IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

SCOTT SILVERMAN, D.C., et al.	:	June Term 2003
Plaintiffs,	:	No. 0363
v.	:	Commerce Program
RUTGERS CASUALTY INS. CO.	:	Control Nos. 100410, 011346
Defendant.	:	

ORDER

AND NOW, this 31st day of March 2005, upon consideration of Plaintiffs' Motion for Class Certification (Control No. 100410) and Defendants' Motion for Partial Summary Judgment (Control No. 011346), all responses in opposition, the respective memoranda and all matters of record, it hereby is **ORDERED** and **DECREED** as follows:

1. Defendant's Motion for Partial Summary Judgment is **GRANTED** and all the claims of Plaintiff Scott Silverman, D.C. and members of his purported class are **dismissed**.

2. Plaintiff Valerie Davis' Motion for Class Certification is **DENIED**.

BY THE COURT:

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C. DARNELL JONES, J.

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MEMORANDUM OPINION

Before the court are Plaintiffs' Motion for Class Certification (Control No. 100410) and Defendants' Motion for Partial Summary Judgment (Control No. 011346). For the reasons fully set forth below, Defendant's Motion for Partial Summary Judgment is **granted** and Plaintiffs' Motion for Class Certification is **denied**.

BACKGROUND

This action was commenced on or about June 4, 2003 by the filing of a Class Action Complaint (the "Complaint"). Thereafter, Plaintiffs filed a Motion for Class Certification, seeking to certify the following classes:

1. All medical providers located within the Commonwealth of Pennsylvania who have rendered medical services to policyholders under policies of insurance issued by Rutgers Insurance Companies ("Rutgers"), which purport to afford Personal Injury Protection for basic loss benefits during the six (6) years prior to the filing of the Complaint, where Rutgers has failed or refused to make payment of benefits within thirty (30) days after Rutgers has received reasonable proof of the amount of benefits due (the "Medical Provider Class").

2. All individuals residing within the Commonwealth of Pennsylvania who have been issued policies of insurance by Rutgers purporting to afford Personal Injury Protection for basic loss benefits during the six (6) years prior to the filing of the Complaint, where Rutgers has failed or refused to make payment of benefits for medical services within thirty (30) days after Rutgers has received reasonable

proof of the amount of benefits due (the "Policyholder Class").

Pl. Mtn. Class Cert. at ¶¶ 1 and 2. Scott Silverman, D.C., was designated as Class Representative for the Medical Provider Class. Valerie Davis was designated as Class Representative for the Policyholder Class.

Plaintiffs' Complaint arises in connection with the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa.C.S. § 1701, *et seq.* ("MVFRL"). Essentially, the MVFRL alters the status of the accident victim and renders the insurance carrier responsible for providing first-party benefits directly to the medical provider. Pursuant to §1797, the medical provider may not bill the insured for services or otherwise attempt to collect from the insured the difference between the provider's full charge and the amount paid by the insurer; medical providers are required to bill the insurance carrier directly for the amount payable. 75 Pa.C.S.A. § 1797. The MVFRL also mandates timely remittance of payments to medical providers and imposes penalties for delay. Section 1716 of the MVFRL states:

> Benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of the amount of the benefits. If reasonable proof is not supplied as to all benefits, the portion supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Overdue benefits shall bear interest at the rate of 12% per annum from the date the benefits become due. In the event the insurer is found to have acted in an unreasonable manner in refusing to pay the benefits when due, the insurer shall pay, in addition to the benefits owed and the interest thereon, a reasonable attorney fee based upon actual time expended.

Id. at § 1716. Thus, under the MVFRL, an insurance company has 30 days from receipt of "reasonable proof of the amount of benefits" to complete any necessary investigation, otherwise it must pay interest "at a rate of 12% per annum." Id.

Plaintiffs contend that Rutgers regularly and as a "purposeful business practice," fails to pay basic loss benefits on behalf of its policyholders within the time prescribed by § 1716. Pl.

Mem. Class Cert. at 2. Alternatively, Plaintiffs contend that Rutgers, "by failing to maintain or establish procedures or practices to make certain that benefits are paid in a prompt and timely manner, has willfully and wantonly flaunted the requirements of the [MVFRL] which has resulted in damages and loss to Plaintiffs." Id. Plaintiffs have brought claims against Rutgers for breach of contract and pursuant to the Pennsylvania Bad Faith Statute, 42 Pa.C.S.A. § 8371 and the Unfair Trade Practices Consumer Protection Law, 73 Pa. C.S.A. § 201-1 *et. seq.*("UTPCPL"). Plaintiffs also seek declaratory relief, punitive damages, litigation costs, administrative costs and counsel fees. Id.

