IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JOYCE A. SANBORN, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	C.A. No. N13C-01-018 EMD CCLD
GEICO GENERAL INSURANCE COMPANY,	)	
Defendant.	)	

Submitted: October 26, 2015
Decided: February 1, 2016

Upon Consideration of
Plaintiff's Motion for Partial Summary Judgment on the "Standing" Issue
DENIED

Upon Consideration of
Defendant's Motion for Summary Judgment
DENIED

John S. Spadaro, Esquire, John Sheehan Spadaro, LLC, Hockessin, Delaware, *Attorney for Plaintiff Joyce A. Sanborn.*

Paul A. Bradley, Esquire, Maron Marvel Bradley & Anderson LLC, Wilmington, Delaware, and Meloney Perry, Esquire, Perry Law, P.C., Dallas Texas, *Attorneys for Defendant GEICO General Insurance Company.*

DAVIS, J.

INTRODUCTION AND PROCEDURAL HISTORY

This is a civil action assigned to the Complex Commercial Litigation Division of the Court. Despite the arguments set forth by the parties in recently filed briefs, plaintiff Joyce A. Sanborn brought this "as an action for declaratory relief" and not for money damages. Ms.

Sanborn contends that Defendant GEICO General Insurance Company's ("GEICO") "current practice of failing or refusing to pursue recovery of its insureds' Personal Injury Protection ("PIP") deductible when only some, but not all, of the deductible has been paid, in violation of 21 *Del. C.* § 2118(a)(2)(f)". Ms. Sanborn purports to pursue this suit as a proposed class action, pursuant to Superior Court Civil Rule 23. The proposed class is comprised of all Delaware insureds of GEICO whose PIP coverage is subject to a deductible.[1]

On January 3, 2013, Ms. Sanborn filed the Complaint against GEICO. The Complaint seeks a declaration that GEICO's current practice of failing or refusing to pursue recovery of its insureds' PIP deductibles on the basis that only some, but not all, of the deductible has been paid is unlawful and in violation of 21 *Del. C.* § 2118(a)(2)(f). On March 15, 2013, GEICO filed Defendant GEICO General Insurance Company's Answer to Plaintiff's Class Action Complaint (the "Answer"). GEICO asserts, among other affirmative defenses, that (i) Ms. Sanborn lacks standing; (ii) Ms. Sanborn's claim is not ripe; and, (iii) Ms. Sanborn's claim is moot.

A. MS. SANBORN'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On January 9, 2015, Ms. Sanborn filed Plaintiff Joyce A. Sanborn's Motion for Partial Summary Judgment on the "Standing" Issue (the "Partial Summary Judgment Motion"). Ms. Sanborn argues that the term "similar insurance" in GEICO's excess clause is inherently ambiguous. Ms. Sanborn contends that because the excess clause is ambiguous, the GEICO policy must be treated as primary insurance. Ms. Sanborn further argues that GEICO chose to extend PIP coverage to Ms. Sanborn under its own policy, and thus waived any right to treat its PIP coverage as excess insurance.

[1] To date, Ms. Sanborn has not moved for entry of an Order under Rule 23(c) of the Superior Court Rules of Civil Procedure to certify the class. Therefore, the claim, as applicable to the class, is not before the Court. The instant opinion focuses solely on Ms. Sanborn in her individual capacity.

On February 13, 2015, GEICO filed Defendant GEICO General Insurance Company's Response In Opposition To Plaintiff Joyce A. Sanborn's Motion for Partial Summary Judgment on the "Standing" Issue (the "Partial Summary Judgment Motion Opposition"). GEICO argues that the term similar insurance, as used in the excess clause, is not ambiguous. GEICO further contends that its policy complies with the Delaware PIP statute and, thus, it is proper to treat its policy as an excess policy under the present facts and circumstances. Lastly, GEICO argues that it has never acknowledged its PIP coverage as primary coverage, and therefore has not waived its right to treat its PIP coverage as excess insurance.

On February 27, 2015, Ms. Sanborn filed Plaintiff Joyce A. Sanborn's Reply Brief In Support Of Her Motion For Partial Summary Judgment On The "Standing" Issue (the "Partial Summary Judgment Motion Reply").

