UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

GEICO Indemnity Company, **Plaintiff,** **vs.** **Darinda Kay Smith, *et al.*,** **Defendants.**	**3:12-cv-08127 JWS** **ORDER AND OPINION** **[Re: Motions at Dockets 110, 111, 112, 114, 115, 116, & 117]**
Hillary Rider, *et al.*, **Counterclaimants,** **vs.** **GEICO Indemnity Company,** **Counterdefendant.**	

I. MOTIONS PRESENTED

Before the court are seven motions *in limine*.[1] At docket 110 plaintiff and counterdefendant GEICO Indemnity Company ("GEICO") moves *in limine* to preclude

[1]Counsel for the moving parties failed to certify that they in good faith attempted to resolve these disputes before seeking judicial intervention. LRCiv 7.2(l) ("No opposed motion in limine will be considered or decided unless moving counsel certifies therein that the movant has in good faith conferred or attempted to confer with the opposing party or counsel in an effort to resolve disputed evidentiary issues that are the subject of the motion."). In light of the briefing filed and the approaching trial date, however, the court elects to waive this requirement.

checks written by Darinda Kay Smith ("Smith") to Pima Federal Credit Union on which Smith handwrote various dates and notations. Defendants and counterclaimants Darinda Kay Smith, Barry T. Webb, Hillary Rider, Amber Davis, and Nathan Davis (collectively, "Defendants") oppose at docket 119.

At docket 111 GEICO moves *in limine* to preclude Smith and Hillary Rider ("Rider") from testifying. Defendants oppose at docket 120.

At docket 112 GEICO moves *in limine* to preclude Amber Davis ("Davis") from "stating or suggesting that before the accident underlying this case, Darinda Smith transferred the Chevrolet Silverado listed on her GEICO policy to Smith's son Brandon."[2] Defendants oppose at docket 121.

At docket 114 Defendants move *in limine* to preclude evidence that the Cadillac Escalade was insured by Farmers Insurance Company. GEICO opposes at docket 124.

At docket 115 Defendants move *in limine* to preclude "any evidence of an assignment of bad faith claims, [and] any evidence of demand letters and/or correspondence from GEICO to the Defendant's counsel."[3] GEICO responds at docket 125.

At docket 116 Defendants move *in limine* to preclude evidence of GEICO's claim file and to preclude Jose Castillo from testifying as a witness. GEICO responds at docket 126.

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[2]Doc. 112 at 2.

[3]Doc. 115 at 1–2.

At docket 117 Defendants move *in limine* to preclude records from Pima Federal Credit Union and Desert Energy Credit Union regarding Smith. GEICO responds at docket 127.

Oral argument was requested but would not assist the court.

II. STANDARD OF REVIEW

The district courts exercise broad discretion when ruling on motions *in limine*.[4] In order for evidence to be excluded under such motions, it must be "clearly inadmissible on all potential grounds."[5] "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context."[6]

"It is settled law that *in limine* rulings are provisional. Such 'rulings are not binding on the trial judge [who] may always change his mind during the course of a trial.'"[7] "Denial of a motion *in limine* does not necessarily mean that all evidence contemplated by the motion will be admitted to trial. Denial merely means that without the context of trial, the court is unable to determine whether the evidence in question should be excluded."[8]

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[4] *See Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002).

[5] *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004).

[6] *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993).

[7] *United States v. Benedetti*, 433 F.3d 111, 117 (1st Cir. 2005) (quoting *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000)).

[8] *Ind. Ins. Co.*, 326 F. Supp. 2d at 846.

III. DISCUSSION

A. Smith's Pima Federal Credit Union Checks

GEICO seeks to preclude Defendants from offering copies of seven checks that Smith wrote in 2010. The first six checks are dated before November 30, 2010, and either have nothing, Smith's loan number, or the word "truck" written in the "for" line on the check.[9] According to Defendants, the November 30 check has "Brandon's TR" written in the "for" line,[10] which shows that Smith had transferred ownership of the Chevy Silverado to Brandon. GEICO argues that the checks should be barred, or at least redacted, because the dates and notations on the checks are inadmissible hearsay.

Defendants do not dispute that the dates and notations are hearsay. Indeed, Defendants offer the dates and notations for the truth of the matters asserted—namely, that the checks were written on the dates indicated and that Smith wrote the November 30 check for the purpose of paying down the loan on Brandon's truck (if, in fact, that is what is written in the "for" line). Defendants argue that the checks are admissible under several exceptions to the hearsay rule. The court agrees; GEICO's motion will be denied.