A two-day hearing on the issue of class certification was held on December 15, 2004 and January 5, 2005. At the hearing, several members of the proposed representative classes testified. Following the first hearing day but prior to the second hearing date, defense counsel directed the court's attention to the Superior Court's recent decision in Schappell v. Motorists Mut. Ins. Co., 2004 Pa. Super. 476, 2004 Pa. Super. LEXIS 4822 (December 15, 2004), which Defendant claims bars the instant action by the Medical Providers. Thereafter, the court directed Defendants to file a Motion for Summary Judgment setting forth its position on the issue. Both the Motion for Class Certification and the Motion for Partial Summary Judgment[1] are currently before the court and are fully discussed below.

1 Rutgers has moved for summary judgment as to Dr. Silverman's claims only, not those of Valerie Davis.

DISCUSSION

I. Medical Provider Class

A. The Medical Provider Class' Claims Are Invalid Under the MVFRL

Upon review of the Complaint, it is not entirely clear what Plaintiffs' intentions are with respect to the instant lawsuit.[2] Plaintiffs do not contend that Rutgers has failed to pay benefits, nor do they claim that Rutgers has not paid interest at the rate required by the MVFRL. In fact, each of the Medical Providers who testified at the class certification hearing admitted that they were in fact paid both benefits and interest by Rutgers. (N.T. 12/15/04, S. Himmelstein at 27-8, 34-5; J. Teller at 36-7, 46, 48; M. Teller at 50-1, 56). Based upon their submissions, it appears that the aim of Plaintiffs' case is to penalize Rutgers for failing to pay medical benefits within the 30 day statutory period, regardless of whether overdue benefits were paid with interest. However, such an action can not lie.

Rutgers has taken the position that the claims of the proposed Medical Provider Class can not proceed before this court because § 1716 does not create a private right of action. In support of its argument, Rutgers cites the Superior Court's recent decision in Schappell v. Motorists Mut. Ins. Co., 2004 Pa. Super. 476, 2004 Pa. Super. LEXIS 4822 (December 15, 2004), which currently is binding law in this Commonwealth. In Schappell, plaintiff chiropractor brought a class action against defendant insurance carriers, alleging that he was entitled to bring a private action for interest as provided under the § 1716 of the MVFRL because he was paid beyond the 30 day statutory period. The insurance carriers argued that the MVFRL does not create a private right of action under § 1716 and that plaintiff was first required to exhaust his administrative remedies before instituting legal action. The Superior Court agreed with defendants and opined

that the proper forum for such disputes was the Department of Insurance, which was created by the legislature and placed in charge of "the execution of the laws of this Commonwealth in relation to insurance." Id. at 12. [3]

As a result of the Superior Court's decision in Schappell, medical providers who have been paid benefits outside the 30 day statutory time period are limited to the remedies set forth in § 1716, namely 12% interest. Here, Plaintiffs case rests solely on the contention that there has been a technical violation of § 1716. However, as each of the Medical Providers who testified at bar admitted that they were in fact paid both benefits and interest by Rutgers, the claims of the proposed Medical Provider Class necessarily fail because there are no recoverable damages. It would be both absurd and unconscionable to allow this case to proceed for the sole purpose of an award of attorneys fees. A determination which would result in the assessment of fines, penalties, or even a declaration that Rutgers has engaged in improper insurance practices does not rest within the jurisdiction of this court, but is a matter that should properly be raised before the Department of Insurance, as it deals with Rutgers' insurance practices.

B. The Medical Provider Class Has No Standing To Bring A Bad Faith Claim

As previously indicated, Schappell clearly states that § 1716 is the exclusive remedy governing overdue benefits. Still, the Medical Provider Class also purports to state a claim against Rutgers for bad faith. Bad faith actions against an insurance company in Pennsylvania are governed by 42 Pa.C.S.A. § 8371, which provides:

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2 Rutgers did not file preliminary objections to the complaint, despite myriad pleading deficiencies.
3 Rejecting the notion that the legislature intended to create a private right of action under § 1716, the Superior Court distinguished between situations where payments are "overdue" and therefore covered by § 1716 and situations where the bill was "unpaid" and covered by § 1797. The Superior Court recognized that § 1797 specifically recognized a provider's right to institute a legal action to challenge an insurer's refusal to pay for medical treatment covered by the statute, while § 1716 did not. Id.

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured[4], the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date that the claim was made by the insured in an amount equal to the prime rate of interest plus three percent.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa.C.S.A. § 8371.

