

LEXSEE



Analysis

As of: Sep 16, 2012

**ROGER T. CRENSHAW, Plaintiff, vs. MONY LIFE INSURANCE COMPANY;
DISABILITY MANAGEMENT SERVICES, INC., Defendants. AND RELATED
COUNTERCLAIMS.**

CASE NO. 02cv2108-LAB (RBB)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA**

2004 U.S. Dist. LEXIS 9883

April 30, 2004, Decided

May 3, 2004, Filed

PRIOR HISTORY: Crenshaw v. Mony Life Ins. Co., 318 F. Supp. 2d 1015, 2004 U.S. Dist. LEXIS 9882 (S.D. Cal., Apr. 27, 2004)

DISPOSITION: [*1] Defendant Mony's Motion For Partial Summary Judgment granted. Plaintiff's Motion For Partial Summary Judgment and injunctive relief denied. Plaintiff's Motion for Summary Judgment or Partial Summary Judgment on Counterclaim denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff doctor filed an insurance bad faith action against defendant insurer alleging, inter alia, breach of contract and seeking injunctive relief under Cal. Bus. & Prof. Code § 17200 and Cal. Ins. Code § 790.03, contending that defendant wrongfully denied plaintiff disability benefits. Defendant filed counterclaims alleging breach of contract and fraud, and both sides filed motions for partial summary judgment.

OVERVIEW: After nearly four years of making payments for plaintiff doctor's alleged total disability, defendant insurer issued a reservation of rights letter in which it disputed the severity of plaintiff's tinnitus and its

disabling interference in his professional life. The district court granted the defendant insurer summary judgment on plaintiff's bad faith denial of insurance benefits claim upon application of California's "genuine dispute" doctrine, finding that the defendant's decision to discontinue benefits was not unreasonable as a matter of law where, during the period plaintiff's alleged "total disability," defendant provided evidence that plaintiff worked as the medical officer on cruise ships representing himself as fit to serve in such a capacity. However, summary adjudication was denied as to defendant's fraud counter-claim where factual issues remained whether plaintiff knowingly made a false claim for benefits. Finally, injunctive relief was denied under Cal. Bus. & Prof. Code § 17200 and Cal. Ins. Code § 790.03, was defendant's denial of a single claim by a single claim and was not sufficient to support the finding of an unfair business practice.

OUTCOME: Defendant's motion for partial summary judgment is granted, plaintiff's motion for partial summary judgment was denied, and the only remaining claims surviving for trial were plaintiff's breach of contract claim, and defendant's counterclaims for breach of contract and fraud.

CORE TERMS: insurer, disability, tinnitus, insured's, depo, summary judgment, genuine, bad faith claim, coverage, hearing loss, doctor, profession, disabled, good faith, summary adjudication, disability benefits, fair dealing, patient, causes of action, punitive damages, counterclaim, severe, matter of law, breach of contract, emotional distress, occupation, impairment, covenant, partial, triable

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > General Overview

[HN1]The court is empowered pursuant to Fed. R Civ. P. 56(c) to enter summary judgment on factually unsupported claims or defenses, and thereby secure the just, speedy and inexpensive determination of every action.

Civil Procedure > Discovery > Methods > General Overview

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

[HN2]Summary judgment is appropriate 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 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the suit under governing law. The court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

[HN3]Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an absence of evidence to support the plaintiff's claims.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Standards >

Appropriateness

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN4]The party moving for summary judgment has the initial burden of demonstrating that there is no issue of material fact and that summary judgment is proper. The movant is not required to produce evidence showing the absence of a genuine issue of material fact, nor is he or she required to offer evidence negating the non-movant's claims.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

[HN5]A mere scintilla of evidence in support of the non-moving party's position is not sufficient. Summary judgment must be entered if, under the governing law, there can be but one reasonable conclusion as to the verdict. However, if reasonable minds could differ, the judgment should not be entered in favor of the moving party.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Evidence > Procedural Considerations > Burdens of Proof > Allocation

[HN6]If the party moving for summary judgment has the burden of proof at trial (e.g., a plaintiff on a claim for relief, or a defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Thus, if the moving party has the burden of proof at trial, that party must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in its favor.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

[HN7]In making determinations regarding elements of a claim to which the moving party has the burden of proof at trial, the court is to believe the non-movant's evidence. Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, and are not appropriate for resolution by the court on a motion for summary judgment.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Summary Judgment > Opposition > General Overview

[HN8]If the party moving for summary judgment meets his or her burden, the burden then shifts to the non-movant to show that summary judgment is not appropriate. The non-movant does not meet this burden by showing some metaphysical doubt as to material facts. Consequently, the non-moving party cannot successfully oppose a properly supported summary judgment motion by resting on mere allegations or denials in his or her pleadings.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Materiality

[HN9]The non-movant upon a motion for summary judgment must go beyond the pleadings to designate specific facts showing that there are genuine and material factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. If the non-movant fails to make a sufficient showing of an element of his or her case, the movant is entitled to a judgment as a matter of law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Standards > Materiality

[HN10]The mere fact that the parties make cross-motions for summary judgment does not necessarily mean that there are no disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other.

Insurance Law > Disability Insurance > Accrual of Benefits

[HN11]Disability insurance is designed to provide a substitute for earnings when, because of bodily injury or disease, the insured is deprived of the capacity to earn his living. It does not insure against loss of income.

Insurance Law > Disability Insurance > Accrual of Benefits

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

[HN12]Disability insurance policies do not provide coverage for legal disabilities, such as the loss of a license required to practice a profession, but rather for disabilities due to sickness or injury.

Insurance Law > Disability Insurance > Mental Impairments

Insurance Law > Disability Insurance > Physical Impairments

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > General Overview

[HN13]"Total disability" does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way. Recovery is not precluded because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of the business. Conversely, the insured is not totally disabled if he is physically and mentally capable of performing a substantial portion of the work connected with his employment. He is not entitled to benefits because he is rendered unable to transact one or more of the duties incidental to his business.

Contracts Law > Breach > General Overview

Contracts Law > Types of Contracts > Covenants

Insurance Law > Bad Faith & Extracontractual Liability

[HN14]Disability insurance policies are continuing contracts for periodic payments. An insurer's obligation to pay is conditioned on the insured's continuing disability. Accordingly, in a suit brought by an insured for breach of contract, recovery is limited to benefits which have already accrued because the insured has no cause of action for recovery of future disability benefits on that theory. However, a claim alleging an insurer breached the implied covenant of good faith and fair dealing may subject the insurer to liability for both accrued and future disability benefits under that tort theory. Cal. Civ. Code § 3333. Continuing payments under a reservation of rights pending a decision on the

disputed benefits may avoid that risk, although if an insurance company has no valid grounds to deny payment, it may be unreasonable to act as if it does. However, a proper reservation of the right to sue its insured to recover benefits paid requires the insurer have a good faith belief in the existence of some right or defense to payment.

Contracts Law > Breach > General Overview
Contracts Law > Types of Contracts > Covenants
Torts > Damages > General Overview

[HN15]An insurer's decision to continue payments under a reservation of rights, rather than cut off benefits entirely where it concludes there is no coverage, goes to the issue of damages, not liability. As long as the insurer's coverage decision was reasonable, it will have no liability for breach of the covenant of good faith and fair dealing. An insurer which denies benefits reasonably, but incorrectly, will be liable only for damages flowing from the breach of contract, i.e., the policy benefits. On the other hand, if the insurer is found to have acted unreasonably, its liability for breach of the covenant of good faith and fair dealing will sound in tort, exposing it to a much broader array of damages. Because of that risk, many insurers reasonably choose to pay the disputed benefits pending a court decision, as a strategy to mitigate whatever damages might later be claimed by the insured, including possible punitive damages, should the insurer ultimately lose the coverage dispute. Such a strategy, while perhaps beneficial to an insured in the short run, is primarily a self-protective measure, not an obligation.

Insurance Law > Bad Faith & Extracontractual Liability > General Overview
Insurance Law > Disability Insurance > Total Disability
Public Health & Welfare Law > Social Services > Disabled & Elderly Persons > Agency Actions & Procedures > Negative Actions

[HN16]Termination of benefits claimed on grounds of total disability, without "proper cause" can support a finding of bad faith. Unreasonable conduct by the insurer is established when there is a lack of justification for cutting off benefits.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Insurance Law > Bad Faith & Extracontractual Liability > General Overview

Insurance Law > Claims & Contracts > Disclosure Obligations > Fraudulent Intent

[HN17]The act of initiating suit to recoup benefits paid does not constitute actionable bad faith unless the insurer has acted unreasonably in investigating or withholding benefits. To be actionable, the adverse conduct complained of must be shown to have been taken arbitrarily or with no reasonable basis. Thus, under California law, a bad faith claim can be dismissed on summary judgment if the defendant can show that there was a genuine dispute as to coverage.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN18]A legitimate coverage dispute may arise when the insurer obtains evidence calling into question the right of the insured to continue receiving benefits, insulating an insurer from bad faith liability. Further, California's "genuine dispute" doctrine, under which a bad faith claim can be dismissed on summary judgment if the defendant can show that there was a genuine dispute as to coverage, is not limited to purely legal disputes, such as the meaning of a contractual provision language or unsettled California law. In some cases, the application of the rule will permit the invocation of the doctrine and summary judgment for the defendant on a bad faith claim.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN19]The sufficiency of the evidence giving rise to a reasonable inference of the insurer's tortious conduct is a question of law. Courts may consider the purpose and attitude of the insurer in withholding or terminating benefits. Competent evidence must exist on which a jury finding of "unreasonableness" can stand. Speculation or conjecture are insufficient to sustain a bad faith claim. A court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, even if the court concludes the claim is payable under the policy.

Contracts Law > Breach > General Overview
Contracts Law > Remedies > Compensatory Damages >

General Overview

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN20]Under the "genuine dispute" doctrine, if there is a proper basis to dispute coverage, even an erroneous denial of a claim in breach of the insurer's contract will not by itself support tort liability. Only the damages flowing from the breach of contract (i.e., the benefits due), not tort damages, are at issue as long as the insurer's coverage decision was reasonable.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Insurance Law > Bad Faith & Extracontractual Liability

[HN21]A court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, even if the court concludes the claim is payable under the policy terms, so long as there existed a genuine issue as to the insurer's liability.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Contracts Law > Types of Contracts > Covenants

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN22]A plaintiff alleging an insurer's bad faith under California law must establish not only his right to benefits under the policy, but also that the insurer's decision to terminate payments was unreasonable or without proper cause. A showing the insurer took some action adverse to the insured, such as denying benefits, standing alone, is not sufficient to show unreasonable conduct adequate to sustain a bad faith claim. Mere negligence is not enough to constitute unreasonable behavior for purposes of establishing a breach of the implied covenant of good faith and fair dealing in an insurance case.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Insurance Law > Bad Faith & Extracontractual Liability > Payment Delays & Denials

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

[HN23]The genuine dispute doctrine relieves an insurer of tort liability for denying or delaying payment of a

claim when a genuine issue over the insured's entitlement to benefits exists. The doctrine can apply to factual disputes over the value of the claim or the propriety of a claim and is not limited to legal issues concerning the policy language or coverage. The doctrine allows a district court to grant summary judgment when it is undisputed or indisputable that the basis for the denial of benefits was reasonable--for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. Because the key to a bad faith claim is whether denial of a claim was reasonable, a bad faith claim should be dismissed on summary judgment if the defendant demonstrates that there was a genuine dispute as to coverage.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Insurance Law > Bad Faith & Extracontractual Liability > Payment Delays & Denials

[HN24]Insurers have the obligation to make an investigation regarding coverage. However, if at the time the insurer makes the decision to deny coverage, it has a good reason to dispute liability, the insurer is not susceptible to a claim of bad faith failure to make a more thorough investigation.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Contracts Law > Types of Contracts > Covenants

Insurance Law > Bad Faith & Extracontractual Liability > General Overview

[HN25]An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing. However, if the insurer has a good faith reason to believe it was not liable for the claim, the genuine dispute doctrine will entitle it to summary adjudication of a bad faith claim.

Evidence > Procedural Considerations > Objections & Offers of Proof > Objections

Evidence > Relevance > Relevant Evidence

Labor & Employment Law > Disability & Unemployment Insurance > Disability Benefits > Coverage & Definitions > Disabilities

[HN26]"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

Civil Procedure > Remedies > Damages > Punitive Damages

Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Punitive Damages > General Overview

Torts > Damages > Punitive Damages > Award Calculations > Appellate & Posttrial Review

[HN27]Punitive damages are made available in insurance bad faith claims to discourage the perpetuation of objectionable corporate policies that breach the public's trust and sacrifice the interests of the vulnerable for commercial gain.

