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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In Re:
ANNETTE LYNCH,
Debtor.

Chapter 7 Case
 # 97-10381 cab

RAYMOND J. OBUCHOWSKI, Esq.,
Trustee,
v.
PHICO INSURANCE CO.,
Defendant.

Adversary Proceeding
 # 97-1084 cab

Appearances: *Lisa Chalidze, Esq.*
Miller, Faignant & Behrens, P.C.
Rutland, VT 05702
Attorney for Trustee

Douglas J. Wolinsky, Esq.
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Burlington, VT 05402
Attorney for Debtor/Defendant

MEMORANDUM OF DECISION
GRANTING DEFENDANT'S MOTION FOR FINAL SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The matters before the Court are the Motion for Summary Judgment and Memorandum of Law in Support Thereof filed by the Defendant, PHICO Insurance Company (hereafter "PHICO") dated December 9, 1998 [Dkt. #117-1] (hereafter "Defendant's Motion for Summary Judgment") and Plaintiff's Motion for Partial Summary Judgment on Coverage for Legal Fees and Expenses of Board of Medical Practice Proceedings and For Insured's Time Spent Assisting in the Defense of Same and of Civil Lawsuits dated May 12, 2000 [Dkt. #253-1] (hereafter "Plaintiff's Motion for Partial Summary Judgment"). This Court has jurisdiction pursuant to 28 U.S.C. §§157 and 1334. Based upon the pleadings, the various matters filed of record and applicable law, the defendant's motion for summary judgment is granted and plaintiff's motion for partial summary judgment is denied.

BACKGROUND

On March 17, 1997, the debtor filed a voluntary petition for relief under chapter 7 of title 11 U.S.C. ("the Bankruptcy Code"). Raymond J. Obuchowski was appointed chapter 7 trustee and on October 1, 1997, this Court (Conrad, J.) approved the trustee's Application to Employ Lisa Chalidze, Esq., as Special Litigation Counsel. On September 26, 1997, the plaintiff filed a Complaint for Declaratory Judgment seeking a determination of coverage in favor of the debtor pursuant to professional liability insurance[1] issued by PHICO. The debtor had been named in eleven different actions by former patients alleging various types of wrongdoing committed by the debtor in her psychiatry practice.[2] The defendant filed an Answer and Affirmative Defenses on January 27, 1998. An extensive discovery dispute arose thereafter regarding the extent of permissible discovery as framed by the issues raised in the Complaint.

On June 16, 1998, the plaintiff filed a Motion for Partial Summary Judgment on Coverage and Memorandum in Support, and PHICO filed Opposition to the Plaintiff's Motion for Partial Summary Judgment on Coverage on July 6, 1998. The plaintiff filed a Supplemental Memorandum in Support of Motion for Partial Summary Judgment on August 3, 1998. Pursuant to the matters filed of record and a hearing held on August 4, 1998, this Court (Conrad, J.) issued its Memorandum of Decision on October 16, 1998, granting in part and denying in part the plaintiff's motion for partial summary judgment regarding coverage. The Court determined that ten (10) of the non-waiver agreements sent by PHICO to the debtor were not legally sufficient under Vermont law to

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[1] While the plaintiff refers to a single Professional Liability Policy in his Complaint and plural Physicians Professional Liability Policies in the Amended Complaint, it appears that two professional liability insurance contracts were issued by PHICO in favor of the debtor during the operative period of 1992 through 1996. *See* PHICO Insurance Company's Second Statement of Undisputed Facts in Support of its Motion for Summary Judgment, para. 1; Composite Exh. B. However, there is no contention that the existence of a single or successive policies is material to this dispute.

[2] While both the Complaint and Amended Complaint describe the debtor as a psychologist, the record indicates that she was actually a licensed psychiatrist at all times relevant to this dispute.

put the debtor on notice regarding which claims were not covered by the professional liability policy issued by PHICO; but that the terms of the reservation of rights letter regarding the eleventh claim were legally sufficient. Consequently, the Court ruled that the ten non-waiver agreements were ineffective and, therefore, PHICO was estopped from denying coverage on those ten claims. It is undisputed that PHICO continued to defend and subsequently settled all eleven claims within the policy limits.

