NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the matter of : Case No. 94-13602

Professional Insurance Management, Inc. :

Debtor

Professional Insurance Management, Inc. and Joseph J. Schipsi, Sr. : Adver. No. 94-1325

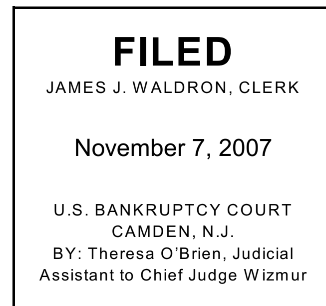
Plaintiffs

v.

Ohio Casualty Co., West American Insurance Co., American Fire & Casualty Co., Ohio Life Insurance Co., d/b/a The Ohio Casualty Group of Insurance Cos., and : **OPINION**

Harleysville Mutual Insurance Co., Huron Insurance Co., Pennland Insurance Co., Harleysville Mutual Insurance Co. of NJ, Harleysville Garden State Insurance Co., d/b/a The Harleysville Group

Defendants



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In this court's written decision of August 7, 2007, Counts I, II and VII of the plaintiffs' second amended complaint were dismissed with prejudice. Defendants' motions to dismiss as to the remaining counts were converted to motions for summary judgment. The plaintiffs have responded to the summary judgment motions on the remaining counts of the complaint, and have also asked for reconsideration of the August 7, 2007 decision. The plaintiffs' position can be broken down into four major contentions: (1) that Ohio and Harleysville each breached an implied covenant of good faith and fair dealing in their respective contractual relationship with the plaintiffs by encouraging the debtor to expand its business while the defendants secretly planned to terminate the plaintiffs' agency status; (2) that the defendants each breached an implied covenant of good faith and fair dealing by refusing to accept new policies submitted by the plaintiffs during the 90 day notice termination period;

(3) that the defendants over-reserved on the plaintiffs' accounts from 1990 through termination in 1993, thereby depriving the plaintiffs of bonuses which they would otherwise have been entitled to receive, and (4) that the court should reconsider the dismissal of Counts I, II and VII primarily on the ground that the administrative determinations of the Commissioner of the Department of Banking and Insurance ("DOBI") and the affirmance by the New Jersey Superior Court, Appellate Division, were beyond the scope of the referral from the Bankruptcy Court.

As discussed below, I have determined to grant the motions for summary judgment as to the remaining counts of the plaintiffs' second amended complaint, and to deny the motion for reconsideration of the dismissal of Counts I, II and VII of the complaint.

PROCEDURAL HISTORY

On January 22, 2007, the New Jersey Superior Court, Appellate Division, affirmed the decision of the Commissioner of the DOBI, which accepted the Report and Recommendations of Administrative Law Judge Wells that the defendants did not violate the Fair Automobile Insurance Reform Act of 1990, N.J.S.A. 17:33(B)-(1) et seq. ("FAIRA") in their dealings with the plaintiffs. The

plaintiffs' petition for certification was denied by the New Jersey Supreme Court on April 12, 2007. Based on the conclusion of the state court adjudicative process, Ohio Casualty and Harleysville informally moved before the bankruptcy court to have this adversary proceeding dismissed in its entirety. The plaintiffs argued that the state court action did not resolve all of their causes of action, and moved to file a second amended complaint. At a hearing held on July 24, 2007, Counts I, II and VII of the second amended complaint were dismissed with prejudice. The motions to dismiss the remaining counts were converted to motions for summary judgment. A written opinion memorializing this decision was entered on August 7, 2007. The debtor moved for reconsideration on September 21, 2007 and the parties have all been afforded the opportunity to supplement their arguments.

DISCUSSION

Summary judgment is appropriate where the moving party is entitled to judgment, as a matter of law, and where there exists no genuine dispute as to any material fact.[1] Nebraska v. Wyoming, 507 U.S. 584, 590, 113 S. Ct. 1689,

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[1] Bankruptcy Rule 7056 makes Fed. R. Civ. P. 56 applicable to adversary proceedings. Rule 56(c) provides, in pertinent part that the "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

1694, 123 L. Ed.2d 317 (1993); Fasold v. Justice, 409 F.3d 178, 183 (3d Cir. 2005); Caufield v. Center Area School District, 133 Fed.Appx. 4, 8 (3d Cir. 2005). The party seeking summary judgment "bears the initial responsibility of informing the . . . court of the basis for its motion." Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed.2d 265 (1986). See also Crawford-El v. Britton, 523 U.S. 574, 600 n.22, 118 S.Ct. 1584, 1598 n.22, 140 L.Ed.2d 759 (1998); Johnson v. Knorr, 130 Fed.Appx. 552, 554 (3d Cir. 2005).

