DOCKET NO. FST CV12 6016414 S	:	SUPERIOR COURT
DANIEL WILLIAMS, ET AL.	:	JUDICIAL DISTRICT OF STAMORD/NORWALK
V.	:	AT STAMFORD
SAFECO INSURANCE COMPANY OF AMERICA	:	OCTOBER 28, 2015

MEMORANDUM OF DECISION RE DEFENDANT'S MOTION IN LIMINE REGARDING EVIDENCE OF OTHER BAD FAITH (#264)

Plaintiffs Daniel and Shirley Williams commenced this lawsuit against defendant Safeco Insurance Company of America ("Safeco") on or about December 4, 2012, alleging breach of their insurance contract (the "policy"), breach of the covenant of good faith and fair dealing, negligent adjustment, violation of the Connecticut Unfair Insurance Practices Act, Gen. Stat. § 38-815, et seq., ("CUIPA") as enforced by the Connecticut Unfair Trade Practices Act, Gen. Stat. § 41-110 et seq. ("CUTPA"), and negligent infliction of emotional distress. In summary, the complaint alleges that plaintiffs' home in Westport was deluged by 9,000 gallons of sewage caused by a faulty valve in the municipal sewer system on August 30, 2011. The complaint further alleged that Safeco, while acknowledging coverage under the policy, unreasonably delayed payment through several allegedly unfair settlement practices and kept plaintiffs out of their home for several years.

The jury trial in this matter commenced on October 20, 2015. On October 13, 2015, the defendant Safeco filed several motions in limine with supporting memoranda of law, including this one seeking an order barring the introduction of evidence or comment concerning unsubstantiated allegations or complaints of bad faith against the defendant in an attempt to prove that Safeco's alleged unfair settlement practices were part of a "general business practice"

264.02

as required by Gen. Stat. 38a-816(6).[1] The defendant Safeco argues that unsubstantiated allegations or complaints are not relevant evidence of such a practice and would unduly prejudice and confuse the jury. On October 16, 2015, the plaintiffs filed an objection, arguing that the reasoning adopted by the courts when allowing prior allegations of bad faith at the pleading stage also should support a finding that those allegations are admissible at trial as probative evidence of a "general business practice." On October 19, 2015, the court entered a ruling on the motion in limine (#264.01), specifying four types of evidence the court would allow into evidence as relevant to a showing of a general business practice of unfair settlement practices by defendant Safeco. Due to the imminence of trial, the court deferred rendering a memorandum explaining its decision.

The order provided:

> As will be more fully explained in a memorandum of decision, the court will permit the following four categories of evidence to prove a "general business practice": (1) live testimony of similar practices involving other insureds of Safeco; (2) evidence of similar practices in complaints before the insurance commissioner that have been ruled upon as valid, or comparable testimony from Insurance Department personnel; (3) written evidence of similar practices in complaints before courts that have been adjudicated against Safeco; and (4) evidence provided by the insurer's internal sources as to its practices. Provided, however, that such proof must be directly relevant to the unfair settlement practices alleged in the complaint and which are, in fact, identified in Section 38a-816(6), specifically the allegations contained in Count IV, subparagraphs 14(a), (b), (c), (e), (f), (g) and (h).

The referenced memorandum of decision is set forth herein. The case settled on the fourth day of trial, Tuesday, October 27, 2015. Because the present motion raised

[1] Safeco also filed motions in limine re Testimony of Insurance Department Representatives (#262) and Testimony of Safeco Employees (#265), which the court has denied on the basis of the reasoning and subject to the limitations contained herein.

questions of first impression, the court deemed it worthwhile to set forth relevant authorities informing its decision.

DISCUSSION

The procedure for a motion in limine is set forth in Practice Book § 15-3:

> The judicial authority to whom a case has been assigned for trial may in its discretion entertain a motion in limine made by any party regarding the admission or exclusion of anticipated evidence. . . . Such motion shall be in writing and shall describe the anticipated evidence and the prejudice which may result therefrom. All interested parties shall be afforded an opportunity to be heard regarding the motion and the relief requested. The judicial authority may grant the relief sought in the motion or such other relief as it may deem appropriate, may deny the motion with or without prejudice to its later renewal, or may reserve decision thereon until a later time in the proceeding.

Our supreme court, in *McBurney v. Paquin*, 302 Conn. 359, 377-78 (2011) explained, ". . . [T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial."

The section of CUIPA at issue here, Gen. Stat. § 38a-816(6), specifies fifteen examples of "unfair claim settlement practices" prefaced by the phrase "committing or performing with such frequency as to indicate a general business practice any of the following." The prohibited practices include, "(C) failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies; (D) refusing to pay claims without conducting a reasonable investigation based upon all available information; (F) not attempting good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear . . . ."