On December 9, 1998, PHICO filed the instant motion for summary judgment [Dkt. #117], along with its Statement of Undisputed Facts [Dkt. #118], seeking judgment in its favor regarding any remaining claim being asserted by the plaintiff pursuant to its Complaint. While the Complaint was less than clear, especially because the claims for relief were intermingled and not set forth in separate counts, it appears that two claims for relief remained after partial summary judgment had been granted: the first seeking a determination as to whether PHICO breached the contract of insurance and the second seeking a determination as to whether the breach, if any, was in good faith. There has been considerable debate on the record concerning whether the latter claim is legally distinguishable from a bad faith claim in the insurance context. Nonetheless, the plaintiff twice filed objections to PHICO's summary judgment motion as premature due to the ongoing discovery disputes in this Court, which were soon to pour over into the District Court. Various unsuccessful sanctions motions likewise crowd the record. On May 11, 1999, the Court agreed to adjourn further consideration of PHICO's summary judgment motion until discovery was completed, and an order to that effect was entered on June 7, 1999. Thereafter, an already congested record was expanded further.

On June 28, 1999, the plaintiff filed a Supplemental Memorandum in Opposition to Motion for Summary Judgment and Request for Entry Against Defendant [Dkt. #178-1] again opposing

summary judgment due to discovery issues but also raising substantive opposition to the motion and mixing arguments regarding PHICO's alleged violation of the covenant of good faith and fair dealing with arguments regarding insurer bad faith. In response, PHICO filed a Supplemental Memorandum of Law in Support of PHICO's Motion for Summary Judgment [Dkt. #180-1] alleging that the plaintiff was arguing a factual dispute regarding a non-issue of insurer bad faith and attacking the merits of the plaintiff's claim by emphasizing that PHICO never refused to defend the debtor and settled all claims against her within the policy limits.

Various discovery disputes ensued and on August 6, 1999, the plaintiff finally filed a Motion to Amend Complaint to Conform to the Evidence "specifically to make an allegation of bad faith as opposed to his previous request for the court to determine whether PHICO has breached the contract of insurance and, if so, whether the breach was in good faith." While the motion to amend would appear to resolve the uncertainty surrounding the case posture, it did not. Once again, the Court agreed to postpone a determination regarding PHICO's pending summary judgment motion on August 9, 1999, with a related Order entered September 15, 1999. On September 22, 1999, a hearing was held and the Court granted the plaintiff's motion to amend. With no amended complaint on file and the summary judgment proceedings languishing, the Court granted PHICO's Motion for Setting of Deadline on February 8, 2000 and set March 1, 2000 as the due date for any additional summary judgment filings.

On March 1, 2000, the parties filed an flurry of papers directed at the pending summary judgment motion. PHICO filed its Second Supplemental Memorandum of Law in Support of its Motion for Summary Judgment [Dkt. #226-1], along with its Second Statement of Undisputed Facts [Dkt. #227-1], again attacking the original Complaint on the merits inasmuch as no amended pleading had been filed. The plaintiff filed a Second Supplemental Memorandum in Opposition to

Defendant's Motion for Summary Judgment and Request for Entry of Judgment Against Movant [Dkt. 230-1], along with the plaintiff's Memorandum in Response to Defendant's "Undisputed" Facts in Support of Summary Judgment [Dkt. 229-1], regarding "undisputed facts" that had been filed by PHICO more than one year earlier on December 9, 1998 [Dkt. #118-1]. The plaintiff has never filed a response to PHICO's Second Statement of Undisputed Facts [Dkt. #227-1][3]. In his Second Supplemental Memorandum[4], the plaintiff attaches various non-verified papers and in essence asserts that PHICO breached its fiduciary obligations to the debtor in the manner in which it conducted its defense of the debtor and requests that summary judgment be entered in favor of the non-moving plaintiff. On March 22, 2000, PHICO filed its Response to Plaintiff's Second Supplemental Memorandum challenging the plaintiff's filing as an inappropriate attempt by the plaintiff to affirmatively seek summary judgment relief without complying with Bankruptcy Rule 7056. PHICO also disputed the debtor's argument that PHICO was required under the insurance contract to defend the debtor, or fully reimburse her for professional expenses incurred, in the administrative license revocation proceedings, in addition to defending her in the eleven liability actions.

In the midst of this paper melee, the plaintiff filed an Amended Complaint on March 21, 2000, nearly six months to the day after the request to amend was approved by the Court. Notwithstanding the intention set forth in the motion to amend "specifically to make an allegation of bad faith as opposed to his previous request for the court to determine whether PHICO has breached the contract of insurance and, if so, whether the breach was in good faith," the Amended

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[3] While plaintiff's failure to respond to defendant's statement of undisputed facts constitutes an independent basis for granting the defendant's summary judgment motion, *cf.* In re Fowler, 250 B.R. 828 (Bankr. Conn. 2000), this Court has elected to review the record and reach the same result on the merits.