Once the moving party has offered its initial proofs, the burden shifts to the non-moving party to establish that there is a genuine fact issue for trial. Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. The non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.'" Id. See also Olson v. General Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996) (nonmovant must provide more than mere allegations). The evidence offered must be of sufficient quantum and quality to allow a rational and fair minded fact finder to return a verdict in favor of the nonmovant, bearing in mind the applicable standard of proof that

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moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

would apply at a trial on the merits. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254, 106 S. Ct. 2505, 2513, 91 L. Ed.2d 202 (1986); Lawrence v. National Westminster Bank N.J., 98 F.3d 61, 65 (3d Cir. 1996).

The record is "'viewed in the light most favorable to the party opposing the motion.'"[2] Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986) (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed.2d 176 (1962)). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Liberty Lobby, 477 U.S. at 255, 106 S. Ct. at 2513. See also Caufield, 133 Fed.Appx. at 8. However, to satisfy his burden, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec., 475 U.S. at 586, 106 S. Ct. at 1356. See also Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1001 (3d Cir. 1994). The non-movant must come forward with specific facts showing that there is a genuine issue for trial. Id. See also Bradley v. Kemper Ins. Co., 121 Fed.Appx. 468, 470 (3d Cir. 2005) ("While the

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[2] In making our determination, we do not attempt to resolve any existing issues of fact or credibility. Questions of credibility are only considered where we find that the evidence is too incredible to be believed by reasonable minds. Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1250 (3d Cir. 1992) (quoting Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 909 (3d Cir. 1984)). See also Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1362 n.1 (3d Cir. 1996).

evidence that the non-moving party presents may be either direct or circumstantial, and need not be as great as a preponderance, the evidence must be more than a scintilla.").

As noted above, the plaintiffs assert four major contentions:

> (1) that Ohio and Harleysville each breached an implied covenant of good faith and fair dealing under the Bak-A-Lum analysis;
>
> (2) that the defendants each breached their obligation to write new policies submitted by the debtor during the 90 day termination period;
>
> (3) that the defendants both over-reserved to cover the debtor's loss claims, and
>
> (4) that the court should reconsider the dismissal of Counts I, II and VII because the ALJ's determination was beyond the scope of his referral.

I will address each of these contentions below.

I. Breach of Implied Covenant of Good Faith and Fair Dealing Under Bak-A-Lum.

In Counts IV and IX of the second amended complaint, the debtor asserts that Ohio and Harleysville each breached an implied covenant of good faith and fair dealing by encouraging the plaintiffs to expand their business while secretly planning to terminate the plaintiffs' agency relationship. The

plaintiffs contend that the factual circumstances of this case are closely analogous to those examined in Bak-A-Lum Corp. of Am. v. Alcoa Bldg. Products, Inc., 69 N.J. 123, 351 A.2d 349 (1976). Bak-A-Lum held that a defendant breaches an implied covenant of good faith and fair dealing when it encourages a party to expand or make investments based on an anticipated continuing relationship with the defendant, while all along secretly harboring termination plans. See also Elliot & Franz, Inc. v. Ingersoll-Rand Co., 457 F.3d. 312, 330 (3d Cir. 2006); Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assocs., 182 N.J. 210, 231, 864 A.2d 387, 399-400 (2005).

The factual predicates for the so-called Bak-A-Lum causes of action against Ohio and Harleysville are laid out in the certification of the plaintiff Joseph Schipsi, the principal of plaintiff Professional Insurance Management ("PIM"). When PIM became a Harleysville agent in 1978, and an Ohio agent in 1980, it had one office, six producers and twelve support staff. Both carriers met regularly with PIM employees, encouraging PIM to write their policies, and rewarding PIM with bonuses and trips. Ohio became the major source of business underwriting for PIM. When Ohio did not have the staff to rate and underwrite the volume of business done by PIM, PIM hired a rater and underwriters to facilitate the processing of Ohio policies. As the relationship grew, Ohio provided PIM with a direct computer link to Ohio to service its

personal line products. PIM's book of business with Harleysville also grew. In 1993, Harleysville encouraged the debtor to branch out into life insurance. Within a short period of time, PIM became the second highest life insurance producer in New Jersey for Harleysville. By 1993, PIM had increased its personnel to ten producers and twenty support staff at two locations. PIM invested in various equipment, programs, hardware and software to keep pace with the increase in business with both carriers.

