaintiff. Plaintiff seizes upon Bell's deposition testimony when Bell had difficulty recalling Plaintiff's precise language in response to the $50,000 offer.[37] Plaintiff argues that his statements cannot properly be viewed as words of acceptance. Rather, Plaintiff contends by responding "it's about time" he signified his protest.

Irrespective of Plaintiff's verbal response, the words themselves do not raise a material factual dispute sufficient to compel a jury question. Even assuming the facts in Plaintiff's favor as the non-movant, Plaintiff's subsequent conduct manifested his acceptance of the settlement offer. Even if Plaintiff initially protested, upon receipt he deposited the check despite clear language in the accompanying letter stating that "enclosed is our draft in the amount of $50,000 to settle your Uninsured Motorist claim." Then, despite his claimed understanding that more funds would be forthcoming, after depositing the check Plaintiff took no action for fourteen months. After fourteen months of inactivity, Plaintiff then filed a lawsuit for UM damages rather than contact State Farm, which complaint, as

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[35] *Id*. (citing *Leeds v. First Allied Connecticut Corp.*, 521 A.2d 1095, 1097 (1986)).

[36] *Montray Realty Co.*, 30 Del. (7 Boyce) at 168 (citations omitted).

[37] Bell Dep. at p. 31.

previously noted, made no mention of Plaintiff's acceptance of the $50,000 check from Defendant.

If Plaintiff was confused or expected additional settlement funds, it was paramount for Plaintiff to contact Bell and inquire about same before accepting and depositing the $50,000. There is no indication that Plaintiff was ever given assurances that additional funds beyond the $50,000 would be forthcoming or that this payment did not represent anything other than complete resolution of Plaintiff's UM claim. If Plaintiff was surprised that no additional funds were tendered, one would expect that Plaintiff would have acted much sooner than fourteen months later, and that Plaintiff or his newly-retained attorneys might contact the insurance company directly, rather than filing a lawsuit.

Sympathetic as a Court might be to an injured insured, it is not the Court's role to protect parties from a lack of contracting diligence, or to help parties avoid that which hindsight might reveal was a bad deal.[38] The Court finds that Plaintiff unquestionably accepted the $50,000 settlement based upon his conduct. Therefore, Plaintiff's uninsured motorist claim was settled because it included both a valid offer and acceptance.

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[38] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010) ("[The court] must assess the parties' reasonable expectations at the time of contracting and not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal. Parties have a right to enter into good and bad contracts, the law enforces both.").

B. An Accord and Satisfaction was Not Required to Settle the Insurance Claim.

Albeit unclear from Plaintiff's papers, presumably, Plaintiff's second argument against the purported settlement is proffered in the alternative. While Plaintiff's primary argument is that there was no meeting of the minds, in the alternative, Plaintiff seemingly argues that even if the Court deems the $50,000 offer accepted, the agreement does not qualify as an accord and satisfaction. Plaintiff offers this argument in response to Defendant's pleading accord and satisfaction as an affirmative defense. Plaintiff's arguments for why an accord and satisfaction was unfulfilled are (1) that there was no dispute regarding the amount owed (2) that State Farm did not act in good faith.

A party asserting an accord and satisfaction must assert that:

> (1) a bona fide dispute existed as to the amount owed that was based on mutual good faith;
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> (2) the debtor tendered an amount to the creditor with the intent that payment would be in total satisfaction of the debt; and
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> (3) the creditor agreed to accept the payment in full satisfaction of the debt.[39]

An accord and satisfaction requires a *bona fide* dispute over an amount owed. "To be deemed bona fide, a dispute must be (1) honest and advanced in good faith, and (2) founded on some reasonable, tenable or plausible ground."[40]

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[39] *Acierno,* 693 A.2d at 1068.

In *Acierno v. Worthy Bros.*,[41] a contractor agreed to provide demolition and paving services for a developer in exchange for $630,000.[42] The developer fell behind on payments and the contractor sued the developer for the sum allegedly due under the contract.[43] The developer retained a replacement contractor to complete the work and remedy perceived deficiencies.[44] Negotiations followed and the developer tendered a settlement check for $327,703.55.[45]

In analyzing whether the check tendered during negotiations constituted an accord and satisfaction, the Delaware Supreme Court affirmed the Superior Court's finding that no accord and satisfaction occurred because the developer had not acted in good faith by refusing to allow the contractor to cure alleged deficiencies before hiring a replacement.[46] Essentially, the Court deemed that while a *bona fide* dispute existed regarding the amount owed, the developer's lack of fair dealing in not permitting the contractor the opportunity to cure defects negated the accord and satisfaction.

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[40] *Id*. at 1069.

[41] *Id*. at 1067.