Defendants first argue that the disputed assertions qualify as statements in documents that affect an interest in property under Rule 803(15). Under this rule a hearsay statement is admissible (1) if it is "contained within a document that affects an

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[9]Doc. 110-1 at 2 (blank), 4 (loan number), 6 (loan number), 8 (loan number), 10 (loan number), 12 ("Truck").

[10]*Id.* at 14.

interest in property;" (2) if it is "relevant to the purport of the document;" and (3) "if dealings with the property since the document was made have not been inconsistent with the truth of the" statement.[11] All three requirements are met here. A check is a document that establishes or affects an interest in property because it orders the drawer's bank to pay the payee a sum certain in money.[12] The date and any information listed in the "for" line of a check is relevant to the check's purpose. And it does not appear that there were any subsequent dealings that are inconsistent with the truth of the statements or the purport of the checks.

Even if Rule 803(15) did not apply, the court finds that the checks will likely qualify under the residual exception to the hearsay rule.[13] That exception, set out in Rule 807, provides that a hearsay statement is not excluded if (1) it has "circumstantial guarantees of trustworthiness" equivalent to those presented under the hearsay exceptions in Rule 803 or 804; "(2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice."[14]

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[11] *United States v. Boulware*, 384 F.3d 794, 807 (9th Cir. 2004).

[12] *See Spurlock v. C.I.R.*, 85 T.C.M. (CCH) 1236, at *5 (T.C. 2003) (cited with approval in *United States v. Tann*, 425 F. Supp. 2d 26, 30 (D.D.C. 2006)).

[13] Defendants also argue that Rule 803(3) and (5) apply. Contrary to Defendants' argument, Rule 803(3) does not apply because the checks do not contain a statement of Smith's then-existing intent to transfer ownership of the truck to Brandon. Rule 803(5) may apply, but Defendants make no attempt to establish that the assertions on the checks accurately reflect Smith's knowledge. Fed. R. Evid. 805(5)(C).

[14] Fed. R. Evid. 807.

With regard to factors (3) and (4), it is premature to rule on whether the checks are more probative than any of Defendants' other evidence or whether admitting them will best serve the purpose of the rules and the interests of justice. Factors (1) and (2) are satisfied because the checks are offered as evidence of a material fact and they have circumstantial guarantees of trustworthiness. As Defendants point out, when the checks were written Smith could not possibly have known that she would be involved in an automobile collision and a subsequent dispute with GEICO about the truck's ownership. The fact that Smith had no motive to fabricate the dates or notations on her loan payment checks provides a circumstantial guarantee of trustworthiness.

B. Smith and Rider Will Not Be Precluded Outright From Testifying

GEICO's next motion seeks an order precluding Smith and Rider from testifying at trial, arguing that their testimony is irrelevant under Rule 401 and that the probative value of their testimony is substantially outweighed by a danger of unfair prejudice under Rule 403. With regard to Smith, Defendants acknowledge that Smith has suffered memory loss that prevents her from testifying as to most material facts. But, the court agrees with Defendants that GEICO has not established that Smith has no relevant testimony to offer. For example, as Defendants point out, Smith's testimony regarding her memory loss itself is relevant under Rule 401. The probative value of such testimony is not substantially outweighed by a danger of unfair prejudice.

With regard to Rider, Defendants concede that it "may be true" that Rider is capable of offering "little or no" testimony relevant to the coverage dispute central to this

trial.[15] Yet, Defendants maintain that they should be allowed to call Rider as a witness "solely in the event that there is some factual dispute regarding the nature of the accident, the loss that she incurred, and/or any other matter for which she may have relevant testimony."[16] The court agrees with the parties that Rider will not likely offer relevant testimony at this trial, but finds it premature to rule that her testimony is irrelevant in its entirety. If Rider does testify, the court agrees with GEICO that the probative value of her testimony on the topic of the loss of her son would be substantially outweighed by a danger of unfair prejudice.

C. Davis' Testimony Regarding Smith's Transfer of Ownership of the Silverado

At her deposition Davis testified that "the arrangement" between Smith and her son Brandon "was supposed to be" that Brandon would acquire ownership of the Chevy Silverado once Smith acquired the Cadillac Escalade.[17] But Davis testified that she had no idea whether Smith actually followed through on this plan.[18] GEICO seeks an order precluding Davis from testifying that Smith transferred the Silverado to Brandon upon acquiring the Escalade because she lacks knowledge of whether the transfer occurred. Defendants do not and cannot dispute that Davis lacks firsthand knowledge of any actual transfer of ownership; Davis admitted as much in her deposition.