Schipsi asserts that in early 1992, both Ohio and Harleysville secretly determined to terminate PIM's agency contracts. As to Ohio, by the end of 1992, PIM had achieved its highest overall production volume with Ohio. Ohio's branch manager sent a letter congratulating PIM. Notwithstanding this increase in sales volume, Ohio took various actions as predicates to PIM's termination. In December 1992, it lowered PIM's PPA commission from 15% to 10%, while at least 27 other New Jersey agencies kept the higher commission rate. Schipsi contends that the commission was reduced to allow Ohio to pay a lower commission rate on renewals after termination. Ohio instituted a "tie-in" or "collateral business" requirement for PIM commercial accounts. PIM accounts were renewed at higher rates than the insureds had previously paid. Ohio threatened PIM with suspension in February 1993 over unpaid items that PIM asserts were unpaid due to Ohio's omissions. Other bogus claims by Ohio

"which support[ ] PIM's claim that Ohio had a secret plan to discredit and terminate PIM" Schipsi Cert. ¶ 20, p.10, included Ohio's claim that PIM was making monthly payments late, was misusing premium financing vouchers, was failing to return premiums timely, and was wrongfully asserting that approximately $137,000 was due from PIM to Ohio at the time of termination. On November 15, 1993, Ohio sent PIM a notice of termination.

As to Harleysville, Schipsi contends that sometime in early 1992, Harleysville also commenced a secret campaign to terminate PIM's agency contract. In January 1992, PIM's segmentation code was reduced from Class 2 to Class 4.[3] In February 1992, PIM received a bonus for 1991. In that same month, Harleysville sent the debtor a letter describing certain problems that existed between Harleysville and PIM. Harleysville threatened late charges for PIM's alleged delays in submitting policies and premiums. Harleysville also notified PIM that it was tightening its guidelines for workers' compensation coverage. In a February 1993 agency review of PIM, the Harleysville reviewer internally described Harleysville's plan with regard to PIM as "building a paper trail that will be needed should the agency not return to profitability in the

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[3] Harleysville annually reviewed its independent agents, and classified its agents from "1", the highest rating, to "5", the lowest rating, on its Agency Segmentation Scale. The annual classification was communicated to the agent.

short run." Exh. 33. The reviewer highlighted Harleysville's intention to encourage PIM's life insurance work to help the branch meet its goals. In 1993, PIM's segmentation code was further reduced to Class 5, which is one step above termination. On November 10, 1993, Harleysville terminated the agency contract.

As noted above, on a summary judgment motion, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Liberty Lobby, 477 U.S. at 255, 106 S.Ct. at 2513. In this case, however, because the factual bases asserted by the plaintiffs in support of their Bak-A-Lum causes of action have already been adjudicated, the plaintiffs are collaterally estopped from relying on these assertions to relitigate. In my August 7, 2007 opinion on the defendants' motion to dismiss the plaintiffs' second amended complaint, I determined that in Counts I, II and VII of the second amended complaint, which alleged breaches of contract and breaches of the implied covenant of good faith and fair dealings by the defendants, PIM reconstituted the identical conduct listed as FAIRA violations committed by the defendants and presented to Judge Wells. I determined to dismiss Counts I, II and VII on the ground that the facts asserted by PIM in those counts had been fully adjudicated by Judge Wells and supported his conclusions that no FAIRA violations were committed by the defendants, and that the defendants' actions

leading up to the terminations of the agency contracts were a reasonable exercise of the carriers' rights to govern the agency relationships. Judge Wells' Report and Recommendations were adopted by the Commissioner and affirmed by the Appellate Division of the New Jersey Superior Court. Therefore, I determined that the plaintiffs were collaterally estopped from relitigating the same factual issues in the bankruptcy court.

The same conclusion is reached here as to Counts IV and IX. All of the factual issues raised in these counts are identical to the facts adjudicated by Judge Wells, and identical to the facts raised in Counts I, II and VII of the second amended complaint, which have been dismissed. The factual determinations made by Judge Wells were essential to the prior judgment, ultimately entered by the Commissioner, that the defendants did not violate FAIRA. In his Report and Recommendations, Judge Wells explained that he was required to adjudicate the facts pertaining to all aspects of the relationship between the plaintiffs and the carriers prior to agency termination because PIM contended that the bogus claims of the carriers about problems with PIM, relied upon by the carriers to justify the termination of the agency contracts, were pretextual, and that the primary aim of the carriers was to "get rid of PIM because of PIM's increased activity in the PPA (private passenger automobile) arena". PIM v. Ohio Casualty Ins. Co. and Harleysville Ins. Cos., AOL Dkt. No.