B. GEICO'S MOTION FOR SUMMARY JUDGMENT

On March 12, 2015, GEICO filed Defendant GEICO General Insurance Company's Motion for Summary Judgment (the "Summary Judgment Motion"). GEICO contends that Ms. Sanborn has no standing to sue; that Ms. Sanborn's claim for declaratory relief is not ripe for adjudication; and in the alternative, that Ms. Sanborn's claim for declaratory relief is moot.

On April 17, 2015, Ms. Sanborn filed Plaintiff Joyce A. Sanborn's Answering Brief In Opposition To GEICO's Motion For Summary Judgment (the "Summary Judgment Motion Opposition"). Ms. Sanborn argues that she has established the elements of standing and that the dispute is ripe for adjudication. Lastly, Ms. Sanborn contends that the claim is not moot because GEICO's adoption of new business practices implicates the doctrine of voluntary cessation.

On May 1, 2015, GEICO filed Defendant GEICO General Insurance Company's Reply Brief In Support Of Its Motion For Summary Judgment (the "Summary Judgment Motion Reply").

On October 26, 2015, the Court held a hearing on the Partial Summary Judgment Motion, the Summary Judgment Motion, and the respective responses and replies. After hearing arguments from the parties, the Court took the matter under advisement. For the reasons stated in this Opinion, the Court **DENIES** Plaintiff's Partial Summary Judgment Motion and **DENIES** GEICO's Summary Judgment Motion.

RELEVANT FACTS

On December 12, 2010, Ms. Sanborn was injured in an automobile accident in Middletown, Delaware. Ms. Sanborn was a passenger in a rental car operated by Christopher Craig. The rental car was owned by Enterprise Leasing Company of Philadelphia ("ELCO"), and rented from Enterprise Rent-a-Car ("ERAC") in Wilmington. At the time of the accident, Mr. Craig was insured by Progressive Direct Insurance Company ("Progressive"). The Rental Agreement provided coverage for the rental car and in addition, Mr. Craig purchased the optional Personal Accident Insurance ("PAI"). At the time of the accident, GEICO insured Ms. Sanborn. Ms. Sanborn's PIP policy was subject to a $10,000 per accident deductible. Therefore, the potential sources of insurance for Ms. Sanborn's injuries included Mr. Craig's Progressive policy, the PAI purchased with the rental car, and Ms. Sanborn's GEICO policy.

Progressive reported the accident to GEICO on December 17, 2010. In January 2013, ***subsequent*** to the instant action being filed, GEICO implemented a new claims-handling policy. The new policy stated that GEICO would pursue recovery of its insureds' PIP deductibles regardless of whether the applicable deductible was exhausted. On February 28, 2013 and

March 8, 2013, pursuant to its new claims-handling guidelines, GEICO sent letters to ELCO and Progressive, respectively, advising of GEICO's right to recover any portion of the deductible paid by Plaintiff.

The dispute arises in determining GEICO's obligation under the Delaware PIP Statute, 21 *Del. C.* § 2118(a)(2)(f), regarding the recovery of its insureds' PIP deductibles.

LEGAL STANDARD

The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[2] Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[3] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.[4] The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.[5] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.[6]

---

[2] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99–100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).
[3] *Id*.
[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *See also Cook v. City of Harrington*, 1990 WL 35244 at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").
[5] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).
[6] S*ee Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).

DISCUSSION

A. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE "STANDING" ISSUE

1. GEICO's Excess Insurance Clause is Not Inherently Ambiguous

Ms. Sanborn's GEICO policy contains a "No-Fault Coverages" section, which contains the following language:

> This insurance is excess over *similar insurance* available to any person injured because of the use or operation of a vehicle not covered by a Delaware No-Fault policy.

Ms. Sanborn argues that the term "similar insurance" is inherently ambiguous. Ms. Sanborn contends that the ambiguity must be construed against GEICO, as the drafter, in conformity with the doctrine of *contra proferentem*. Ms. Sanborn fails to direct the Court to any cases in Delaware that agree with her position. Instead, Ms. Sanborn cites to a multitude of cases from other jurisdictions that have addressed the meaning of the term "similar insurance" as it appears in automatic termination clauses.[7]

For example, Ms. Sanborn relies upon *United Fire and Casualty Company v. Victoria*. In *Victoria*, the term appeared in an auto policy's termination clause:

> If you obtain other insurance on "your covered auto," any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.[8]

The policies at issue in *Victoria* were a United policy and a State Farm policy. The United policy provided liability coverage of $250,000 per person and $500,000 per accident. The State