Contracts Law > Types of Contracts > Covenants

Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Punitive Damages > General Overview

Torts > Damages > Punitive Damages > Conduct Supporting Awards

[HN28]Punitive damages are available in insurance bad faith claims if in addition to proving a breach of the implied covenant of good faith and fair dealing proximately causing actual damages, the insured proves by clear and convincing evidence that the insurance company itself engaged in conduct that is oppressive, fraudulent, or malicious.

Contracts Law > Remedies > Foreseeable Damages > General Overview

Contracts Law > Types of Contracts > Covenants

Insurance Law > Bad Faith & Extracontractual Liability > Remedies > Punitive Damages > Evil & Malicious Intent

[HN29]Punitive damages may be awarded when an insurer breaches the covenant of good faith and fair dealing and is guilty of oppression, fraud or malice. A plaintiff may meet the state of mind requirement for an award of punitive damages by showing that the insurer's bad faith was part of a conscious course of conduct, firmly grounded in established company policy.

Civil Procedure > Remedies > Damages > Punitive Damages

Insurance Law > Claims & Contracts > Good Faith &

Fair Dealing > General Overview

Torts > Damages > Punitive Damages > Availability > General Overview

[HN30]An insurer's refusal to provide coverage, when supported by a reasonable argument made in good faith, cannot form the basis for punitive damages. Absent the required motivation in denying the insured's claim, the insurer will not be liable for punitive damages.

Contracts Law > Consideration > Enforcement of Promises > General Overview

Insurance Law > Claims & Contracts > Estoppel & Waiver > Misrepresentations

Insurance Law > Claims & Contracts > Estoppel & Waiver > Policy Coverage

[HN31]An insurer's failure to allude to valid defenses in a denial of coverage letter does not estop it from later raising them where no prejudice to the insured is shown. Proof of estoppel, in the insurance law context, requires a showing of detrimental reliance by the injured party. An insured's nondisclosures or misrepresentations concealing facts rather than legal theories supporting a plaintiff's claims can give rise to estoppel.

COUNSEL: For ROGER T CRENSHAW, plaintiff: Kristen L Churchill, Cadena Churchill, San Diego, CA.

For MONY LIFE INSURANCE COMPANY, defendant: Todd Matthew Sorrell, Fulbright and Jaworski, Los Angeles, CA.

For MONY LIFE INSURANCE COMPANY, counter-claimant: Todd Matthew Sorrell, Fulbright and Jaworski, Los Angeles, CA.

For ROGER T CRENSHAW, counter-defendant: Kristen L Churchill, Cadena Churchill, San Diego, CA.

JUDGES: HONORABLE LARRY ALAN BURNS, United States District Judge.

OPINION BY: LARRY ALAN BURNS

OPINION

ORDER:

(1) GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT;

(2) DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND INJUNCTIVE RELIEF; AND

(3) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT ON COUNTERCLAIM.

[Dkt Nos. 105, 101, 126]

This matter is before the Court on three motions for partial summary judgment on the First Amended Complaint or the First Amended Counterclaim in this insurance bad faith action. Each motion has been opposed, [*2] and in each instance a Reply was filed. Pursuant to Civil Local Rule 7.1(d)(1), the court found the issues appropriate for decision on the papers and without oral argument. After careful consideration of the papers, the evidence, and pertinent authority, for the reasons discussed below, the Court **GRANTS** Defendant's motion and **DENIES** Plaintiff's motions.

I. BACKGROUND

A. Factual Background

Dr. Roger T. Crenshaw, M.D. ("Crenshaw") is a 60-year-old retired family practitioner and psychiatrist/sex therapist. He received his medical degree in 1969. In the early 1990's, Crenshaw began experiencing slow onset hearing loss, accompanied by tinnitus.¹ He contends his symptoms became severe in early 1998 following scuba diving, an ear infection, and antibiotic use, which are all known to cause or exacerbate tinnitus.

1 Mony notes Crenshaw testified at his deposition he experienced some level of tinnitus for over 20 years before his October 1998 disability claim. Crenshaw Depo. p. 71. He stated he had had "intermittent bouts of tinnitus that haven't lasted very long since I was in my mid 20s to 30s ... generally **associated with shooting, diving, flying.**" Crenshaw Depo. 71:7-14 (emphasis added). He answered affirmatively that his tinnitus occurred in the "mid-eighties" **from diving and flying.**" Id. 73:16-19 (emphasis added).

[*3] Tinnitus is an abnormal perception of sound when no sound exists.² There is no objective test to

confirm either the existence or severity of subjective tinnitus.³ Slattery Decl. P2; Harris Decl. 4 P2. "The tinnitus sufferer 'hears' a buzzing, ringing tone or roaring, but the source of the noise is not in the ears... The source of tinnitus is believed to be in the central nervous system, but the exact source remains a medical mystery." Pl. Mots. P&A 2:22-25, 2:20-22; *see* Bone Depo. p. 20 (tinnitus is a subjective complaint; doctors "rely upon patient's self-reporting to determine whether it exists"); Olsson Depo. pp. 78-79, 83 (tinnitus is "subjective"). The parties dispute the severity of Crenshaw's tinnitus and the degree of its disabling interference in his professional life. Objective audiology testing confirms hearing loss, and Crenshaw apparently uses hearing aids. Other than the tinnitus and hearing loss, Crenshaw reports his overall health is good.

2 Crenshaw suffers from subjective tinnitus, not objective tinnitus. Bone Depo. pp. 20-21; *see* Olsson Depo. 78:24-79:1: "To objectively determine if he has tinnitus, no. That's impossible. Because the tinnitus is subjective."

[*4]

3 Dr. Bone is Crenshaw's treating physician whose specialty is otolaryngology (ear, nose, throat). Churchill Decl. Ex. "B", Bone Decl. P1. He testified that, in connection with his treatment and consultation with Crenshaw, he had never come to the conclusion that Crenshaw suffered from "objective tinnitus," but rather that his "evaluation of Crenshaw was that he suffered from subjective tinnitus." Bone Depo. 20:2-9. Subjective tinnitus is "heard by the patient but cannot be heard on examination by an examiner," and the diagnosis of subjective tinnitus requires the doctor to "rely upon the patient's self-reporting to determine whether it exists." Bone Depo. 20:12-17. Similarly, the usual method for the healthcare provider to determine the severity of a subjective tinnitus condition is to rely on the patient's self-reporting. Bone Depo. 20:22-21:1. That was the primary mechanism Dr. Bone used in determining Crenshaw's tinnitus disabled him from engaging in his profession. Bone Depo. 21:2-22.

4 In an Order entered April 27, 2004, Magistrate Judge Ruben B. Brooks conditionally denied Plaintiff's motion to disqualify or strike Dr. Jeffrey Harris, M.D. as a defense expert witness in this case. Dkt No. 183. Dr. Harris saw

Crenshaw once when he was referred for a consultative examination on October 22, 1998. Id. p. 4. A colleague of Dr. Harris' at Scripps Clinic, Dr. Byrne, apparently conducted the actual tests, including an ear exam, audiogram, and blood tests. Id. pp. 4-5. Dr. Harris supervised and co-signed the chart note. Id. p. 6. He denies ever having been a "treating physician" of Crenshaw, and did not recall Crenshaw at all at the time he was contacted to provide expert testimony on tinnitus in this case. Id. p. 10. Judge Brooks found Dr. Harris was not a treating physician of Crenshaw. Id. p. 15

[*5] In June 1976, Mony had issued a Group Insurance Policy containing a disability benefits provision covering Crenshaw and others. In January 1985, the insureds were given the option to transfer to a Group Policy Number G-8000 (the "Policy") when the initial policy terminated. Crenshaw opted to continue coverage under the new policy, effective February 1, 1985. By October 1998, Crenshaw maintains his tinnitus and hearing problems had become so distracting and disruptive to his therapy sessions he felt he could no longer competently continue in his professional practice, causing him to make a disability claim against the Policy.

The Policy provision under which Crenshaw claimed and received disability benefits states:

Disability. As used in this provision, the term "Disability" means a disability which wholly and continuously disables the MEMBER so that he is unable to perform the substantial and material duties of his profession. Throughout the disability, he must be under the regular care of a PHYSICIAN and not working at any gainful occupation.

FAC Ex. "A" pp. 11, 13 (same definition in both Member Short Term and Member Long Term Disability Income Benefits sections).

[*6] In his October 27, 1998 benefits application, Crenshaw identified the "cause for the claim" as: "I am unable to hear my [patients] due to bilateral severe ringing in ears." Mony Mot. Sorrell Decl. Ex. "B". He identified as the nature of his condition: "Bilateral severe tinnitus." Id. He identified March 1998 as the "date of

first symptom," and responded "no" to the question "Ever had this before?" Id. He identified a single attending physician: Dr. Robert Bone, M.D. He described his "regular occupation" as: "Family Practice & Psychiatry." He left blank the date range during which he was "continuously totally disabled and wholly unable to perform your regular occupation," but answered "no" to the questions: "During this period, did you visit your place of business or perform any duties of your regular occupation?" and "During this period, did you perform any other occupation?" Id. He indicated on the form he had been "actively and steadily employed when [his] disability began." Id. In response to the question when he expected to be able to resume his regular occupation, he noted "Unknown," and left blank the followup "Any other occupation?". Id.

In an October 18, 1999 "Insured's [*7] Disability/Incapacity Statement," Crenshaw reported: no changes in his condition; no new doctors attended him; he had not worked anywhere since his last claim statement; he was not able to return to work; his condition prevented him from working because "as a psychiatrist, I need to listen, understand, and talk all day in one hour slots"; he did not expect to return to work; and, in response to the question had he considered rehabilitation, he stated: "To retrain in another medical field where hearing is unimportant would take 4 years. (Hearing & understanding & concentrating)." Mony Mot. Sorrell Decl. Ex. "C". He summarized:

There have been no changes to my severe tinnitus which is consistent, neverending, relentless 24 hour/day loud as a television noise. I am still unable to concentrate longer [than] 10 minutes at a stretch.

Mony Mot. Sorrell Decl. Ex. "C" (emphasis added).

In an August 13, 2000 "Insured's Disability/Incapacity Statement," Crenshaw reported changes to his condition since his last statement as: "None, if anything worse." Mony Mot. Sorrell Decl. Ex. "D". He reported he had not worked anywhere since his last claim statement, and he was unable [*8] to return to work. Id. He described how his condition kept him from working as: "Unable to concentrate & understand for any period of time." Id. His expected return to work was "Unknown - doubtful." Id. "There is no branch of

medicine that I can rehab too [*sic*]." Id.

Mony began paying Crenshaw disability benefits of \$ 2,750.00 per month beginning in October or November 1998. Pl. Mots. 3:10-11, 3:5-6. However, in May 2002, Mony issued a reservation of rights letter, ultimately terminating Crenshaw's benefits in October 2002 on grounds its investigation caused it to conclude his claim was fraudulent and it would seek reimbursement of the over \$ 137,000.00 paid out on the claim.

Mony contends Crenshaw has never been wholly disabled from engaging in the substantial and material duties of his profession. FACC P23. Rather, Mony alleges he was motivated to submit a disability claim because he faced "legal and administrative problems" arising from illegal conduct he did not disclose to Mony. 5 FACC P24. Mony relies on evidence of Crenshaw's volunteer medical and recreational activities and his written representations to the Federal Aviation Administration ("FAA") associated [*9] with his piloting of small planes and on applications to serve as a ship's doctor to allege he falsely stated to Mony he was totally disabled in order to obtain benefits he was not entitled to receive under the Policy.

5 Mony's FACC alleges, among other things, it discovered Crenshaw engaged in the illegal distribution of lidocaine and syringes and that a criminal complaint was filed against him in March 1998. FACC P9. In April 1998, an accusation was filed against him on behalf of the Medical Board of California seeking, among other things, revocation or suspension of his Physician's and Surgeon's Certificate based on his illegal distribution of lidocaine. FACC P10. On October 8, 1998, he pleaded *nolo contendere* to certain criminal charges. He filed his claim for disability benefits twenty days thereafter, alleging total disability from working due to tinnitus. FACC P12. On February 17, 1999, the Medical Board's decision became effective, placing Crenshaw on probation for five years and suspending his license for six months. FACC P15. He entered a stipulation thereafter whereby he was suspended from the practice of medicine for a one year period commencing on March 19, 1999. FACC P19.