[4] The Court adopts the title of the various papers filed herein for reference purposes. However, it rejects the titles as inaccurate and misleading in light of the plethora a papers filed in relation to PHICO's summary judgment motion since December 9, 1998.

Complaint is drafted to include an allegation of "actual bad faith" intertwined with claims of negligence, breach of express contract, breach of fiduciary duties, and breach of PHICO's duty of good faith and fair dealing towards the debtor, thereby seeking compensatory and punitive damages. The Amended Complaint supplants the original Complaint and, based upon the motion to amend and its amended allegations, constitutes a claim of bad faith against PHICO.

PHICO's Answer and Affirmative Defenses to the Amended Complaint was filed April 6, 2000, and disputes the amended claims for relief. PHICO responds that there is no duty to defend the insured in administrative proceedings that do not involve a claim for damages, that the debtor never made a claim for reimbursement for administrative professional expenses, that PHICO never denied a defense of the debtor in the underlying eleven actions, that PHICO fulfilled all contractual obligations by settling all claims against the insured within policy limits, and that PHICO never controlled the relationship between the debtor and her insurance defense attorney. As for affirmative defenses, PHICO asserts that the plaintiff has failed to state a claim upon which relief can be granted, that the Amended Complaint contains false statements in violation of Rule 11[5], that no fiduciary duty exists in Vermont between and insurer and its insured, that any claim for reimbursement of expenses incurred by the debtor during administrative proceedings is time barred under the policy and was never submitted by the insured, and an accord and satisfaction based upon its payment of all claims for damages against its insured.

Due to the apparent uncertainties surrounding the plaintiff's attempt to obtain summary judgment relief on its claim for reimbursement of professional expenses incurred during the license revocation proceedings pursuant to his Second Supplemental Memorandum referenced above, the

[5] Because this request for Rule 11 sanctions fails to comply with the procedural requirements of Bankruptcy Rule 9011(c)(1)(A), the Court will not address the matter. *See* Hadges v. Yonkers Racing Corp., 48 F.3d 1320 (2nd Cir. 1995).

plaintiff filed a motion for partial summary judgment on May 12, 2000. With the exception of a fee affidavit executed by the debtor, the plaintiff attached to his motion only unverified papers, including an unsigned and incomplete copy of the Defendant's Answers and Objections to Plaintiff's First Set of Interrogatories and Requests to Produce, in support of the requested relief. The plaintiff also submitted a Statement of Undisputed Facts in conjunction with his motion for partial summary judgment, with the pertinent facts soon rendered disputed upon the filing of PHICO's Response to Plaintiff's Statement of Facts on June 8, 2000. In opposition to plaintiff's summary judgment motion, PHICO also filed its Opposition to Plaintiff's Motion for Partial Summary Judgment and an Affidavit of Ritchie E. Berger, Esq., the debtor's insurance defense counsel. Thereafter, the plaintiff filed a Supplemental Memorandum in Support of Plaintiff's Motion for Summary Judgment on July 25, 2000.

It should also be noted that in conjunction with his Amended Complaint, the plaintiff also filed a Motion to Determine Whether the Remaining Claims are Core or Non-Core on March 21, 2000. The matter was fully briefed by the parties and this Court ordered that the remaining claims were core matters on July 21, 2000. The Plaintiff also filed a Motion to Withdraw Reference on August 8, 2000, which was denied by the District Court on September 11, 2000.

ISSUE

The issue presented is whether the record shows that there is no genuine issue as to any material fact regarding the plaintiff's claim for reimbursement of administrative time and expenses and the defendant's defenses in opposition to the claims for relief asserted by plaintiff in the Amended Complaint, and whether either moving party is entitled to judgement as a matter of law pursuant to Rule 56, Fed.R.Civ.P. and Fed. R. Bankr. Pr. 7056.

SUMMARY JUDGMENT STANDARD

It is well settled that summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Bankr. R. 7056. A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record plaintiff's failure to introduce evidence in support of essential element of claim). "The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Liberty Lobby, 477 U.S. at 247, 106 S.Ct. at 2509. Factual disputes that are irrelevant or unnecessary are not material. Id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id.