[42] *Id*.

[43] *Id*. at 1068.

[44] *Id*.

[45] *Id*. at 1068.

[46] *Id*. at 1069.

C. There was no Bona Fide Disputed Debt to Support an Accord and Satisfaction.

Plaintiff first argues that an accord and satisfaction was never accomplished because there was never a *bona fide* dispute as to an amount owed. Second, Plaintiff argues that even if such a dispute existed, Defendant did not act in good faith. Plaintiff claims that the low settlement amount and State Farm's failure to inform Plaintiff fully regarding lost future earnings exemplify Defendant's unfair dealing.

This Court agrees with Plaintiff to the limited extent that there was never a *bona fide* dispute regarding the amount owed. In an uninsured motorist context with applicable policy limits, there is no *bona fide* dispute regarding the amount owed. Rather, the insured simply files a claim with the insurer and the insurer assesses the claim's value. That an insurance policy includes coverage limits of up to $100,000, as here, does not mandate that an insured automatically is owed the entire policy limits when making a claim under that portion of the policy. There was no prior agreement that any claim made by an insured would automatically be compensable for the policy limits. Moreover, there was no prior agreement that certain injury claims, such as a total knee replacement, would necessarily receive the policy limits.

Rather, the policy limit only sets the maximum compensable figure that the insured can possibly receive. Some claims may receive a policy limit tender, while

other claims less or nothing at all. Therefore, the $50,000 settlement payment cannot operate as a "satisfaction" because it did not satisfy any previous *bona fide* disputed debt. Since, irrespective of fair dealing, the Court finds there is no *bona fide* disputed debt to constitute an accord and satisfaction, the Court need not reach Plaintiff's further argument regarding Defendant's fair dealing.[47]

D. Defendant Need Not Prove an Accord and Satisfaction to Prove the Claim's Settlement.

Despite Plaintiff's argument otherwise, the fact that there was no *bona fide* disputed debt is not "fatal" to Defendant's motion. It is axiomatic that an insurance claim can be settled without invoking the principle of accord and satisfaction. Quite simply, Plaintiff made an insurance claim seeking an unclear amount of compensation, State Farm offered $50,000 and Plaintiff accepted the offer.

When Plaintiff accepted the $50,000, that payment was not satisfying an underlying disputed debt, because there was no prior agreement satisfied by the acceptance. There was no prior agreement whereby Plaintiff was to receive the full policy limits, nor was there a demand by Plaintiff which would elevate a

[47] In its Reply Brief, Defendant argues that "State Farm owed an obligation or debt to Mr. Price for uninsured motorist benefits even if the specific amount of obligation or debt had not been reduced to a dollar value. However, whether the dispute between Mr. Price and State Farm had not been reduced to a dollar value or did not precisely meet the definition of accord and satisfaction is of no moment." Defendant's Reply Br. at p. 6. Although Defendant seemingly interprets the facts differently than the Court, the Court's conclusion remains the same, i.e. that the insurance claim was otherwise settled, irrespective of accord and satisfaction.

simple insurance claim to a *bona fide* disputed debt.[48] Plaintiff did not have an agreement to necessarily receive a specified sum; rather, he had an agreement whereby he received UM coverage. In other words, by paying an insurance premium, uninsured motorists were one of "the risks within the scope of [his] insurance policy."[49] Insurance coverage does not guarantee than an insurance claim will be paid.

When Plaintiff made his uninsured motorist claim, Plaintiff had simply that, a claim. Presumably, in response, irrespective of the claim's merits, State Farm could have possibly tendered any amount from zero to $100,000. State Farm offered $50,000 which Plaintiff accepted in settlement of his uninsured motorist claim. There is no further analysis required because an accord and satisfaction was unnecessary for resolution of Plaintiff's claim.

E. Even Assuming the Insurance Policy's Language was Vague, Unclear, or "Deceptive," No Legal Authority Supports Vacating an Otherwise Valid Settlement.

Plaintiff lastly contends that an accord and satisfaction was impossible because Defendant did not act in good faith when drafting Plaintiff's insurance

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[48]Even assuming Plaintiff had demanded full policy limits of $100,000, State Farm would have been under no duty to pay that precise amount, absent additional demonstration by Plaintiff. Plaintiff's demand in those circumstances would presumably operate merely as an offer. However, it is important to remember that Plaintiff made no such policy limit demand.

[49] COVERAGE, Black's Law Dictionary (9th ed. 2009).

policy. Plaintiff asserts that State Farm employs vague and unclear language in its insurance policy that an average insured cannot understand.