BK1-139-02S at 4 (N.J. AOL October 7, 2003).

A critical factor favoring application of the issue of collateral estoppel is the avoidance of inconsistency. Pivnick v. Beck, 326 N.J. Super. 474, 486, 741 A.2d 655, 662 (App. Div. 1999), aff'd, 165 N.J. 670, 762 A.2d 653 (2000). The carriers are correct to argue that an adjudication in favor of the plaintiffs that each of the defendants secretly intended to terminate the plaintiffs' agency contracts, while they encouraged the plaintiffs to expend resources to grow PIM's operation, is totally inconsistent with the adjudicated facts and conclusions reached by Judge Wells. A Bak-A-Lum cause of action for breach of the implied covenant of good faith and fair dealing requires a demonstration of bad faith or unfair dealing, and may not be advanced absent improper motive. Wilson v. Amerada Hess Corp., 168 N.J. 236, 252, 773 A.2d 1121, 1131 (2001). See also Emerson Radio Corp. v. Orion Sales, Inc., 80 F.Supp. 2d 307, 311 (D.N.J. 2000), rev'd in part on other grounds, 253 F.3d 159 (3d Cir. 2001) ("[T]he [New Jersey] cases note a state of mind or malice-like element to breach of good faith and fair dealing, holding that the duty excludes activity that is unfair, not decent or reasonable, nor dishonest.").

> Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance. See, e.g., Abbott v. Amoco Oil Co., supra, 189 Ill. Dec. 88, 619 N.E. 2d at 796; Adams v. G.J. Creel and Sons, Inc., supra, 465 S.E.2d at 85-86. Bad motive or intention is essential, for, as stated by the United States Court of Appeals for the Seventh

> Circuit, "[c]ontract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother' s keeper." Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd.,970 F.2d 273, 280 (7th Cir. 1992) (holding that franchiser may not use contractually provided discretion arbitrarily or capriciously to place franchisee in detriment; franchiser's decisions must be justified as honest, legitimate business decisions); see also JRT, Inc. V. TCBY Sys., Inc., 52 F.3d 734, 736 (8th Cir. 1995) (requiring franchisee to show "objectively ascertainable proof of intentional bad faith"); Hengel, Inc. v. Hot 'N Now, Inc., 825 F.Supp. 1311, 1323 (N.D.Ill 1993)(finding franchiser may not exercise discretion in arbitrary and capricious manner); Bonfield v. AAMCO Transmissions, Inc., 708 F.Supp. 867, 885 (N.D.Ill. 1989)(finding duty of good faith requires discretion to be exercised reasonably and with proper motive).

Wilson, 168 N.J. at 251-52, 773 A.2d at 1130-31.

In his Report and Recommendations, Judge Wells reviewed all of the factual assertions contained in the plaintiffs' certification submitted in support of Counts IV and IX of the second amended complaint, and specifically found that each of the courses of conduct complained of by PIM had a legitimate business reason. He concluded that

> PIM simply did not prove that the business reasons offered by Harlesyville and Ohio were pretextual, false, trumped-up, or otherwise not valid. From the totality of the evidence before me, I CONCLUDE that the independent genesis of the termination decisions by both Ohio and Harleysville was the deterioration of the business relationship between the insurance carriers and its agent, together with the erosion of trust and compounded by the fact that PIM essentially was failing to heed the marketing suggestions continuously voiced by the insurance carriers, with the ultimate result that PIM was unprofitable in its commercial (and non-PPA) lines that historically have been the mainstay of the agency as well

as the insurance carriers.

Report and Recommendations at 165. These conclusions would be totally inconsistent with an adjudication on Counts IV and IX that the defendants acted in bad faith or with improper, malice-like motive. The plaintiffs are collaterally estopped from relitigating the factual bases of Counts IV and IX.

Even if collateral estoppel does not apply, the plaintiffs have failed to establish causes of action for breach of the covenant of good faith and fair dealing in Counts IV and IX.