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[15]Doc. 120 at 2.

[16]*Id.*

[17]Doc. 112-1 at 3 p.70:5–11.

[18]*Id.*

GIECO goes one step further and argues that Davis also cannot testify about any plan to transfer ownership because such testimony would be hearsay. It does not appear that counsel established any foundation for Davis' deposition testimony. Defendants now contend that Davis' testimony was based on unspecified "conversations" between Smith and Davis in which Smith apparently told Davis "about the Escalade replacing the Silverado."[19] Defendants admit that Davis' testimony is hearsay, but argue it is admissible under several exceptions to the hearsay rule.

Assuming that Defendants can lay a proper foundation for Davis' testimony, Smith's statement that she intended to transfer ownership of the Silverado to Brandon will qualify under Rule 803(3) as a statement of the declarant's then-existing plan. This statement of Smith's intention would be admissible as evidence "tending to prove the doing of the act intended."[20]

D. Smith's Subjective Intent to Maintain Farmers Coverage is Irrelevant

After Smith acquired the Escalade Davis continued to insure the vehicle through Farmers Insurance Company ("Farmers"). Farmers has accepted coverage and made a policy limits payment. Defendants seek an order precluding evidence that the Escalade was insured by Farmers, that Farmers accepted coverage, and that Farmers paid the claim. Defendants argue that such evidence is irrelevant under Rule 401 and its probative value is substantially outweighed by the danger of confusion and unfair prejudice under Rule 403.

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[19]Doc. 121 at 2.

[20]Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules.

GEICO argues that evidence "that Davis maintained insurance on the Escalade through Farmers is highly relevant in that it tends to show that Smith did not intend to replace the Silverado with the Escalade *on the GEICO policy*," but rather intended to "keep the Silverado insured by GEICO and the Escalade insured by Farmers."[21] As further proof of this intent, GEICO states that Smith wrote a check to Davis in mid-November 2010 with "Ins." written in the "for" line, indicating the check was payment for three months of Farmers' premiums. GEICO argues that evidence showing that Smith and Davis intended for the Escalade to be covered by Davis' Farmers policy is relevant to whether the GEICO policy's replacement vehicle clause applies.

GEICO misstates the question with which the jury will be tasked to decide at trial. As the court stated in the order at docket 101, the applicability of a replacement vehicle clause depends on whether the new car replaced the car described in the policy, "which must be disposed of or incapable of further service at the time of replacement."[22] The inquiry focuses on the insured's intent as to the two vehicles' *use*,[23] not her intent as to coverage. Thus, if Smith disposed of her Silverado and used the Escalade in its place, the Escalade would be covered under the GEICO policy's replacement vehicle clause. If Smith did not, the Escalade would not be covered under the clause. Either way, Smith's subjective intent to keep the Escalade on Davis' Farmers policy is irrelevant.

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[21]Doc. 124 at 4–5 (emphasis added).

[22]Doc. 101 at 10 (quoting *Allstate Ins. Co. v. Gov't Emp. Ins. Co.*, 202 S.E.2d 640, 642 (S.C. 1974)).

[23]*Id.* at 10–11.

E. Evidence of Correspondence Between Counsel and the Assignment of Bad Faith Claims to Hillary Rider and Barry Webb

According to Defendants, GEICO's Exhibit 2,[24] Exhibit 4,[25] and Exhibit 5[26] contain correspondence between counsel. Defendants seek an order precluding these documents as irrelevant as well as the assignment of bad faith claims to Hillary Rider and Barry Webb. In response, GEICO withdraws Exhibit 4 and Exhibit 5 from its exhibit list and, with regard to Exhibit 2, states that it will not attempt to introduce "any demand letters from Defendants' counsel, correspondence from GEICO to counsel, disclaimer of liability or coverage to anyone but Darinda Smith, or assignments of bad faith claims to Hillary Rider and Barry Webb."[27]

In light of GEICO's representations, Defendants' motion will be denied as moot.

F. Davis' Statement and GEICO's Log Notes

GEICO's Exhibit 2 is its 34-page claim file,[28] which consists of "correspondence among the insurers, the parties, and their attorneys; a transcript of a recorded interview of Amber Davis by [Ioana] Squires that took place on February 1, 2011; a 'coverage worksheet'; and log notes."[29] Defendants object to the claim file in its entirety under

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[24]Doc. 118 at 2 ("GEICO Claim File").

[25]*Id.* ("Letter dated 3/4/2011 from Ioana Squires to Bryce Hamblin advising no coverage.").

