UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

William Joseph Staley,

Debtor.

C/A No. 99-04622-W

Adv. Pro. No. 99-80383-W

William Joseph Staley,

Plaintiff,

v.

Conseco Health Insurance Company,

Defendant.

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as stated in the attached Order of the Court, summary judgment is granted in favor of Conseco Health Insurance Company as it relates to the Eighth Cause of Action for intentional infliction of emotional distress and the Ninth Cause of Action for Unfair Trade Practices Act. The Court finds that a genuine issue of material fact exists as it relates to the Sixth Cause of Action for Conversion.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
7/12, 2000

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

K Dyer KAREN R. DYER

Deputy Clerk

Nancy Mendoza Rcd

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: William Joseph Staley, Debtor.	C/A No. 99-04622-W Adv. Pro. No. 99-80383-W
William Joseph Staley, Plaintiff, v. Conseco Health Insurance Company, Defendant.	**ORDER** Chapter 7

THIS MATTER comes before the Court upon Motion for Partial Summary Judgment (the "Motion") by Conseco Health Insurance Company ("Conseco" or "Defendant") filed with the Court on May 12, 2000. Based upon the review of the pleadings and the arguments of counsel at the hearing on the Motion, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. William Joseph Staley ("Plaintiff" or "Debtor") was an insurance agent for Capitol American Insurance Company ("Capitol") from 1992 to 1998.

2. Sometime between November of 1997 and February of 1998, Conseco bought or otherwise acquired Capitol.

3. During his employment with Capitol, Plaintiff received advances, loans, gifts, and bonuses (collectively "advances") from the employer.

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4. In November of 1998, Plaintiff was told by an agent of Capitol that he was to sign a promissory note for the payback of the advances received, which totaled $102,047.71.[1] Under the terms of the Note, Plaintiff was to pay back $490.61 per week to Capitol for a period of 208 consecutive weeks.

5. On May 28, 1999, Plaintiff filed for relief under Chapter 13 of the Bankruptcy Code. On the date of the filing of the bankruptcy petition, the Note had been paid down to $78,713.02.

6. Defendant began to withhold Plaintiff's's commission for the purpose of paying the weekly amount. Since the Chapter 13 filing, Defendant has continued to apply renewal commissions against the amount of Plaintiff's debt.

7. On January 11, 2000, Plaintiff filed an Amended Complaint.[2] The Amended Complaint asserts the following causes of action against Defendant: (1) violation of the automatic stay pursuant to 11 U.S.C. §362; (2) violations of the Fair Debt Collection Practices Act pursuant to

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[1] The Promissory Note specifies that Plaintiff promised to pay to Capitol the principal sum of $102,047.71, "together with interest to be due and to accrue on the unpaid principal balance outstanding from time to time hereon from the date hereof until maturity at the rate of nine percent (9%) per annum." The Note further stated:

> The principal amount of this Promissory Note and interest accrued thereon shall be due and payable in two hundred eight (208) consecutive weekly installments of principal and interest in the amount of FOUR HUNDRED NINETY AND 61/100 DOLLARS ($490.61) each, commencing on the commission cycle of November 27, 1998 and continuing regularly thereafter on each commission cycle of each succeeding calendar week through and including November 15, 2002, at which time all amounts remaining outstanding under this Promissory Note shall be due and payable in full. It is expressly agreed that time is of the essence to this Promissory Note.

[2] The initial Complaint was filed on November 4, 1999. Upon Debtor's Motion for Leave to Amend Complaint, and without any objection by Defendant, the Court entered an Order on January 11, 2000 granting leave to Plaintiff to amend the initial Complaint.

15 U.S.C. §1692; (3) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) pursuant to 18 U.S.C. §1861 et. seq.; (4) violations of S.C. Code Ann. §§40-10-10, 20, 40, 80; (5) breach of the implied covenant of good faith and fair dealing; (6) conversion; (7) breach of fiduciary duties; (8) intentional infliction of emotional distress; and (9) violation of Unfair Trade Practices Act.

8. In the Motion filed on May 12, 2000, Defendant moved for Summary Judgment, pursuant to Fed. R. Civ. P. 56(c), made applicable in bankruptcy proceedings pursuant to Fed.R. Bankr. P 7056, on the following causes of action: (a) Second Claim for violations of the Fair Debt Collection Practice Act pursuant to 15 U.S.C. §§1692; (b) Third Claim for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) pursuant to 18 U.S.C. §1861 et. seq.; (c) Fourth Claim for violations of S.C. Code Ann. §§40-10-10, 20, 40, 80; (d) Sixth Claim for conversion; (e) Seventh Claim for breach of fiduciary duties; (f) Eighth Claim for intentional infliction of emotional distress; and (g) Ninth Claim for violation of Unfair Trade Practices Act.

9. On June 27, 2000,[3] Plaintiff filed a Return to Motion for Partial Summary Judgment (the "Return to Motion"). The Return to Motion only responds to the following causes of action: (a) Fourth Claim for violations of S.C. Code Ann. §§40-10-10, 20, 40, 80; (b) Sixth Claim for conversion; (c) Eighth Claim for intentional infliction of emotional distress; and (d) Ninth Claim for violation of Unfair Trade Practices Act.

10. At the hearing on the Motion, Defendant acknowledged that factual issues existed for the Fourth Cause of Action dealing with violations of S.C. Code Ann. §§40-10-10, 20, 40, 80, and

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[3] A hearing on the Motion was originally scheduled to be heard before this Court on June 20, 2000; however, upon the request of counsel the hearing was continued to July 6, 2000.

withdrew the request for Summary Judgment on that cause of action.

CONCLUSIONS OF LAW

Fed. R. Civ. P. 56(c), made applicable in bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056, provides that summary judgment should be granted "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 a judgment as a matter of law." "On a summary judgment motion, the Court does not try factual issues; rather, it determines whether there are any fact issues to be tried." Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D.S.C. 1995). *Courts should grant summary judgment against a party who fails to provide any evidence of an* element which is crucial to that party' case, and on which the party bears the ultimate burden of proof. See id. Generally, no issue of material fact exists "[i]f the evidence is merely colorable . . . or is not significantly probative." Glover v. Lockheed Corp., 772 F. Supp. 898, 904 (D.S.C. 1991). Furthermore, a party cannot prevail on a motion for summary judgment by creating a genuine issue of material fact through mere speculation "or the building of one inference upon another." Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985).

In this case, Defendant has moved for summary judgment on seven of the nine causes of action alleged in the Amended Complaint; however, at the hearing on the Motion, counsel for Defendant expressly withdrew his request for summary judgment on the Fourth Cause of Action. In his Return to Motion, Plaintiff responded to only four of the causes of actions; therefore, the Court grants summary judgment in favor of Defendant as to the following causes of action, to which Plaintiff failed to respond: (a) Second Cause of Action for violations of the Fair Debt

Collection Practices Act pursuant to 15 U.S.C. §1692; (b) Third Cause of Action for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) pursuant to 18 U.S.C. §1861 et. seq.; and (c) Seventh Cause of Action for breach of fiduciary duties.

As to the First Cause of Action for violation of the automatic stay pursuant to 11 U.S.C. §362 and the Fifth Cause of Action for breach of the implied covenant of good faith and fair dealing, Defendant did not move for summary judgment; therefore, these causes of action remain to be tried on the merits. Furthermore, at the hearing on the Motion, Defendant acknowledged that general issues of material fact exist in relation to the Fourth Cause of Action dealing with violations of S.C. Code Ann. §§40-10-10, 20, 40, 80; therefore, this claim also remains to be tried on the merits.

The Causes of Action which remain to be decided by the Court are the Sixth Cause of Action for conversion, the Eighth Cause of Action for intentional infliction of emotional distress, and the Ninth Cause of Action for Unfair Trade Practices Act. As to the Sixth Cause of Action for Conversion, the Court finds that a genuine issue of material fact exists; therefore, summary judgment on that cause of action will be denied.

Defendant requests that summary judgment be granted in its favor on Plaintiff's Eighth Cause of Action for intentional infliction of emotional distress because Defendant's conduct was neither extreme nor outrageous. In order to recover under a claim for intentional infliction of emotional distress, a plaintiff must establish the following:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct;
> (2) the defendant's conduct was so extreme and outrageous that it exceeded all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community;
> (3) the actions of the defendant caused the plaintiff's emotional

distress; and

(4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Fleming v. Rose, 526 S.E.2d 732, 739 (S.C. Ct. App. 2000); Hainer v. American Medical Int'l Inc., 465 S.E.2d 112, 117 (S.C. Ct. App. 1996); Gattison v. S.C. State College, 456 S.E.2d 414, 416 (S.C. Ct. App. 1995). Initially, the court has to make a determination of whether the conduct in question " may reasonably be regarded as so extreme and outrageous as to permit recovery." Fleming, 526 S.E.2d at 739 (citing McSwain v. Shei, 402 S.E.2d 890 (S.C. 1991)). In state courts, after the judge determines that the conduct on which the claim is based was extreme and outrageous, the decision whether the conduct is sufficiently extreme to result in liability is left to the jury. Id. Courts have emphasized that the tort of intentional infliction of emotional distress should not be viewed as a "'panacea for wounded feelings rather than reprehensible conduct.'" Gattison, 456 S.E.2d at 416. Rather, the majority of cases have emphasized that liability under a cause of action for intentional infliction of emotional distress requires "'hostile or abusive encounters' or 'coercive or oppressive conduct.'" Fleming, 526 S.E.2d at 739; see, e.g., Save Charleston Foundation v. Murray, 333 S.E.2d 60 (S.C. Ct. App. 1985) ("Merely converting someone's promissory note and maliciously bringing against the person a civil action based on the note is not conduct that, as a matter of law, 'exceeds all possible bounds of decency' and is 'atrocious and utterly intolerable.' This conclusion becomes particularly evident when one considers the former conduct can afford a basis for launching an action for conversion . . . and the latter can form the basis for maintaining an action for malicious prosecution.").

In this case, Plaintiff claims that Defendant's actions in withholding renewal commissions were clearly extreme and outrageous given the fact that Defendant withheld *commissions in excess of the repayment schedule* set out in the promissory note; and, as a result,

Plaintiff has suffered severe financial harm by being without the income.[4] After reviewing the evidence in the light most favorable to Plaintiff, the Court finds that the facts of this case do not establish that Defendant's conduct was so extreme or outrageous as to constitute intentional infliction of emotional distress. The only evidence which was introduced at the hearing in support of Plaintiff's position was the Affidavit in which Plaintiff asserts that Defendant represented to him that he had no choice but to sign the Note promising to pay back the advances at issue. The facts alleged, however, fall short of conduct that may be viewed as "atrocious and utterly intolerable in a civilized society." Fleming, 526 S.E.2d at 740. Therefore, the Court finds in favor of Defendant as it relates to the Eighth Cause of Action and grants summary judgment on the claim.

Defendant also claims that summary judgment should be granted in its favor on Plaintiff's Ninth Clause of Action for violation of the Unfair Trade Practices Act. Pursuant to the South Carolina Unfair Trade Practices Act ("UTPA"), "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . declared unlawful." S.C. CODE ANN. §39-5-20 (Law. Co-op. 1976). In order to bring a cause of action pursuant to UTPA, the plaintiff must demonstrate the following: "(1) that the defendant engaged

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[4] At the hearing on the Motion, Plaintiff presented an Affidavit to the Court in which he testified that Capitol's representative stated that the Promissory Note was not an option and had to be signed. The representative further stated that, unless Plaintiff signed the Note, all his commissions would be withheld. Despite his signing the Promissory Note which provided for monthly payments of $490.61, Plaintiff asserts that Defendant began to withhold all of his renewal commissions, thus causing a tremendous detrimental affect on his personal finances and home life. Defendant objected to the introduction of the Affidavit into evidence on the basis of relevance. Despite Defendant's objection and the Court's own concern regarding the timeliness of the Affidavit, which was presented for the first time to opposing party and to the Court on the date of the Hearing; the Court has taken the Affidavit into consideration in reaching a holding in this case.

in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an adverse impact on the public interest." Havird Oil Co v. Marathon Oil Co., 149 F.3d 283, 291 (4th Cir. 1998).

The Court finds that no cause of action could be maintained under the UTPA because the third factor, requiring that Defendant's alleged unlawful practice have an adverse impact on the public interest has not been met. Courts have emphasized that an unfair trade practice is deemed to have an adverse impact on the public interest if such practice has the potential for repetition. See Wingard v. Exxon Co., 819 F. Supp. 497, 504 (D.S.C. 1992). If the alleged unfair or deceptive acts only affected the parties to a trade or commercial transaction, then courts have held that such acts are beyond the UTPA's embrace. See, e.g. Omni Outdoor Advertising v. Columbia Outdoor Advertising, 974 F.2d 502, 507 (4th Cir. 1992); Ardis v. Cox, 431 S.E.2d 267, 271 (S.C. Ct. App. 1993). In this case, Plaintiff suggests that any deceptive actions that Defendant took against Plaintiff could be, and probably have been, repeated against other agents. At the hearing on the Motion, Plaintiff referred to an e-mail correspondence dated November 2, 1998 in which a representative of Defendant informed the appropriate individual at Conseco to "hold all of [Plaintiff's] commissions to payback [the outstanding] balance." The correspondence also specified: "Please have all of the above agents contracts placed on 'no advance'." The correspondence that Plaintiff strictly relies on to make his case does not clearly indicate that other agents were treated by Conseco the same way as Plaintiff. The Court finds that Plaintiff offers no clear basis other than sheer speculation to conclude that the withholding of commissions in this case will affect public interest. "South Carolina courts have consistently rejected speculative claims of adverse public impact and required evidentiary proof of such

effects." Omni Outdoor Advertising, 974 F.2d at 507. Therefore, the Court finds in favor of Defendant and grants summary judgment on the Ninth Cause of Action.[5]

CONCLUSION

From the foregoing arguments, it is therefore,

ORDERED that Defendant's Partial Motion for Summary Judgment on the Eighth Cause of Action for intentional infliction of emotional distress and Ninth Cause of Action for violation of the Unfair Trade Practices Act is granted.

IT IS FURTHER ORDERED that a genuine issue of material fact exists as it relates to the Sixth Cause of action for conversion; therefore, summary judgment on that cause of action will be denied.

IT IS FURTHER ORDERED that the following causes of action remain for trial: (a) First Cause of Action for violation of the automatic stay pursuant to 11 U.S.C. §362; (b) Fourth Cause of Action dealing with violations of S.C. Code Ann. §§40-10-10, 20, 40, 80; (c) Fifth Cause of Action for breach of the implied covenant of good faith and fair dealing; and (d) Sixth Cause of Action for conversion.

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 12, 2000.

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[5] The Court also notes that the first requirement may not have been met. Section 39-5-10(b) defines "trade" and "commerce" as including "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate." In this case, it is questionable whether the withholding of Plaintiff's renewed commission by Defendant falls under the definition of 'trade" or "commerce" as outlined in §39-5-10.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

intake bn

JUL 12 2000

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KAREN R. DYER K Dyer

Deputy Clerk

Reed

Manning & Mendoza