The court must view all the evidence in the light most favorable to the nonmoving party, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir.), *cert. den.*, 484 U.S. 977 (1987), and draw all inferences in the non-movant's favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990). However, if the evidence is merely colorable, or is not significantly probative or merely raises "some metaphysical doubt as to the material facts," summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). In making its determination, the court's sole function is to determine whether there is any material dispute of fact that requires a trial. *See* Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994).

Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a summary judgment motion. Liberty Lobby, 477 U.S. at 255, 106 S.Ct. 2513-14. Lastly, the court is not obligated in our adversary system to "scour the record" in search of a factual dispute on behalf of a nonmoving party. *See* Waldridge v. American Hoechst Corp., 24 F.3d at 922; *see also* Monahan v. New York City Department of Corrections, 214 F.3d 275, 292 (2d Cir. 2000)(while trial court has discretion to conduct an assiduous review of the record in determining if summary judgment warranted, "it is not required to consider what the parties fail to point out").

DISCUSSION

In his Amended Complaint, the plaintiff seeks to recover from PHICO based upon allegations of actual bad faith emanating from PHICO's handling of the debtor's defense, both in the underlying medical malpractice claims and in the license revocation proceedings against her by the Vermont Board of Medical Practice. The plaintiff claims that PHICO's handling of the debtor's defense violated its contractual duties of good faith, fair dealing and complete candor, and as well as its fiduciary duty to her. The plaintiff further alleges that PHICO breached its express contractual duties to the debtor *inter alia* by failing to provide a defense to the Board of Medical Practice administrative proceedings and by failing to reimburse the debtor for her time and legal expenses incurred in defense of the professional misconduct claims filed against her. The plaintiff also asserts that PHICO's claims handlers were impermissibly utilizing information received from insurance defense counsel, who in turn was receiving information from the insured and her personal counsel, to formulate coverage defenses or a basis for non-renewal of the policy in contravention of its "duty" to its insured. Plaintiff lists various "indicators" in this regard. While plaintiff never alleges that the debtor submitted a claim to PHICO for legal representation in the administrative proceedings or

sought from PHICO reimbursement for such expenses, he alleges nonetheless that PHICO failed to make or offer to make any payments to the debtor for her legal fees and time incurred in the administrative proceedings before the Board of Medical Practice "or to advise her of her rights thereto."

Based upon the gravamen of the Amended Complaint and the plaintiff's representation that he requested (and received) leave to amend the original Complaint "specifically to make an allegation of bad faith *as opposed to* his previous request for the court to determine whether PHICO has breached the contract of insurance and, if so, whether the breach was in good faith," (emphasis added) the Amended Complaint is deemed to seek relief pursuant to a theory of insurer actual bad faith, in its various forms. Even assuming *arguendo* that plaintiff is maintaining an independent claim for breach of contract without good faith in the amended pleading, this claim fails for the same reasons as the overall bad faith claim.

Vermont recognizes a cause of action by an insured against an insurer for its bad faith conduct in dealing with the insured. Bushey v. Allstate Insurance Co., 670 A.2d 807, 164 Vt. 399 (1995); Davis v. Liberty Mutual Insurance Co., 19 F.Supp.2d 193, 202 (D. Vt. 1998). To establish a first part claim for bad faith, a plaintiff must show that (1) the insurance company had no reasonable basis to deny benefits of the policy, *and* (2) the company knew or recklessly disregarded the fact that no reasonable basis existed for denying the claim. Bushey v. Allstate Insurance Co., 670 A.2d at 402. An insurance company is free to challenge claims that are "fairly debatable" and will be held liable only where it has intentionally denied or failed to process or pay a claim without a reasonable basis. Id. As recognized by the Vermont Supreme Court, the rule in Vermont limits recovery to instances in which an insurer not only errs in denying coverage, but does so unreasonably. Id.