In *Capstone Building Corp. v. Amico Ins. Co.,* 308 Conn. 760, 793-803 (2013), the court stated, "We note that § 38a–816 (6) requires that a plaintiff allege and prove that the relevant

conduct was a part of a general business practice." Id., 802 n.41. The court noted in *Mead v. Burns,* 199 Conn. 651, 662 (1986), that the definition of "unfair claims settlement practices" in General Statutes § 38-61(6), the predecessor to §38a-618(6), reflects the legislative determination that isolated instances of unfair insurance settlement practices are not so violative of the public policy of this state as to warrant statutory intervention. In *Lees v. Middlesex Ins. Co.,* 229 Conn. 842, 849 n.8 (1994), the court noted, "The term 'general business practice' is not defined in the statute, so we may look to the common understanding of the words as expressed in a dictionary. *State* v. *Indrisano*, 228 Conn. 795, 809-10, 640 A.2d 986 (1994). 'General' is defined as 'prevalent, usual [or] widespread'; Webster's Third New International Dictionary; and 'practice' means '[p]erformance or application habitually engaged in . . . [or] repeated or customary action.' Id."

The issue of how to allege a "general business practice" has been extensively considered by the courts. "[F]or a plaintiff to allege CUIPA and CUTPA violations successfully, the plaintiff must allege more than a singular failure to settle a plaintiff's claim fairly. The plaintiff must allege that the defendant has committed the alleged wrongful acts with such frequency as to indicate a general business practice." *Quimby* v. *Kimberly Clark Corp.*, 28 Conn. App. 660, 672 (1992). The numerous superior court cases considering the sufficiency of challenged allegations of a complaint need not be referenced here. A majority of decisions have held that merely alleging the existence of a general business practice is insufficient and that a plaintiff must allege similar instances of unfair claim settlement practices involving other insureds. See, e.g., 12 Robert M. Langer et al., Conn. Prac. Series, *Unfair Trade Practices* §3.13, at 248-61 (2013); *Annual Survey of Developments in Insurance Coverage Law,* Conn. Bar. J., Vol. 86, No. 2, at 183; Vol. 85, No. 2, at 123; See also Vol.74, No. 4, at 380.

The far less considered problem, currently before the court, is that of proof: once a "general business practice" is properly alleged, what evidence is admissible to prove the allegation? Certain principles emerge from our jurisprudence. See *Lees* v. *Middlesex Ins. Co.*, supra, 229 Conn. 849 ("In requiring proof that the insurer has engaged in unfair claim settlement practices with such frequency as to indicate a general business practice, the legislature has manifested a clear intent to exempt from coverage under CUIPA isolated instances of insurer misconduct. . . . We conclude that the defendant's alleged improper conduct in the handling of a single insurance claim, without any evidence of misconduct by the defendant in the processing of any other claim, does not rise to the level of a 'general business practice' as required by § 38a-816 (6)." (Citation omitted; footnote omitted; internal quotation marks omitted.)).

Also, in *Lees* v. *Middlesex Ins. Co.*, the plaintiff sought to introduce evidence of other suits filed against the defendant-insurer, as well as complaints against the defendant logged with the insurance commissioner. The Supreme Court noted, with approval, that the trial court refused to consider that evidence: "The plaintiff suggests that the trial court, in granting the defendant's motion for summary judgment, improperly failed to consider three other suits filed against the defendant and two complaints against the defendant lodged with the insurance commissioner, all alleging CUIPA violations. The trial court correctly concluded, however, that the only misconduct alleged by the plaintiff in her complaint concerned the defendant's handling of the plaintiff's loss of contents claim. Furthermore, the record reflects, and the plaintiff does not dispute, that the three suits alleging CUIPA violations by the defendant were withdrawn, and the complaints were resolved on the basis of the defendant's responses to the insurance commissioner. Because the plaintiff adduced no additional facts or information concerning any

of those matters, the trial court properly determined that they were of no evidentiary value." *Lees* v. *Middlesex Ins. Co.*, supra, 229 Conn. 848 n.6.

The Supreme Court's discussion of the evidence proffered in *Lees* does not set an absolute bar to evidence of prior suits and insurance commissioner claims. Rather, it sets a threshold, requiring that such suits and claims have evidentiary value before they may be considered in support of a CUIPA/CUTPA claim. In other words, (1) they must involve the same or very similar practices as alleged in the complaint, and (2) they must involve other claimants. Evidence of suits and claims may be relevant only if it proves "that there has been a general business practice as to the precise type of unfair claims practice alleged." *Thomas* v. *Biller Associates Tri-State, Inc.*, Superior Court, judicial district of New Haven, Docket No. CV-05-40106955-S (August 31, 2009, *Corradino, J.*) (48 Conn. L. Rptr. 517, 518). In particular, "judicial findings concluding that an insurer had mishandled claims against its insureds would similarly be admissible to establish a general practice if they were sufficient in other respects, namely number, frequency and similarity." *Edible Arrangements, Inc.* v. *Brenner*, Superior Court, judicial district of New Haven, Docket No. CV-08-5019963-S (January 7, 2010, *Robinson, J.*) (49 Conn. L. Rptr. 141, 143-44 n.3).