[7] *United Fire & Cas. Co. v. Victoria*, 576 N.W.2d 118 (Iowa 1998) (finding that the new insurance policy with different limits was not "similar" for purposes of the automatic termination clause); *Employers Mut. Cas. Co. v. Martin*, 671 A.2d 798 (R.I. 1996) (finding that "the disparity in coverage is sufficient to preclude the interpretation that the two policies represent similar insurance."); *South Carolina Farm Bureau Mut. Ins. Co. v. Courtney*, 536 S.E.2d 689 (S.C. Ct. App. 2001) ("Where, as here, a second, subsequent automobile insurance policy differs in both the amount of coverage and the kind of coverage provided, the policies will not be held to be 'similar' insurance as contemplated in an automatic termination provision.").

[8] *Victoria*, 576 N.W.2d at 120.

Farm policy provided liability coverage of $100,000 per person and $300,000 per accident.[9] The Iowa Supreme Court stated that an average policy buyer is not an expert on insurance language, and to the average buyer, "a policy with substantially lower limits would not likely be viewed as 'similar.'"[10] The Court applied an objective test to determine whether the term was ambiguous and examined "whether a genuine uncertainty exists as to which of two or more possible meanings is the proper one."[11] The Court found that the disparate limits of liability and differing policy provisions rendered the two policies not "similar" for purposes of the automatic termination clause.[12]

GEICO contends that cases involving the term "similar insurance" used in automatic termination clauses are distinguishable from this case, where the term "similar insurance" is used in an excess coverage clause. Like Ms. Sanborn, GEICO cannot direct this Court to any decision by a Delaware court. GEICO relies on the reasoning set out in *Hogdon v. Barr*.[13] In *Hogdon*, the Court held that the term "similar insurance" as used in the automatic termination clause was ambiguous because it was not clear whether the similarity applied to the type of insurance or to the amount of coverage.[14] However, the Court went on to state:

> This determination is consistent with the purpose behind "other insurance" provisions. The original reason for such clauses was to prevent overinsurance and double recovery. These clauses evolved, with respect to automobile liability insurance contracts, to "function solely to reduce or eliminate the insurer's loss in the event of *concurrent* coverage of the same risk." Such clauses are valid "as long as their enforcement *does not* compromise coverage for the insured." If an insured "is afforded *full* indemnification for a loss," there is no public policy against their use.[15]

---

[9] *Id*.
[10] *Id*.
[11] *Id*. at 121.
[12] *Id.*
[13] 1996 WL 798748 (Conn. Super. April 26, 1996).
[14] *Id*. at *2.
[15] *Id*. (internal citations omitted) (emphasis in original).

The proper construction of an insurance contract is purely a question of law.[16] In contrast to automatic termination clauses, "similar insurance," as used in an excess coverage clause, does not act to carve out an area of non-coverage in the insured's policy. Rather, the clause merely states that if similar insurance is available, that insurance must be applied before applying the coverage in the GEICO policy. If the similar insurance does not fully compensate the insured for her loss, then the coverage in the GEICO policy will cover the excess amounts up to its stated limits. The excess provision does not compromise coverage for the insured. Rather, it aims to prevent double recovery and to reduce or eliminate the insurer's loss in the event of concurrent coverage of the same risk. With these considerations in mind, and considering the GEICO policy as a whole, the term "similar insurance," as used in reference to an excess coverage provision, is not ambiguous.

2. The Delaware PIP Statute Does Not Require That Ms. Sanborn's Policy be Treated as Primary Insurance

Section 2118(a)(2)(d) of Title 21 of the Delaware Code provides:

> The coverage required by this paragraph shall also be applicable to the named insureds and members of their households for accidents which occur through being injured by an accident with any motor vehicle other than a Delaware insured motor vehicle while a pedestrian or while occupying any registered motor vehicle other than a Delaware registered insured motor vehicle, in any state of the United States, its territories or possessions or Canada.[17]

Ms. Sanborn argues that the statute requires that when an insured is injured in an accident involving a vehicle not registered in Delaware, the Delaware insurance policy must be applied as the primary coverage. Ms. Sanborn states that this conclusion is required by Delaware public policy, which favors full compensation of victims of automobile accidents. Ms. Sanborn

[16] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).
[17] 21 *Del C.* § 2118(a)(2)(d).

suggests that if GEICO's policy is not designated as the primary policy, Ms. Sanborn will be forced to forgo fuller compensation in favor of lesser compensation.

