

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

EDWARD LIPCHOCK.,)
)
 Plaintiff,)
)
 v.)
)
 NEW CASTLE COUNTY)
 and GALLAGHER BASSETT)
 SERVICES, INC.,)
)
 Defendants.)

C.A. No. N12C-11-232 CLS

ORDER

On this 12th Day of July and upon Defendant Gallagher Bassett’s Motion to Dismiss, it appears to the Court that:

1. Before this Court is Defendant Gallagher Bassett Services, Inc.’s (“Gallagher Bassett”) motion to dismiss brought pursuant to Del. Super. Ct. Civ. R. 12(b)(6). The Court has reviewed the parties’ submissions. For the following reasons, Defendant’s motion is **DENIED, in part, and GRANTED, in part.**
2. On or about July 28, 2012, Plaintiff Edward Lipchock (“Plaintiff”) was involved in motor vehicle accident as a passenger in a vehicle owned by Defendant New Castle County (“NCC”). Plaintiff suffered physical injuries, which required medical treatment, incurred medical expenses, and lost wages.

3. On November 29, 2012, Plaintiff filed a nine-count complaint against NCC and Gallagher Basset (collectively, “Defendants”). Plaintiff asserted that the vehicle was insured by NCC and that Gallagher Bassett was acting as NCC’s third-party administrator in order to administer the no-fault policy.¹ However, Plaintiff asserted, in the alternative, that the “motor vehicle [was] owned by New Castle County and *insured by Defendant Gallagher Basset Services, Inc....*”²
4. Counts I-V consisted of allegations against NCC³ and Counts VI through IX consisted of claims against Gallagher Bassett. In Count VI, Plaintiff argued that Gallagher Basset “failed to compensate or commit itself to compensate Plaintiff for the full extent of his recoverable no-fault benefits, pursuant to the aforementioned no-fault policy, in violation of 21 *Del. C.* §2118.”⁴ In Count VII, Plaintiff alleged that Gallagher Basset violated 21 *Del. C.* §2118B by failing to promptly process claims.⁵ Count VIII alleges that “[u]nder [the no-fault policy], pursuant to 18 *Del. C.* §2301, et seq., Defendant Gallagher Bassett Services, Inc. has an obligation to act in good faith and to refrain from engaging in unfair claim settlement practices.”⁶ In

¹ Compl., at ¶5.

² *Id.* at ¶ 6 (emphasis added).

³ In Count V, Plaintiff alleged that Gallagher Bassett was acting as an agent of NCC and, as such, Gallagher Bassett’s actions were imputed to NCC.

⁴ Compl., at ¶ 22.

⁵ *Id.* at ¶ 24.

⁶ *Id.* at ¶¶ 26-28.

Count IX, Plaintiff asserted that he was entitled to punitive damages based on the Gallagher Bassett's "conscious indifference."⁷

5. Upon a motion to dismiss brought for failure to state a claim upon which relief can be granted, the Court must consider whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.⁸ When determining whether to grant the motion, the Court must accept all well-pled allegations in the complaint as true.⁹ However, it does not "blindly accept conclusory allegations unsupported by specific facts, nor [does it] draw unreasonable inferences in the plaintiffs' favor."¹⁰
6. Gallagher Bassett has moved to dismiss the Complaint on several grounds. As to Counts VI & VII, Gallagher Bassett states that, as a claims adjusting company, it cannot be liable for claims under 21 *Del. C.* §§ 2118 and 2118B because these statutes apply to "insurers." Gallagher Bassett also argues that Count IX, Plaintiff's bad faith claim, must be dismissed because Plaintiff must also establish that Gallagher Bassett was an insurer for a bad faith breach of insurance contract.

⁷ *Id.* at ¶¶ 30-31.

⁸ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

⁹ *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009)

¹⁰ *Id.* at 704 (citing *In re General Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del.2006)).

7. The issues here are almost identical to the issues in *Colbert v. Goodville Mut. Cas. Co.*, 2010 WL 2636860 (Del. Super. June, 30, 2010). In *Colbert*, a plaintiff sought PIP benefits from an insurance company that had a claims adjusting company work on the plaintiff's claim. The claims adjusting company informed the plaintiff that further PIP coverage was denied. The plaintiff filed a seven-count complaint against the insurance company, an employee of the claims adjusting company, and the claims adjusting company itself, which included, *inter alia*, claims based on contract and violations of 21 *Del. C.* §§ 2118(i)(2) and 2118B.¹¹ The claims adjusting company and its employee ("claims adjusters") moved to dismiss the claims.
8. The Court dismissed the contract claims because it found that "(1) no contract exist[ed] between the plaintiff and the [claims adjusters]; and (2) the plaintiff [was] not a third-party beneficiary of any contract to which the moving defendants are a party."¹² The Court explained that, while plaintiff was a third-party beneficiary of the insurance contract by operation of law,¹³ the claims adjusters could not be liable under the insurance contract since they were not a party to that contract.¹⁴ The Court did not permit the plaintiff to recover as a third-party beneficiary of the claims adjusting agreement between the insurance company and the claims adjusting

¹¹ *Colbert*, 2010 WL 2636860 at *1.

¹² *Id.* at *3.

¹³ *Id.*

¹⁴ *Id.*

company because “[t]he benefit to the plaintiff which arises from a claims adjusting agreement is indirect and insufficient to give rise to third-party beneficiary status.”¹⁵

9. The Court also dismissed the plaintiff’s claims against the claims adjusters arising from 21 *Del. C.* §§ 2118 and 2118B because the Court found that they did not qualify as “insurers” under either statute.¹⁶ The Court acknowledged that the term “insurer” was not defined; however, the Court looked to § 2118(c) and determined that insurers are “companies that are authorized to issue insurance policies in the State of Delaware.”¹⁷
10. Plaintiff stated that his claims would not survive if Gallagher Bassett was not acting as an insurer when it denied Plaintiff’s claims for benefits. According to this Court’s analysis in *Colbert*, Plaintiff’s claims against Gallagher Bassett based on §§ 2118 and 2118B are only viable if Gallagher Bassett was an “insurer,” which means that it must be a company authorized to issue insurance policies in the State of Delaware. Therefore, Plaintiff had to allege that Gallagher Bassett *was* an insurer, not that Gallagher Bassett *was acting as* an insurer, in order to state a claim under those statutes. Plaintiff did allege, in the alternative, that Gallagher Bassett insured the

¹⁵ *Id.*

¹⁶ *Id.* at *4.

¹⁷ *Id.*

vehicle. Assuming this allegation to be true, it is reasonably conceivable that plaintiff could recover based on the §§2118 and 2118B claims.

Therefore, the Court will not dismiss Counts VI and VII at this stage in the proceedings. Since Plaintiff alleged that Gallagher Bassett insured the vehicle, the bad faith claim in Count IX is not dismissed. However, Plaintiff will be required to show that Gallagher Bassett was an insurer of the vehicle for that claim also.¹⁸

11.Count VIII of the Complaint must be dismissed. Plaintiff listed several grounds, derived from § 2304(16), to support his claim for unfair settlement practices. However, “this Court has held that 18 *Del. C.* § 2301, *et seq.*, specifically § 2304(16) does not provide for a private cause of action.”¹⁹

12.For foregoing reasons, Defendant Gallagher Bassett’s motion to dismiss is **GRANTED**, on Count VIII, but **DENIED WITHOUT PREJUDICE** on Counts VI, VII and IX. It seems to the Court that the parties should be able to determine whether Gallagher Bassett was an insurer in a reasonable period of time and to advise the Court.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

¹⁸ See *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 365 (Del. Super.1982).

¹⁹ *Yardley v. U.S. Healthcare, Inc.*, 698 A.2d 979, 988 (Del. Super. 1996) *aff'd*, 693 A.2d 1083 (Del. 1997).