In Bak-A-Lum, the plaintiff sought an injunction and damages against a manufacturer for breach of an exclusive distributorship. The parties had entered into a verbal agreement that Bak-A-Lum would be the exclusive distributor of ALCOA's products in Northern New Jersey. Several years later, ALCOA determined to terminate its exclusive relationship with Bak-A-Lum and to appoint additional distributors in the same area, but secreted that plan from Bak-A-Lum, at a time when Bak-A-Lum undertook a major expansion and added substantial expenses to its operations. ALCOA apparently knew of and encouraged the expansion, maintained the secrecy of its termination plans to "avoid any risk of cooling plaintiffs' interest in selling ALCOA products" before termination, and induced Bak-A-Lum to place an unusually large order for

merchandise just before the announcement of termination. 69 N.J. at 128, 351 A.2d at 351. Citing to the trial court's finding that ALCOA's conduct toward Bak-A-Lum bespoke "a certain hypocrisy as well as ruthlessness," the Supreme Court reaffirmed the principle that every New Jersey contract contained an implied covenant of good faith and fair dealing. Id. Concluding that ALCOA breached that implied covenant, the Court awarded damages to Bak-A-Lum as a consequence of that breach.

> While the contractual relation of manufacturer and exclusive territorial distributor continued between the parties an obligation of reciprocal good-faith dealing similarly persisted between them. In such circumstances defendant's selfish withholding from plaintiff of its intention seriously to impair its distributorship although knowing plaintiff was embarking on an investment substantially predicated upon its continuation constituted a breach of the implied covenant of dealing in good faith of which we have spoken.

Id. at 130, 351 A.2d at 352. See also Sons of Thunder, Inc., v. Borden, Inc., 148 N.J. 396, 690 A.2d 575 (1997).

The elements that caused the Bak-A-Lum court to conclude that ALCOA breached the implied covenant of good faith and fair dealing between the parties are missing in this case. The debtor first claims that the defendants withheld their intentions to terminate the plaintiffs' agency contracts, which intentions were formed in early 1992. No evidence has been supplied by the plaintiffs that such a secret intent was formed by either carrier. Rather, the record is replete

with the continuous warnings afforded by both carriers to the plaintiffs during the time period in question threatening suspension or termination if the performance of PIM did not improve. The only evidence presented that would remotely reflect a plan to terminate is the Harleysville February 1993 agency review of the debtor, in which the reviewer reflected that "building a paper trail" would be needed "should the agency not return to profitability in the short run". Exh. 33. However, this statement is qualified, and does not represent a formed intent to terminate. As well, the report must be viewed in the context of other warnings and threats from Harleysville to PIM during the 1992 to 1993 period, including the downgrading of PIM's segmentation code in 1992 and 1993.

There is no support in this record for the plaintiffs' contention that while the carriers harbored a secret intent to terminate, they each encouraged the growth and expansion of PIM's operations. PIM compares its operations in 1978 and 1980 with its physical plant and staffing in 1993. Counsel for PIM acknowledged during oral argument that neither carrier encouraged PIM's growth from early 1992 on. In fact, he characterized the actions of the carriers as "negative encouragement," presumably meaning that he acknowledged the suspension and termination warnings of the carriers directed to PIM during that period.

Nor has any other motive, besides the unsuccessful assertion of PIM that both carriers were motivated by a desire to violate FAIRA, and encouraged PIM to violate FAIRA, been advanced by the plaintiffs. PIM asserts that during the relevant time frame, Harleysville encouraged PIM to sell Harleysville life insurance policies, that PIM encouraged its producers to do so, and that the agency was successful in meeting Harleysville's goals with regard to the sale of life insurance policies. However, the opportunity of PIM to sell life insurance policies was not terminated by Harleysville. There is no correlation between the encouragement by Harleysville of the sale of life insurance policies by PIM, and a secret, bad faith plan on Harleysville's part to terminate the agency contract with PIM.

The motion for summary judgment as to Counts IV and IX of plaintiffs' second amended complaint may be granted.

II. Post-Termination Conduct.

In Counts III and VIII, the plaintiffs charge Ohio and Harleysville with breach of the implied covenant of good faith and fair dealing based on the post-termination conduct of each defendant. Harleysville notified PIM of the termination of its agency contract on November 10, 1993, effective February 8, 1993. Ohio notified PIM of its termination on November 15, 1993, effective

March 1, 1993. Accepting the plaintiffs' presentation of the facts, and drawing all favorable inferences therefrom, following the issuance of the notices of termination, the defendants refused to write new policies submitted by PIM, regardless of whether underwriting requirements were met. The plaintiffs contend that the refusal to write new policies violated both the New Jersey statute governing agency termination and the specific terms of the agency contracts with Ohio and Harleysville.