To rebut the principle that an insured has a duty to read an insurance contract,[50] Plaintiff argues that an insured is under no duty to read "phantom" contract terms. Plaintiff contends that the lack of clarity in Plaintiff's insurance policy, including a lack of defined terms, made it impossible for Plaintiff to understand the policy and made it impossible for Plaintiff to realize that UM coverage included potential coverage for lost future earnings.

Although unclear from Plaintiff's papers, Plaintiff is apparently arguing that any purported accord and satisfaction must be vacated because the insurance terms were unclear, that the insurance policy must be construed against State Farm, and that its terms violated Delaware's Consumer Fraud Act.[51] Plaintiff limited this argument to an accord and satisfaction analysis; however, because this Court has concluded, without relying upon accord and satisfaction, that this claim was settled, this Court will apply the argument to the settlement in general.

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[50] *See Graham v. State Farm Mut. Auto Ins. Co.*, 565 A.2d 908, 913 (Del.1989) (general duty to read contract and party's failure to read terms of insurance contract will not justify later disavowal of an unfavorable term.); *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1362 (Del. Super. 1990)(a party's duty to read is a matter of general contract law.).

[51] Presumably, this argument is more pertinent to Plaintiff's claim for bad faith breach of contract, but the Court will address the argument as presented by Plaintiff in its papers wherein Plaintiff argued that this reasoning demonstrated that an accord and satisfaction had not occurred.

The Delaware Supreme Court explained in *Penn Life Mutual Insurance Company v. Oglesby*[52] that, with insurance contracts,

> [i]t is the obligation of the insurer to state clearly the terms of the policy, just as it is the obligation of the issuer of securities to make the terms of the operative document understandable to a reasonable investor whose rights are affected by the document. Thus, if the contract in such a setting is ambiguous, the principle of *contra proferentem* dictates that a contract must be construed against the drafter.
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> The policy behind this principle is that the insurer or the issuer, as the case may be, is the entity in control of the process of articulating the terms. The other party, whether it be the ordinary insured or the investor, usually has very little say about those terms except to take them or leave them or to select from limited options offered by the insurer or the issuer. Therefore, it is incumbent upon the dominant party to make the terms clear. Convoluted or confusing terms are the problem of the insurer or issuer – not the insured or investor.[53]

The language relied upon in *Oglesby* served primarily to explain the Delaware Supreme Court's approach to insurance contract interpretation when the Court must resolve ambiguous contract language.[54] In *Oglesby*, the Court's insurance policy interpretation was determinative of whether a particular injury was covered under the policy.[55] There is no such coverage question present in this case because the parties agree regarding the insurance policy's coverage. No

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[52] 695 A.2d 1146 (Del. 1997).

[53] *Id*. at 1149-50 (citations omitted).

[54] *Id*. at 1150-51.

[55] *Id*. at 1151.

ambiguous provision must be construed against State Farm. Plaintiff seemingly argues that the agreement's ambiguity must not only be construed against the drafter, but further, that the ambiguity compels vacating the settlement. Plaintiff has cited no authority where an ambiguous or unclear insurance policy was construed against a drafter such that a settlement reached under that policy was vacated.

Presumably, Plaintiff relies upon *Oglesby* more to highlight public policy, which, by analogy, Plaintiff contends requires the settlement be vacated. *Oglesby* explained that it was construing the language against the insurance company because the insured had no control over the language and "it is incumbent upon the dominant party to make the terms clear."[56]

This Court, as it must, accepts the policy supporting *Oglesby*; however, vacating a settlement based upon *contra proferentem* is too drastic an interpretation. As stated, Plaintiff has cited no legal authority supporting this relief, and the Court finds no legal authority for taking this expansive step. Therefore, this Court will not vacate the settlement based upon the underlying policy's language.

[56] *Id.* at 1150.

F. Delaware's Consumer Fraud Act is Within the Sole Discretion of the Insurance Commissioner.

Plaintiff also relies upon Delaware's Consumer Fraud Act, pursuant to 6 *Del. C.* §2513(a), which provides that

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

Plaintiff's reliance upon 6 *Del. C.* §2513(a) of Delaware's Consumer Fraud Act provides no support for vacating the settlement. Most importantly, §2513(a) cannot be read without the limitations provided in §2513(b)(3). §2513(b)(3) provides that "this section shall not apply . . . to matters subject to the jurisdiction of the . . . Insurance Commissioner of this State."[57] The Insurance Commissioner is responsible for investigating complaints against insurance companies, pursuant to 18 *Del. C.* §3 *et seq.,* and as such, §2513(a) of Delaware's Consumer Fraud Act is inapplicable to this private, non-administrative action.