While the factual conditions under which a bad faith claim may ripen are varied, a denial of coverage or failure to process or pay a claim without a reasonable basis is fundamental to a recovery for bad faith by an insured. *See* Bushey v. Allstate Insurance Co., *supra; see also* INSURER BAD FAITH AND OTHER EXTRA-CONTRACTUAL LIABILITIES, SE64 ALI-ABI 729 (2000) ("To one extent or another, in virtually all jurisdictions ... the first element is always the same: The insurer has denied a claim"). While it may be possible to envision circumstances of outrageous abuse of an insured by an insurance company which is otherwise fully defending and settling claims within the terms of the policy, no evidence of such circumstances has been filed or referenced by the plaintiff here. The plaintiff never disputed that PHICO defended the debtor against all eleven claims for damages filed by former patients alleging various acts of professional misconduct, notwithstanding that PHICO had properly reserved its rights regarding one of the claims. Nor does the plaintiff dispute that PHICO settled all claims filed against the debtor within its policy limits, without having the debtor incur any excess liability or litigation defense costs. At most, the plaintiff may claim that PHICO acted improperly by attempting to reserve its rights pursuant to certain non-waiver notices that were subsequently deemed ineffective by this Court. However, while not specifically addressed in Vermont, other states that have considered the matter and determined that an insurer does not breach its insurance policy merely by providing a defense under a reservation of rights. *See* Kelly v. Iowa Mutual Insurance Co., 620 N.W.2d 637, 642 (Iowa Sup. Ct. 2000)(and authorities cited therein); Dietz-Britton v. Smythe, Cramer Company, 743 N.E.2d 960, 966 (Ohio Ct. App. 2000); First State Insurance Co. v. Kemper National Insurance Co., 971 P.2d 953, 959-961 (Wash. Ct. App. 1999). This finding comports not only with commonsense, but also with general Vermont law. *See* Vermont Insurance Management, Inc. v. Lumbermens' Mutual Casualty Co., 764 A.2d 1213, 1215 (Vt. 2000); *see also* 12 V.S.A. 4711 *et seq.* (Vermont Declaratory Judgments Act) (and insurance cases

thereunder).

Nor can the plaintiff demonstrate that the initial reservation of rights by PHICO, although procedurally flawed, were undertaken in bad faith or for an impermissible purpose. It would be incongruous for the plaintiff to assert that the non-waiver agreements were ineffective to constitute a valid reservations of rights because they failed to put the insured on notice of the claims being reserved, yet were specific enough to disclose a prohibited purpose for PHICO reserving its rights. In fact, one of the non-waiver agreements was deemed adequate and set forth grounds that may provide a legal basis for denying coverage in Vermont under appropriate circumstances. *See* PHICO's Second Statement of Undisputed Facts [Dkt. # 227-1], Exh. B; PHICO's Physicians Professional Liability Policy, at p.4, Exclusion "m" (no coverage for "any claim based upon an act of fornication, adultery, deviate sexual behavior, or sexual assault"); *see also* City of Burlington v. Association of Gas and Electric Insurance Services, Ltd., 751 A.2d 284 (Vt. 2000) (recognizing that insurance policies may exclude coverage for intentional harms): TBH v. Meyer, 716 A.2d 31 (Vt. 1998) (inferred intent rule may preclude coverage for perpetrators of sexual misconduct). No one disputes that to some extent the underlying eleven claims and license revocation proceedings involved that allegations of inappropriate sexual conduct between the debtor and certain former patients. While this Court makes no determination whatsoever regarding the viability of these or any other potential basis for PHICO asserting a lack of coverage defense to the underlying claims, it suffices to say that the plaintiff has failed to show that PHICO's reservation of rights resulted from outrageous or egregious conduct. Moreover, the potential grounds for denying coverage are irrelevant here because PHICO not only defended the debtor against all actions filed against her, it undeniably paid all claims within the policy limits. Additionally, the plaintiff has not demonstrated that the debtor sustained any damages as a result of PHICO's actions. Therefore, PHICO has

demonstrated that it is entitled to summary judgment as a matter of law on the plaintiff's claim that PHICO failed to properly defend the debtor in the underlying litigation.

