IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

MELISSA MURPHY, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	C.A. No. 04C-07-003 RFS
	)	
UNITED SERVICES AUTO ASSN., et al.,	)	
	)	
Defendants	)	

Date Argued: April 28, 2005
Date Decided: May 10, 2005

ORDER

Upon careful review of the filings in the above captioned matter, Defendants' Motion to Dismiss for Lacking of Standing is granted, and Certain Defendants' motion to Dismiss is granted as to the Class Claims. It appears to the Court that:

Plaintiffs Melissa Murphy ("Murphy") and Peter Galley ("Galley") have brought suit for themselves and as representatives of a class of persons who have purchased no-fault auto insurance pursuant to 21 *Del. C.* § 2118. They are suing Progressive Northern Insurance Company ("PNIC") and GEICO Indemnity Insurance Company ("GEICO"), their providers, respectively, and fifteen other insurance companies who provide no-fault insurance in Delaware, as a defendant class.[1] Plaintiffs allege that the Defendants are engaged in an industry-wide practice that unfairly denies full payment for medical expenses.[2]

They are seeking monetary damages in the amount of $1,606.00 for Murphy and $1,633.60 for Galley. In addition, they seek monetary damages for the amounts each class

plaintiff has had to pay for medical expenses as a result of this practice, and they seek punitive damages.[3] The Plaintiffs also have requested a declaratory judgment that the practice violates the public policy of Delaware and undermines the intent of the No Fault Law. Specifically, they ask for "an order declaring denials based on the insurers' medical reports, unauthorized and illegal, an order declaring the practice of unilateral reductions in medical expense payments unauthorized and illegal . . . ." Pl.'s Compl. at 6. A motion for Class Certification has not yet been made.

The Defendants (other than GEICO and PNIC) have filed a motion to dismiss under Rule 12(b)(6), claiming the representative Plaintiffs lack standing to bring suit against them. PNIC has adopted the reasoning of and joined in a limited capacity the Defendants Motion to Dismiss for Lack of Standing. It claims that Galley and other non-PNIC policy holders have no standing to sue it, for the same reasons they have no standing to sue the other insurance companies.

GEICO and PNIC have also filed a Rule 12(b)(6) motion to dismiss, alleging that the Plaintiffs have failed to sufficiently plead the Superior Court Civil Rule 23 class action criteria, and for failure to state a claim upon which relief can be granted. They have been joined in this motion by the other fifteen defendants. More specifically, GEICO and PNIC claim that Plaintiffs 1) have failed to adequately define their class; 2) have not shown how common questions of law or fact predominate over individual questions; 3) have failed to allege how the representative Plaintiffs, Murphy's and Galley's, claims are typical of those of the class members; 4) have not proved that the representative Plaintiffs are adequate to represent the interests of the class members; and, 5) did not allege in their complaint that handling the case as a class action is superior to other means of resolving these disputes. Moreover, these two Defendants argue that even if Plaintiffs had pleaded those Rule 23 requirements, they would not, as a matter of law, be

able to meet them. In addition, GEICO and PNIC allege that the Plaintiffs cannot maintain a class action because the relief they seek is primarily monetary. They also claim that the Complaint is not clear enough under Superior Court Rule 8 to give Defendants notice of the nature of the claim (and, in a footnote, that it is prolix, in violation of Rule 8's mandate that a Complaint be "simple, concise and direct").

DISCUSSION

The Plaintiffs, Murphy and Galley do not have standing to sue the Insurance Company Defendants from which they have not purchased no-fault insurance. The Delaware Supreme Court has stated that the law in Delaware is based upon the Supreme Court's interpretation in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), as it was summarized by the Third Circuit:

> (1) the plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Dover Historical Soc'y, 838 A.2d at 1110, *citing*, *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 175-76 (2000).