Neither the Pennsylvania Supreme Court nor the Superior Court has addressed the issue of whether medical providers may bring an action under § 8371, a remedy which is normally reserved for the insured. However, this discrete issue has been addressed by several lower courts, including this court, holding therein that § 8371 does not extend to claims raised by medical providers for treatment provided to persons injured in motor vehicle accidents. *See e.g.*, Glick v. Progressive Northern Ins. Co., March Term 2002, No. 1179 (CCP Phila. 2002)(Cohen, J.); Taylor v. Nationwide Ins. Co., 35 Pa. D & C.4th 101 (1997)(Wettick, J.). Though not binding, this court finds these opinions to be persuasive and applicable under the circumstances at bar. The issue essentially is one of standing. The proposed Medical Provider Class members have no direct contractual relationship with Rutgers; Rutgers did not enter into a motor vehicle insurance policy with any members of the Medical Provider Class, nor do they claim to reside in the households of any named Rutgers insured. Similarly, it has not been alleged that any of the insured's rights have been assigned to the members of the Medical Provider Class; their rights

4 Under the MVFRL, the term "insured" is defined as 1) a individual identified by name as an insured in a policy of motor vehicle insurance or a relative of the insured who resides in the same household. 75 Pa.C.S.A. § 1702.

arise solely from the MVFRL.[5] The MVFRL establishes both the rights, as well as the remedies available to medical providers. Since the Medical Provider Class' claims are barred under the MVFRL, summary judgment must be granted in favor of Rutgers as to the Medical Providers' bad faith claims.

C. The Medical Providers May Not Bring A Claim Under the UTPCPL

The Medical Providers also seek to assert a claim against Rutgers under the UTPCPL. However, this claim too fails as a matter of law. A private right of action under the UTPCPL is available for "…a person who purchases or leases goods or services primarily for personal, family or household purposes…" 73 Pa.C.S.A. § 201-9.2. The proposed Medical Provider Class members were not purchasers of the insurance policies in question and therefore lack standing under the UTPCPL. Accordingly, summary judgment is granted in favor of Rutgers.

II. Class Certification

A. The Proposed Policyholder Class

As this court has already determined that the Medical Providers have failed to set forth a valid claim, it need not address the issue of class certification as to those plaintiffs. However, this issue remains to be decided as respects the Policyholder Class.

The purpose behind allowing class action suits is "to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate." DiLucido v. Terminix Int'l, Inc., 450 Pa.

5 It is for this reason the court rejects Plaintiffs' contention that Silverman is an intended third party beneficiary of the policy issued by Rutgers to Davis. The MVFRL was drafted to specifically define the rights and obligations of the insurance companies and treating physicians. The court does not find it appropriate to convey third party beneficiary status on medical providers who are expressly provided remedies under this statute, nor do Plaintiffs cite to any credible authority or evidence to support such a conclusion.

Super. 393, 397, 676 A.2d 1237, 1239 (1996); Lillian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976) ("[t]he class action in Pennsylvania is a procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims"). For a suit to proceed as class action, Rule 1702 requires that five criteria be met:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
>
> (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.[6]

Pa.R.C.P. 1702. Rule 1702. The burden of proving each of these elements is initially on the moving party who must present enough evidence to establish a prima facie case from which the court can conclude that the five class certification prerequisites have been met. Debbs v. Chrysler Corp., 2002 Pa. Super. 326, 810 A.2d 137, 154 (2002). Although this burden "is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made," the class proponent must demonstrate more than mere conjecture or conclusory allegations, particularly if other facts of record contradict the propriety of the class action. Cambanis v. Nationwide Ins. Co., 348 Pa. Super. 41, 45, 501 A.2d 635, 637 (1985); Cook, et al. v. Highland Water and Sewer Auth., 108 Pa. Commw. 222, 229, 530 A.2d 499 (1987).

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6 It has been noted that "the requirements for class certification are closely interrelated and overlapping ...." Janicik v. Prudential Ins. Co., 305 Pa. Super. 120, 130, 451 A.2d 455 (1982).

The court finds that Valerie Davis has failed to sustain this burden insofar as she has not presented enough evidence to support certifying the proposed Policyholder Class. As a preliminary matter, it must be noted that Davis, and similarly situated plaintiffs, lack standing to bring suit under the pertinent sections of the MVFRL because the payment for medical benefits are not made to the insured, but rather directly to the medical providers. 75 Pa.C.S.A. § 1797. Moreover, the uncontroverted evidence presented at the hearing indicates that Rutgers fully complied with § 1716 of the MVFRL by paying the required interest. Thus, Davis has failed to establish a prima facie case from which the court can conclude that the five class certification prerequisites have been met because there has been no evidence that she has suffered or is entitled to any damages.[7]

Furthermore, even applying the liberal standards of class certification, the Policyholder Class may not be certified because they have failed to meet the commonality, typicality, and efficiency and manageability requirements of Pa.R.C.P. 1702 and 1708. The proposed class representative, Davis fails to satisfy the typicality requirement because she has failed to demonstrate that the class action parties' claims and defenses are typical of the entire class. The

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7 Rutgers has not moved for summary judgment as to Ms. Davis, only as to the Medical Providers, so these issues are not currently before the court. However, this court notes that it appears unlikely that Valerie Davis can sustain a prima facie case for breach of contract, bad faith, or violation of the UTPCPL. First, Davis has not set forth a valid claim for breach of contract because the evidence demonstrates that the medical providers were in fact paid both benefits and interest by Rutgers, therefore, she has suffered no damages. Moreover, a class action based upon the bad faith statute cannot be comprised of those individuals whose claims have not paid within 30 days because a claim for "bad faith" requires more than a failure to pay in a timely manner. Terletsky v. Prudential Property and Casualty Ins. Co., 437 Pa. Super. 108, 649 A.2d 680, 688 (1994). For purposes of an action against an insurer for failure to pay a claim, such conduct "imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill-will; mere negligence or bad judgment is not bad faith." Id. (*quoting* Black's Law Dictionary 139 (6th ed. 1990)). No such evidence has been proffered here. In fact, the testimony establishes that the reason for the delay was understaffing, rather than improper motive. (N.T. 1/5/05, T. Rochon-Booker at 66, 78, 100; L Spruill at 128). Finally, in order to assert a private cause of action under the UTPCPL, every plaintiff must demonstrate his/her justifiable reliance on the misrepresentation or wrongful conduct. Toy v. Metropolitan Life Ins. Co., 2004 Pa. Super. 404, 863 A.2d 1 (2004). In other words, Davis must demonstrate that she would not have purchased the Rutgers Policy had she been aware of their insurance practices. Davis has made no such allegations in the Complaint.

purpose behind this requirement "is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that the pursuit of their interests will advance those of the proposed class members." DiLucido v. Terminix Int'l, Inc., 450 Pa. Super. 393, 404, 676 A .2d 1237, 1242 (1996). Davis has not established that her position is typical of other class members because she has not demonstrated that she is entitled to damages. Rather, the evidence indicates that Rutgers fully complied with the MVFRL in connection with the payment of Davis' claim. Clearly, this would not be true of a "typical" class members in a viable case.

With respect to the commonality element, a plaintiff generally satisfies its burden with where "the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent." Foust v. Southeastern Pa. Transp. Auth., 756 A.2d 112, 118 (Pa. Commw. 2000; Allegheny County Housing Auth. v. Berry, 338 Pa. Super. 338, 342, 487 A.2d 995, 997 (1985) ("[t]he common question of fact means precisely that the facts must be substantially the same so that proof as to one claimant would be proof as to all). Even assuming such a claim was permissible, in order to prove that the late payment of benefits was unreasonable, a case by case evaluation would be required, as each claim submitted to Rutgers involves different issues, amounts and types of coverage available. As a result, each claim eventually must be investigated and handled on a case by case basis.[8] For these same reasons,

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8 Plaintiffs cite Glick v. Progressive Northern Ins. Co., March Term 2002, No. 1179 (CCP Phila. 2002) in support of their Motion for Class Certification. Despite nearly identical factual scenarios, Glick is distinguishable from the instant matter in one very important aspect. In Glick, the issue was whether the Progressive's conduct demonstrated a pattern and practice of "blanket denial" of paying interest on overdue bills. In other words, it was alleged that Progressive had a practice of never paying interest on overdue claims, unlike the case at bar where it appears that interest was typically paid. Thus, the commonality and typicality requirements were satisfied in Glick, because the "reasonableness" of Progressive's conduct was not an issue and therefore no case by case determination was necessary. Here, it is uncontroverted that Rutgers paid the interest due under the MVFRL.

the court finds that Plaintiffs' claims also fail to satisfy the "fair and efficient mention of adjudication requirement." [9]

Based on the foregoing, Plaintiffs' Motion for Class Certification is **denied**.

CONCLUSION

For the above-stated reasons, this court finds as follows:

1. Plaintiffs' Motion for Class Certification is **denied**.

2. Defendant's Motion for Partial Summary Judgment is **granted** and all the claims of Plaintiff Scott Silverman, D.C. and members of his purported class are dismissed with prejudice.

BY THE COURT:

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C. DARNELL JONES, J.

9 To determine if a class action would constitute a fair and efficient method of resolving the issues in dispute, a court must look for the following criteria: 1) whether common questions of law or fact predominate over any question affecting only individual members; 2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action; 3) whether the prosecution of separate actions by or against individual members of the class would create a risk of (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct; (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; 4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues; 5) whether the particular forum is appropriate for the litigation of the claims of the entire class; 6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions; and 7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action. Pa.R.C.P. 1708.