IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FIRST STATE ORTHOPAEDICS, P.A., on behalf of itself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	C.A. No. N17C-06-320 WCC
GALLAGHER BASSETT SERVICES, INC.,	)	
Defendant.	)	

Submitted: January 9, 2018
Decided: May 3, 2018

On Defendant's Motion to Dismiss and Motion to Strike Class Allegations GRANTED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court is Defendant Gallagher Bassett Services, Inc.'s ("Gallagher Bassett" or Defendant") Motion to Dismiss First State Orthopaedics, P.A.'s ("FSO" or "Plaintiff") complaint ("Complaint") and Motion to Strike the Proposed Class Allegations. For the reasons set forth below, Defendant's Motions will be **GRANTED**.

I. FACTUAL & PROCEDURAL BACKGROUND

FSO brings this proposed class action on behalf of itself and "all Delaware health care providers who, at any time since June 22, 2014, submitted health care invoices to Gallagher Bassett for care provided to Delaware workers' compensation claimants...."[1] FSO filed the instant class action against Gallagher Bassett seeking recovery of statutory interest under 19 Del. C. § 2322F, punitive damages, and other relief arising from Defendant Gallagher Bassett's violations of 19 Del. C. § 2322F(h).[2] Specifically, FSO alleges that Gallagher Bassett failed:

> (i)...to contest the sufficiency of the invoice's 'data elements,' as that term is used in 19 Del. C. § 2322F(h), within 30 days of receipt; (ii) though ultimately paid by Gallagher Bassett, the invoice was paid only after the expiration of the 30-day period under section 2322F(h); and (iii) Gallagher Bassett's payment of the invoice was unaccompanied by the statutory interest provided under section 2322F(h).[3]

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[1] Compl. ¶ 2.
[2] *Id.* at ¶ 1.
[3] *Id.* at ¶ 2.

Since June 22, 2014, Gallagher Bassett has contracted with various Delaware workers' compensation insurers, to act "as a third-party claims adjuster or claims administrator [("TPA")]"[4] "with respect to claims for workers' compensation benefits brought by FSO's patients."[5] Such a role gave Gallagher Bassett the authority to administer, evaluate, process, handle, pay, and even deny workers' compensation claims for FSO's patients by the Delaware workers' compensation insurers.[6] FSO alleges that Gallagher Bassett acted as an agent for the insurers,[7] and had a pecuniary interest to reduce and minimize the costs associated with patient's workers' compensation claims to help optimize the financial condition of the insurers it contracted with.[8] Plaintiff also alleges that Gallagher Bassett was a joint venturer with "the insurers responsible for providing workers' compensation insurance to FSO's patients."[9]

The Complaint alleges Gallagher Bassett routinely failed to pay the statutory interest that accrued on claims Defendant failed to timely contest within 30 days of receipt as well as claims it unsuccessfully disputed in the utilization review process allowing the 30-day deadline to pass.[10] In addition to the remedies discussed above,

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[4] *Id.* at ¶ 2.
[5] *Id.* at ¶ 5.
[6] Compl. ¶ 7.
[7] *Id.* at ¶ 6.
[8] *Id.*
[9] *Id.* at ¶ 7.
[10] *Id.* at ¶ 2.

FSO also seeks class certification, and an award of declaratory relief, compensatory and punitive damages.

Gallagher Bassett has moved to dismiss the Complaint, asserting 19 Del. C. § 2322F(h) of the Delaware Workers' Compensation Act (the "Act") does not apply to Gallagher Bassett.[11] In the event, Gallagher Bassett does fall under the statute as an "insurance carrier," Defendant argues that any payment disputes by healthcare providers must first be brought before the Industrial Accident Board ("IAB").[12] Additionally, Gallagher Bassett moves to strike all class allegations from the Complaint as there is no proper basis for a class action.[13]

II. STANDARD OF REVIEW

In considering the Motion to Dismiss for failure to state a claim filed pursuant to Rule 12(b)(6), the Court must assume the truthfulness of the complaint's well-pleaded allegations,[14] and afford plaintiff "the benefit of all reasonable inferences

[11] Def.'s Mot. to Dismiss and Mot. to Strike Class Allegations at 1 [hereinafter Def.'s Mot. to Dismiss].
[12] *Id.* at 2.
[13] *Id.* at 2–3.
[14] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38–39 (Del. 1996). *See also VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (noting that the complaint is to be liberally construed and under "Delaware's judicial system of notice pleading, a plaintiff need not plead evidence" but must "only allege facts that, if true, state a claim upon which relief can be granted").