A plaintiff must establish injury to himself by the parties he wishes to sue. *See Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 690 (E.D. Pa. 1973) ("It is a fundamental principle of law that a plaintiff must demonstrate injury to himself by the parties whom he sues before that plaintiff can successfully state a cause of action."). Here, the Plaintiffs have failed to demonstrate they were injured by any of the fifteen insurance companies they are attempting to sue as a class. "A plaintiff may not use the procedural device of a class action to boot strap

himself into standing he lacks under the express terms of the substantive law." *Id*. at 694.[4] Because Plaintiffs Murphy and Galley suffered no injury at the hands of the fifteen Defendants other than PNIC and GEICO, those Defendants are dismissed from this case for lack of standing.

Even if the Court were to find standing, it would still dismiss this class action. The Plaintiffs are seeking a hundred percent return on all of their applicable expenses, stating: "Once an insurer has accepted responsibility for injuries arising from an accident, prompt payment should be made until such time as there is an adjudication adverse to the insured . . . ." Pl.'s Compl. ¶ 36. They claim:

> The medical bills and 'no work' directions of the health care providers for the Class, are *prima facie* evidence of reasonableness and necessity. The IMEs and cost reduction opinions merely dispute the reasonableness and necessity of the treatment and opinions of the health care providers and the burden of proof should be on the insurers under the stated public policy for No Fault, prompt payment without the necessity for suit.

Pl.'s Compl. ¶ 35.

The Plaintiffs have failed to state a cause of action upon which relief can be granted. As a matter of law, the burden lies on the Plaintiff, not on the insurer, to show the expenses were "reasonable and necessary." 21 *Del. C*. § 2118 (a) requires that every owner of a motor vehicle have personal injury insurance providing coverage "for reasonable and necessary expenses incurred within 2 years from the date of the accident."[5] The words "reasonable and necessary" qualify the scope of the delineated benefits that an insurance company must pay. In fact, section 2118 has been interpreted as "fix[ing] a statutory minimum rather than a maximum standard of protection." *Casson v Nationwide Ins. Co.*, 455 A.2d 361, 366 (Del. Super. Ct. 1982) (finding that, regarding lost earnings, "reasonable" referred to the amount, while "necessary" meant

"those lost earnings which were 'unavoidable' or inescapable'"). Delaware has consistently permitted insurers to investigate the reasonableness of expenses.[6]

Furthermore, in *Ramsey v. State Farm Mut. Ins. Co.*, 869 A.2d 327 (Table), 2005 WL 528846, at * 1 (Del.) the Supreme Court, in adopting the reasoning of *Casson*, 455 A.2d 361, stated, "[t]he PIP statute provides recovery only for 'reasonable and necessary' expenses. In order to satisfy that requirement, Ramsey had to establish that her lost wages were unavoidable. Since she offered no evidence on that point, she failed to establish her entitlement to PIP benefits." This ruling directly contradicts the claims of the Plaintiffs that the burden of proof should be on the insurers, and that section 2118 and public policy require full payment of benefits until an adverse judgment is obtained.[7]

In sum, the causes of action brought by Murphy and Galley on behalf of a class of plaintiffs and against the fifteen Defendants and against PNIC and GEICO must be dismissed. The individual claims of Murphy and Galley against PNIC and GEICO survive dismissal, however, because they may have a contract claim against their respective insurance companies. In this regard, their claims must be severed as each only has standing against the company which issued his or her no fault insurance policy. In addition, in response to the Defendants' Motion to Dismiss for the reason that the Complaint is not sufficiently clear under Superior Court Civil Rule 8, pursuant to Superior Court Civil Rule 12(e), the Plaintiffs are required to provide a more definite statement of their respective claims against PNIC and GEICO within thirty days.

Because the class action claims have been dismissed for lack of standing and for failure to state a claim upon which relief can be granted under Rule 12(b)(6), the Court need not address the Defendants' other contentions regarding the Superior Court Civil Rule 23 class certification requirements.

CONCLUSION

Considering the foregoing, Defendants' Motion to Dismiss for Lack of Standing is granted. Plaintiffs Murphy' and Galley's claims are dismissed against the Defendants United Services Auto Association, State Farm Mutual Automobile Insurance Company, The Peninsula Insurance Company, Allstate Ins. Co., Hartford Underwriters Ins. Co., Nationwide Mut. Ins. Co., Nationwide Assurance, Keystone Ins. Co., Encompass Ins., Pawtucket Mut. Ins. Co., Liberty Mut. Ins. Co., Westfield Ins. Co., Montgomery Mut. Ins. Co., Harleysville Mut. Ins. Co., and The Travelers Indemnity Co. The Class allegations of Plaintiffs Murphy and Galley are also dismissed against GEICO and PNIC. All that remains is each Plaintiff's claim against the individual's carrier. The Plaintiffs have thirty days to provide a more definite statement of those claims.