[*10] In a November 1, 2002 letter to Crenshaw's counsel, Mony's Manager of Disability Claims, Sharon

Monroe, responded to counsel's October 24, 2002 letter regarding the disability claim and Mony's termination of benefit payments, explaining in pertinent part:

Our investigation has disclosed that in March, 1998, a criminal complaint was filed against Dr. Crenshaw and in April, 1998, an accusation was filed by the Medical Board seeking revocation or suspension of Dr. Crenshaw's license due to this illegal distribution of Lidocaine and syringes to persons performing electrolysis. Six months later, in October, 1998, Dr. Crenshaw filed his claim form with MONY, claiming that his first symptoms of tinnitus were in March, 1998 (the month in which the criminal complaint was filed) and that his first treatment for that alleged condition was in April, 1998 (the month in which the accusation by the Medical Board was filed).

Disability policies provide benefits for injuries or sickness and not for an inability to work due to legal or social difficulties. We have determined that Dr. Crenshaw filed his claim subsequent to the institution of criminal and regulatory proceedings against him that [*11] compromised his ability to practice in his profession. **Under the circumstances, we do not find that his subjective complaints relating to his alleged condition of tinnitus are credible and we are compelled to terminate benefits.** We note, for example, that on Medical Certificates that Dr. Crenshaw submitted to the Federal Aviation Administration on April 6, 2000 and March 28, 2002 ... that he did not disclose a condition of tinnitus or any other hearing disorder, and that he passed his hearing test. Indeed, on those certifications Dr. Crenshaw was specifically asked to disclose any "disability" and he disclosed none. Our determination is further supported by the evidence demonstrating that Dr. Crenshaw is in fact physically capable of performing the substantial and material duties of his

profession. Thus, the benefits Dr. Crenshaw claimed and received under his policies from October 31, 1998 through September 19, 2002, totaling \$ 137,322, must be repaid to Mony.

Churchill Decl. Ex. "G" (emphasis added).

B. Procedural Background

Crenshaw filed a complaint on October 25, 2002 and his First Amended Complaint ("FAC") on November 19, 2002. Mony filed its Answer [*12] and Counterclaim on January 3, 2003 and its First Amended Counterclaim ("FACC") on April 4, 2003 after District Judge Jeffery T. Miller had denied Crenshaw's motion to strike the Counterclaim but dismissed Mony's fraud claim, with leave to amend. Dkt No. 23. On stipulation of the parties, Judge Miller dismissed all claims against co-defendant Disability Management Services, Inc., leaving Mony as the only defendant. Dkt No. 27. Judge Miller subsequently denied Crenshaw's motion to strike and motion to dismiss the FACC. Dkt No. 47.

The FAC alleges eight causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) deceit; (4) conspiracy to defraud; (5) interference with contractual relationship; (6) intentional infliction of emotional distress; (7) violation of statutory duties (CAL. BUS. & PROF. CODE § 17200); and (8) declaratory relief. The FACC alleges three causes of action: (1) breach of contract; (2) fraud; and (3) declaratory relief.⁶

⁶ The statutory right to seek declaratory relief (CAL. CODE CIV. P. § 1060) extends to insurers' rights and obligations. If an insurer loses a declaratory relief suit, only the parties' contract rights are affected, not the "reasonableness" of the insurer's claims handling practices. *Safeco Ins. Co. v. Kartsone*, 510 F. Supp. 856, 859 (C.D.Cal. 1981).

[*13] The Court now decides: Mony's Motion For Partial Summary Judgment; ⁷ Crenshaw's Motion For Partial Summary Judgment And Injunctive Relief; ⁸ and Crenshaw's Motion For Summary Judgment Or, In The Alternative, Partial Summary Judgment On Defendant's Counterclaim ⁹ (collectively the "Motions"). Substantial overlap in the arguments, evidence, and issues causes the Court to address the Motions by first deciding two

questions affecting claim elements common to the several causes of action and affirmative defenses the parties seek to have summarily adjudicated. The first is whether the dispute over Crenshaw's total professional disability can be summarily adjudicated. The second is whether Mony acted reasonably in denying the disability claim, irrespective of the ultimate findings regarding Crenshaw's condition and regarding the parties' cross-claims for breach of contract. In light of those findings, the Court then decides whether summary relief is warranted or precluded on the grounds raised in the Motions.

⁷ Mony's Motion seeks summary adjudication: of Crenshaw's bad faith claim on grounds Mony did not engage in unreasonable claims handling and it had proper cause for its decision to terminate benefits; of Crenshaw's claim Mony entered the insurance contract with no intention of performing; of Crenshaw's conspiracy claim; of Crenshaw's intentional infliction of emotional distress claim; of Crenshaw's claim for statutory violations; and of Crenshaw's punitive damages claim. Dkt No. 126.

[*14]

⁸ Crenshaw seeks summary adjudication of: his breach of contract claim (FAC Count One); his violation of statutory duties/injunctive relief claim (FAC Count Seven); his declaratory relief claim (FAC Count Eight) on the issues of (a) Mony's obligation to pay disability benefits and (b) whether the denial of the claim was unreasonable. Dkt No. 105, 2:8-11.

⁹ Crenshaw seeks summary judgment on the Counterclaim in whole (*i.e.*, breach of contract, fraud, and declaratory relief) or, alternatively, partial summary adjudication.

II. DISCUSSION

A. Standard Of Review

1. Summary Judgment

Federal Rule of Civil Procedure 56(c) empowers [HN1]the court to enter summary judgment on factually unsupported claims or defenses, and thereby "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). [HN2]Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, [*15] if any, show 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); *see also* Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001). A fact is material if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1305-1306 (9th Cir. 1982) (the existence of a disputed material fact "requires a trial to resolve the parties' differing versions of the truth"). The court "must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

[HN3]Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an absence of evidence to support the plaintiff's claims. *See Celotex*, 477 U.S. at 325; *see also* *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998). [*16] [HN4]The movant has the initial burden of demonstrating that there is no issue of material fact and that summary judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970); *Arpin*, 261 F.3d at 919. The movant is not required to produce evidence showing the absence of a genuine issue of material fact, nor is he or she required to offer evidence negating the non-movant's claims. *Lujan v. Nat'l Wildlife Fed'n.*, 497 U.S. 871, 885, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990) ("Celotex made clear that Rule 56 does not require the moving party to *negate* the elements of the non-moving party's case; to the contrary, 'regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied"), *quoting* *Celotex*, 477 U.S. at 323. [HN5]A "mere scintilla of evidence in support of the non-moving party's position is not sufficient." *Anderson*, 477 U.S. at 252. Summary judgment must be entered [*17] "if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Id.* at 250-251. However, "if reasonable minds could differ," the judgment should not be entered in favor of the moving party.*Id.*

[HN6]If the moving party has the burden

of proof at trial (*e.g.*, a plaintiff on a claim for relief, or a defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Thus, if the moving party has the burden of proof at trial, that party must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in [its] favor.

Pecarovich v. Allstate Ins. Co., 272 F. Supp.2d 981, 985 (C.D. Cal. 2003) (citations omitted) (emphasis added).

However, [HN7]in making those determinations, the court is to believe the non-movant's evidence. *Anderson*, 477 U.S. at 255. Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, and are not appropriate for resolution by the court on a motion [*18] for summary judgment. *Id.*

[HN8]If the movant meets his or her burden, the burden then shifts to the non-movant to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at 324. The non-movant does not meet this burden by showing "some metaphysical doubt as to material facts." *Matsushita Elec. Indus.*, 475 U.S. at 586-587 (there is also no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion so that there is no genuine need for trial). Consequently, the non-moving party cannot successfully oppose a properly supported summary judgment motion by "resting on mere allegations or denials in his [or her] pleadings." *Anderson*, 477 U.S. at 256. [HN9]The non-movant must go beyond the pleadings to designate specific facts showing that there are genuine and material factual issues that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250; *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000), *citing* *Rule 56, Celotex*, 477 U.S. at 323, [*19] and *Anderson*, 477 U.S. at 249 (to successfully rebut a properly supported motion for summary judgment, the nonmoving party "must point to some facts in the record that demonstrate a genuine issue of material fact and, with all reasonable inference made in the plaintiff[]'s favor, could convince a reasonable jury to find for the plaintiff[]"). If the non-movant fails to

make a sufficient showing of an element of his or her case, the movant is entitled to a judgment as a matter of law. *Celotex*, 477 U.S. at 325; *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of material fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found").

[HN10]"The mere fact that the parties make cross-motions for summary judgment does not necessarily mean that there are no disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other." *Starsky v. Williams*, 512 F.2d 109, 112 (9th Cir. 1975). [*20] "Each motion must be considered on its own merits." *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001).

2. Insurer Conduct: Standards And Liability ¹⁰

10 The Court has relied for statements of California insurance law on the practice guide: Hon. H. Walter Croskey & Rex Heeseman, *et al.*, *Insurance Litigation*, Ch. 12, 6, The Rutter Group (2003), and authority cited therein.

[HN11]"Disability insurance is designed to provide a substitute for earnings when, because of bodily injury or disease, the insured is deprived of the capacity to earn his living ... It does not insure against loss of income." *Erreca v. Western States Life Ins. Co.*, 19 Cal.2d 388, 397, 121 P.2d 689 (1942). [HN12]Disability insurance policies do not provide coverage for legal disabilities, such as the loss of a license required to practice a profession, but rather for disabilities due to sickness or injury. *See Goomar v. Centennial Life Ins. Co.*, 76 F.3d 1059, 1062 (9th Cir. 1996). [*21]

[HN13]"Total disability" does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform *the substantial and material acts necessary to the prosecution of a business or occupation in the usual or customary way*. Recovery is not precluded ... because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of the

business Conversely, the insured is not totally disabled if he is physically and mentally capable of performing *a substantial portion of the work connected with his employment*. He is not entitled to benefits because he is rendered unable to transact one or more of the duties incidental to his business.

Erreca, 19 Cal.2d at 396 (citations omitted) (emphasis added).

[HN14]Disability insurance policies are continuing contracts for periodic payments. An insurer's obligation to pay is conditioned on the insured's continuing disability. *Erreca*, 19 Cal.2d at 400-402. Accordingly, in a suit brought by an insured for breach of contract, recovery is limited to benefits which have already accrued because the insured [*22] has no cause of action for recovery of future disability benefits on that theory. *Id.* at 402. However, a claim alleging an insurer breached the implied covenant of good faith and fair dealing may subject the insurer to liability for both accrued and future disability benefits under that tort theory. CAL. CIV. CODE § 3333 (the tort measure of damages includes "all detriment proximately caused" by the tortfeasor's conduct). Continuing payments under a reservation of rights pending a decision on the disputed benefits may avoid that risk, although if an insurance company has no valid grounds to deny payment, it may be unreasonable to act as if it does. ¹¹ *Morris v. Paul Revere Life Ins. Co.*, 109 Cal.App.4th 966, 977, 135 Cal. Rptr. 2d 718 (2003). However, A proper reservation of the right to sue its insured to recover benefits paid requires the insurer have a good faith belief in the existence of some right or defense to payment. *See Sprague v. Equifax, Inc.*, 166 Cal.App.3d 1012, 1032, 213 Cal. Rptr. 69 (1985).

11 [HN15]"An insurer's decision to continue payments under a reservation of rights, rather than cut off benefits entirely where it concludes there is no coverage, goes to the issue of damages, not liability. **As long as the insurer's coverage decision was reasonable, it will have no liability for breach of the covenant of good faith and fair dealing.** An insurer which denies benefits reasonably, but incorrectly, will be liable only for damages flowing from the breach of contract, *i.e.*, the policy benefits On the other hand, if the insurer is found to have acted unreasonably, its

liability for breach of the covenant of good faith and fair dealing will sound in tort, exposing it to a much broader array of damages. Because of that risk, many insurers reasonably choose to pay the disputed benefits pending a court decision, as a strategy to mitigate whatever damages might later be claimed by the insured, including possible punitive damages, should the insurer ultimately lose the coverage dispute. Such a strategy, while perhaps beneficial to an insured in the short run, is primarily a self-protective measure, not an obligation." *Morris*, 109 Cal.App.4th at 977 (citations omitted) (emphasis added).

[*23] [HN16] Termination of benefits claimed on grounds of total disability, without "proper cause" can support a finding of bad faith. "Unreasonable conduct" by the insurer is established when there is a lack of justification for cutting off benefits. *Sprague*, 166 Cal.App.3d at 1032 (upholding judgment for "conspiracy to fraudulently deny insurance benefits" based, among other things, on evidence the insurer's claims adjusters were instructed by their supervisor to find ways to deny claims); see *Pistorius v. Prudential Ins. Co.*, 123 Cal.App.3d 541, 547, 176 Cal. Rptr. 660 (1981) (periodic and arbitrary termination of disability benefits to see if the claimant would complain generated evidence to support a "bad faith" judgment as well as punitive damages).