that can be drawn from [their] pleading."[15] Certain documents that are "integral to a plaintiff's claims…may be incorporated by reference without converting the motion to a summary judgment."[16] At this preliminary stage, dismissal will be granted only when the Court is able to determine with "reasonable certainty" that plaintiff would not be entitled to relief "under any set of facts that could be proven to support the claims asserted" in the complaint.[17]

III. DISCUSSION

As briefly stated above, Gallagher Bassett seeks dismissal of Plaintiff's claim under 19 Del. C. § 2322F(h) (the "Prompt-Pay Statute") as well as the Plaintiff's proposed class certification. Gallagher Bassett argues that 19 Del. C. § 2322F(h) is inapplicable as Gallagher Bassett is neither an "employer" nor "insurance carrier" as defined under the statute.[18] It also argues that if the Prompt-Pay Statute is applicable to Gallagher Bassett, the IAB must first hear Plaintiff's claims.[19]

The Plaintiff, in its answering brief, sets forth several arguments for why Defendant Gallagher Bassett should be liable for the statutory interest under 19 Del. C. § 2322F(h) to FSO and all members of the proposed class. First, FSO

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[15] *See In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (noting, however, that the Court is not required to blindly accept all allegations or draw all inferences in a plaintiff's favor).
[16] *See Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct. Apr. 16, 2014).
[17] *See id.* (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).
[18] Def.'s Mot. to Dismiss at 1.
[19] *Id.* at 2.

contends that Gallagher Bassett falls under the broad definition of "insurance carrier" because it routinely evaluates, pays, and denies worker's compensation claims on behalf of Delaware employers.[20] Second, Plaintiff asserts that Gallagher Bassett is liable for the statutory interest because it was an agent for undisclosed principals.[21] Third, Plaintiff argues that because Gallagher Bassett had a pecuniary interest, it was a joint venturer with the undisclosed insurers and should, therefore, be liable for statutory interest.[22] Finally, Plaintiff urges the Court to follow its decision in *First State Orthopaedics, P.A. v. Liberty Mut. Ins. Co.*, and find an implied private right of action under Section 2322F(h).[23]

Gallagher Bassett rejects Plaintiff's arguments and reiterates its claims from the Motion to Dismiss that Gallagher Bassett is not an "insurance carrier" under the Prompt-Pay Statute and if it falls under the Prompt-Pay Statute, the Plaintiff's claim must first go to the IAB.[24] It also asserts that agency law is inapplicable to this statutory claim and Plaintiff's "joint venturer" argument is flawed.[25] The Court will first turn to the language of the Prompt-Pay Statute to determine if it is applicable to Gallagher Bassett. After such determination has been made, the Court will then determine if FSO's class action allegations should be stricken from the record.

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[20] Pl.'s Answering Br. in Opp'n to Def.'s Mot. to Dismiss at 7.
[21] *Id.* at 10.
[22] *Id.* at 12.
[23] *Id.* at
[24] Def.'s Reply Br. in Supp. Def.'s Mot. to Dismiss at 1,6.
[25] *Id.* at 4–5.

A. THE PROMPT-PAY STATUTE

Section 2322F(h) was enacted in 2007 along with other reforms to the Delaware Workers' Compensation Act to help create "standards for billing and payment of health care services...."[26] Section 2322F(h) specifically implements prompt payment of health care expenses for non-preauthorized care.[27] In fact, it mandates that:

> [a]n employer or insurance carrier shall be required to pay a health care invoice within 30 days of receipt of the invoice as long as the claim contains substantially all the required data elements necessary to adjudicate the invoice, unless the invoice is contested in good faith. If the contested invoice pertains to an acknowledged compensable claim and the denial is based upon compliance with the health care payment system and/or health care practice guidelines, it shall be referred to utilization review. Any such referral to utilization review shall be made within 15 days of denial. Unpaid invoices shall incur interest at a rate of 1% per month payable to the provider. A provider shall not hold an employee liable for costs related to nondisputed services for a compensable injury and shall not bill or attempt to recover from the employee the difference between the provider's charge and the amount paid by the employer or insurance carrier on a compensable injury.[28]

Thus the viability of Plaintiff's claim against Defendant hinges on 19 Del. C. § 2322F(h) and whether Gallagher Bassett is considered an "employer" or "insurance

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[26] Delaware General Assembly, Senate Bill 1, at http://legis.delaware.gov/BillDetail?LegislationId=18082 (last visited March 28, 2018).
[27] *Id.*
[28] 19 Del. C. § 2322F(h).

carrier" under the Act.[29] Such a determination requires the Court to engage in statutory interpretation.