IT IS SO ORDERED.

Dated:_____

_____
Richard F. Stokes, Judge

oc: Prothonotary
cc: H. Clay Davis, III, Esquire
Sherry R. Fallon, Esquire
Dawn L. Becker, Esquire
Gary W. Aber, Esquire
John D. Balaguer, Esquire

ENDNOTES

1. The other insurance companies are United Services Auto Association, State Farm Mutual Automobile Insurance Company, The Peninsula Insurance Company, Allstate Ins. Co., Hartford Underwriters Ins. Co., Nationwide Mut. Ins. Co., Nationwide Assurance, Keystone Ins. Co., Encompass Ins., Pawtucket Mut. Ins. Co., Liberty Mut. Ins. Co., Westfield Ins. Co., Montgomery Mut. Ins. Co., Harleysville Mut. Ins. Co., The Travelers Indemnity Co.

2. [P]laintiffs . . . allege that Defendants have unlawfully denied payment of some or all of their benefits, relying on medical opinions Defendants have procured or because of self-serving reviews based on criteria orchestrated by the Defendants, or on evaluations by an untrained insurance adjuster's unsubstantiated opinion of coverage, necessity and/or reasonableness of costs. They also allege that many such determinations are made before there is sufficient treatment to make a fair assessment. They allege an industry wide practice of unfair denials or partial payments.

Pl.'s Compl. at 1.

3. This is an action seeking recovery of amounts the Plaintiff and the Class have paid for health care expenses or have lost earnings because they were injured in auto accidents and their contractual and statutory benefits were denied based on [the practice in n.2]. . . .
1. The amounts to be recovered are the sums paid by all who were forced to meet the expenses or losses which should have been met or paid by the Defendants.

Pl.'s Compl. at 1.

4. There are no Delaware class action cases which specifically address the issue of a plaintiff's standing to sue a defendant class or a group of defendants. Sections (a) and (b) of Superior Court Civil Rule 23 are identical to the Federal Rule. The Court has reviewed extensively the Federal law regarding standing and discovered that there is a difference of opinion as to how the issue should be addressed. See, e.g., *State ex rel. Erie Fire Ins. Co. v. Madden*, 515 S.E.2d 351, 355 n. 6 (W. Va. Supr. 1998) for a discussion of the Federal Courts'

views. The question is whether a Court should address the class certification requirements under Federal Rule of Civil Procedure 23 before considering standing or vice versa. If a class is certifiable, then the question becomes whether standing should be addressed to the plaintiff or defendant class as a whole, or examined from each plaintiff to each defendant. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-31 (1999)*; Amchem Prods., Inc.*, 521 U.S. 591, 612-13 (1997); *Rivera v. Wyeth-Ayerst Labs*, 283 F.3d 315, 319 (5th Cir. 2002)*; Payton v. County of Kane*, 308 F.3d 673, 678-82 (7th Cir. 2002) *cert. denied sub nom. Carroll County, Ill. v. Payton*, 540 U.S. 812 (2003)*; Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998)*; La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973); *In re Eaton Vance Corp. Sec. Litig.*, 220 F.R.D. 162 (D. Mass. 2004); *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684 (E.D. Pa. 1973).

Standing is an issue of state subject matter jurisdiction, however, and under Delaware law, it is not subject to the same Constitutional limitations inherent in a Federal Court's Article III standing analysis. *See Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003) ("Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are 'mere intermeddlers.'"); *Cedar Crest Funeral Home, Inc., v. Lashley*, 889 S.W.2d 325 (Tx. Ct. App. 1993) (declining to follow the reasoning applied to class standing in *Weiner*, 358 F. Supp. 684, because it conflicted with the procedural requirements for subject matter jurisdiction under Texas law).