The statute governing agency termination provides in pertinent part as follows:

> d. Termination of any such contract for any reason . . . shall become effective after not less than 90 days' notice in writing given by the company to the agent and the Commissioner of Banking and Insurance. No new business or changes in liability on renewal or in force business, except as provided in subsection l. of this section, shall be written by the agent for the company after notice of termination without prior written approval of the company. However, during the term of the agency contract, including the said 90-day period, the company shall not refuse to renew such business from the agent as would be in accordance with said company's current underwriting standards. The company shall, during the period of 12 months from the effective date of such termination, provided the former agent has not been replaced as the broker of record by the insured, and upon request in writing of the terminated agent, renew all contracts of insurance for such agent for said company as may be in accordance with said company's then current underwriting standards and pay to the terminated agent a commission in accordance with the agency contract in effect at the time notice of termination was issued.

N.J.S.A 17:22-6.14a(d). The statute provides that an agent may not write for the insurance carrier after notice of termination without prior written approval of the company.

The plaintiffs propose that the discretion afforded to an insurance carrier that has given notice of termination to an agent to approve new business cannot be exercised arbitrarily and unreasonably. Therefore, a blanket rejection of all new business by a carrier is per se unreasonable, and should occasion consequences against the carrier, including damages for failure to write new business during the 90-day period. However, the carriers are correct to reflect that while the statute requires renewal of in force business, both during the 90-day period before termination and during the 12 months following termination, nothing in the statute requires the carrier to accept new business. The simple explanation offered by both carriers that they terminated PIM's agency contract because they did not want to continue to do business with the agency is sufficient basis to substantiate the blanket rejection of new business from PIM by both carriers during the 90-day period.

As to the applicable contract provisions, under the Agency/Company Agreement between Harleysville and PIM, paragraph VIII, pertaining to termination or suspension, permits a terminated agent to operate under a

Limited Agency Agreement to service unexpired insurance policies during the 90-day period following notice of termination. This provision pertains only to servicing unexpired policies, and does not offer to the terminated agent any opportunity to write new policies.

Similarly, the Ohio/PIM Agency Agreement allows an agent terminated with 90-days advance written notice to operate under a Limited Agency Agreement, which provides for the continued servicing of policies issued prior to the termination date. PIM has not recited any contractual provision permitting the agent to write policies after the notice of termination has been issued.

If the causes of action asserted in Counts III and VIII by the plaintiffs rest on the contention that the defendants, by refusing to accept new business from PIM following the issuance of notices of termination, breached the implied covenant of good faith and fair dealing, the plaintiffs have failed to produce an evidentiary basis for the bad faith or malicious motive required to substantiate that cause. Wilson, supra.

On these grounds, the summary judgment for Counts III and VIII shall be granted.

III. Over- Reserved Claims.

In Counts V and X, the plaintiffs contend that the defendants breached their contract by setting their loss reserves abnormally high, thus skewing the debtor's loss ratios, and blocking the debtor's right to recover contingency bonuses. Reserves are set by the insurance companies and are based on estimates of potential payouts on claims over a given year. The loss reserves have an impact on the agency's loss ratio. A high reserve would result in a high loss ratio. The plaintiffs seek damages from the defendants for over-reserving for losses on claims filed by PIM insureds. In Counts VI and XI, the plaintiffs also seek punitive damages to the extent that the defendants intentionally and/or grossly over-reserved for claims.

During discovery, the plaintiffs were supplied with the loss reserves established by each carrier for PIM during the period of 1990 to 1993. In defense of the carriers' summary judgment motions, the only factual basis presented by the plaintiffs to support the allegations in Counts V, VI, X and XI is Schipsi's certification, in which he relies exclusively on his years of experience in the business, and his "feeling" that both defendants over-reserved for claims. He states that:

> 51. In 1992 and 1993, based on my then 29 years of

> experience in the business, I felt that both Ohio and Harleysville "over reserved" the losses of my policyholders. If this was the case, it would skew the loss ratios against PIM, deprive it of a contingency, and in the case of Harleysville, justify its putting PIM in a lower segmentation class.