[HN17] The act of initiating suit to recoup benefits paid does not constitute actionable bad faith unless the insurer has acted unreasonably in investigating or withholding benefits. See *Old Republic Ins. Co. v. FSR Brokerage, Inc.*, 80 Cal. App. 4th 666, 687-688, 95 Cal. Rptr. 2d 583 (2000) (an insurer which properly paid all third-party claims against a realtor and sales agent under an errors and omissions [*24] policy, then later sued its insured for fraud for misrepresenting the agent as an employee rather than an uncovered independent contractor, was not liable to suit by the realtor for bad faith). To be actionable, the adverse conduct complained of must be shown to have been taken arbitrarily or with no reasonable basis. *Franceschi v. American Motorists Ins. Co.*, 852 F.2d 1217, 1220 (9th Cir. 1988). Thus, "under California law, a bad faith claim can be dismissed on summary judgment if the defendant can show that there was a genuine dispute as to coverage." *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992 (9th Cir. 2001); *Lunsford v. American Guarantee & Liability Ins. Co.*, 18

F.3d 653, 656 (9th Cir. 1994) ("a court can conclude as a matter of law that the insurer's denial of a claim is not unreasonable, so long as there existed a genuine issue as to the insurer's liability"); *Franceschi*, 852 F.2d at 1220.

[HN18] A legitimate coverage dispute may arise when the insurer obtains evidence calling into question the right of the insured to continue receiving benefits, insulating an insurer from bad faith liability. *Phelps v. Provident Life & Acc. Ins. Co.*, 60 F. Supp.2d 1014, 1022-1024 (C.D. Cal. 1999) [*25] (insurer stopped paying on a 17-year-old disability claim based on its review of surveillance films showing the insured engaging in activities inconsistent with the claim and on an IME report strongly critical of the claim (although it resumed payments based on another disabling condition); the insurer was found not liable for bad faith conduct because the evidence gathered legitimately called into question the insured's entitlement to benefits). The "genuine dispute" doctrine is not limited to purely legal disputes, such as "the meaning of a contractual provision language or unsettled California law." *Guebara v. Allstate Ins. Co.*, 237 F.3d 987, 992-994 (9th Cir. 2001). "In some cases, the application of the rule will permit the invocation of the doctrine and summary judgment for the defendant on a bad faith claim." *Id.* at 994.

[HN19] The sufficiency of the evidence giving rise to a reasonable inference of the insurer's tortious conduct is a question of law. Courts may consider the purpose and attitude of the insurer in withholding (or terminating) benefits. Competent evidence must exist on which a jury finding of "unreasonableness" can stand. Speculation [*26] or conjecture are insufficient to sustain a bad faith claim. See *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 670 (9th Cir.), *cert. denied*, 157 L. Ed. 2d 137, U.S. , 124 S. Ct. 222 (2003) ("a court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, even if the court concludes the claim is payable under the policy").

[HN20] Under the "genuine dispute" doctrine, if there is a proper basis to dispute coverage, even an erroneous denial of a claim in breach of the insurer's contract will not by itself support tort liability. *Tomaselli v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1280-1281, 31 Cal. Rptr. 2d 433 (1994) (the "mistaken withholding of policy benefits, if reasonable or if based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith

liability"). Only the damages flowing from the breach of contract (*i.e.*, the benefits due), not tort damages, are at issue as long as the insurer's coverage decision was reasonable. *Morris*, 109 Cal.App. 4th at 977;

B. Crenshaw's Insurer Bad Faith Cause Of Action

Crenshaw [*27] moves for summary adjudication in his favor of his bad faith cause of action alleging Mony's denial of his disability claim was unreasonable as a matter of law because Mony failed to conduct a thorough investigation and its reasons for denying the claim are pretextual. Mony moves for summary adjudication in its favor on Crenshaw's bad faith claim on grounds its handling of the disability claim was reasonable because during its administration of the claim, its investigation revealed grounds to believe Crenshaw had been lying about the disabling extent of his tinnitus and his abilities, as evidenced by his engaging in activities inconsistent with his claimed disability and by his contrary representations to third parties.

The applicable legal standard to resolve the bad faith cause of action is whether Mony unreasonably denied Crenshaw's disability claim.

[HN21][A] court can conclude as a matter of law that an insurer's denial of a claim is not unreasonable, even if the court concludes the claim is payable under the policy terms, so long as there existed a genuine issue as [to] the insurer's liability.

Franceschi, 852 F.2d at 1220, *citing* *Safeco Ins. Co. v. Guyton*, 692 F.2d 551, 557 (9th Cir. 1982) [*28] (holding a term in a group comprehensive major medical policy was ambiguous, insurer did not act in bad faith, and insurer conducted adequate investigation to support its coverage denial on grounds of its reasonable interpretation of the ambiguous term, applying California law).

Crenshaw's burden is two-fold. [HN22]He must establish not only his right to benefits under the Policy, but also that Mony's decision to terminate payments was unreasonable or without proper cause. *Opsal v. United Servs. Auto. Ass'n*, 2 Cal.App. 4th 1197, 1205, 231 Cal. App. 3d 1530, 10 Cal. Rptr. 2d 352, 283 Cal. Rptr. 212 (1991); *Franceschi*, 852 F.2d at 1220. A showing the insurer took some action adverse to the insured, such as

denying benefits, standing alone, is not sufficient to show unreasonable conduct adequate to sustain a bad faith claim. *Mason v. Mercury Casualty Co.*, 64 Cal.App.3d 471, 475-476, 134 Cal. Rptr. 545 (1976); *California Shoppers, Inc. v. Royal Globe Ins. Co.*, 175 Cal.App.3d 1, 15, 54, 221 Cal. Rptr. 171 (1985); *Opsal*, 2 Cal.App.4th at 1205. "Mere negligence is not enough to constitute unreasonable behavior for purposes of establishing a breach of the implied [*29] covenant of good faith and fair dealing in an insurance case." *Aceves v. Allstate Ins. Co.* 68 F.3d 1160, 1166 (9th Cir. 1995); *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 90 Cal.App. 4th 335, 346, 108 Cal. Rptr. 2d 776 (2001) ("The mistaken or erroneous withholding of policy benefits, if reasonable or based on a legitimate dispute as to the insurer's liability under California law, does not expose the insurer to bad faith liability") (citations omitted); *Fraley v. Allstate Ins. Co.*, 81 Cal.App.4th 1282, 1292, 97 Cal. Rptr. 2d 386 (2000).

1. Triable Issues Of Material Fact Imbue The Question Whether Crenshaw Is Wholly Disabled From Practicing His Profession

Unless Crenshaw is "wholly and continuously disabled" to the extent "he is unable to perform the substantial and material duties of his profession" on his claimed grounds of tinnitus and hearing loss, he is not entitled to disability benefits under the **terms of the Policy**. FAC Ex. "A", pp. 11, 13. The Court finds the evidence does not conclusively establish whether Crenshaw is able or unable to engage in his "profession." Although Crenshaw describes himself as a psychiatrist/sex [*30] therapist and his practice may largely have consisted of that specialty occupation, there is also substantial evidence in the record that he describes his profession as including more general medical practice as well.¹² He refers to himself as having a "family practice."¹³ Evidence in the record suggests experts acknowledge a difference between the more intensive concentration skills demanded in a psychotherapy practice compared to a family or general medical practice. *See Sweetow Depo.*;¹⁴ *Olsson Depo.*¹⁵ Even were the Court to accept Crenshaw's tinnitus and hearing loss prevent him from performing his counseling and sex therapy work due to the impairment in his ability to hear his patients' speech and to concentrate on their problems, he apparently has been able to provide other medical services. The extent to which his tinnitus and hearing loss interfere with the duties of a general medical, as opposed

to a psychiatric, practice are questions for the factfinder and are not resolved on this record. Even the extent to which those impairments interfere with his psychiatry practice is unsettled. Crenshaw's treating physician, Dr. Bone, testified his notation in Crenshaw's [*31] chart that "tinnitus is vocationally disabling" was something Crenshaw told him, not his own conclusion. Bone Depo. 52:10-13; *see also* Bone Depo. pp. 107, 109-111. Both Dr. Bone and Crenshaw's tinnitus expert, Robert Olsson, also testified "reasonable minds can differ" on the question of Crenshaw's disability. *See* Bone Depo. pp. 136-137; Olsson Depo. p. 182.

12 As extracted from the record by Mony, *see* Crenshaw Depo., p. 128: In response to a question asking whether he was a psychiatrist, Crenshaw testified "No, I'm a physician. Physician is an M.D., medical doctor." *See also* Crenshaw Depo. pp. 128, 156 where he represented to the FAA that he was simply a physician; p. 264 stating he wrote that his occupation included "family practice"; and p. 316 noting he is a member of the American Academy of Family Practice. The Sorrell Decl. Ex. "R" document has Crenshaw representing to Windjammer in applying for a position as a ship's doctor on a cruise that he was recently retired from "general practice."

13 Crenshaw's disability claim recited his occupation as: "Family Practice & Psychiatry", in that order. Mony Mot. Sorrell Decl. Ex. "B". Testimony from a fellow in the American Academy of Family Practice, like Crenshaw, described a "family practitioner" as a provider of the "basic medical needs of entire families from cradle to grave," with no substantive difference from a "general practitioner." Paul Depo. 15:2-12. Dr. Paul was the FAA medical examiner for Crenshaw's FAA certification in 2000 and 2002. Paul Depo. 46:2-7. Crenshaw did not provide on his forms nor did he tell Dr. Paul that he had for at least two years prior to April 2000 complained of tinnitus, nor that Crenshaw was claiming a medical disability due to tinnitus and hearing loss, nor that he had stopped working entirely because of a claimed disability due to tinnitus. Paul Depo. 64:9-22; 66:3-67:11. He recalled no discussions with Crenshaw about tinnitus in 2000, only that Crenshaw represented he was "a little hard of hearing". Paul Depo. 70:2-6.

[*32]

14 Dr. Robert W. Sweetow, M.D., an audiologist (Sweetow Depo. 91:3-4), examined Crenshaw and was deposed in this matter on November 20, 2003. He concluded Crenshaw has subjective tinnitus, but confirmed there is no way to objectively confirm its existence (Sweetow Depo. 51:18-20). Dr. Sweetow in fact testified: "**I believe he could practice as a general practitioner.** He could practice as a psychotherapist, be he wouldn't be very competent as a psychotherapist if he was unable to concentrate because of his tinnitus and hearing loss, whereas **the demands on a general practitioner would be different. And he may be able to fulfill his responsibilities in that situation,** whereas I think as a psychotherapist the demands are just too much more intense for communication." Sweetow Depo. 81:4-12 (emphasis added). Dr. Sweetow also testified that since he first saw Crenshaw in 1998, they had not discussed his social life, recreational activities, travel experiences, vacations, or his professional or medical activities, although he acknowledged activities outside a person's profession would be relevant to ascertaining the severity of a patient's claimed tinnitus. Sweetow Depo. 82:12-25. He testified that until his deposition, he was unaware that Crenshaw indicted on FAA medical certificates that he was not disabled, that he passed the agency's conversational voice test at six feet, or that Dr. Paul had written a letter in April 2000 opining there were no restrictions or limitations on Crenshaw's ability to practice medicine. Sweetow Depo. p. 119.

[*33]

15 Dr. Robert J. Olsson, M.D. has been designated an expert witness for Crenshaw "to testify regarding my tinnitus and audiological evaluation of Dr. Crenshaw" in August 2003 (Churchill Ex. "C", Olsson Decl. PP1, 3) and was deposed in this matter. His professional opinion regarding Crenshaw's condition (tinnitus and hearing loss) is that it is "**severe enough to make it impossible for Dr. Crenshaw to perform the normal tasks required of psychotherapy.**" Olsson Decl. P16 (emphasis added).