Even if §2513(a) was applicable in this private, non-administrative action, in interpreting the case in the light most favorable to Plaintiff, no proffered facts indicate that State Farm's behavior was subject to §2513. While Plaintiff has

[57] 6 *Del. C.* §2513(b)(3).

asserted that the unclear terms in the uninsured motorist portion of the agreement are "deceptive," Plaintiff has failed to adduce any facts that State Farm employed these allegedly deceptive practices "with intent that others rely upon such concealment . . . in connection with the sale, lease or advertisement of any merchandise."[58]

Taken further, even assuming that uninsured motorist coverage is "merchandise" under the statute, no proffered facts demonstrate State Farm purposely drew up the "unclear" policy language with intent that consumers rely upon that concealment when choosing an insurance provider. Plaintiff's insurance purchase is not a subject of this case and is the only conduct prohibited by 6 *Del. C.* §2513(a).

Even if, as Plaintiff implies, this Court concluded that State Farm intentionally made this policy portion "deceptive" to reduce *pro se* pursuit of future lost earnings in their UM claims, §2513(a) is inapposite because it protects consumers who are deceived while purchasing merchandise; it does not protect customers who have purchased merchandise and are seeking to receive a benefit of that purchase. Therefore, despite Plaintiff's reliance upon *Oglesby* or the Consumer Fraud Act, there is no valid legal basis to vacate the settlement.

[58] 6 *Del. C.* §2513(a).

This Court has concluded that Plaintiff's uninsured motorist claim was effectively settled, that there was no disputed debt, that an accord and satisfaction was not required to settle Plaintiff's claim, and that there is no legal authority to vacate the settlement based upon the terms of Plaintiff's insurance policy. Therefore, Defendant's Motion for Summary Judgment is **GRANTED** on Plaintiff's claim for uninsured motorist benefits found in Count I and II of Plaintiff's Amended Complaint.

II. SUMMARY JUDGMENT IS APPROPRIATE ON PLAINTIFF'S BAD FAITH-BREACH OF CONTRACT CLAIM AS A MATTER OF LAW.

In *Tackett v. State Farm*,[59] the Delaware Supreme Court reasoned that an insured's claim against an insurer for unfair denial or delay in claim payments constituted a claim for bad faith breach of contract.[60] *Tackett* held that a bad faith claim can stem from an insurer's failure to investigate, pay, process a claim, or in delaying payment.[61] The Delaware Supreme Court has expressly clarified that the parameters of a bad faith action are expressly limited to those circumstances.[62]

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[59] 653 A.2d 254 (Del. 1995).

[60] *Id*. at 264.

[61] *Id*. (citing *Casson v. Nationwide Ins. Co.,* 455 A.2d 361, 369 (Del. Super. 1982).

[62] *Dunlap.*, 878 A.2d at 442.

In this case, Plaintiff is claiming bad faith breach of contract despite the plaintiff having settled the underlying dispute.[63] With the Court concluding, *supra*, that the settlement was valid, there is a fundamental legal question whether, after settling an insurance claim, a Plaintiff can nevertheless assert a claim for bad faith breach of contract for conduct in settling the claim. This is an apparent issue of first impression in Delaware. This Court concludes that no such relief is available as a matter of law.

Plaintiff has provided no legal authority supportive of a bad faith breach of contract claim following an otherwise valid settlement. (Plaintiff disputes that a valid settlement occurred.) This Court has been unable to find any jurisdiction where a bad faith claim has even proceeded, nevertheless has been successful, when the underlying insurance claim has been settled.[64] Delaware has expressly limited the circumstances where a Plaintiff can pursue a claim for bad faith breach of contract and the Court declines to expand the theory. This Court reasons that when an insurance claim is settled, a plaintiff cannot substantiate a claim for bad faith breach of contract, as a matter of law.

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[63] The Court notes again, that although Plaintiff labeled his claim as "bad faith -breach of contract," Plaintiff has argued both that State Farm acted in bad faith and that State Farm breached the implied duty of good faith and fair dealing.

[64] *See generally*, S. Ashley, *Bad Faith Actions Liability & Damages* §§ 3:39, 5:2, 5A:2, 5:9, 5.10, 5.14 (Sept. 2012); Shernoff, *Insurance Bad Faith Litigation* (May 1997); 14 *Couch on Ins*. §§ 206:23, 206:27, 206:28.

A. There was no Unreasonable Delay Sufficient to Compel a Finding of Bad Faith.

Even assuming that a bad faith claim was not foreclosed as a matter of law following a settlement, Plaintiff cannot adduce a sufficient bad faith breach of contract claim under *Tackett*. Plaintiff cannot claim that State Farm refused to pay, because State Farm made a settlement offer and honored its deposited draft of that sum. At best, Plaintiff can argue that State Farm acted in bad faith by unreasonably delaying paying Plaintiff's claim.

The facts that support Plaintiff's argument that State Farm delayed addressing the claim are limited to the duration from which Plaintiff first reported the incident in February 2009, to when settlement was first offered, in May 2010. Also, Plaintiff relies upon Mr. Murphy's deposition testimony during which he claimed that State Farm should have tendered payment as early as October 2009.[65]

Between Plaintiff's first reporting the accident in February 2009 and the settlement offer in May 2010, Plaintiff was still treating for his injury, and varied his treatment from more conservative non-surgical efforts before the eventual knee replacement operation in June 2009. It is reasonable that State Farm would monitor varying treatments and results when valuing a claim. Once Plaintiff underwent his

[65] This Court notes that Mr. Murphy's testimony was the subject of a now mooted *Daubert* motion *in limine*, which hypothetically could have excluded his testimony. However, in accepting the facts "in the light most favorable to the non-moving party" the Court will include Mr. Murphy's expected testimony in its analysis.

knee replacement in June 2009, he made no attempt to contact State Farm, until State Farm contacted Plaintiff in September 2009.[66] At that time, State Farm then forwarded the medical records for expert analysis.

While limited communication occurred between Plaintiff and Gregory Bell between March and September 2009, it is important to note that Plaintiff was also not actively pursuing his claim by contacting State Farm. It is also notable that Plaintiff initially delayed filing an insurance claim for nearly seven months.[67] Plaintiff cannot justly chastise State Farm for its "delay" when Plaintiff himself initially delayed filing the claim for nearly seven months, and then took limited affirmative steps to advance his claim between March 2009 and September 2009.

To the extent there were delays in the handling of Plaintiff's claim, it appears any delays were reasonable with each party sharing some responsibility. Therefore, a *Tackett* bad faith breach of contract claim based on delay cannot stand.[68]

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[66] It is unclear whether State Farm was even aware Plaintiff had undergone the June 2009 total knee replacement until State Farm contacted Plaintiff in September 2009. It is unclear whether Plaintiff took the affirmative step to notify State Farm of that decision.

[67] There is some record evidence that the delay in filing the insurance claim may have been related to Plaintiff being unaware that this collision would be covered under UM. However, in a situation where a plaintiff is seriously injured, at potential great cost, the Court expects a plaintiff, represented or not, to be diligent in searching out all potential opportunities for redress.

[68] Despite Plaintiff labeling his claim as "bad faith-breach of contract," which would traditionally be limited to the examples of bad faith enunciated in *Tackett*, since Plaintiff has also argued a breach of implied duty of good faith and fair dealing, the Court will review those arguments *infra*, as well.

III. THERE IS NO LEGAL SUPPORT OR MATERIAL FACTUAL DISPUTE SUFFICIENT FOR PLAINTIFF TO PROCEEED UNDER A CLAIM OF A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING.

The implied duty of good faith and fair dealing attaches to every Delaware contract, including insurance contracts.[69] The duty of good faith and fair dealing has been defined as "the obligation to preserve the spirit of the bargain rather than the letter, the adherence to substance rather than form."[70] "Candor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process."[71]

In an insurance context, good faith requires "that the insurer act in a way that honors the insured's reasonable expectations."[72] This includes a duty, on the insurer's part, "not to take advantage of the [parties'] unequal positions in order to become a secondary source of injury to the insured."[73] "The implied covenant of good faith requires more than just literal compliance with the policy provisions and

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[69] *Dunlap*, 878 A.2d at 442.

[70] *Pierce v. International Ins. Co. of Ill.*, 671 A.2d 1361, 1366 (Del. 1996) (quoting 3A *Corbin on Contracts* §654A (1994)).

[71] *E.I. duPont de Nemours and Co. v. Florida Evergreen Foliage*, 744 A.2d 457, 461 (Del. 2000).

[72] *Dunlap*, 878 A.2d at 444.

[73] *Id*.

statutes."[74] It "requires that the insurer act in a way that honors the insured's reasonable expectations."[75]

A. **Plaintiff's claim is not Analogous to *Dunlap* or *Woodward*.**

The only Delaware case that Plaintiff relies upon which involves the implied duty of good faith and fair dealing in the auto insurance context is *Dunlap v. State Farm Fire and Casualty Company.* [76] In *Dunlap*, the Delaware Supreme Court considered whether "the implied covenant of good faith and fair dealing encompassed claims other than for bad faith in denying or delaying payment of benefits."[77]

The *Dunlap* plaintiff had suffered "catastrophic injuries" in a collision and requested that her uninsured motorist insurer agree partially to deny coverage to allow her to settle with a potential tortfeasor whose liability was questionable.[78] The insurance provider refused, causing *Dunlap* to litigate her claim against that tortfeasor unsuccessfully, whereby *Dunlap* lost substantial damages.[79]

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[74] *Id*.