"The goal of statutory construction is to determine and give effect to legislative intent."[30] A court must first determine if the statute is ambiguous or not. If the statute is found to be clear and unambiguous, then the plain meaning of the statutory language controls.[31] "The fact that the parties disagree about the meaning of the statute does not create ambiguity."[32] Rather, a statute is ambiguous only if it is reasonably susceptible to different interpretations,[33] or "if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature."[34] "When confronting an ambiguous statute, a court should construe it 'in a way that will promote its apparent purpose and harmonize [it] with other statutes' within the statutory scheme."[35]

Section 2322F(h) imposes statutory interest as a penalty for insurance carriers and/or employers who fail to timely pay workers' compensation claims. The penalty

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[29] 19 Del. C. § 2301(11). Under the Act, an employer is defined as "those who employ others unless they are excluded from the application of this chapter…and if the employer is insured, the term shall include the insurer as far as practicable; employer shall also include the governing body for which employable relief recipients are assigned work…." *Id.*

[30] *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007) (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

[31] *Ins. Comm'n of the State of Del. v. Sun Life Assur. Co. of Canada (U.S.)*, 21 A.3d 15, 20 (Del. 2011).

[32] *Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010).

[33] *Ins. Comm'n of the State of Del.*, 21 A.3d at 20 (citing *Chase Alexa, LLC v. Kent Cnty. Levy Ct.*, 991 A.2d 1148, 1151 (Del. 2010)).

[34] *Id.*

[35] *Id.*

is specifically limited to the two terms "employer" and "insurance carrier" which are defined in Section 2301 of the Act. However, for the purposes of this Opinion, the Court will only focus on the term "insurance carrier," since there is no dispute that the Defendant is not an employer under the Statute.

An "insurance carrier" is broadly defined as "any insurance corporation, mutual association or company or interinsurance exchange which insures employers against liability under this chapter or against liability at common law for accidental injuries to employees."[36] Broken down, an insurance carrier must be an entity that is in the business of providing insurance. Although the Act does not define the term "insurance," a clear definition can be found in the Delaware Insurance Code as: "a contract whereby one undertakes to pay or indemnify another as to loss from certain specified contingencies or perils, called 'risks,' or to pay or grant a specified amount or determinable benefit in connection with ascertainable risk contingencies or to act as surety."[37]

In the instant case, the Court finds the statutory language to be unambiguous. The Workers' Compensation Act clearly defines the terms "insurance carrier" and "employer," making it unsusceptible to different interpretations. FSO argues that Gallagher Bassett engages in the business of insurance by processing and paying

[36] 19 Del. C. § 2301(17).
[37] 18 Del. C. § 102(2).

valid claims. While they may process claims, such an attempt to rewrite the statute to include TPAs like Gallagher Bassett is flawed for several reasons.

First, such an interpretation would be contrary to the definition itself. TPAs like Gallagher Bassett do not provide insurance for employers against liability. TPAs contract with insurers to process, determine and pay or deny workers' compensation benefits. They do take on some functions traditionally performed by the insurance carrier which have been delegated to them, but the TPAs do not engage in the actual writing or insuring of employers and their employees. Plaintiff tries to use the definition of insurance to argue that Gallagher Bassett handled one of "the most critical aspect[s] of the business of insurance... [by] processing, evaluating and paying insurance benefits [to FSO and those similarly situated]."[38] And because of its entanglement in the insurance process, Gallagher Bassett should be considered an "insurance carrier."

The Court agrees with the Plaintiff, that Gallagher Bassett's role is more than purely administrative. The Defendant even admits that it determines if a payment should be made and that requires the insurer to delegate some of its power and authority.[39] However, because the statute is unambiguous, the Court must only rely on the plain language of the Act and Defendant Gallagher Bassett is simply not an

[38] Pl.'s Answering Br. in Opp'n to Def.'s Mot. to Dismiss at 10.
[39] Trial Tr. 9:8–23, 10:1–5, Dec. 11, 2017.

insurance carrier. It has never provided the insurance to the employers, nor any type of indemnification. More importantly, Gallagher Bassett paid the insurance proceeds directly from bank accounts that were funded by the underlying employer or insurance carriers, never from its own funds.[40] The Court finds no convincing evidence to suggest that Gallagher Bassett is an insurance carrier as defined in Section 2301.