Conflicting inferences and credibility issues also arise from the record with respect to Crenshaw's descriptions of the tinnitus impairment compared to

activities he is able to undertake. For example, he represented in his October 18, 1999 disability statement provided to Mony his "severe tinnitus" was "consistent, neverending, relentless 24 hour/day loud as a television noise" and he was "still unable to concentrate longer [than] 10 minutes at a stretch." Mony Mot. Sorrell Decl. Ex. "C". Crenshaw elaborated various other descriptions to convey the severity of his tinnitus: "ringing which occurs every [*34] day, which is horrible to excruciating" (Crenshaw Depo. 15:262-263); "whooshing, roaring mixed with a high tension wire sound. Very loud. It's as if we had a television going on in the background here, but not in the background, in the forefront" (Crenshaw Depo. 15:269-270); "like having a jet engine in your head" (Crenshaw Depo pp. 16-17). Crenshaw has represented these symptoms are constantly present, "24 hours a day, seven days a week," since early 1998. Crenshaw Depo. pp. 16, 18-20, 159.

At the same time, Crenshaw twice applied for and twice obtained a position as ship's doctor on month-long Carribean cruises after affirmatively representing he had no disability;¹⁶ he volunteered several hours a month to provide medical services to underserved populations in Mexico, including performing surgeries, supervising and mentoring medical students, treating patients in several clinics; he renewed his pilot's license twice during his disability period, on April 6, 2000 and March 28, 2002, affirmatively stating he had no disability; he logged over 2,000 hours as a pilot, solo and with passengers, during the time period, sometimes through harrowing weather conditions; he worked as "Pilot [*35] in Command" and "General Medical Officer" for Liga International on a monthly basis for approximately eight hour periods at one of Liga's Mexican clinics;¹⁷ he did not identify the doctor(s) he consulted for his tinnitus on the FAA form asking him to disclose all his health care professionals "within the last three years." Mony Mot. P&A pp. 6-10.

¹⁶ Crenshaw's work was for the Windjammer Barefoot Cruises, Ltd. on the M/V Amazing Grace "as a medical officer for the periods of April 13, 2001, through May 10, 2001 and April 12, 2002 through May 9, 2002" acting "as the ship medical officer for the passenger[s] and crew during those periods of time, with duties of "listening to patients, evaluating their complaints,, and treating the patients," according to Windjammer's operations and hotel director, Marc Burton. Burton Decl. PP1-2. In exchange for

working as the medical officer, the company paid roundtrip airfare for Crenshaw and his wife between California and Florida and provided them free cruises at the times Crenshaw was serving as the ship's medical officer, including free meals. Burton Decl. P3. Crenshaw had no medical assistant on board during those cruises. Id.

[*36]

¹⁷ Crenshaw represents his volunteer medical work is simple and basic care to people who do not have access to a doctor, adding "the total time spent in this activity was and is about 8 weekends a year, and averages about 8 hours a month." Churchill Ex. "I", Crenshaw Decl. P10.

In addition, in an April 20, 2000 certification letter prepared at Crenshaw's request by Dr. Gerald Paul for consideration by the Medical Board, Dr. Paul stated: "I have no reservations about Dr. Crenshaw's physical or mental ability to practice medicine without any limitations or restrictions." Dr. Paul stated at his deposition he did not intend to exclude psychotherapy. Because he understood Crenshaw's practice to include psychotherapy, his allusion to the "ability to practice medicine" included that area of practice. Paul Depo. pp. 95-96, 102. In the years 1998 through 2002, Crenshaw also traveled extensively (New Zealand, Fiji, Tahiti, the Carribean, Alaska, Mexico, Canada, and within the continental United States) sometimes for weeks or months at a time. Crenshaw Depo. pp. 23-27, 31-35, 42, 275. He continued to golf, [*37] hunt, and ocean dive. Crenshaw Depo. pp. 27-30, 36, 90-94.

In sum, reasonable inferences can be drawn from the evidence that the tinnitus prevents him from engaging in the practice of psychiatric medicine because of the degree of concentration and listening skills required to communicate with patients. Reasonable inferences can also be drawn that Crenshaw's lifestyle and activities are inconsistent with his representations that the tinnitus is excruciating, unrelenting, and prevents him from concentrating for more than 10 minutes at a time, wholly disabling him from engaging in any of the medical practices he pursued in his profession. A hearing impairment is objectively established by the evidence, but even in the range of normal speech with hearing aids, the fact of disabling severity is a question for trial.

2. Applying The "Genuine Dispute" Doctrine, As A Matter Of Law Mony Did Not Unreasonably Deny

Crenshaw's Claim

Both sides move for summary adjudication on the issue of the reasonableness of Mony's conduct. Resolution of the reasonableness issue is dispositive of Crenshaw's claim Mony breached the implied covenant of good faith and fair dealing in a bad faith denial [*38] of his claim. Mony correctly frames the question for summary adjudication of the bad faith claim: **"the question presented ... is simply whether or not, given the totality of the circumstances, defendant and counter-claimant MONY ... acted reasonably when it made the decision to stop paying disability benefits to Crenshaw in late 2002."** ¹⁸ Mony Mot. P&A 1:5-8 (emphasis added).

18 "This motion does not address the question as to whether or not plaintiff and counter-defendant Roger T. Crenshaw ("Crenshaw") suffers from a physical impairment. Nor does this motion address the question of whether Crenshaw is disabled from working in his regular occupation due to such an impairment." Mony Mot. P&A 1:2-5.

Assuming for purposes of deciding the Motions that Crenshaw is disabled within the Policy definition, the Court nevertheless finds his bad faith claim does not survive application of the "genuine dispute" doctrine. [HN23]That doctrine relieves an insurer of tort liability for denying or delaying payment of a claim [*39] when a genuine issue over the insured's entitlement to benefits exists. Chateau Chamberay, 90 Cal.App.4th at 348. The doctrine can apply to factual disputes over the value of the claim or the propriety of a claim and is not limited to legal issues concerning the policy language or coverage. Id. The doctrine "allows a district court to grant summary judgment when it is undisputed or indisputable that the basis for the denial of benefits was reasonable -- for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law." Amadeo, 290 F.3d at 1161. Crenshaw's burden to establish a breach of the implied covenant of good faith and fair dealing under California law requires that he show "(1) benefits due under the policy were withheld, and (2) the reason for withholding benefits was unreasonable or without proper cause." Feldman, 322 F.3d at 668, *citing* Guebara, 237 F.3d at 992. "Because the key to a bad faith claim is whether denial of a claim was reasonable, a bad faith claim should

be dismissed on summary judgment if the defendant demonstrates [*40] that there was 'a genuine dispute as to coverage.'" Id., *quoting* Guebara, 237 F.3d at 994.

Whether Mony breached the contract in denying Crenshaw's claim is a question deferred to trial, along with the determination whether Crenshaw is wholly disabled from engaging in his profession. Nevertheless, despite Crenshaw's argument the reasons Mony relies on to support its "genuine dispute" defense to the bad faith claim are merely pretextual, ¹⁹ the Court finds no disputed material fact prevents a finding as a matter of law that Mony reasonably terminated benefit payments based on a genuine dispute over Crenshaw's disability within the Policy definition.

19 Crenshaw challenges as a purported reason for Mony's denial its reliance on a "legal disability" argument arising out of Crenshaw's administrative and criminal proceedings. Mony denies it is basing its FACC affirmative claims against Crenshaw on a theory of "legal disability." Opp. 2:27-28. Rather, Mony represents it raises those proceedings only as **evidence of motive** to submit a fraudulent claim. Crenshaw does not dispute he was subjected to those proceedings. In addition, he argues that even if there were a legal disability that prevented him from practicing his profession subsequent to his claim for disability benefits, it would be irrelevant to his entitlement to benefits under a prior "*bona fide*" claim of factual disability. Pl. Mo. p. 10. However, the Court has found triable issues of fact exist whether Crenshaw's disability, to use his expression, is a *bona fide* factual disability within the Policy definition. Accordingly, his extensive arguments related to the issue of "legal disability" raise no separate matter amendable to being adjudicated, summarily or otherwise. The denial letter articulates evidence Mony relied on to deny the claim. Churchill Decl. Ex. "G".

[*41] [HN24]Insurers have the obligation to make an investigation regarding coverage, However, if at the time the insurer makes the decision to deny coverage, it has "a good reason to dispute liability," the insurer is not susceptible to a claim of bad faith failure to make a more thorough investigation. Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc., 971 F.2d 272 (9th Cir. 1992) (the duty to investigate ends when the insurer has a

reasonable basis to deny coverage even if that basis is ultimately determined to be incorrect, affirming the insurer's entitlement to withhold payment of a claim on a performance bond until liability was established once the insurer determined a genuine issue existed concerning the interpretation of a contract); *see* Franceschi, 852 F.2d at 1220 (although the insurer's failure to provide benefits was deemed a breach of contract, the court upheld summary judgment in favor of the insurer dismissing the claim for tortious breach of the covenant of good faith and fair dealing).

Crenshaw maintains Mony breached its duty and acted unreasonably in failing independently to investigate his medical condition, focusing instead [*42] on ancillary inquiries with the purported objective of finding ways to terminate payment of benefits to which he is entitled. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 819, 169 Cal. Rptr. 691, 620 P.2d 141 (1979) ("... an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial"). However, the *Egan* court found the insurer there denied a claim without a thorough investigation *and* without any good faith reason to believe that it was not liable for the claim. "Egan is inapposite when an insurer does not conduct a more thorough investigation because the insurer already has a good reason to dispute liability." *Binderson-Newberg*, 971 F.2d at 282-283.

[HN25]"An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing." *Mariscal v. Old Republic Life Ins. Co.*, 42 Cal.App.4th 1617, 1624, 50 Cal. Rptr. 2d 224 (1996). However, if the insurer has a good faith reason to believe it was not liable for the claim, unlike in *Egan*, the genuine dispute doctrine will entitle [*43] it to summary adjudication of a bad faith claim. *See* *Guebara*, 237 F.3d at 996 (an insured's inconsistent explanations and the insurer's three independent experts justified invocation of the genuine dispute doctrine to defeat the insured's bad faith claim on summary judgment). Mony contends it acted reasonably, in the totality of the circumstances, in its dealings with Crenshaw and in terminating benefit payments in late 2002 when it concluded Crenshaw's disability claim was fraudulent and in breach of the Policy because he did not suffer from a disability which wholly and continuously rendered him unable to perform the substantial and

material duties of his profession. *Mony Mot.* 1:7-8; FACC P27. Mony's discoveries included: he had criminal and administrative problems that were going to interfere with the practice of his profession and which motivated him to file a false disability claim; he applied for and worked as a cruise ship doctor while supposedly disabled; he represented to the FAA he was not disabled while collecting disability insurance benefits; in April 2000, at Crenshaw's request, Dr. Paul certified Crenshaw's physical and mental ability to practice [*44] medicine without limitations or restrictions in a letter to the Medical Board; Crenshaw worked as a doctor in Mexico while purportedly disabled; he regularly pilots aircraft and engages in numerous activities inconsistent with his claimed disability. *Mony Mot.* pp. 5-11.

The Court overrules Crenshaw's relevancy objections to all the evidence Mony identifies in support of its contention it acted reasonably and of its assertion at a minimum a genuine dispute existed regarding its liability to pay Crenshaw disability benefits. *See* Pl. Opp. pp. 15-19. [HN26]"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED.R.EVID. 401. The Court finds the contradictory information Mony had when it denied coverage regarding Crenshaw's ability to function professionally, despite his hearing impairment and tinnitus, as well as his characterization of his symptoms or lack thereof to others evaluating his ability to undertake responsible activities defeats the bad faith claim. For example, representations [*45] in his disability claim forms are inconsistent with representations in his FAA applications to maintain his pilot's license and in his applications to serve as a cruise ship doctor.

Crenshaw contends Mony behaved unreasonably, and hence tortiously, in failing to conduct an independent medical examination. Mony contends, and the evidence from his attending physician and expert opinion in the record supports the fact, that Crenshaw's subjective tinnitus condition is not amenable to detection or measurement by any objective testing. Crenshaw has not shown how an additional medical examination would have altered the foundation for Mony's claim decision. Mony provides the declaration of an expert witness in insurance coverage, David Peterson, Esq. Mr. Peterson attests, after a review of documents and deposition

testimony that in a case such as this, where the allegedly disabling condition is based on self-reporting and no objective testing or examination is available to a medical examiner to verify the condition, "it was certainly reasonable and within insurance industry standards to make a determination to cease benefit payments without obtaining an independent medical examination." Peterson [*46] Decl. PP3-4. Based on their reviews of the insurance file in connection with this lawsuit, Dr. William H. Slattery III, M.D. and Dr. Jeffrey Harris, M.D., both express doubts as to the degree of severity of tinnitus Crenshaw claims, in consideration of his activities and statements they deem inconsistent with the claimed severity. Slattery Decl. P3; Harris Decl. P3. The Court has already found triable issues prevent adoption as an established fact of the premise that Crenshaw is in fact disabled as defined in the Policy.