Schipsi's Cert. at 22, ¶ 51. Schipsi complains that because he believes that the defendants over-reserved claims after PIM's termination, the defendants should provide information concerning the actual losses for the claims that were reserved during the effected period. Schipsi asserts "[t]hat [the] information could easily be supplied prior to or at the time of trial in which case PIM will be in a position to evaluate whether it can maintain its belief that the insurance companies over-reserved their claims." Id. at 23, ¶ 53.

By relying solely on Schipsi's "feeling" and "belief" that the defendants over-reserved for claims, the plaintiffs have failed to meet their burden to establish that there is a genuine fact issue for trial. Notwithstanding Schipsi's many years of experience in the field, his unsubstantiated belief, without a scintilla of support, is woefully insufficient in quantum and quality to warrant the return of a verdict in favor of the plaintiffs. Whatever the utility of the defendants' actual losses for the years in question, the plaintiffs were required to come forward in response to this summary judgment motion with some competent evidence to support their allegations. Their failure to do so compels me to grant the defendants' motion for summary judgment on Counts V, VI, X

and XI.

IV. Reconsideration of Dismissal of Counts I, II and VII.

Finally, the plaintiffs seek reconsideration of the dismissal of Counts I, II and VII. The plaintiffs contend that the Report and Recommendations issued by Judge Wells improperly exceeded the scope of the referral, that Judge Wells ignored the bankruptcy court's findings and conclusions in its "Opinion on Termination of Debtor's Agency Status", issued July 12, 1999 ("d" or "e" opinion) as a matter of collateral estoppel, and that the plaintiffs were not given a fair hearing before the ALJ. None of these arguments can be sustained.

Putting aside the issue of the timeliness of the motion for reconsideration raised by the defendants,[4] a decision may be reconsidered when the movant can demonstrate: (1) an intervening change in controlling law; (2) new evidence not previously available or dispositive evidence presented but not considered; or (3) a need to "correct a clear error of law or prevent manifest injustice." See, e.g., United States v. Omega Inst., Inc., 25 F. Supp.2d 510, 513 (D.N.J. 1998); In re

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[4] The decision sought to be reconsidered, the written opinion dated August 7, 2007, contemplated a partial conversion of the motion to dismiss into a motion for summary judgment. The contested matter was not finalized and no order or judgment was entered. The timeliness of the motion for reconsideration is not at issue here.

Consol. Parlodel Litig., 22 F. Supp.2d 320, 329 (D.N.J. 1998); Database Am., Inc. v. Bellsouth Adver. & Publ'g Corp., 825 F. Supp. 1216, 1220 (D.N.J. 1993); In re Christie, 222 B.R. 64, 67 (Bankr. D.N.J. 1998). A motion for reconsideration should not be used as a means to reargue the original motion. Database America, 825 F. Supp. at 1220. Such a motion "is not an appeal. It is improper on a motion for reconsideration to "'ask the Court to rethink what [it] had already thought through--rightly or wrongly.'"" Tyree Org., Ltd. v. Natirar Realty Corp., 1994 WL 405506 at *2 (quoting Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co. of Md., 744 F. Supp. 1311, 1314 (D.N.J. 1990) (citing Above the Belt v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983))).

Here, the issue of whether Judge Wells exceeded the scope of the referral was raised by the plaintiffs on the motion to dismiss, and was rejected in my August 7, 2007 opinion. In applying collateral estoppel to the factual findings of Judge Wells relating to PIM's termination by the defendants, I noted that Judge Wells made specific findings and conclusions regarding the carriers' conduct toward PIM leading up to the terminations of the agency contracts "[b]ecause PIM charged that the carriers' true motives in engaging in the conduct described in these counts were designed to pressure PIM into violating FAIRA, and that the concerns ultimately terminated PIM in violation of FAIRA."

In re Professional Ins. Mgmt, Inc., No. 94-1325, 2007 WL 2300692 at *6 (Bankr. D.N.J. Aug. 7, 2007).[5] As detailed in my opinion, the plaintiffs raised the argument in exceptions to the Commissioner, and in submissions to the Appellate Division. The arguments were rejected in each of these fora. No basis for reconsideration on this ground has been advanced by the plaintiffs.

Next, the plaintiffs complain that Judge Wells failed to apply collateral estoppel principles to the "d" or "e" opinion issued on July 12, 1999 by this court. In that opinion, I focused on whether Ohio terminated the debtor's agency status based on "gross and wilful misconduct" and/or the debtor's "failure to pay monies due to the company after written demand therefor".