GEICO argues that the statute requires every Delaware automobile insurance policy to contain the required minimum liability coverage, $15,000 per person and $30,000 per accident. GEICO contends that the statute allows the required coverage, by agreement of the parties, to be "written subject to certain deductibles, waiting periods, sublimits, percentage reductions, *excess provisions* and similar reductions offered by insurers . . . ."[18]

The United States District Court for the District of Delaware explained the treatment of "Other Insurance" provisions by Delaware Courts.[19] The District Court explained that "other insurance" provisions state that the policy will provide only limited coverage for an insured's loss if other insurance is available.[20] An example of such a limitation on coverage is an excess clause. "An excess clause provides that if other insurance is available, the policy with the excess clause will provide coverage for an insured's loss only after the limits of coverage found in the other insurance policy are exhausted."[21]

In *Krutz v. Harleysville Mutual Insurance Company*, the plaintiff was "not faced with the prospect of being denied benefits entirely but rather in what order she may potentially receive the maximum benefits of the subject policies."[22] The District Court stated that plaintiff's "Aetna insurance will be available whenever she is injured by an uninsured or underinsured motor vehicle, while traveling in a non-owned vehicle that may not be insured, and so long as Ms.

[18] 21 *Del. C.* § 2118(a)(2)(f) (emphasis added).
[19] *Krutz v. Harleysville Mut. Ins. Co*., 766 F. Supp. 219, 222 (D. Del. 1991).
[20] *Id*.
[21] *Id*.
[22] *Id*. at 226.

Krutz is not deprived of some uninsured/underinsured motorist benefits, Delaware's public policy is not threatened."[23]

In the present case, the Court finds that GEICO's excess provision is in compliance with the Delaware PIP statute and should not be deprived of its effect. Ms. Sanborn's policy contains the required minimum liability coverage—$15,000 per person and $30,000 per accident—and is written subject to a viable excess clause. Section 2118(a)(2)(d) requires that the coverage provided for by the policy be applicable when the insured, or a member of his household, is occupying a motor vehicle registered in a state other than Delaware and is injured in an accident with a non-Delaware insured motor vehicle.[24] Section 2118(a)(2)(d) has no effect on the order of liability when multiple policies are implicated in an accident. Ms. Sanborn will not face the prospect of being denied benefits entirely. Accordingly, the Court holds that Section 2118(a)(2)(d) does not require Ms. Sanborn's GEICO policy to be treated as the primary policy even though when the December 12, 2010 accident occurred Ms. Sanborn occupied a motor vehicle that was not registered or insured in Delaware.

3. Whether GEICO Waived its Right to Treat its PIP coverage as Excess Insurance is a Factual Issue for the Jury to Decide

Ms. Sanborn argues that GEICO consciously, voluntarily, and unequivocally refrained from asserting its status as excess insurer to the ERAC policy. Ms. Sanborn contends that GEICO knew that other potential sources of insurance existed; knew that those sources arose under the ELCO and Progressive policies; acted under a duty to investigate the applicability of those potential sources of insurance; and consciously chose to extend PIP coverage under its own policy and apply Ms. Sanborn's out-of-pocket medical expenses against its own PIP deductible.

[23] *Id*.
[24] 21 *Del. C*. § 2118(a)(2)(d)

To establish GEICO's waiver, Ms. Sanborn points to the deposition testimony of Lorraine Workman, GEICO's corporate designee and regional liability administrator. Ms. Sanborn asked Ms. Workman about an entry made by a GEICO PIP adjuster in the database regarding Ms. Sanborn's PIP coverage. The note states in part, "Critical coverage condition ha[s] been resolved. Okay to extend PIP minus deductible."[25] When asked about the significance of that entry, Ms. Workman stated: "That was the point at which the company had decided that we would afford PIP benefits to Ms. Sanborn because both Enterprise and Progressive had indicated they were not."[26] Ms. Workman went on to state:

> It's our position that an insured, as Ms. Sanborn is, is entitled to their benefits under the policy after determination, whether there's coverage that should apply in advance . . . . So, yes, the determination, at this point, after we were told that neither Enterprise was going to afford her benefits and that Mr. Craig's carrier [Progressive] was not going to afford her benefits, then, yes, I think that was a correct determination that she was entitled to her coverage.[27]

Ms. Sanborn contends that this testimony establishes GEICO's acceptance of its designation as primary insurer, as well as GEICO's conscious and voluntary waiver from asserting its status as an excess insurer.

GEICO contends that there is no evidence that it, at any time, acknowledged its PIP coverage as primary. GEICO argues that the Ms. Workman deposition excerpt cited by Ms. Sanborn does not support Ms. Sanborn's conclusion that GEICO waived asserting its status as excess insurer. Ms. Workman stated that GEICO made the determination to extend PIP benefits to Ms. Sanborn under the circumstances known at the time.[28] Contrary to Ms. Sanborn's assertion, GEICO states that at the time it extended these benefits, GEICO was not aware of all potential sources of insurance. Further, GEICO argues that the evidence shows that the GEICO

[25] Pl. Mot. Summ. Judg., Ex. G, Lorraine Workman Deposition, July 17, 2014 ("Workman Dep."), 70-71.
[26] Workman Dep. 71: 7–11.
[27] Workman Dep. 72: 5–9, 15–21.
[28] Workman Dep. 72: 22–24.

adjuster told Ms. Sanborn that she was "entitled to make the claim" and that GEICO would have reviewed the circumstances again, if and when Ms. Sanborn met her deductible.[29]

In order to prove waiver, Ms. Sanborn must prove three elements:

> (1) There is a requirement or condition to be waived, (2) the waiving party must know of the requirement or condition, and (3) the waiving party must intend to waive that requirement or condition.[30]

"Intention forms the foundation of the doctrine of waiver, and an intention to waive must appear clear from the record evidence before summary judgment is granted on this issue."[31] In *AeroGlobal Capital Management., LLC v. Cirrus Industries, Inc.*, the Court found that it was for the trier of fact to decide whether the defendant's conduct under the circumstances evidenced an intentional, conscious, and voluntary abandonment of its claim or right. "Where the inference of ultimate fact to be established concerns intent or other subjective reaction, summary judgment is ordinarily inappropriate."[32]

The record in this case does not demonstrate a clear intention by GEICO to waive its status as excess insurer. Because there is a genuine issue of material fact regarding GEICO's intention to waive its status as excess insurer, summary judgment is inappropriate.

B. GEICO'S MOTION FOR SUMMARY JUDGMENT

1. Ms. Sanborn Has Established Standing to Bring This Lawsuit

GEICO contends that Ms. Sanborn has failed to establish that she has suffered an injury-in-fact that is fairly traceable to GEICO's conduct, which will likely be redressed by a favorable decision. Ms. Sanborn contends that the standing issues raised in the present case are identical to

[29] Workman Dep. 77: 12–15.
[30] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).
[31] *Id*. at 445.
[32] *Id*. at 446.

those addressed by this Court in *Stratton v. American Independent Insurance Company*.[33] Ms. Sanborn argues that just as the *Stratton* Court determined that plaintiff had standing to bring his suit, this Court should make the same determination and GEICO's Summary Judgment Motion should be denied. For the reasons set out below, the Court finds that Ms. Sanborn has established standing to bring her lawsuit.

a. Injury-in-Fact

GEICO contends that Ms. Sanborn has failed to establish an injury-in-fact. GEICO's Interrogatories sought information about (i) other insurance policies under which Ms. Sanborn is making a claim for the injuries sustained in the accident at issue; (ii) health care providers who treated Ms. Sanborn for injuries sustained in the accident; (iii) the amount of out-of-pocket expenses Ms. Sanborn paid for any treatment; and (iv) whether Ms. Sanborn received any form of monetary benefits or income as a result of the accident. Ms. Sanborn objected and repeatedly refused to provide responsive answers, stating that the information sought is irrelevant to the subject matter of the litigation in her Answers to GEICO's Interrogatories.[34] GEICO argues that by failing to assert specific facts related to Ms. Sanborn's claim, Ms. Sanborn has failed to establish that she has suffered an injury-in-fact and, therefore, lacks standing to bring her claim.

Ms. Sanborn argues that the principal issue in the present case is identical to the issue raised by the plaintiff in *Stratton*. The plaintiff in *Stratton* claimed that his automobile insurer refused to provide him, and others similarly situated, the full benefit of the mandated coverage under 21 *Del. C.* § 2118(a)(2)(f) by ignoring its obligation to pursue recovery of its insured's

[33] 2010 WL 3706617 (Del. Super. Sept. 16, 2010).
[34] Ms. Sanborn stated in many of the Answers to GEICO's Interrogatories: "Ms. Sanborn objects to this interrogatory on the grounds that it is overly broad and unduly burdensome in its application, and on the further ground that it seeks information neither relevant to the subject matter of this litigation, nor reasonably calculated to lead to the discovery of admissible evidence."

deductibles.[35] The plaintiff sought a declaratory judgment that PIP insurers "are obligated by statute and contract to pursue PIP deductibles on behalf of their insureds and that AIIC, [Stratton's insurer], routinely has failed to meet these obligations."[36] AIIC argued that its obligation to pursue the recovery of an insured's deductible does not arise until it makes a PIP payment.[37] The *Stratton* Court did not make a determination as to plaintiff's standing because it ordered limited discovery to determine the validity of the insurance company's alleged attempt to "pick off" the class representative by settling the lead plaintiff's claim. However, the *Stratton* Court did state that, in the absence of the insurer's "pick off" attempt, it would find that the plaintiff had standing to bring his claim:

> In this case, if the Court was to consider only the allegations of the Amended Complaint and view them in the light most favorable to Stratton, the Court would readily find that Stratton has standing to bring his claim. Stratton alleges that he suffered an "injury in fact" that is directly "trace[able] to the challenged action of the defendant," namely that the value of his PIP insurance has been and will continue to be diminished by AIIC's practice of declining in good faith to pursue recovery of its insureds' PIP deductibles via subrogation.[38]

The Court finds that Ms. Sanborn has established an injury-in-fact. At the time Ms. Sanborn filed this action, GEICO's then-current policy did not routinely seek recovery of the deductibles of its insured until the applicable deductible was exhausted. Shortly after Ms. Sanborn filed her lawsuit, GEICO's new claims-handling policy was implemented. The new policy provides that GEICO will assert its subrogation rights and protect its insureds' interests, regardless of whether the applicable deductible has been exhausted. Although GEICO's new policy adheres to 21 *Del. C*. § 2118(a)(2)(f), GEICO has made it clear, in this litigation and as recently as at oral arguments on October 26, 2015, that GEICO still disagrees with the Court's

[35] *Stratton*, 2010 WL 3706617 at *1.
[36] *Id*.
[37] *Id*. at *2.
[38] *Id*. at *6.

decision in *Stratton* and does not believe its former policy violated 21 *Del. C.* § 2118(a)(2)(f). Accordingly, and despite the new claims-handling policy, GEICO still maintains the position that the insurer is not required to pursue recovery of an insured's deductible until the deductible is exhausted.[39]

Because GEICO's legal position as to 21 Del C. § 2118(a)(2)(f) appears to be at odds with its current policy, seeking subrogation and protecting the insured's interests regardless of whether the applicable deductible has been exhausted, the Court finds that Ms. Sanborn suffered an injury-in-fact at the time the Complaint was filed. The Court also finds that Ms. Sanborn's GEICO policy was diminished in value because of GEICO's practice of seeking recovery for its insureds only when the applicable deductible was exhausted. Just as GEICO voluntarily adopted the new claims-handling policy, GEICO could just as easily revert back to the former policy, which is in alignment with its position on the ability to seek recovery of its insureds' deductibles. The discrepancy between GEICO's policy and its interpretation of the statute render the injury suffered by Ms. Sanborn one that is capable of evading review. Therefore, the Court determines that Ms. Sanborn has plead the existence of an injury sufficient to establish standing.

b. Causal Connection

GEICO contends that Ms. Sanborn has failed to establish a causal connection between the complained-of injury and the challenged action of GEICO. GEICO argues that Ms. Sanborn's complained-of injury is traceable to her own inaction in handling the claim. GEICO claims that Ms. Sanborn failed to: (1) notify GEICO that she paid any medical expenses out-of-pocket; (2) request that GEICO recover any amounts that she paid out-of-pocket; (3) notify GEICO of her suit against Mr. Craig as well as the resulting settlement; and (4) pursue other available PIP coverage.

[39] Workman Dep. 33: 14–21.

Ms. Sanborn contends that she did not hinder GEICO from attempting to recover her deductible. Ms. Sanborn claims that she promptly informed GEICO of the accident as well as all potential sources of insurance. Ms. Sanborn also claims that she informed GEICO of the accident-related medical expenses that she incurred. Ms. Sanborn argues that even if she provided GEICO with untimely notice of her claim and was otherwise uncooperative, GEICO waived these defenses by not raising them earlier. Further, Ms. Sanborn contends that GEICO was required to show "that evidence which . . . could have been developed by prompt investigation has not or cannot be developed by later investigation or that in some other respect it is reasonably probable that a resolution of the claim could have been reached if prompt notice had been given . . . ."[40] Ms. Sanborn lastly argues that GEICO has not offered proof of prejudice arising from Ms. Sanborn's alleged late notice and noncooperation, and thus cannot avoid performance under the policy.

The Court finds that there is a causal connection between the complained-of injury and the challenged action of GEICO. Just as the Court determined in *Stratton*, this Court finds that Ms. Sanborn's injury is directly traceable to the challenged action of GEICO—namely that the value of Ms. Sanborn's PIP insurance was diminished by GEICO's practice of declining to pursue recovery of its insureds' PIP deductibles via subrogation. The record, at this point in the litigation, appears to demonstrate that Ms. Sanborn timely notified GEICO of the December 12, 2010 accident and provided GEICO with medical bills and records pertaining to injuries Ms. Sanborn sustained as a result of the accident. Accordingly, any claims by GEICO alleging untimely notice and noncooperation by Ms. Sanborn are unavailing.

[40] *Falcon Steel Co. v. Md. Cas. Co.*, 366 A.2d 512 (Del. Super. 1976).

c. Redressability

GEICO contends that Ms. Sanborn has failed to establish that it is likely, and not merely speculative, that the complained-of injury will be redressed by a favorable decision. GEICO states that the Court is left to speculate whether Ms. Sanborn was actually made whole through her settlement with Mr. Craig, and whether GEICO's alleged conduct had any bearing on whether she was made whole. GEICO states that Ms. Sanborn settled with Mr. Craig in the amount of $7,500 and released Mr. Craig and any other person, corporation or entity, their heirs, executors, administrators, agents and assigns from any causes of action resulting from the December 12, 2010 accident. Thus, GEICO contends that Ms. Sanborn has assumed responsibility for all medical expenses connected with the accident that were the subject of the settlement with Mr. Craig.

GEICO also argues that a PIP insurer's statutory right of subrogation is limited to the tortfeasor's maximum coverage for all claims "after the injured party's claim has been settled or otherwise resolved."[41] As such, GEICO contends that Ms. Sanborn's recovery would be limited to the liability coverage not already exhausted by any claims made against the per-accident policy limits, not just Ms. Sanborn's claim. There is evidence that at least two other parties within another vehicle involved in the accident were seeking compensation from Mr. Craig's carrier, Progressive, for serious injuries they sustained as a result of the accident. Because there is no evidence showing whether any portion of Mr. Craig's per-accident PIP coverage remains, GEICO argues that the Court is left to speculate whether any PIP insurer could or should have recovered any more than Ms. Sanborn already has recovered. GEICO contends that if Ms. Sanborn has recovered all that could have been recovered, the alleged diminished value or her PIP insurance has been restored.

[41] 21 *Del. C.* § 2118(g)(1).

The Court finds that a favorable decision would redress Ms. Sanborn's claim. Ms. Sanborn is not seeking money damages; therefore, Ms. Sanborn's settlement with Mr. Craig has no bearing on whether Ms. Sanborn will be adequately redressed. Ms. Sanborn seeks a declaration that GEICO must attempt recovery of the PIP deductibles of its insureds, regardless of whether such deductible has been exhausted. Therefore, just as in *Stratton*, if the Court finds that GEICO has not met its obligations under the PIP statute, and directs GEICO to engage in practices that comport with 21 *Del. C.* § 2118(a)(2)(f), Ms. Sanborn's insurance policy will regain whatever value it lost as a result of GEICO's past practices.

2. Ms. Sanborn's Claim is Ripe for Adjudication

GEICO argues that Ms. Sanborn's claim is not ripe for adjudication because the statutory right to subrogation has not yet accrued. Section 2118(g) grants the PIP insurer a statutory right of subrogation "to the rights . . . of the person from whom benefits are provided, to the extent benefits are so provided."[42] GEICO relies on the Delaware Supreme Court's holding in *Harper v. State Farm Mutual Automobile Insurance Company*.[43] The *Harper* Court held that ". . . a cause of action for the PIP insurer's statutory right of subrogation, against the tortfeasor's liability insurer, does not accrue until the PIP benefit is paid to or for its insured."[44] GEICO reads the *Harper* holding in conjunction with the language of 21 *Del. C.* § 2118(g) and contends that a PIP insurer's right to statutory subrogation is not triggered unless and until the insurer makes a PIP payment. GEICO argues that because Ms. Sanborn has not exhausted her deductible and a PIP payment has not been made, the right to subrogation has not yet accrued.

GEICO's reliance on *Harper* is misplaced. Section 2118(a)(2)(f) provides in part: "[I]nsurers shall recover *any* deductible for their insureds or their household members pursuant

[42] 21 *Del. C.* § 2118(g).
[43] 703 A.2d 136 (Del. 1997).
[44] *Id*. at 141.

to subsection (g) of this section."[45] Section 2118(g) provides: "Insurers providing benefits . . . shall be subrogated to the rights . . . of the person for whom benefits are provided, to the extent of the benefits so provided."[46] GEICO interprets the language of the statute—"*providing* benefits"—to be synonymous with *paying* benefits. However, this interpretation is flawed. Subsection (g) states that the benefits provided are those described in paragraphs (a)(1)–(4) of section 2118. The benefits are provided to the insured when he or she purchases the insurance policy. Without these provisions, the insured would not be able to operate or authorize another person to operate his or her vehicle. Thus, the benefits contemplated by subsection (g) are the provisions that every automobile insurance policy must contain in order for a vehicle to be lawfully operated—including the required minimum PIP coverage. There is nothing in the statute that indicates that the benefits provided include the *payment* of PIP claims. Accordingly, Ms. Sanborn's claim is ripe because she has established that GEICO failed to pursue recovery of her PIP deductible, in violation of 21 *Del. C.* § 2118(a)(2)(f).

3. Ms. Sanborn's Claim is Not Moot

GEICO claims that Ms. Sanborn's claim for declaratory relief is moot because the legal issue in dispute is no longer amenable to judicial resolution. GEICO argues that Ms. Sanborn's claim is moot because GEICO took steps to ensure its compliance with 21 *Del. C.* § 2118(a)(2)(f). Prior to this suit being filed, GEICO voluntarily commenced changes to its claims-handling procedures. While its efforts were not finalized prior to the filing of this suit, GEICO initiated the efforts before Ms. Sanborn filed this action. The new guidelines ensure that GEICO will consistently assert its subrogation rights and protect its insureds' interests, regardless of whether the applicable deductible has been exhausted. As such, GEICO contends

[45] 21 *Del. C.* 2118(a)(2)(f) (emphasis added).
[46] 21 Del. C. 2118(g).

that the controversy between the parties no longer exists and the Court can no longer grant relief in this matter.

Ms. Sanborn contends that GEICO's adoption of new business procedures implicates the doctrine of voluntary cessation. The Court agrees. As discussed above, GEICO has adopted a new business procedure; however, GEICO still maintains that a PIP insurer's right to statutory subrogation is not triggered unless and until the insured exhausts the deductible and the insurer makes a PIP payment. GEICO's position on its ability to seek recovery of its insureds' deductibles is at odds with its practice and policy. A plaintiff's claim will not be considered moot when a defendant "continues to defend the legality of its actions, making it not clear why the [defendant] would necessarily refrain from [the same conduct] in the future."[47] Ms. Sanborn's claim is not moot, as GEICO could revert back to its former policy and practice and not seek recovery of its insureds' deductibles until the deductible is exhausted and a PIP payment has been made.

CONCLUSION

For the forgoing reasons Plaintiff's Motion for Partial Summary Judgment on the "Standing" Issue is **DENIED** and Defendant's Motion for Summary Judgment is **DENIED**.

IT IS SO ORDERED.

Dated: February 1, 2016
Wilmington, Delaware

/s/ *Eric M. Davis*
Eric M. Davis, Judge

[47] *Cooper v. Charter Comm. Entm't's, I, LLC*, 760 F.3d 103, 108 (1st Cir. 2014).