The record substantiates that Mony had consulted Dr. Richard Jaeger, its in-house physician, over time to review and evaluate Crenshaw's records and to render opinions regarding his hearing impairments. The Court finds his opinion rather confirms than dispels Mony's genuine doubt on the question of Crenshaw's total professional disability. At his deposition, Dr. Jaeger testified his first involvement was in approximately February 1999. Jaeger Depo 16:12-15. He saw at that time audiograms showing mild to moderate hearing loss in the normal speech frequencies and that Crenshaw was claiming impairments due to tinnitus. Jaeger Depo. 16:20-17:6. He clarified that a note [*47] in his file that Crenshaw had "a more significant hearing loss at higher frequencies" referred generally to "higher than normal conversational speech." Jaeger Depo. 18:20-25. He testified *he did not believe the hearing loss alone constituted a significant impairment, particularly with compensation from hearing aids*, but without any medical evidence to the contrary, *he did not disagree with Dr. Bone's conclusion the tinnitus "could be impairing."* Jaeger Depo. 33:2-13.

In addition, an internal memorandum dated February 19, 1999 solicited Dr. Jaeger's medical opinion as to whether Crenshaw "is impaired from his profession as claimed" based on medical information including "claim forms and a letter from Dr. Bone, who indicates the patient is unable to listen to his clients; office notes from Scripps Clinic (3/27 and 6/11/98); and notes of an evaluation and 3 biofeedback sessions s/EMGs aimed and [sic] relieving muscle tension 8/28. 10/19, 10/27, &

11/10/98" and on a diagnosis of "Tinnitus, sensorineural hearing loss (bilateral hearing aids)". Churchill Decl. Ex. "F". Dr. Jaeger responded:

I have reviewed the file and in my opinion **the treating physician feels** [*48] the patient is significantly impaired. There is no good objective test to determine the presence of tinnitus or degree. **It is possible** that the tinnitus is so loud and constant as to create a significant impairment in the ability to hear.

Id. (emphasis added).

A May 2001 medical examiner's questionnaire completed on Crenshaw apparently at Mony's behest inquired "based on hearing loss & tinnitus agree [insured] is TO from regular OCC?" and bears the Medical Department's notation "Agree" with what appears to be the signature of Dr. Jaeger. Churchill Decl. Ex. "F". The questionnaire shows the examiner did not conduct an "IME" (construed to be Independent Medical Examination) or "Field investigation," but summarized Crenshaw's medical history with a primary diagnosis of "hearing loss -- both ears -- tinnitus" and a secondary diagnosis of "bilateral arthritis -- knees, h & n," noting hearing test results from September 1998 confirmed hearing loss, and medical information from April 26, 2001 recorded "CP -- tinnitus -- hearing loss, no recent testing, unable to listen to patients." Id. In addition, the examiner noted in the "most recent examinations/findings" section [*49] "fishing, hunting, golf, CPAP 1/4 nights." Id. In addition, it appears another investigator from Mony did consult Dr. Bone, Crenshaw's treating physician. See Pl. Opp. p. 8, n. 6 ("Shortly before denial, an investigator from MONY did a perfunctory visit to Dr. Crenshaw's treating doctor, Dr. Bone, and Dr. Bone again confirmed disability. Nevertheless, MONY totally disregarded Dr. Bone's opinion, as it had disregarded the opinions of Drs. Sweetow and Olsson").

Another doctor, Ray Webster, M.D., reviewed Dr. Crenshaw's information and reported his opinions in a two-page August 15, 2002 memorandum. Churchill Decl. Ex. "U". His findings were that the information presented in the FAA medical examination was consistent with the conditions in Crenshaw's medical records and claims file because "the FAA exam shows that he has significant hearing loss in both ears, consistent with *high frequency*

sensorial hearing loss. As noted in my earlier comments, being in an airplane may actually improve his hearing by using the headset and with the background noise of the engine masking some of his tinnitus...." Churchill Ex. "U" (emphasis added). Dr. Webster did not "feel the material presented [*50] in the FAA exams is contradictory or refutes the information provided by the Scripps Medical Clinic regarding his tinnitus and hearing loss," because "while he has significant hearing loss, he probably does better in a cockpit than he does in a quiet room listening to patients." Id.

In an August 21, 2002 internal communication to Mony's medical department, Dr. Jaeger responded to a request the medical department again review Crenshaw's file and provide answers to three questions, apparently triggered by: "We have information showing Dr. Crenshaw has passed his FAA hearing tests from 1996 to as recent as 3/02, that he volunteers as a ship doctor on Windjammer Cruise Lines as well as a family practitioner in Mexico." Churchill Decl. Ex. "F". In Dr. Jaeger's opinion: "Dr. Bone's conclusions [are] consistent with the audiogram and FAA hearing tests"; Crenshaw's "hearing loss is fairly profound at mid to high frequencies," but he did not directly answer the posed question ("Do the audiogram's [*sic*] and FAA hearing tests both report the same degree of hearing loss, which is mild to moderate?"). In response to the question "Based on his current hearing loss, **would he be able** [*51] **to perform his duties as a family practitioner or as a psychiatrist** with minor limitations?" (emphasis added), Dr. Jaeger opined, without differentiating the distinct areas of practice:

It is difficult to say the impact the tinnitus would have on his overall ability to hear. In my opinion, it is quite likely that he would be significantly impaired.

Churchill Decl. Ex. "F".

With respect to Crenshaw's failure to investigate premise, the Court finds Mony did investigate Crenshaw's entitlement to disability payments and reasonably concluded a genuine coverage dispute exists. Tinnitus, by consensus of all the experts and treating physicians, cannot be detected, confirmed, or measured as to severity by any objective diagnostic test. Mony submitted the records Crenshaw provided for review by its medical department, among other affirmative steps

Mony articulated it took to evaluate Crenshaw's claim. The Court finds Crenshaw has not carried his burden to show Mony so failed to investigate before denying his claim after four years of paying benefits that the conduct substantiates bad faith.

Crenshaw also contends Mony unreasonably terminated his benefits without an interview. [*52] However, the evidence substantiates an interview Mony's adjuster attempted in May 2002 was frustrated by Crenshaw's refusal to make himself available for that purpose. The Declaration of Dennis McMahon substantiates he "traveled from New York to California to, among other things, meet with" Crenshaw in May 2002. McMahon Decl. P2. He represents:

[He] showed up at Crenshaw's residence and met him after ringing the doorbell. Crenshaw told me at that time that he had some errands to run and had no time for the meeting at that point, but that I could return at 6:00 p.m, that evening to meet with him for an interview. [P] Pursuant to our agreement, I returned at 6:00 p.m. and found an envelope bearing my name taped to the front door. The letter inside was from Crenshaw, and it canceled our meeting and instructed me to contact Kristen Churchill (his lawyer) to arrange an appointment. I immediately called Ms. Churchill's office and left a voicemail message. She never returned that call. [P] I continued to call Ms. Churchill's office, and was finally able to reach her on July 31, 2003. She inquired as to why I wanted to meet with Crenshaw, and I informed her, among other things, [*53] that personal interviews are routinely conducted. Ms. Churchill then refused to arrange an appointment for an interview with Crenshaw, instead telling me that I should forward a letter to her at her office containing a list of all the questions I wanted to ask Crenshaw. Ms. Churchill said that she would address those questions in her response.

McMahon Decl. PP2-4.

Other conduct Crenshaw contends substantiates

Mony's bad faith was a failure to obtain a vocational/labor market survey before terminating his benefits. There is no dispute such a survey was not conducted. However, Crenshaw has failed to demonstrate a vocational/labor market survey was a legitimate requirement before Mony could terminate his benefits in good faith. His reliance on *Moore v. American Life Ins. Co.*, 150 Cal.App.3d 610, 197 Cal. Rptr. 878 (1984) is misplaced. The *Moore* court simply decided an evidentiary challenge to the admissibility of evidence of employer practices to find actual employment prospects constituted admissible evidence on the facts of that case. No legal standard is articulated with respect to such a purported obligation, and Crenshaw has not carried his burden to [*54] demonstrate the absence of a "labor market survey" in this case supports his bad faith claim.

Contrary to Crenshaw's characterization, and without deciding the issues of credibility or disputed material facts, the Court finds the following evidence adequately supportive, collectively, of the reasonableness of Mony's decision to deny the disability claim on grounds it genuinely disputed the validity of the claim, even if Crenshaw's tinnitus and hearing loss are ultimately found to constitute a qualifying disability entitling him to benefits under the Policy: his recreational activities such as golf, ocean diving, ²⁰ hunting, ²¹ and sufficient comfort to tolerate extensive travel; his medical missionary work; his ability to pass the FAA hearing test involving normal speech differentiation and his ability to log hundreds of hours of plane piloting time, while deeming his tinnitus to be of so negligible a part of his medical history as to not warrant mention; ²² his volunteer work as the medical officer on cruise ships where he represented himself as fit to take responsibility for the medical emergencies of up to 94 passengers and 44 crew members for month-long periods (Burton Depo. [*55] 10:15-20); and his non-disclosure as a disability of the tinnitus and hearing loss conditions in connection with those activities while he was simultaneously representing to Mony they totally disabled him from engaging in his profession. The Court has found triable issues of fact exist regarding the scope of Crenshaw's "profession". The Court finds Mony's decision to deny Crenshaw's disability claim was not arbitrary or without a basis adequate to support the existence of a genuine dispute calling into question the right of the insured to continue to receive benefits. *See Phelps*, 60 F. Supp.2d at 1022-1024; *Binderson-Newberg*, 971 F.2d 272; *Franceschi*, 852 F.2d at 1220; *Guebara*, 237 F.3d 987.

Accordingly, Mony is entitled to summary adjudication in its favor of Crenshaw's bad faith cause of action.

20 The Court notes from Crenshaw's deposition testimony he associated his tinnitus with "shooting, diving, flying." (Crenshaw depo. 71:7-14), yet apparently remains able to tolerate those activities (or is unwilling to give them up) even though they are known to exacerbate the condition.

[*56]

21 Absent any explanation to the contrary, the Court presumes the hunting involves the use of firearms, whereas loud noises have been associated with the onset or exacerbation of tinnitus.

22 The Court finds disingenuous Crenshaw's attempt to characterize Mony's argument as a ludicrous equating of ability to fly a plane with the ability to practice psychiatry. Rather, the significant import of the flying activity strikes the Court as being Crenshaw's apparent determination neither his disabling tinnitus nor identification of the doctor who attended him for that condition warranted a mention on his medical certification.

C. Mony's Fraud Claim Cannot Be Summarily Adjudicated

Crenshaw seeks summary adjudication of Mony's FACC fraud cause of action on grounds of lack of evidence of fraudulent intent. However triable issues of fact prevent summary adjudication of the issue whether Crenshaw is able to perform the substantial and material duties of his "profession" and, accordingly, whether he is disabled under the Policy. Until the viability of his disability is established, it cannot [*57] be determined whether he knowingly made a false claim for benefits or whether either party breached the contract -- Mony by denying coverage or Crenshaw by submitting a disability claim containing misrepresentations and concealment of material facts. The trier of fact must first resolve the disputes raised by conflicting evidence and inferences surrounding the severity of Crenshaw's hearing impairments. Although Crenshaw maintains "severity" is not a requirement for a finding of a disabling condition, only that the claimant "is unable to perform the substantial and material duties of his profession" (*see Opp. P&A pp. 13-14*), Crenshaw's own descriptions of his psychiatric *and* family medical practices require the

scope of Crenshaw's "profession" as a medical doctor be preliminarily determined. That issue cannot be summarily decided by the Court. Crenshaw has not met his burden to show no triable issues of material fact and his entitlement to judgment as a matter of law on the FACC fraud cause of action.

D. Crenshaw Offers No Evidence To Support His Claim Mony Deceitfully Entered The Insurance Contract With No Intention To Perform

The FAC alleges as the Third Cause [*58] of Action that in selling the insurance and in its annual renewals, "Mony made written representations in said policies of insurance to the effect that timely monthly disability benefits would be paid to plaintiff in the event of disability and that plaintiff would be treated in good faith and with fairness in accordance with the requirements of California law" (FAC P28), whereas:

At the time of making each representation, MONY had no intention to honor said promises and instead intended to, whenever it suited their purposes of gaining financial advantage over policyholders and wrongfully increase profits, (a) deny valid claims; (b) force policyholders to litigate their claims and thereby unnecessarily incur emotional distress and attorneys' fees; and (c) otherwise engage in the nefarious and wrongful conduct alleged in the second, fourth, fifth, sixth, and seventh causes of action herein.