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[5] Judge Wells explained:

> During the hearing, I was mindful that the issue to be decided was not whether the insurance companies (Ohio and Harleysville) had cause to terminate PIM. Rather, the issue to be decided and the focus of the case was whether the insurance companies violated the FAIRA when they terminated PIM and/or reduced PIM's PPA commissions. Notwithstanding the finite issue to be reviewed, it was necessary to include a detailed review of the relationship between PIM and the two insurance companies because PIM asserted, inter alia, that certain of the grounds raised by the insurance companies for the termination of PIM were simply a pretext for the real reason for the termination, namely PPA loss ratio and PPA volume. Accordingly, it was my determination that although it was clear that the issue was not whether Ohio and Harleysville had cause to terminate PIM, it was nevertheless necessary to scrutinize the espoused reasons for termination to determine if they were pretextual in nature or legitimate.

ALJ Decision at 151.

N.J.S.A. 17:22-6.14a(e). If either or both of these bases for termination were established, the debtor would be precluded from receiving post-termination commissions or renewals. In footnote 54 of the opinion, I specifically noted that I was not adjudicating the complaint filed by PIM seeking compensatory and punitive damages for wrongful termination of the agency contract, although PIM was permitted to make a limited presentation on its contention that Ohio's actions were occasioned by FAIRA violations. In contrast, Judge Wells opened the record to focus on the FAIRA violations, and to consider the accounting difficulties outlined by PIM both in the "d" or "e" opinion and before the ALJ, to determine whether those accounting difficulties were actually a pretext for FAIRA violations. The record presented to Judge Wells was expansive and all-inclusive, whereas the adjudication of the "d" or "e" issue was focused on the details of the accounting issues. Judge Wells' expansive review of all evidence was justified under the circumstances, was accepted by the Commissioner, and was affirmed by the Appellate Division. Factors favoring application of the principle of this issue preclusion, such as conservation of judicial resources and avoidance of repetitious litigation, would not be served by announcing at this juncture that Judge Wells failed to estop the defendants from relitigating the accounting issues between the parties based on the "d" or "e" opinion.

The final point of reconsideration raised by the plaintiffs is that they were

not given a fair hearing before Judge Wells, and that Judge Wells "mislead [sic] the parties and counsel into believing that he was admitting everything into evidence for the purpose of protecting the record on appeal," Docket No. 415 at 44, rather than for the purpose of adjudicating plaintiffs' contentions that the defendants breached the implied covenants of good faith and fair dealing in their conduct toward the plaintiffs. By this argument, the plaintiffs seek to appeal the findings and conclusions of Judge Wells before this court. The underlying facts were properly adjudicated by Judge Wells. PIM articulated exceptions to Judge Wells' decision to the Commissioner, and appealed the decision to the Appellate Division. The Bankruptcy Court is not an appellate forum for state court decisions. See Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 1521-22, 161 L.Ed.2d 454 (2005) (the Rooker-Feldman doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments . . . and inviting district court review and rejection of those judgments"); Korelis v. New Jersey Judicial Officials in Court Process Action, 201 Fed.Appx. 870, 872 (3d Cir. 2006) (federal courts are not a forum to appeal state court decisions); Barnes v. Domitrovich, 184 Fed.Appx. 164, 165 (3d Cir. 2006) ("Rooker-Feldman bars lower federal courts from exercising jurisdiction over a case that is the functional equivalent of an appeal from a state court judgment."). The fairness of the adjudication before Judge Wells will not be reviewed here.

The plaintiff's quest for reconsideration of the decision to dismiss Counts I, II and VII of the second amended complaint is denied.

CONCLUSION

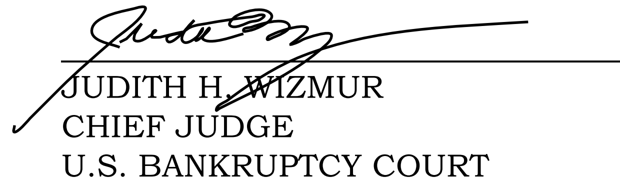
For the reasons expressed, the following matters are determined:

1. Summary judgment is granted on all remaining counts, including Counts III, IV, V, VI, VIII, IX, X and XI.

2. The plaintiffs' motion for reconsideration of the dismissal of Counts I, II and VII is denied in its entirety.

The defendants' counsel shall submit an order in conformance with this opinion.

Dated: November 7, 2007



JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT