

**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.: N15C-12-054 WCC CCLD
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY,)	
)	
Defendant.)	

Submitted: June 30, 2016
Decided: November 1, 2016

**Upon Defendant Liberty Mutual Insurance Company's
Motion to Dismiss Proposed Class Action Complaint - DENIED**

OPINION

John S. Spadaro, Esquire, John Sheehan Spadaro, LLC, 54 Liborio Lane, Smyrna, DE 19977. Attorney for Plaintiff and the Proposed Class.

Colin M. Shalk, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., The Renaissance Centre, 405 North King Street, Suite 300, P.O. Box 1276, Wilmington, DE 19899. Attorney for Defendant.

Tiffany Powers, Esquire, Andrew Hatchett, Esquire, Alston & Bird LLP, 1201 West Peachtree Street, Atlanta, GA 30309. Attorneys for Defendant.

CARPENTER, J.

Before the Court is Defendant Liberty Mutual Insurance Company's ("Liberty Mutual") Motion to Dismiss Plaintiff First State Orthopaedics, P.A.'s ("FSO") Proposed Class Action Complaint. For the reasons set forth below, Defendant's Motion will be DENIED.

I. FACTS

FSO brings this proposed class action on behalf of all Delaware health care providers who, at any time since December 4, 2012, submitted health care invoices to Liberty Mutual for care provided to Delaware workers' compensation claimants where either (i) the invoice was never contested by Liberty, (ii) the invoice was unsuccessfully contested by Liberty through the statutory utilization review process, or (iii) though ultimately paid by Liberty, payment occurred only after the expiration of the 30-day period under 19 *Del. C.* § 2322F(h), and Liberty Mutual failed to pay the required statutory interest. Put more simply, this litigation has been brought to attack Liberty Mutual's alleged practice of refusing to pay the 1% interest on outstanding invoices as mandated by § 2322F(h).

To provide some background, in 2007, the General Assembly enacted comprehensive reforms to the Delaware Workers' Compensation Act ("WCA"). The amended legislation created the utilization review program. This allowed for the prompt resolution of disputes between employers, insurance carriers, and health

care providers regarding treatment compensable under the WCA. The findings of the Workers' Compensation Oversight Panel, which oversaw the utilization review program, were appealable to the Industrial Accident Board ("Board").

The 2007 amendments also imposed repercussions on insurance carriers for failure to pay legitimate claims promptly. The legislation required invoices be paid within 30 days of receipt from the health care provider, as long as the claim contained substantially all of the data necessary to assess the appropriateness of the claim, and further mandated that all unpaid invoices be subject to an interest rate of 1% per month.

Here, the Complaint alleges Liberty Mutual routinely failed to pay statutory interest it indisputably owed on claims not contested within 30 days of receipt and claims it unsuccessfully disputed in the utilization review process. FSO therefore maintains that Liberty Mutual owes interest accrued under § 2322F(h) to FSO and others similarly situated. As a result, FSO requests that the Court grant class action certification and award declaratory relief in addition to compensatory and punitive damages.¹

Liberty Mutual has moved to dismiss the Complaint, asserting no private right of action exists under the statute. According to Liberty Mutual, only the Board has

¹ Count I of the Complaint seeks a declaratory judgment. Count II is entitled "Private Right of Action Pursuant to 19 *Del. C.* § 2322F(h)."

the authority to decide the interest rate dispute. FSO opposed the Motion and a hearing was held before this Court on April 18, 2016.

The question presented here is essentially whether the Court or the Industrial Accident Board should decide FSO's claim regarding Liberty Mutual's failure to make interest payments required under § 2322F(h). The unspoken procedural effect of the decision is whether any health care provider would reap the benefits of § 2322F(h), as obviously a class action claim could not be raised before the Board and the economics of appealing each individual claim separately to the Board would make such action unrealistic or impractical. As such, the resolution of this issue of first impression is important to both parties.

II. STANDARD OF REVIEW

Pursuant to Superior Court Civil Rule 12(b)(6), the Court may dismiss a complaint for "failure to state a claim upon which relief can be granted."² Dismissal is only appropriate where the Court determines "with *reasonable certainty* that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief."³ In deciding Defendant's Motion to Dismiss, the Court must assume as true the well-pleaded allegations of the

² See Super. Ct. Civ. R. 12(b)(6).

³ See *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3 (Del. Super. Apr. 16, 2014) (emphasis added) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

Complaint,⁴ and afford Plaintiff “the benefit of all reasonable inferences” drawn therefrom.⁵

III. PRIVATE RIGHT OF ACTION

Delaware courts have traditionally applied the three factor test articulated by the Supreme Court of the United States in *Cort v. Ash*⁶ when determining whether a private right of action exists. While there has been some suggestion that a stricter analysis focusing entirely on legislative intent is the more appropriate standard, our courts generally adhere to the three factor analysis and this Court will do the same.

(a) Member of the Class

The first inquiry is whether Plaintiff is a member of the class for whose benefit the statute was enacted. While there is no question that the WCA was generally created to ensure the prompt and fair payment of injured worker’s claims, the Court believes it would be unfair to end the inquiry at this point. The injured worker has little interest in the administrative processing of the health care provider’s claim and once the appropriateness of that claim has been determined by

⁴ See *Solomon v. Pathe Commc’ns Corp.*, 672 A.2d 35, 38-39 (Del. 1996). See also *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995) (providing that complaint is “well-plead” if it puts opposing party on notice of claim brought against it); *In re Benzene Litig.*, 2007 WL 625054, at *5 (Del. Super. Feb. 26, 2007) (discussing broad test for sufficiency of complaint).

⁵ See *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (providing also that the Court is not required to blindly accept all allegations or draw all inferences in the plaintiff’s favor).

⁶ 422 U.S. 66 (1975).

the administrative forum, their interest totally diminishes. A close examination of this part of the statute reflects that, once the issues of coverage and legitimacy of a given claim are determined through the administrative process, the only party with any interest in pursuing a claim and for whom the benefit of the statute was created would be the health care provider. It is their invoices that are not being paid appropriately by the insurance carrier and it is for their inconvenience and failure to be paid promptly that the interest provision was created. As such, the Court is convinced that this factor has been established.

(b) Legislative Intent

The second inquiry is whether there is any legislative intent to create an implied private right of action. What is clear from the WCA is that the legislature intended that undisputed claims and claims determined to be appropriate be paid promptly and that failure of an insurance carrier to do so result in a 1% interest penalty. The only party that would appear to benefit from this penalty would be the health care providers, who either have their invoices timely processed or receive additional interest for unpaid claims. In addition, the only party under the Act that would have any incentive to enforce the interest penalty provision against the insurance carrier would be the provider. So while the words “private cause of action” are not mentioned or expressly provided for in this statute, the clear

implication is that the legislature was providing a tool to the health care industry to ensure their bills were being properly paid. The Board's role is to resolve disputes over coverage and to ensure an injured worker is receiving the benefits they are entitled to under the WCA. Once those issues are resolved, they have no further decision to make given that the timing and rate of interest are predetermined by the statute. To say some administrative function remains for the Board under the Act is simply a fallacy. As such, the Court believes the legislature intended to provide health care providers a means of enforcing prompt payment of their invoices.

(c) Advancement of the Statute's Purpose

The final factor to consider is whether recognition of an implied private right of action would advance the statute's purpose. The answer here is clearly "yes." The purpose of § 2322F(h) of the WCA is to ensure that uncontested invoices are promptly paid and that any disputed claims are timely resolved. The only mechanism the statute provides to accomplish this is the potential interest penalty which would result when insurance carriers fail in either respect. So giving the health care provider a private right to enforce this penalty, the only party with any financial interest to do so, actually serves to promote the intent of the statute.

Having found that all three factors support allowing Plaintiff to pursue its private cause of action, Defendant's Motion as to this issue is hereby DENIED. To

be clear, the Court's ruling allows Count II of the proposed Complaint to remain as it relates to the enforcement of the 1% interest penalty. While the Court will permit the Complaint as written to continue, it warns Plaintiff's counsel that it has significant concerns regarding what appears to be an assertion by the Plaintiff that Liberty Mutual is abusing the utilization review process. It would seem that anything beyond the enforcement in pursuit of the interest owed would be a matter for the Board and not the Court. However, the Court will not address the issue now and will allow for further discovery. Thus, at this stage of the litigation, the Court will allow Count II to continue unless redrafted by Plaintiff in light of this Opinion.⁷

IV. DECLARATORY JUDGMENT

Count I of the Complaint seeks relief in the form of a declaratory judgment. Defendant asserts two arguments in support of its Motion to Dismiss Count I: (1) no actual controversy exists between the parties, and (2) Plaintiff lacks standing to pursue its damages claims. At this stage of the litigation, the Court is simply not in a position to find either argument supported to the extent that would justify dismissal.

⁷ In its Brief in Opposition to Defendant's Motion to Dismiss, Plaintiff relies on *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361 (Del. 1996) for the proposition that the WCA's exclusivity bar does not apply to FSO's claim. See Pl.'s Br. in Opp'n to Def.'s Mot. to Dismiss at 9-10. Defendant's Motion does not assert the exclusivity clause as a ground for dismissing the Complaint. Thus, while the Court finds the *Pierce* decision appears to support Plaintiff's contentions, it need not address this issue here.

If the evidence supports Plaintiff's contention that Liberty Mutual refuses to pay interest on claims not paid within 30 days, a payment allegedly mandated by statute, there is clearly a controversy between the parties. The Court's declaration that the interest obligation exists and that Liberty Mutual possesses no good faith basis for refusing to pay would establish the framework for the parties continuing relationship and justifies the declaratory judgment count remaining in the litigation.

With respect to standing, Liberty Mutual argues Plaintiff has failed to assert that it has sustained any losses as opposed to the overall putative class. The Court finds the pleadings, as alleged, are sufficient to place Defendant on notice of the claims and that those pleadings assert that FSO has suffered a loss. As such, there is no basis to justify dismissal for lack of standing at this juncture in the litigation. As such, the Court finds the two arguments advanced in Defendant's Motion to Dismiss Count I are without merit.

V. CONCLUSION

Based on the reasoning set forth above, Defendant's Motion to Dismiss is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.