Further, there is no clear legislative history or intent to suggest that the General Assembly meant to include TPAs. The Act has been amended on many occasions to reflect the current intent of the General Assembly and to ensure the Act is effectuating the original purpose of workers' compensation benefits. In various amendments since 2007, the definition Section 2301 and Section 2322F of the Act were amended, and none of these amendments contemplated TPAs. In fact, the most recent amendment in 2015, which occurred after Gallagher Bassett had already assumed the role as a TPA for insurers, did not propose a change in the definition of an "insurance carrier" to broaden the scope of statutory interest.[41] Because of the plain language of the Act and a lack of legislative intent to suggest otherwise, the Court cannot extend the scope of the definition. That is a job for the legislature. If it

[40] Def.'s Reply Br. in Supp. Def.'s Mot. to Dismiss at 2.
[41] Gallagher Bassett acted as a TPA since June 22, 2014, the Act was amended in July 2015. If the legislatures were concerned with the intermediary role of the TPAs during 2014, such concerns could have been addressed in the most recent amendments, however it was not.

is necessary in order to continue to achieve the goals of the Act, especially if the insurance carriers are not making the ultimate decision to pay or deny the workers' compensation claims, then it is a legislative remedy that must be pursued and not a rewrite by the judiciary.

B. INSURERS CANNOT AVOID THE STATUTORY MANDATE BY CONTRACTING WITH TPAs

The Plaintiff attempts to persuade the Court that Gallagher Bassett is liable under the Prompt-Pay Statute through various different arguments. As the Court discussed above, it rejects the Plaintiff's interpretation of the Prompt-Pay Statute and finds the Act to unambiguously define "insurance carriers." This Court has also reviewed the Plaintiff's other arguments and finds them equally unavailing. However, before the Court discusses the remaining issues in this Motion, it would first like to address what the Court believes is the underlying question of this case. This question is can an insurance carrier or employer avoid the statutory mandate by contracting its claim processing out to a third party like Gallagher Bassett? The answer is no. This Court believes that despite Plaintiff's best attempts to categorize Gallagher Bassett as an "insurance carrier" under the Act, Gallagher Bassett simply cannot be held liable for the statutory interest imposed under the Prompt-Pay Statute. This does not mean that the insurance carriers/employers, who are identified in the explanation of benefits ("EOB"), can evade liability. In fact, it means exactly the

opposite. If the TPA's with whom the insurance carrier/employer has contracted with do not timely process workers' compensation claims, the statutory penalty must be imposed on the insurance carrier/employer. The insurance carrier/employer will remain responsible for noncompliance with the Prompt-Pay Statute because the Act clearly places this liability upon them. In other words, the insurance company/employer cannot avoid the statutory mandate by contracting its claim processing to a third party. If the insurance carrier/employer are penalized due to the malfeasance of the TPA, that is an issue between those entities to resolve. It will not displace who is liable under the Act. Based on this finding the Court need not discuss a private cause of action or the viability of a class certification because the Plaintiff has filed suit against the wrong defendants. If Plaintiff desires to continue pursuing legal remedies, FSO must file suit against the proper defendants—the respective insurance carriers and/or employers.

C. GALLAGHER BASSETT CANNOT BE LIABLE UNDER AGENCY LAW

As an alternative, the Plaintiff argues that if Gallagher Bassett is not an "insurance carrier," FSO has a viable agency law claim against Gallagher Bassett.[42] Specifically, Plaintiff contends that because Gallagher Bassett acts on behalf of

[42] Pl.'s Answering Br. in Opp'n to Def.'s Mot. to Dismiss at 10.

undisclosed principals—employers and/or insurance carriers—as their agent, Gallagher Bassett may be considered a party to a contract and liable for the principal's nonperformance.[43] Defendant argues that the Plaintiff's claim has no merit in a statutory action, rather such an agency law claim is only applicable in contract cases. Defendant also argues that "FSO's claim that it cannot identify the underlying insurer is unfounded"[44] as the EOB identifies the insurer and the client.[45]

This Court has previously held an agent liable for nonperformance only when, "[a]n agent who transacts business on behalf of another…at the time of entering into the transaction [] fails to disclose his agency as well as the identity of his principal."[46] The Court agrees with Defendant Gallagher Bassett, that the proper employer or insurance carrier is not hidden from the Plaintiff. While it may take some administrative effort to find the information, it is not a situation where there is an intentional non-disclosure of that information.

Additionally, the Court is not convinced by Plaintiff's policy argument that if this Court rejected Plaintiff's agency law claim, the Court "would subvert the administration of justice, and (in particular) the General Assembly's intent in enacting section 2322F(h)."[47] While the Court does not condone the actions of the

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[43] *Id.* at 11.
[44] Def.'s Reply Br. in Supp. Def.'s Mot. to Dismiss at 3.
[45] *Id.* at 4.
[46] *Seaford Steel Prods. v. Taubler*, 1987 WL 18427, at *2 (Del. Super. Ct. Oct. 6, 1987)
[47] Pl.'s Answering Br. in Opp'n to Def.'s Mot. to Dismiss at 11.

Defendant and the insurers Gallagher Bassett has contracted with, such a policy concern is one for the General Assembly, not this Court to address. The Court is only able to interpret the language of this statute; it is up to the legislature to decide if they want to hold TPAs liable under the Statute.

D. GALLAGHER BASSETT AND THE INSURERS ARE NOT IN A JOINT VENTURE

FSO in its answering brief asserts that Gallagher Bassett is liable for the statutory interest because it acted as a joint venturer with the undisclosed insurance carriers.[48] FSO argues because it presented such a claim in its Complaint under the legal standard for a motion to dismiss, the Court must accept well-pleaded allegations as true. Therefore, the Court cannot dismiss Plaintiff's claim.[49] Defendant refutes this argument on the basis that the Plaintiff has failed to establish any facts that a joint venture exists.[50] Gallagher Bassett argues that FSO's claim, if accepted by the Court, would produce an absurd result and allow the recovery of statutory penalties when there is no statutory right for them to do so.

While there is no particularity requirement to prove the existence of a joint venture, the Plaintiff must provide the Court with some evidence for it to conclude

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[48] *Id.*
[49] *Id.* (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).
[50] *Tally Bros., Inc. v. Ford Motor Co.*, 1992 WL 240341, at *2 (Del. Super. Ct. Sept. 16, 1992).

that the plaintiff may be entitled to relief.[51] The Court will not "blindly accept conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiffs' favor."[52]

For a joint venture to exist under Delaware law, there must be, "(1) a community of interest in the performance of a common purpose, (2) joint control or right of control, (3) a joint proprietary interest in the subject matter, (4) a right to share in the profits, [and] (5) a duty to share in the losses...."[53] In its Complaint, the Plaintiff states "Gallagher Bassett's role as joint venturer entailed the handling, evaluation, processing, payment or denial of claims for workers' compensation benefits."[54] Plaintiff also states that "Gallagher Bassett held a pecuniary interest in optimizing the financial condition of the (unidentified) insurers responsible for providing workers' compensation insurance to FSO's patients, by containing, reducing or minimizing costs associated with such patients' workers' compensation claims."[55] However even if these assertions are true, it does not make the TPA and the employer/ insurance carrier they contracted with joint venturers. If the Court was to accept the Plaintiff's logic, it would encompass nearly every contractual

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[51] Del. Super. Ct. Civ. R. 9(b) (requiring that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").
[52] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).
[53] *Warren v. Goldinger Bros., Inc.*, 414 A.2d 507, 509 (Del. 1980).
[54] Compl. ¶ 7.
[55] *Id.* at ¶ 8.

relationship. And clearly, there is nothing to suggest that TPAs "split profits, or share losses with their customers."[56]

Gallagher Bassett may have a pecuniary interest to insure their contractual relationship continued, but it is not in an effort to reduce losses they share or to participate in the profit of the employer/insurance carrier. Instead there is nothing to suggest this relationship is other than a contractual one for which the Defendant receives a contracted fee. Thus, the Court is unwilling to find the Plaintiff has alleged sufficient facts to support this contention.

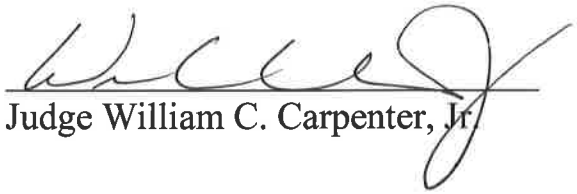
IV. CONCLUSION

As the Court stated above, the Plaintiff has filed suit against the wrong defendant(s). Gallagher Bassett simply does not fall under the definition of an "insurance carrier" and if the Court were to find that Gallagher Bassett did, not only would the Court be broadening the scope of the Act, it would be engaging in judicial legislating, which the Court may not do. FSO's remedy here is to address this issue legislatively and to also clarify through legislation their right to redress this issue through the legal process and not administratively.

[56] Def.'s Reply Br. in Supp. Def.'s Mot. to Dismiss at 12.

Thus, because the Court finds that FSO's claim against Gallagher Bassett fails, FSO's proposed class action must also be denied. Defendant's Motion to Dismiss is **Granted** and Defendant's Motion to Strike Class Allegations is **Granted**.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.