[75] *Id*.

[76] 878 A.2d 434 (2005).

[77] *Id*. at 437.

[78] *Id*.

[79] *Id*. at 438.

The Delaware Supreme Court held that by refusing to allow settlement, the insurer had become a secondary injury source to Plaintiff without advancing any interest of its own.[80] Therefore, the Delaware Supreme Court determined that the scope of implied duties of good faith and fair dealing was not limited to an insurance company's failure to promptly process and pay claims.[81] To this Court's knowledge, since *Dunlap*, there has not been any judicial extension of the implied duty of good faith and fair dealing in Delaware auto insurance cases, and Plaintiff has cited no supplemental authority.

Plaintiff also relies upon *Woodward v. Farm Family Casualty Insurance Company*[82] *to* a support a claim that State Farm breached the implied duty of good faith and fair dealing. *Woodward* involved casualty insurance. Pursuant to 18 *Del. C.* § 3914, casualty insurers are required to provide notice of the applicable period of limitations.[83] In that limited context, the Delaware Supreme Court stated in *dicta* that hypothetically, if a casualty insurance company failed to inform an insured of a shorter than normal period of limitations, such would constitute a breach of the

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[80] *Id*. at 445.

[81] *Id*. at 444.

[82] 796 A.2d 638, 648 (Del. 2002).

[83] "An insurer shall be required during the pendency of any claim received pursuant to a casualty insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages." 18 *Del. C*. § 3914.

insurer's implied covenant of fair dealing.[84] In addition to being limited to casualty insurance, that example was also made in *dicta*, despite the facts then before the Court, which the Court deemed were insufficient to constitute a breach of the implied duty.[85]

Plaintiff's case does not turn on either *Dunlap* or *Woodward*. *Dunlap* is inapposite because *Dunlap* involved an insurer's refusal to allow an unrelated insurance settlement for no logical reason. The insurer in *Dunlap* had harmed its insured's interests without promoting any interest of its own. There are no analogous facts present in Plaintiff's case.

Woodward also is unhelpful to Plaintiff. The Court was addressing a specific casualty insurance statute and speculating whether a hypothetical indirect breach of that statute would constitute a breach of good faith. It is an extreme logical jump to conclude that the Delaware Supreme Court's speculative hypothetical breach of good faith in a casualty insurance case, in *dicta*, can be analogized to this case. Plaintiff asserts that it is analogous because *Woodward* "so strongly condemns unfair nondisclosures"[86] that State Farm's failure to alert Plaintiff that lost future earnings were potentially compensable through UM would constitute a lack of good faith.

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[84] *Id*.

[85] *Id*.

[86] Pl's Answering Br. at p.19-20.

Plaintiff's argument is without merit. First, Plaintiff has proffered no statute that provides a similar starting point from which to analogize. The Court is aware of no statute which requires insurance companies to explain to Plaintiff's with potential lost future earnings claims that such claims are potentially compensable through UM. Furthermore, the failure to inform an insured regarding the period of limitations is far more egregious than the failure to detail every specific loss category in an insurance claim. A claimant unaware of the limitations deadline is at risk of losing the entire action and potentially is without recourse, whereas, assuming State Farm omitted disclosing that lost future earnings were potentially compensable through UM, Plaintiff lost one aspect of potential UM compensation.

B. **Delaware's Unfair Claims Practices Statute Does Not Provide for a Private Cause of Action.**

Delaware's Unfair Claims Practices Statute, in pertinent part, provides that "[n]o person shall engage in this State in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."[87] The General Assembly has expressly defined certain activities as unfair or deceptive act or practices.[88] Most relevantly, in 18 *Del. C.* §2304(16) the General Assembly has prohibited "unfair claim settlement practices" which include an insurance

[87] 18 *Del. C.* §2303.

[88] 18 *Del. C.* §2304.

company "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. . ."[89]

Plaintiff relies upon 18 *Del. C.* §2304(16)(f) to claim that by allegedly not attempting in good faith to effectuate fair and equitable settlements, Plaintiff has a valid implied breach of good faith and fair dealing claim. However, this Court has repeatedly held that 18 *Del. C.* §2301*, et seq*., and specifically §2304(16) does not provide for a private cause of action.[90] Plaintiff essentially is attempting to argue that an implied duty breach claim can stand in part dependent upon §2304(16), despite the statute not supporting a private cause of action. In essence, by relying on §2304(16), Plaintiff appears to be attempting to circumvent the jurisprudence and establish claim where one would otherwise be prohibited. For that reason, the Court will not substantively consider Plaintiff's reliance upon §2304(16), and Plaintiff will have to establish an implied breach of good faith and fair dealing claim upon judicial authority.