In *Thomas* v. *Biller Associates Tri-State, Inc.*, the court ruled on the admissibility of evidence of other claims made against the defendant and discussed its concerns therein. "But insofar as rank hearsay is allowed into evidence without the opportunity to cross examine or otherwise contest its basis, questions of fundamental fairness are raised which in the context of this case is a component of a due process analysis." *Thomas* v. *Biller Associates Tri-State, Inc.*, supra, 48 Conn. L. Rptr. 519. For a plaintiff to successfully prove a CUIPA/CUTPA claim there must be "evidence beyond that of paper complaints not subject to cross examination." Id., 524.

Thus, a third requirement for the proffered evidence is that it complies with the rules of evidence, including those relating to relevance and inadmissible hearsay. "Evidence is admissible only if it is relevant. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The proffering party bears the burden of establishing [relevance]." (Citation omitted; internal quotation marks omitted.) *McBurney v. Paquin*, supra, 302 Conn. 378.

Multiple concerns may arise when a party offers a judicial or quasi-judicial record of one case as evidence in another case. To that end, some of the principles that underlie judicial notice of judicial records provide guidance in the instant matter. Generally, "[c]ourt records may be judicially noticed for their existence, content, and legal effect." C. Tait & E. Prescott, Connecticut Evidence (4th Ed. 2008) § 2.3.4 (d), at 97. However, "[c]are should be taken to avoid noticing judicial records in one case as evidence upon which to find facts in another case. For example, one can judicially notice that certain testimony was given in a case, but not that it was true. Similarly, a judgment in one case cannot be used to establish facts in another case without complying with the hearsay rule. There is no general hearsay exception for judgments or other court records, but parts thereof may satisfy a recognized hearsay exception, such as an admission of a party opponent, declaration against interest, or former testimony. Judgments that satisfy the doctrines of res judicata and collateral estoppel are not hearsay exceptions. If these preclusion doctrines are applicable, they bar all re-litigation of facts within their scope. If not

applicable, the prior judgments are not proof of anything other than such a judgment itself exists, which is admissible only if that fact is relevant." Id.

ANALYSIS

Defendant Safeco seeks to bar evidence at trial, through judicial notice or otherwise, of five decisions recited in its complaint. Paragraph 16 of Count Four lists the following complaints that were filed in the Superior Court against the defendant alleging CUIPA/CUTPA violations: *Wiacek v. Safeco Ins. Co. of America, Inc.*, Superior Court, judicial district of Danbury, Docket No. CV-329601 (March 31, 1998, Radcliffe, J.) (unspecified claim settlement practices); *Ozkan v. Safeco Property & Casualty Ins. Companies*, Superior Court, judicial district of Waterbury, Docket No. CV-07-5005520-S (October 31, 2007, Roche, J.) (misrepresentation of claim limits); *Jones v. Safeco Ins. Co. of Illinois*, Superior Court, judicial district of Fairfield-Bridgeport, Docket No. CV-98-0357614-S (April 28, 1999, Melville, J.) (requiring resolution of accident case before extending uninsured motorist benefits); *Fetzer v. Safeco Ins. Co. of Amer*ica, Superior Court, judicial district of Litchfield, Docket No. CV-04-0092567-S (August 9, 2006, Pickard, J.) (wrongful denial of claims); and *Strilbyckij v. Safeco Ins. Co. of America*, Superior Court, judicial district of New Haven, Docket No. CV-95-03716682-S (April 21, 1995, Hadden, J.) (refusal of underinsured motorist benefits).

Having reviewed the decisions cited by the plaintiffs and applying the three principles set forth above (i.e., that (1) they involve the same or similar practices (2) affecting other insureds and (3) comply with the rules of evidence), the court finds that, in each case, the allegations involved behavior unspecified or dissimilar to that alleged in the complaint and that the allegations were stricken, dismissed, or otherwise adjudicated in favor of the defendant. Therefore, none of those cases or the allegations therein are admissible as evidence in support of

a general business practice because they do not constitute findings of a relevant unfair claim settlement practice entitled to collateral estoppel effect.

CONCLUSION

In light of the foregoing, the court will consider admission of the following four categories of evidence to prove a "general business practice":

1. Live testimony by other insureds or their agents of similar practices by Safeco because the witnesses would be subject to cross-examination and prior deposition;
2. Evidence of similar practices in complaints before the insurance commissioner that have been ruled upon where there was a fair opportunity to contest the findings, or testimony of Insurance Department personnel, who would be subject to cross-examination;
3. Written evidence of similar practices in complaints before the Superior Court or other courts of record that have been adjudicated adversely to Safeco, which are entitled to collateral estoppel effect; and
4. Evidence provided by the insurer's employees and/or internal cocuments as to its policies and practices.

Hon. Charles T. Lee

Decision entered in accordance with the foregoing. 10/28/15. All counsel and self-represented parties of record notified on 10/28/15. Cassandra Bassett Cassandra Barcello TAC