FAC P29.

Summary adjudication for Mony on Crenshaw's claim of deceit is warranted. Mony shifted the burden on this claim, and Crenshaw has not met his burden to raise a triable issue of fact to support his contention Mony purportedly made promises "without any intention of performing [*59] it," an essential element of the claim. CAL. CIV. CODE § 1710(4); FAC P29 ("at the time of making each representation [in the Policy], MONY had no intention to honor said promises"); *see* Celotex, 477 U.S. at 324. Crenshaw produces no evidence to support his bare allegations. *See* Anderson, 477 U.S. at 256. He was a member of a group covered by the Policy. Mony actually did perform, for four years, paying

Crenshaw the contractually agreed monthly benefit. In contract actions, "something more" than termination of benefits after the ultimate denial of the claim is required to prove a defendant's intent not to perform its promises. *See* Tenzer v. Superscope, Inc., 39 Cal.3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212 (1985)(contract action).

Crenshaw argues Mony disregarded "substantial medical evidence supporting Dr. Crenshaw's disability and had instead concocted reasons unrelated to the medical aspects of the claim to deny Dr. Crenshaw's claim" and "has brought a legal action against Dr. Crenshaw alleging fraud and seeking repayment of benefits paid after Dr. Crenshaw has faithfully paid his premiums for more [*60] than twenty-two years!" Pl. Opp. to Mony Mot., 22:1-5. From those allegations, Crenshaw asks the Court to find "sufficient evidence from which to infer that MONY *never* intended to perform." Pl. Opp. to Mony Mot., 22:5-7 (emphasis added). However, the Court has found the reasons Mony identified for denying the claim presented substantiate a genuine dispute as to coverage.

Moreover, the court finds Crenshaw's cited case in support of the survival of his deceit claim is distinguishable.²³ In this case, not only can reasonable minds differ on the issue of actual disability, but also Crenshaw identifies no representations Mony directed at him to induce him to enter the contract from which it could be reasonably inferred Mony intentionally duped him. The burden was Crenshaw's to raise a triable issue of fact based on evidence to save his deceit claim. He has not carried that burden. The Court finds that Mony is entitled to adjudication of Crenshaw's deceit cause of action in its favor as a matter of law.

23 In *Wetherbee v. United Ins. Co. of Am.*, 265 Cal.App.2d 921, 931, 71 Cal. Rptr. 764 (1968), the insured sought to cancel a health and accident insurance policy. She was induced to keep the policy and bought another when the company sent her express, written reassurances that the policy could never be cancelled and that she was entitled to payments of \$ 150 per month for life in the event she became disabled due to illness or injury. Six years later, the insured suffered a debilitating stroke which confined her to her house at least 90% of the time and made it necessary that she have significant assistance with her activities of daily living. The insurer paid the agreed monthly

sum for two years. The insurer then contacted the insured's doctor, purportedly to obtain supplemental information to ensure payments would continue uninterrupted. The insurer devised an artfully-worded inquiry designed to obtain a reply that the insured occasionally left the house on which to hang a denial of benefits. The doctor replied that the insured continued to be totally disabled but, in answer to the insurer's question whether she remained continuously housebound, the doctor indicated she could come to doctors' appointments with the assistance of another person and a crutch and leg brace. Based on that statement alone, the insurer terminated benefits on grounds the insured was not continually confined within the house. She sued and won, alleging breach of contract and fraud in the inducement to enter the contract. The court held: "we are satisfied that the admission by plaintiff's doctor could not have given rise to any good faith belief on defendant's part that plaintiff was no longer permanently disabled and continuously confined to her home under any reasonable construction of the two policies. To the contrary, the 'confining sickness' provisions of both policies issued to plaintiff expressly provide that the insured's right to recover under said provisions 'shall not be defeated because he visits his physician for treatment ... when such treatment cannot be administered in the home of the Insured.' Under these circumstances, it is obvious that defendant's eagerness to seize upon the admission by plaintiff's doctor as a ground for cancellation of plaintiff's benefits furnishes ample support for a finding that it never intended to fulfill either the representations in its letter of August 1958 or the terms of the two policies. Since an award of punitive damages was thus proper *on the basis of defendant's fraud*, it is unnecessary to discuss defendant's contention that it was not guilty of malice or oppression." Wetherbee, 265 at 932 (emphasis added).

[*61] **E. No Evidence Supports Crenshaw's "Conspiracy" Claim**

The FAC alleges a conspiracy to defraud cause of action against defendants Mony and Disability Management Services, Inc. ("DMS"). The cause of action is based on the theory Mony acted in concert with DMS

in deciding to terminate Crenshaw's benefit payments and to defraud him. FAC PP35-42. Crenshaw voluntarily dismissed DMS from this action without prejudice approximately one year ago when the evidence substantiated DMS was not involved in the handling of his disability claim. Dkt No. 27; *see* Monroe Decl. P23. That dismissal eliminated the FAC Fifth Cause of Action, Interference With Contractual Relationship, which had been alleged only against DMS. Mony met its summary judgment burden adequately to shift the burden to Crenshaw to save his conspiracy claim by an evidentiary showing of triable issues of fact. His Opposition is silent regarding any conspiracy. Accordingly, the Court summarily adjudicates that claim in Mony's favor.

F. Intentional Infliction Of Emotional Distress Requires A Showing Of Extreme Conduct With Reckless Disregard For Or Intent To Cause Severe Distress Which Is Unsupported By This Evidentiary [*62] Record

To prevail on his emotional distress claim, Crenshaw bears the burden of proof of (1) extreme and outrageous conduct by the insurer directed at the insured, (2) the insurer's intent to cause severe emotional distress to the insured, and (3) severe emotional distress suffered by the insured which is (4) proximately caused by the insurer's conduct. *Little v. Stuyvesant Life Ins. Co.*, 67 Cal.App. 3d 451, 136 Cal. Rptr. 653 (1977), *citing* *Fletcher v. Nat'l Life Ins. Co.*, 10 Cal.App.3d 376, 394, 397, 401, 89 Cal. Rptr. 78 (1970) (holding "defendants' threatened and actual bad faith refusals to make payments under the policy, maliciously employed by defendants in concert with false and threatening communications directed to plaintiff for the purpose of causing him to surrender his policy or disadvantageously settle a nonexistent dispute is essentially tortious in nature and is conduct that may legally be the basis for an action for damages for intentional infliction of emotional distress"). "Severe [emotional distress] means substantial or enduring as distinguished from trivial or transitory [and] ... emotional distress of such substantial [*63] quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." *Fletcher*, 10 Cal.App.3d at 397.

"It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed." *Fletcher*, 10 Cal.App.3d at 397 (citation

omitted). The Court finds Crenshaw has failed to produce any evidence adequate to satisfy the elements of the tort. The presence of conflicting evidence or conflicting inferences drawn from the evidence creates triable issues of fact as to the existence of each element. *Little*, 67 Cal.App. 3d 451, 136 Cal. Rptr. 653. ²⁴. In this case, Crenshaw substantiates no "severe emotional distress" he suffered and has not made a *prima facie* showing that Mony's conduct directed at him was "extreme and outrageous." He does no more than allege, without evidentiary support, the intentional or reckless disregard element and causation. The Court has found Mony acted with a reasonable basis in fact to deny Crenshaw's claim based on the "genuine dispute" doctrine, defeating Crenshaw's [*64] bad faith claim. Crenshaw does not identify "outrageous conduct" adequate to support the emotional distress claim. Proof of withholding benefits is not enough standing alone to sustain a claim for intentional infliction of emotional distress. *Soto v. Royal Globe Ins. Co.*, 184 Cal.App.3d 420, 432, 229 Cal. Rptr. 192 (1986); *Ricard v. Pacific Indem. Co.*, 132 Cal.App.3d 886, 895, 183 Cal. Rptr. 502 (1982).

24 In *Little*, the disability insurer provided benefits for two years, then stopped paying when its doctor reported the insured was not disabled from her job as a draftsman. The doctor did not examine her medical records or know the work draftsmanship entails. A jury found the company's conduct outrageous, and an intentional infliction of emotional distress judgment was upheld because the insurer withheld from the physician it selected to examine the insured most of the medical information it had, permitting the reasonable inferences that the insurer purposely ignored the medical information it had, and sought only to justify its predetermined course of discontinuing disability benefit payments it owed the insured under the policy. The facts in this case are thoroughly distinguishable.

[*65] Crenshaw's burden was to come forward with evidence to raise triable issues of fact which could be found by a reasonable jury to satisfy each element of the claim, after Mony's motion shifted the burden by showing the elements of the claim are not satisfied and an absence of a genuine issue of material fact for trial. ²⁵ *Adickes*, 398 U.S. at 157; *Lujan*, 497 U.S. at 885. Crenshaw identifies no conduct by Mony other than the denial of his claim, its pursuit of reimbursement of benefits it contends

Crenshaw was not entitled to receive, and communications setting forth the reasons for its conduct -- *i.e.*, Mony's contention Crenshaw's disability claims were fraudulent. Crenshaw's Opposition does not go beyond a recitation of his allegations and a conclusory paraphrase summarily tracking the *Little* description of the cause of action elements. To defeat summary judgment, the opposing party cannot rely on its allegations alone. *Anderson*, 477 U.S. at 256.

25 Mony relied on evidence in the record adequate to suggest Crenshaw has no evidence to support this claim. For example, Crenshaw told one of his medical experts in August 2003 that he was "not depressed." *Olsson Depo.* p. 106. Crenshaw filled out a "Depression Inventory" related to his emotional state in September 2003 when he saw his other medical expert, Robert Sweetow, Ph.D. *See Sorrell Decl.* P24, Ex. "X"; *Sweetow Depo.* pp. 108-109. Drawing from the questionnaire responses, Mony extracts the statements defeating the inference Mony has caused Crenshaw depression, undue stress, or any severe emotional disturbance. *See Sorrell Decl.* Ex. "X". Dr. Sweetow diagnosed Crenshaw with only "mild mood disturbance." *Sweetow Depo.* p. 108.

[*66] The Court finds severe emotional distress could not reasonably be found from the evidence presented. The "highly unpleasant mental reaction" Crenshaw insists is the "unavoidable consequence" of Mony's conduct (alleged to be refusal to respond to his inquiries regarding the nature of the evidence referenced in Mony's benefits denial letter; Mony's accusation of fraud; its demand for repayment of benefits; and a lawsuit against him to recover benefits) and the generalization that it would be "absurd" to contend Mony's actions would result in anything other than a "highly unpleasant mental reaction" raise only a vague assumption as to Mony's intent. Moreover although the "requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry" (*Fletcher*, 10 Cal.App.3d at 397), Crenshaw's reaction appears not to have exceeded a normal range of unpleasant disturbance associated with any litigation and a legitimate dispute over his entitlement to receive insurance benefits. Accordingly, the Court finds Crenshaw has not carried his burden to preserve his

emotional [*67] distress claim for trial, and Mony is entitled to judgment on this claim as a matter of law.

G. Statutory Violations Claim And Injunctive Relief

Crenshaw alleges as his FAC Seventh Cause of Action that Mony violated its duties under CAL. BUS. & PROF. CODE § 17200, *et seq.* and he is entitled to injunctive relief. Those statutory provisions characterize unlawful, unfair, or fraudulent business acts or practices as unfair competition. Mony construes the claim as relying on the theory that Mony purportedly violated CAL. INS. CODE § 790.03 and its companion regulations (Mony Mot. 23:22-24:14) and contends there is no private right of action for violations of that insurance code section, citing *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal.3d 287, 304, 250 Cal. Rptr. 116, 758 P.2d 58 (1988) to foreclose a CAL. BUS. & PROF. CODE § 17200 claim as a sham substitute (Mony Mot. 23 pp. 23-24). Crenshaw insists his claim is founded on "common law fraud and bad faith" as described in the FAC rather than on the Insurance Code. ²⁶ Pl. Opp. 23:22-23. *See Hangarter v. Paul Revere Life Ins. Co.*, 236 F. Supp.2d 1069, 1103-1110 (N.D.Cal. 2002). [*68] In reliance on the Hangarter discussion, the Court finds a CAL. BUS. & PROF. CODE § 17200 claim is not precluded as a matter of law. Mony contends that even if Crenshaw can bring a BUS. & PROF. CODE § 17200 claim, the claim fails because Crenshaw "cannot offer any evidence that the conduct of Mony Life involving his disability claim is indicative of any 'general business practice.'" Mony Mot. 24:12-14, *citing* *Monroe Decl.* PP21, 22.