[26]*Id.* ("Letter dated 3/11/2011 from Ioana Squires to Amber and Nathan Davis re disclaiming any and all liability coverage for the 2002 Cadillac Escalade.").

[27]Doc. 125 at 2.

[28]Doc. 126 at 11–45.

[29]*Id.* at 2.

Rule 402 and 802, arguing that it is irrelevant hearsay. Defendants also seek an order precluding Jose Castillo from testifying as a witness.

In response, GEICO conditionally withdraws Jose Castillo from its witness list "so long as Ioana Squires, the adjuster who handled the claim underlying this insurance coverage case, is available to testify."[30] GEICO also agrees to "limit the portions of its claim file that it intends to introduce as evidence at trial."[31] As to Defendants' relevancy objection, GEICO argues that the transcript from Davis' recorded interview with Squires and the log notes are relevant because they tend to show that Davis transferred ownership of the Escalade to Smith more than 30 days before the collision. With respect to hearsay, GEICO argues that Davis' statements to Squires are excluded from the definition of hearsay under Rule 801(b)(2) because they are an opposing party's statements and the remainder of the claim file falls under Rule 803(6), the business records exception to the hearsay rule.

Because the transcript of Davis' statements to Squires and the call log notes are the only documents in the claim file that GEICO contends are relevant, the remainder of the claim file will be precluded under Rule 402. The court agrees with GEICO that the transcript and log notes are relevant, however, because they pertain to Davis' transfer of ownership of the Escalade to Smith. Davis' statements are not hearsay under Rule 801(b)(2) and, assuming GEICO can lay the proper foundation, the log notes will fall under Rule 803(6)'s exception to the hearsay rule.

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[30] *Id.* at 1–2.

[31] *Id.* at 2.

G. Smith's Bank Records From Pima Federal Credit Union and Desert Energy Credit Union

GEICO's Exhibit 11 contains Smith's bank records from Pima Federal Credit Union and Desert Energy Credit Union. Defendants argue that these records are irrelevant under Rule 401, they contain inadmissible hearsay, and they include personal information to which Smith is entitled to privacy. In response, GEICO agrees to withdraw all of these records except: (1) a $16,932.31 check dated April 5, 2011, from Boots Auto Sales to Pima Federal Credit Union that paid off Smith's loan on the Chevy Silverado ("the payoff check");[32] and (2) the original purchase and financing documents for the Chevy Silverado.[33]

GEICO argues that the payoff check is relevant because it shows that Smith did not dispose of the Silverado by giving it to Brandon. If Brandon had acquired the Silverado, GEICO argues, "he would have continued to make payments on the vehicle and kept it for his own use, rather than selling it a mere four months after the accident."[34] This argument lacks merit. What matters here is whether Smith disposed of the Silverado by giving it to Brandon. What he did with the truck once he acquired it is of no consequence. Further, GEICO's apparent argument that Brandon's subsequent sale of the truck is evidence that he did not acquire the truck in the first place defies logic.

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[32]Doc. 127 at 9.

[33]*Id.* at 11–27.

[34]*Id.* at 2.

With regard to the relevance of the original purchase and finance documents, GEICO notes that they show that Smith "was the sole purchaser of and borrower for the vehicle."[35] This is relevant, GEICO argues, because it makes it more probable than it would be without this evidence that Smith did not give the truck to Brandon once she acquired the Escalade. How Smith purchased the truck has no bearing on the question of whether she would give the truck to Brandon. This argument also defies logic. Defendants' motion will be granted.

IV. CONCLUSION

Based on the preceding discussion, the motions at docket 110, 111, 112, and 115 are denied; the motions at docket 114 and 117 are granted; the motion at docket 116 is granted in part and denied in part.

GEICO is precluded from:

- Offering evidence that the Cadillac Escalade was insured by Farmers, that Farmers accepted coverage, or that Farmers paid the claim;
- Offering evidence of any part of the GEICO claim file other than the transcript of Davis' conversation with Ioana Squires and the call log notes; and
- Offering any of Smith's bank records from Pima Federal Credit Union or Desert Energy Credit Union.

Defendants are precluded from:

[35] *Id.*

- Offering Davis' testimony that Smith actually transferred ownership of the Chevy Silverado to her son Brandon; and
- Offering Hillary Rider's testimony regarding the loss of her son.

DATED this 5th day of April 2017.

/s/ JOHN W. SEDWICK
SENIOR JUDGE, UNITED STATES DISTRICT COURT