C. The Restatement of Contracts is not Delaware Law and is Not Dispositive.

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[89] 18 *Del. C.* §2304(16)(f).

[90] *Yardley v. U.S. Healthcare, Inc.*, 698 A.2d 979 (Del. Super. 1996), *a'ffd,* 693 A.2d 1083, 1997 WL 188355 (Del. Apr. 11, 1997) (TABLE); *Moses v. State Farm Fire and Cas. Ins. Co*., 1991 WL 269886 (Del. Super. Nov. 20, 1991); *Playtex FP, Inc. v. Columbia Cas. Co*., 1993 WL 54504 (Del. Super. Feb. 19, 1993); *Strollo v. DeRosa*, 1996 WL 527327 (Del. Super. Aug. 29, 1996).

Without sufficient underlying Delaware case law or statutory support, Plaintiff relies upon the Restatement Second of Contracts. Section 161 of the Restatement provides, in pertinent part:

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist. . . .
>
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good-faith and in accordance with reasonable standards of fair dealing.[91]

Although secondary authority, the Restatement of Contracts is not codified law in Delaware, and §161 has not received wide-ranging support in State of Delaware jurisprudence. Only a few opinions have relied on §161[92] and in other Delaware cases, §161 was analyzed when employing other jurisdictional law.[93] On those grounds alone, the Court need not consider whether State Farm breached its implied duty of good faith and fair dealing under §161, as a matter of law.

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[91] Restatement (Second) of Contracts §161 (1981).

[92] *Shore Builders, Inc. v. Dogwood, Inc.,* 616 F. Supp. 1004, 1014 (D. Del. 1985) (Court reasons that whether a party made assertion through non-disclosure pursuant to §161 was jury question); *Walker v. Res. Dev. Co. Ltd., L.L.C.* (DE), 791 A.2d 799, 816 (Del. Ch. 2000) (§161(d) was not persuasive because even if a misrepresentation was made by omission, it was not relied upon.).

[93] *Mitsubishi Power Sys. Americas, Inc. v. Babcock & Brown Infrastructure Group US, LLC,* 2010 WL 275221 (Del. Ch. Jan. 22, 2010) (Referencing §161 in applying New York law);*In Matter of Estate of Massello*, 1997 WL 89091, at *3 fn.2 (Del. Ch. Feb. 24, 1997) (referencing §161 in applying Pennsylvania law).

Even assuming, *arguendo* that §161 is solidly indoctrinated in Delaware jurisprudence, Plaintiff has failed to articulate material facts whereby State Farm's representatives had the *scienter* element required to misrepresent through non-disclosure.

Apparently, Plaintiff asserts that State Farm never informed him that he could potentially receive lost future earnings through his UM claim. Plaintiff contends that this is a factual omission sufficient to compel §161. Notably, however, there was no guarantee that Plaintiff would have received lost future earnings under UM claim simply if he had been informed of their availability. Plaintiff simply would have been able to attempt to receive such compensation.[94] Presumably, Plaintiff would have supplied documentation supportive of lost future earnings and State Farm would have reviewed it, possibly compensated the Plaintiff, or may have declined to compensate Plaintiff.

For the alleged omission to be an assertion under §161(b) in this case, presumably, Gregory Bell would have had to have: (1) omitted that lost future earnings were potentially available through UM; (2) while knowing that Plaintiff mistakenly believed he could not collect such earnings; and (3) that this was a basic

[94] The Court notes that had this matter proceeded to trial Plaintiff intended to call an economist who would have testified that Plaintiff would have been eligible for a substantial lost future earnings claim. That expert's testimony was the subject of a now mooted *Daubert* motion *in limine.*

assumption of Plaintiff's agreement to settle the case for $50,000.[95] In essence, Bell would have had to have purposely omitted this information knowing that Plaintiff would not accept a $50,000 settlement otherwise.

Even when looking at the facts in the light most favorable to Plaintiff, there are simply insufficient material facts proffered, or in dispute, which can fulfill §161(b). First, the only evidence that Plaintiff proffers to suggest that Bell purposely omitted information about lost future earnings is that Bell was aware of Plaintiff's basic, one-time lost wages inquiry because it was included on the activity log. Even assuming Bell's awareness of Plaintiff's lost wages inquiry, many further factual inferences are required to reach §161(b).