26 Despite his insistence he relies on CAL. BUS. & PROF. CODE section 17200, Crenshaw's Motion For Partial Summary Judgment And Injunctive Relief quotes extensively from the Unfair Insurance Practices Act, CAL INS.CODE section 790.03 and related regulations. Pl. Mot. pp. 17-20.

Crenshaw does not meet his burden to offer evidence that Mony's denial of his claim in this particular contract dispute is part of any general business pattern or practice that is unlawful, fraudulent, or unfair. [*69] Crenshaw bases the claim in part on the allegations of conspiracy "between January or 2001 and October of 2002" when he alleges "MONY and DMS knowingly and willfully conspired and agreed among themselves to defraud

plaintiff in connection with his insurance claim, by, *inter alia*, the conduct alleged in this complaint." FAC PP59, 36. DMS has been dismissed from this action, and the Court has summarily adjudicated the conspiracy claim in favor of Mony, so that theory of unfair business practices cannot sustain the statutory cause of action.

Crenshaw does incorporate by reference into his Seventh Cause of Action FAC paragraphs 1 through 14 an 18, setting forth his breach of contract and breach of implied covenant of good faith and fair dealing allegations. He links those claims to his unfair competition cause of action by alleging: "On or after May 8, 2002, in engaging in the bad faith, fraudulent and unfair acts and omissions set forth in" the FAC. FAC P61. However, as the Court finds Crenshaw's bad faith claim does not survive summary adjudication, and Mony's reservation of rights is not actionable conduct, necessarily an unfair competition claim is not supported by bad faith allegations [*70] which are being dismissed.

Crenshaw asserts: "MONY's violations of the above-referenced statutes and regulations was undertaken in bad faith, justifying injunctive relief ... to forbid further violations of Section 17200" and "requesting an order pursuant to section 17200, *et seq.*" Pl. Mot. 20:27-21:2. However, he fails to associate any of his conclusory allegations recited in support of his statutory violation claim to any facts substantiating his contentions. Crenshaw relies on *Hangarter*, 236 F. Supp.2d at 1110, where the evidence conclusively established the insured was totally disabled from practicing her profession as a chiropractor and judgment notwithstanding the verdict was appropriate. That case is distinguishable from this, where the evidence is not conclusive regarding Crenshaw's total disability from practicing medicine and could reasonably support more than one conclusion on that issue. In addition, the court in *Hangarter* found the insurer had no genuine dispute over its duty to provide benefits, but rather deliberately set out to terminate the insured's benefits, unlike the findings this Court has made. In addition, the *Hangarter* court found [*71] the insurer's practices of "targeting certain categories of claims, using biased examiners, ignoring the California definition of total disability, misinforming or failing to inform insureds regarding all of their potential benefits, and other practices" fell below industry standards, and the insurer should have known those practices put it "at risk for punitive damages" (*Id.* at 1086), whereas Crenshaw has signaled no such actual practices by Mony.

The Court concurs with Mony that an insurer's conduct with respect to one insured in processing and administering one claim, even if the fact-finder determines Mony breached its contract with Crenshaw, would not support the sweeping scope of the injunctive relief Crenshaw proposes purportedly to curb the unfair business practices the Court is unable to find exist. Accordingly, Mony is entitled to summary adjudication of Crenshaw's statutory violations and injunctive relief claims.

H. Crenshaw Has Not Carried His Burden To Preserve A Punitive Damages Claim

[HN27]Punitive damages are "made available 'to discourage the perpetuation of objectionable corporate policies' that breach the public's trust and sacrifice the [*72] interests of the vulnerable for commercial gain." *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1164-1165 (9th Cir. 2002) (reversing a grant of summary judgment and remanding for further proceedings on an insured's claim for punitive damages, finding sufficient evidence that the denial of her claim "was not simply the unfortunate result of poor judgment" to allow a jury to conclude that the insurer's actions were willful and "rooted in established company practice"), *quoting Egan*, 24 Cal.3d at 820.

[HN28]Punitive damages are available "if in addition to proving a breach of the implied covenant of good faith and fair dealing proximately causing actual damages, the insured proves by clear and convincing evidence that the insurance company itself engaged in conduct that is oppressive, fraudulent, or malicious."

Amadeo, 290 F.3d at 1164, *quoting PPG Indus., Inc. v. Transamerica Ins. Co.*, 20 Cal.4th 310, 318-319, 84 Cal. Rptr. 2d 455, 975 P.2d 652 (1999); *see also Neal*, 21 Cal.3d at 923 (to assess liability for punitive damages, the court "must look further beyond the matter of reasonable response to that of motive [*73] and intent").

[HN29]"Punitive damages may be awarded when the insurer breaches the covenant of good faith and fair dealing *and* is 'guilty of oppression, fraud or malice.'" *Lunsford*, 18 F.3d at 656 (emphasis added), *quoting Tibbs v. Great American Ins. Co.*, 755 F.2d 1370, 1375 (9th Cir. 1985). "[A] plaintiff may meet the state of mind

requirement for an award of punitive damages by showing that the insurer's bad faith was 'part of a conscious course of conduct, firmly grounded in established company policy.'" *Amadeo*, 290 F.3d at 1165, *quoting Neal v. Farmers Ins. Exchange*, 21 Cal.3d 910, 148 Cal. Rptr. 389, 582 P.2d 980 (1978).

Unless Mony's denial of Crenshaw's claim was plainly unreasonable or the product of a "deliberate restriction of its investigation in a bad faith attempt to deny benefits due to" its insured, he cannot prevail on a punitive damages claim. *Tibbs*, 755 F.2d at 1375 ("Under California law, punitive damages are not available for breach of contract no matter how gross or how willful"). Even a finding an insurer "violated its duty of good faith and fair dealing" is by itself insufficient [*74] to justify an award of punitive damages." *Silberg v. California Life Ins. Co.*, 11 Cal.3d 452, 462-463, 113 Cal. Rptr. 711, 521 P.2d 1103 (1974); *Mock v. Michigan Millers Mutual Ins. Co.*, 4 Cal.App.4th 306, 328, 5 Cal. Rptr. 2d 594 (1992) ("Evidence that an insurer has violated its duty of good faith and fair dealing does not thereby establish that it has acted with the requisite malice, oppression or fraud to justify an award of punitive damages"). The nature of the evidence must support a finding of oppression, fraud or malice. The quantum of proof must be clear and convincing.

In order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud or malice. He must act with the intent to vex, injure or annoy, or with a conscious disregard of the plaintiff's rights.

Mason v. Mercury Casualty Co., 64 Cal.App.3d 471, 474, 134 Cal. Rptr. 545 (1976) (citations omitted) ("It does not follow that because plaintiff is entitled to compensatory damages that he is also entitled to exemplary damages While we have concluded that defendant violated its duty of good faith and fair dealing, this alone does not necessarily establish [*75] that defendant acted with the requisite intent to injure plaintiff").

Crenshaw has not met his burden to come forward with clear and convincing evidence of oppression, fraud or malice to preserve a punitive damages claim. *See CAL. CIV. CODE* § 3294; *Silberg*, 11 Cal.3d at 462-463; *Mock*, 4 Cal.App.4th at 328 (a plaintiff attempting to recover punitive damages based on malice or oppression

must make a clear and convincing evidentiary showing the insurer engaged in "despicable conduct" or had "*established policies or practices* in claims handling which are harmful to insureds" or acted with the intent to vex, injure, or annoy) (emphasis added); *Basich v. Allstate Ins. Co.*, 87 Cal.App.4th 1112, 1121, 105 Cal. Rptr. 2d 153 (2001) (plaintiff must respond to a motion for summary adjudication of a punitive damages claim with clear and convincing evidence). [HN30]An insurer's refusal to provide coverage, when supported by a reasonable argument made in good faith, cannot "form the basis for punitive damages." *Slottow v. American Cas. Co.*, 10 F.3d 1355, 1362 (9th Cir. 1993). Absent the required motivation in denying the insured's [*76] claim, the insurer will not be liable for punitive damages. *Franceschi*, 852 F.2d at 1219.

Mony adequately signaled an absence of evidence to support Crenshaw's pursuit of punitive damages to shift the evidentiary burden to him. He has not met his evidentiary burden to create a triable issue of fact. For the same reasons his bad faith claim is properly dismissed, the punitive damages claim fails, in consideration of the additional absence of proof on the oppression, fraud, or malice elements of a punitive damages claim.

I. Mony's Breach Of Contract Counterclaim Is Not Barred By The Statute Of Limitations

Crenshaw contends Mony's Counterclaim is barred by the four-year statute of limitations applicable to breach of written contract claims. He reasons the "claim is based on the 'false claim' for disability [benefits] which began October 22, 1998." Pl. Mot. 13:4-5. Adopting that point of accrual, he contends the filing of his complaint on October 25, 2002 and Mony's later counterclaim render the counterclaim untimely as a matter of law. The Court adopts Mony's demonstration and authority in support of its argument the statute of limitations does not bar [*77] its counterclaim, on the calendar basis of actual notice upon the filing of Crenshaw's claim for disability benefits, under the relation back rule, and under the delayed discovery rule. Moreover, Crenshaw makes no attempt in its Reply papers to refute Mony's demonstration, nor does he allude to that theory again. Accordingly, summary adjudication for Crenshaw on a theory the FACC is time-barred is denied.

J. Waiver And Estoppel Issues Re Mony's Defenses To The Disability Claim

While a denial of coverage coupled with a misrepresentation or concealment of facts (as opposed to legal theories with respect to coverage) may give rise to an estoppel (*see, e.g., Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142, 1152, 113 Cal. Rptr. 2d 70, 33 P.3d 487 (2001)), "a denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial." *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 31, 44 Cal. Rptr. 2d 370, 900 P.2d 619 (1995) (rejecting an "automatic waiver" rule recognized in earlier cases). Waiver requires intentional relinquishment of a known contractual right, and no such intent can be inferred from failure to mention [*78] them when a claim is denied on other grounds. *Id.* at 33.

Similarly, [HN31]an insurer's failure to allude to valid defenses in a denial letter does not estop it from later raising them where no prejudice to the insured is shown. *Waller*, 11 Cal.4th at 35. Proof of estoppel "requires a showing of detrimental reliance by the injured party." *Waller*, 11 Cal.4th at 34. (insureds could not "detrimentally rely" on the insurer's failure to mention other valid grounds for denying coverage, when the insurer refused on a valid ground to defend the insured in a lawsuit and the insured could not reasonably believe there was a potential for coverage). An insured's nondisclosures or misrepresentations concealing *facts* rather than *legal theories* supporting a plaintiff's claims can give rise to estoppel. *Vu* 26 Cal.4th at 1151. Crenshaw has not made such a showing nor has he demonstrated any detrimental reliance.

Finally, on the issue of waiver of the right to seek reimbursement of the disability payments Mony made to Crenshaw on grounds a reservation of rights letter did not issue until May 2002, the failure to issue a more timely [*79] reservation of rights letter is an insufficient basis upon which to avoid summary adjudication of a waiver based on purported intentional relinquishment of rights. *Ringler Associates, Inc. v. Maryland Casualty Co.*, 80 Cal.App.4th 1165, 1184, 1188-1189, 96 Cal. Rptr. 2d 136 (2000). Mony asserts it did not issue the reservation of rights sooner because it waited until ample reason to do so appeared from the results of its investigation. *Mony Opp.* 11:7-10. The Court has found Mony investigated Crenshaw's claim and found reasonable grounds by May 2002 to genuinely dispute his entitlement to disability payments. Crenshaw produces no evidence of Mony's intent to relinquish its rights to assert any affirmative

defenses or counterclaims against him, nor any detrimental reliance by Crenshaw on any such purported waiver. The Court accordingly rejects Crenshaw's waiver and estoppel arguments.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED:**

1. Mony's Motion For Partial Summary Judgment is **GRANTED.**

2. Crenshaw's Motion For Partial Summary Judgment is **DENIED.**

3. Crenshaw's Motion For Partial Summary

Judgment Re Counterclaim is **DENIED.**

[*80] 4. The FAC and FACC causes of action surviving for trial are: Crenshaw's breach of contract claim; Mony's breach of contract claim; and Mony's fraud claim. The parties' declaratory relief claims survive only to the extent the requested findings are not disposed of by the findings herein.

IT IS SO ORDERED.

DATED: 4-30-04

HONORABLE LARRY ALAN BURNS

United States District Judge