Other Delaware Courts have interpreted Chancery Rule 23, which is essentially the same as Superior Court Civil Rule 23, as being procedural in nature, and not jurisdictional. *See Wilmington Trust Co. v. Schneider*, 320 A.2d 709, 710-11 (Del. 1974) (stating that Chancery

Rule 23 is procedural and not jurisdictional such that it could not confer jurisdiction upon an equity court for a case which should have been brought in a law court); *Delaware Bankers Ass'n v. Div. of Revenue of the Dep't of Finance*, 298 A.2d 352, 357 (Del. Ch. 1972) (finding Chancery Rule 23 could not be "'construed to extend or limit the jurisdiction of the Court of Chancery.'" (citation omitted)). It follows that Superior Court Civil Rule 23 is also procedural in nature, and made not be used to expand the Court's jurisdiction through the creation of a class of defendants or plaintiffs, if standing does not otherwise exist. Furthermore, Superior Court Civil Rule 82 states: "These Rules shall not be construed to extend or limit the jurisdiction of the Superior Court or to affect the venue of actions therein." *Cf. Delaware Bankers Ass'n*, 298 A.2d at 357 (citing Chancery Court Rule 82 in support of the Court's decision that Chancery Rule 23 could not extend the Court's jurisdiction). In sum, despite the nuances at the federal level, this Court will address standing before issues of class certification.

5. 21 *Del. C.* § 2118(a)(2)a. specifically provides:

> (a) No owner of a motor vehicle required to be registered in this State, other than a self-insurer pursuant to § 2904 of this title, shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum insurance coverage:
>
> . . .
>
> (2)a. Compensation to injured persons for reasonable and necessary expenses incurred within 2 years from the date of the accident for:
>
> > 1. Medical, hospital, dental, surgical, medicine, x-ray, ambulance, prosthetic services, professional nursing and funeral services. Compensation for funeral services, including all customary charges and the cost of a burial plot for 1 person, shall not exceed the sum of $5,000. Compensation may include expenses for any nonmedical remedial care and treatment rendered in accordance with a recognized religious method of healing.
> >
> > 2. Net amount of lost earnings. Lost earnings shall include net lost earnings of a self-employed person.

> 3. Where a qualified medical practitioner shall, within 2 years from the date of an accident, verify in writing that surgical or dental procedures will be necessary and are then medically ascertainable but impractical or impossible to perform during that 2-year period, the cost of such dental or surgical procedures, including expenses for related medical treatment, and the net amount of lost earnings lost in connection with such dental or surgical procedures shall be payable. Such lost earnings shall be limited to the period of time that is reasonably necessary to recover from such surgical or dental procedures but not to exceed 90 days. The payment of these costs shall be either at the time they are ascertained or at the time they are actually incurred, at the insurer's option.
>
> 4. Extra expenses for personal services which would have been performed by the injured person had they not been injured.
>
> 5. "Injured person" for the purposes of this section shall include the personal representative of an estate; provided, however, that if a death occurs, the "net amount of lost earnings" shall include only that sum attributable to the period prior to the death of the person so injured.

6. In fact, an insured who wants to challenge an insurer's denial of benefits because of the insurer's belief that they were not reasonable and necessary must bring a claim of bad faith denial of benefits against the insurer. *See Albanese v. Allstate Ins. Co.*, 1998 WL 437370 (Del. Super. Ct.); *Watson v. Metro. Prop. & Cas. Ins. Co.*, 2003 WL 22290906 (Del. Super. Ct.) (bringing claims of bad faith to challenge denials of benefits that the insurers found not to be reasonable and necessary). In order to establish bad faith, a plaintiff "must show that the insurer's refusal to honor [the claim] was clearly without any reasonable justification." *Albanese*, 1998 WL 437370, at *2.

7. With appropriate candor, Plaintiffs' Counsel acknowledged the vulnerability of his position should an insured have the burden to show reasonable and necessary expenses. He brought the *Ramsey* case to the Court's attention at oral argument. Mr. Davis is a well-respected member of

the Bar and has once again acted in a professionally exemplary manner.