To reach §161(b), the Court must infer, without any evidentiary support, that Bell purposely omitted mentioning the lost future earnings possibility because he was aware Plaintiff would not accept the proffered settlement otherwise. There is simply insufficient evidence to support any of these further required inferences or to compel a material fact dispute. At best, Plaintiff's inferred chain of events has

[95] Restatement (Second) of Contracts §161(b) (1981).

generated "some metaphysical doubt as to material facts."[96] That is insufficient to withstand summary judgment.[97]

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[96] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

[97] The Court observes, in *dicta*, that there are insufficient facts to conclude that Defendant breached the implied duty of good faith and fair dealing by settling the UM claim for $50,000, as a matter of law. Plaintiff contends that when an auto insurer settles a UM claim, the insurer must tender payment reflecting either "1) the range of legal damages that a reasonable jury would likely award for injuries resulting in a total knee replacement, or 2) the settlement value that would likely be assigned such injuries within the Delaware legal community." Pl's Answering Br. at p. 20. After citing the estimated value for a total knee replacement as estimated by the legal professionals surveyed, Plaintiff contends that State Farm's smaller offer is a fact demonstrative of State Farm's lack of good faith and fair dealing.

There is simply no legal authority for holding an insurance company to Plaintiff's suggested standard. Plaintiff's suggested standard for insurance companies was the subject of a motion *in limine*. Plaintiff's attorney surveyed Wilmington, Delaware attorney experts who were asked to assess damages only, irrespective of special damages, but were also told nothing about the claim's details. Any number of other factors distinct from the injury suffered would affect an insurer's offer, in addition to affecting a potential jury award.

In a standard UM claim, the insured is often responsible for providing all the evidence regarding the accident and there is often a lack of corroborating evidence and witnesses. It seems likely that in these circumstances, the insurer often has credibility concerns both involving the circumstances of the underlying collision as well as the injuries allegedly suffered. In circumstances where credibility concerns are present, it is reasonable that those concerns would affect a proposed settlement offer.

It may well have been the case that State Farm's settlement offer may have been affected by credibility concerns. First, Plaintiff did not report the incident for seven months and then could not recall or even narrow the incident down to a specific date. Expecting some clarity regarding such details, with an injury alleged to have been so serious, is not expecting too much from an insured. This Court is also aware that at trial, State Farm was preparing to argue that the injury alleged may have preceded the alleged collision. See Def's Reply Br. at p. 6 n.3. All of these factors could reasonably enter into State Farm's calculus when contemplating a settlement offer.

Plaintiff's case is unaided by referencing the opinions of well-respected attorneys and mediators when assessing the value of a total knee replacement, absent additional details. The Court notes that one well-respected mediator's evaluation was $75,000- only $25,000 above what State Farm paid out. (Other well-respected mediator's opinions were higher) Any one of those individuals would certainly understand that while an injury may be estimated to be compensable at a certain amount, other factors can easily degrade that value in a contested proceeding.

This Court has concluded that a bad faith breach of contract claim cannot proceed after a settlement as a matter of law. Since Defendant's arguments bridged claims for both bad faith breach of contract and a breach of the implied duty of good faith and fair dealing, the Court then analyzed Plaintiff's claim under good faith and fair dealing. Plaintiff is without adequate support from Delaware case law, the Unfair Claims Practices Statute, and the Restatement of Contracts in asserting a claim that State Farm breached its duty of good faith and fair dealing. There are insufficient facts proffered or in dispute supporting Plaintiff's claims that State Farm breached its duty of good faith and fair dealing by either not informing Plaintiff that he could potentially receive lost future earnings, or for settling the claim for only $50,000.

Whether settling a lawsuit, or settling an insurance claim, the parties' considerations cannot be fairly limited by the Court as the Plaintiff seeks. Plaintiff was seriously injured and filed an insurance claim. If Plaintiff felt he was being treated unfairly, or that the settlement was too low, Plaintiff should have spoken up, hired legal counsel, and/or taken additional steps to understand the complexities of his insurance policy. Plaintiff did none of the above. While Plaintiff was at a disadvantage of understanding as compared to an insurance company, he was not helpless. Even though State Farm was Plaintiff's insurer, a UM claim necessarily involves an adverse claims process. *Layton v. Hartford Fire Ins. Co.*, 2003 WL 22016865 (Del. Super. Apr. 7, 2003); *Williams v. Limpert*, 1997 WL 528268 (Del. Super. July 3, 1997). State Farm did not breach its implied duty of good faith and fair dealing by settling Plaintiff's claim for $50,000.

Therefore, Defendant's Motion for Summary Judgment is **GRANTED** on Plaintiff's bad faith breach of contract claim found in Count III of Plaintiff's Amended Complaint.

CONCLUSION

For all the reasons provided, Defendant's Motion for Summary Judgment is **GRANTED** as to Counts I, II, and III of Plaintiff's Amended Complaint. All other pending motions are **DENIED AS MOOT**.

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary