

sued Federal Insurance Company for breach of a Directors' and Officers' Liability insurance policy. At issue was whether the alleged wrongful discriminatory acts arose prior to the inception date of the policy. Federal Insurance Company denied coverage and refused to provide a defense for Fulton Bellows in the underlying lawsuit because the evidence indicated that the discriminatory acts arose prior to the inception date of the policy.

In its complaint, Fulton Bellows alleged that Federal Insurance Company's denial of coverage constituted a violation of the *Tennessee Consumer Protection Act*. Judge Edgar dismissed Fulton Bellows' TCPA claim because the plaintiff could not demonstrate that Federal Insurance Company's mere denial of the claim was deceptive or unfair. In so ruling, Judge Edgar stated as follows:

Other state and federal court decisions have made clear that for the TCPA to apply to the denial of insurance claims, the insured must allege that the insurer violated the terms of the policy or acted unfairly in some other way. *See, e.g., Nautilus Ins. Co. v. In Crowd, Inc., No. 3:04-0083, 2005 U.S. Dist. LEXIS 25467, 2005 WL 2671252 (M.D. Tenn. Oct. 19, 2005); Parkway Assocs., LLC v. Harleysville Mut. Ins. Co., 129 Fed. Appx. 955, 960-61 (6th Cir. 2005)* (affirming district court's award of summary judgment where plaintiff failed to allege that defendant insurer misled or deceived it). Further, a mere denial of an insurance claim, absent any deceptive, misleading of [*sic.*] unfair act does [**56] not violate the TCPA. *See, e.g., Williamson v. Aetna Life Ins. Co., 481 F.3d 369, 378 (6th Cir. 2007)* (affirming award of summary judgment for insurer on plaintiff's TCPA claim where at worst insurer's conduct amounted to an "erroneous denial" of a claim); *Stooksbury v. American Nat. Property and Cas. Co., 126 S.W.3d 505, 520 (Tenn. Ct. App. 2003)* (reversing trial court award of damages pursuant to the TCPA where "no material evidence" existed "to support the jury's conclusion that Defendant engaged in deceptive or unfair acts"); *Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 445-46 (Tenn. Ct. App. 2004)* (reversing jury verdict on plaintiff's TCPA claim where insurer simply maintained good faith, although mistaken, belief that plaintiff materially misrepresented her husband's health).

Judge Edgar's opinion as well as the cases cited by Judge Edgar stand for the proposition that the mere denial of an insurance claim does not constitute a violation of the *Tennessee Consumer Protection Act* absent evidence that the insurer deceived the insured about the terms of the policy or acted unfairly in some other way.

The Counterclaim alleges that ANPAC violated the Tennessee Consumer Protection Act by denying their insurance claim and specifically makes the following allegations:

COUNT THREE

(Tennessee Consumer Protection Act, Tenn. Code. Ann. § 47-18-101 *et. seq.*)

34. The Stuttes hereby incorporate paragraphs 1 through 33 of this counterclaim, as if fully set forth herein.

35. ANPAC has engaged in unfair or deceptive acts or practices by denying coverage for the Stuttes' claim, canceling the policy, and filing this coverage action based on allegations ANPAC knows, or should know, to be false, in an effort to avoid its obligations under the Policy.

36. Specifically, ANPAC accused the Stuttes of destroying their home and contents, and of committing concealment or fraud relating to their claim, even though ANPAC knew, or should have known, that these allegations were false based on evidence in its possession concerning the Stuttes whereabouts at the time of the fire.


37. As a direct result of these unfair or deceptive acts or practices, the Stuttes have suffered and continue to suffer the ascertainable loss of money, property, and/or other things of value, including, without limitation, insurance

proceeds for loss to their home and contents and additional living expenses, attorney's fees and other expenses in defending this litigation and attempting to obtain coverage under the policy, lost earnings on the amounts wrongfully withheld by ANPAC, and damage to their credit. In addition, the Stuttes are entitled to recover treble damages, up to three times the actual damages they have sustained, pursuant to Tenn. Code Ann. § 47 – 18 – 109(a)(3).

Thus, the only basis of the counterclaim for damages under the TCPA is the denial of the Stuttes' insurance claim. That alone is insufficient to state a cause of action under the *Tennessee Consumer Protection Act*. Therefore, Plaintiff/Counter-defendant respectfully requests the Court to dismiss the all allegations of violations of the *Tennessee Consumer Protection Act* contained in the Counterclaim, including but not limited to all allegations contained in Count Three, Paragraphs 34, 35, 36, 37 and the associated prayer for relief

Respectfully submitted,

BAKER, KINSMAN, HOLLIS, CLELLAND
& WINER, P.C.

By: 
N. MARK KINSMAN, BPR #6039
J. CHAD HOGUE, BPR #025457
Attorneys for Plaintiff
701 Market Street, Suite 1500
Chattanooga, TN 37402-4825
Ph: (423) 756-3333
Fx: (423) 756-3337
E: markkinsman@bkhcw.com
chadhogue@bkhcw.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 24, 2011, copies of the within and foregoing Memorandum of Law was filed electronically. Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, including:

Peter J. Alliman
135 College Street
Madisonville, TN 37354

Seth A. Tucker
Scott J. Levitt
Jonathan G. Hardin
Darien S. Capron
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue NW
Washington, DC 20004-2401

J. Graham Matherne
Wyatt, Tarrant & Combs, LLP
2525 West End Ave., Suite 1500
Nashville, TN 37203-1423

All other parties, listed below, will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

By: 