Similarly, there is an absence of a genuine issue of material fact regarding the plaintiff's related claim that PHICO acted in bad faith regarding the administrative licensure proceedings brought against her in the Vermont Board of Medical Practice. First, the plaintiff fails to direct this Court to any provision, nor can this Court independently determine any insurance contract provision, that obligates PHICO to defend the debtor in the license revocation administrative proceedings. On the contrary, the plaintiff essentially concedes that the policy requires coverage of claims that include, or the insured reasonably believes will result in, an "express demand for damages". *See* PHICO's Response to Plaintiff's Second Supplemental Memorandum of Law [Dkt. #239-1], at Exhibits A and B. Instead, the plaintiff argues that because the debtor's insurance defense counsel attended certain of the administrative proceedings and reported to PHICO that an adverse ruling by the Board would somehow have a negative impact on the pending lawsuits and the applicable policy language is allegedly unclear, PHICO became obligated to defend her or, alternatively, to reimburse her for all her time and professional expenses incurred therein. It is undisputed, however, that whatever the outcome of the administrative proceedings, the debtor would not be susceptible to an "express demand for damages" by the Board under Vermont law. The plaintiff's argument on this point is not only contrary to the unambiguous terms of the policy limiting coverage to claims involving or likely to involve such a demand for damages, but is contrary to the principle that an insurer generally is not required to defend its insured in administrative proceedings related to a claim unless there is a potential for a determination of damages. *See* e.g., Certain Underwriters at Lloyd's of London v. Superior Court, 103 Cal Rptr.2d 672 (Cal. Sup. Ct. 2001); Patrons Oxford Mutual Insurance Co. v. Marois, 573 A.2d 16 (Me. Sup. Ct. 1990).

Because the express and unambiguous terms of the subject insurance policies do not obligate PHICO to defend or reimburse the debtor for her time and legal expenses incurred during the subject administrative proceedings, it cannot constitute bad faith for PHICO not to pay or offer to pay for these expenses. As importantly, the plaintiff fails to demonstrate that the debtor ever submitted a claim or request to PHICO to provide her with legal counsel or reimbursement of any professional time and expenses related to these administrative proceedings. Therefore, summary judgment in favor of the insurer is appropriate on the second issue and plaintiff's related request for partial summary judgment in this regard is denied.

Lastly, plaintiff sets forth a litany of allegations regarding actions and communications involving the debtor's insurance defense counsel and PHICO claims' handlers as a basis for relief and denial of its summary judgment motion. Not only are none of the allegations of wrongdoing verified or substantiated by affidavit or the like pursuant to Bankruptcy Rule 7056, the plaintiff has not demonstrated any harm or damages occasioned by these alleged acts involving her counsel and PHICO representatives. Neither the plaintiff's deposition filed herein by PHICO nor any of the other admissible matters filed of record refute the Affidavit of Ritchie E. Berger, Esquire, which contravenes plaintiff's allegations of attorney misconduct. As indicated above, PHICO never refused to defend the insured against the claims asserted against her, and settled all claims -- including the claim that was subject to a legally sufficient reservation of rights -- within the policy limits. The fact that her insurance defense counsel may have kept PHICO abreast of license revocation developments or advised PHICO that the debtor's license to practice medicine was revoked as a result of the subject administrative proceedings cannot constitute improper conduct inasmuch as the fact or revocation was public knowledge and the debtor would undoubtedly have fulfilled her good faith obligation to report to her insurer that a condition for obtaining professional liability insurance,

namely a professional license, no longer existed. Because the plaintiff failed to substantiate his allegations of insurer bad faith and misconduct by and between the debtor's insurance defense counsel and representatives of PHICO, summary judgment is warranted against this claim. *See* In re Corporation of Windham College, 34 B.R. 408 (Bankr. Vt. 1983) (court may not consider unverified statements of fact presented in motions, memoranda of law, or other papers in summary judgment proceedings); *see also* In re Brandl, 179 B.R. 620 (Bankr. Minn. 1995).

While this Court is aware that summary judgment should be entered cautiously and only upon reviewing the record with all doubts resolved in favor of the non-moving party, Vermont law clearly contemplates that summary judgment will be entered in cases where the allegations of insurer bad faith are not substantiated or fail to satisfy the essential elements of a bad faith claim. *See* Bushey v. Allstate Insurance Co., *supra;* Vermont Insurance Management, Inc. v. Lumbermans' Mutual Casualty Co., 764 A.2d 1213 (Vt. 2000); Lauzon v. State Farm Mutual Auto Insurance Co., 674 A.2d 1246 (Vt. 1995); *see also* Davis v. Liberty Mutual Insurance Co., 19 F.Supp.2d 193 (D. Vt. 1998).

PHICO has demonstrated the absence of a genuine issue of material fact regarding its defenses to the claims of bad faith as alleged in the Amended Complaint. Therefore, the defendant's motion for summary judgment is granted. The plaintiff's motion for partial summary judgment is denied based upon his failure to establish the absence of any genuine issue of material fact or to demonstrate a legal or factual basis for the requested relief.

/s/ Colleen A. Brown
Hon. Colleen A. Brown
United States Bankruptcy Judge

August 14, 2001
Rutland, Vermont