SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

John S. Spadaro, Esquire
724 Yorklyn Road, Suite 375
Hockessin, DE 19707

James D. Taylor, Jr., Esquire
Saul Ewing LLP
P.O. Box 1266
Wilmington, DE 19899

Re: ***Sammons v. Hartford Underwriters Insurance Co.***
C.A. No. S09C-12-026 RFS

Submitted: March 11, 2010
Decided: April 1, 2010

Dear Counsel:

Pending before the Court is Defendant Hartford Underwriters Insurance Company's ("Hartford") Motion to Dismiss Count V, Consumer Fraud, of the Complaint filed by Mary Ann Sammons and Terry W. Sammons ("Plaintiffs"). For the reasons discussed herein, the Motion to Dismiss Count V is denied.

Background

The factual background relevant to this action is derived from the allegations made in the Complaint. The Plaintiffs were named insureds under a Hartford automobile

insurance policy. In 2006 they were injured in an automobile accident. They tendered claims for personal injury protection ("PIP") benefits under the policy to Hartford, including claims submitted by their health care providers. According to Plaintiffs, Hartford has not paid their claims in accordance with the requirements of either their insurance policy or 21 *Del. C.* § 2118B(c). This statute requires an insurer either to pay or to deny a claim for PIP benefits within 30 days of receiving it. The statute also requires an insurer to pay interest on a claim that should have been paid within 30 days but was not.

Plaintiffs filed a Complaint[1] against Hartford seeking class certification and alleging, in Count V, that Hartford's actions violated the Delaware Consumer Fraud Act ("the DCFA").[2] Section 2513 of the DCFA makes certain things done in connection with the sale, lease or advertisement of any merchandise an unlawful practice. Hartford filed a motion to dismiss Count V for failure to state a claim under Rule 12(b)(6) or, in the alternative, for failure to plead fraud with particularity under Rule 9(b).

Standard of Review

The test for sufficiency of a complaint challenged by a Rule 12(b)(6) motion to

---

[1]The Complaint contains five counts. Count I seeks a declaratory judgment that under Delaware law and under the insurance contracts of proposed class members Hartford was required to pay covered claims for PIP benefits within the 30-day time frame prescribed by 21 *Del. C.* § 2118B. Count II alleges a claim for breach of contract. Count III alleges a claim for bad faith breach of contract. Count IV alleges a claim for a breach of the duty of fair dealing, and Count V alleges a claim for consumer fraud pursuant to the Delaware Consumer Fraud Act.

[2]Title 6 *Del. C.* § 2511-§ 2527.

dismiss is whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.[3] All well-pled allegations in the complaint will be assumed to be true.[4] The complaint must be without merit as a matter of fact or law to be dismissed.[5] The Court will draw every reasonable factual inference in favor of the non-moving party.[6] Rule 9(b) additionally requires that the circumstances constituting fraud be stated with particularity.[7]

The Parties' Contentions

Hartford argues that the consumer fraud claim should be dismissed pursuant to Rule 12(b)(6) because there is no allegation of a connection to the advertisement or sale of Plaintiff's insurance policy, as required by § 2513. Hartford also argues that the only allegation pertaining to the advertisement or sale is boilerplate language that merely recites the statutory elements of § 2513, a recitation which does not suffice for purposes of Rule 12(b)(6). Plaintiffs argue that the Complaint clearly states that their PIP claims were not timely paid and that the insurance policy contained implied promises of good faith and fair dealing. Both promises were made at the time of the sale of the policy. Plaintiffs further allege that Hartford's systematic violations of the 30-day time period

---

[3] *Spence v. Funk*, 396 A.2d 967, 968 (1978).

[4] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. Ct. 1983).

[5] *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52 (Del. 1970).

[6] *Ramunno v. Cawley*, 705 A.2d 1029, 1036 (Del. 1998).

[7] *See, e.g., Latesco, LP v. Wayport, Inc.,* 2009 WL 2246793 (Del. Ch.).

render the sale-related promises false and misleading.

Hartford also argues that the consumer fraud allegations do not meet the particularity standard of Rule 9(b), which requires a statement of the time, place and contents of the false representations, as well as the identity of the person making those representations.[8] Hartford asserts that Plaintiffs fail to allege a single misrepresentation or a single incident of untimely payment of a medical bill, the number of days any payment was late or any amount of interest due. Finally, Hartford argues that the conduct alleged in the complaint is administrative conduct rather than conduct related to the sale of the policy.

Plaintiffs rely on *State v. Publishing Clearing House,*[9] arguing that if DCFA enforcement actions brought by the attorney general on the public's behalf are not subject to heightened pleading standards, neither are such actions brought by private individuals. Moreover, the DCFA is to be liberally construed to achieve its purpose of consumer protection.[10] Plaintiffs argue that if Rule 9 requirements do apply, they are met, in part because the requirements of date, place and time are not always necessary, as long as the

---

[8]*Rinaldi v. Iomega Corp.*, 1999 WL 1442014, at *6 (Del. Super.).

[9]787 A.2d 111 (Del. Ch. 2001).

[10]Title 6 *Del. C.* § 2512 provides that "[i]t is the intent of the General Assembly that such [fraudulent] practices be swiftly stopped and that this subchapter shall be liberally construed and applied to promote its underlying purposed and policies."

defendant is placed on notice of the misconduct with which it is charged.[11] Plaintiffs contend that the Complaint alleges that a contractual promise was made at the time of the sale of the policy to make timely payments. It also alleges the precise conduct resulting in a breach of that promise, i.e., failure to pay interest on late payments. Plaintiffs also assert that the Complaint alleges all the elements of consumer fraud.

Discussion

The purpose of the DCFA is "to protect consumers and legitimate business enterprises from unfair or deceptive merchandising practices in the conduct of any trade or commerce."[12] In pertinent part, § 2513 of the DCFA provides as follows:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

This section establishes a private cause of action under the DCFA.[13]

Rule 12(b)(6). Defendant argues that the allegedly late PIP payments were unrelated to the sale of the policy, and that this lack of connection is fatal to the allegations of fraud brought under the DCFA. Paragraph 51of the Complaint sets out the

---

[11]*Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985).

[12]Title 6 *Del. C.* § 2512.

[13]Title 6 *Del. C.* § 2525(a); *Crowhorn v. Nationwide Mutual Ins. Co.,* 2001 WL 695542 (Del. Super); *Thomas v. Har[t]ford Mutual Ins. Co.*, 2003 WL 220511 (Del. Super.).

allegations of fraud. Paragraph 51(f) provides as follows:

> [T]he Hartford automobile insurance contracts at issue. . . contain an implied promise that covered claims for PIP benefits under 21 *Del. C.* 2118 will be paid by Hartford within thirty days of its receipt of the claim.

Paragraph 51(g) provides as follows:

> Hartford's promise to pay covered claims for PIP benefits within thirty days of its receipt of the claim. . . was made in connection with and at the time of the sale of each such contract.

Paragraph 51(i) provides as follows:

> In selling the automobile contracts at issue. . . . Hartford concealed, suppressed and failed to disclose its widespread and systematic failure to (i) pay covered PIP claims with reasonable promptness, (ii) comply with the requirements of 21 *Del. C.* § 2118B, and (iii) pay statutory interest as appropriate under 21 *Del. C.* § 2118(B(c).

Paragraph 51(j) provides as follows:

> The Hartford automobile insurance contracts at issue. . . contain an implied promise of good faith and fair dealing.

Paragraph 51(k) provides as follows:

> Hartford's promise of good faith and fair dealing (as contained within every automobile insurance at issue, including without limitation Hartford automobile policy no. 55 PHE981455) was made in connection with and at the time of the sale of each such contract.

Paragraph 51(l) provides as follows:

> By failing on a widespread and systematic basis to pay Mr. And Mrs. Sammons' and the proposed members' covered claims for PIP benefits with the (reasonable) time prescribed by 21 *Del. C.* § 2118B, Hartford has created a condition of falsity in the insurance contracts' promise of good faith and fair dealing.

Paragraph 51 (m) provides as follows:

> By failing on a widespread and systematic basis to pay Mr. and Mrs. Sammons and the proposed class members the statutory interest owed them under 21 *Del. C.* § 2118B, Hartford has created a condition of falsity in the insurance contracts' promise of good faith and fair dealing.

Paragraph 51(n) provides as follows:

> Hartford engaged in the conduct described in this paragraph 51 with the intent that others rely on its concealment, suppression and failures to disclose; its promise to pay covered PIP benefits with reasonable promptness; and its promise of good faith and fair dealing.

Thus, the Complaint avers that the contract contained an implied promise to pay covered PIP claims within 30 days of receiving them, a promise which was made at the time of the sale of the policy. The Complaint further alleges that at the time of selling the contract, Hartford concealed its systematic failure to make timely payments. It is also alleged that the good faith and fair dealing promise was made in connection with and at the time of the sale. The Complaint alleges that Hartford created a "condition of falsity" in the promise of good faith and fair dealing and that it intended that others rely on its concealment, suppression and failure to disclose its practice of not making timely PIP payments.[14] The Court finds that these allegations state a claim under which Plaintiffs could conceivably recover and that they therefore withstand Hartford's Rule 12(b)6)

---

[14]*See Ayers v. Quillen*, 2004 WL 1965866, at *5 (Del. Super.)(observing that the "common thread" which runs through DCFA actions is the making of a false or misleading statement or the concealment, suppression or omission of information, thereby creating a condition of falseness.).

challenge.[15]

Rule 9(b) pleading requirements. There is a split of authority on the question of the appropriate pleading for an action under the DCFA, although most courts have found that Rule 9(b) is the correct standard. The Delaware Supreme Court in *Stephenson v. Capano*[16] drew certain distinctions between common law fraud and an action under the DCFA, but has not been asked to rule on the question of the appropriate pleading standard. This Court has addressed the issue on three occasions, as explicated below. Rule 8, which provides for general rules of pleading, provides in part as follows:

> (a) Claims for relief. A pleading which sets forth a claim for relief. . . shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the party deems itself entitled.

Rule 9, which provides for pleading special matters such as fraud, provides in part as follows:

> (b) . . . In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake, shall be stated with particularity.

---

[15]*Spence v. Funk*, 396 A.2d at 967. Moreover, the incorporation of applicable, existing law into a contract does not require a deliberate expression by the parties. The laws in force at the time and place of making the contract enter into, and form a part of it as if they had been expressly referred to, or incorporated in, its terms. *Koval v. Peoples*, 431 A.2d 1284 (Del. Super. Ct. 1981). The 30-day payment period contained in 21 *Del.C.* § 2118B is therefore part of the insurance contract at issue here.

[16]462 A.2d 1069 (Del. 1983). Those three differences are: (1) a negligent misrepresentation is sufficient to violate the statute; (2) a violation of the statute is committed regardless of actual reliance by the plaintiff; and (3) the plaintiff need not show intent by the defendant to induce action or inaction by the plaintiff. *Id.* at 1074.

In *Kerr v. American Independent Ins. Co.*,[17] this Court ruled on a motion to dismiss a DCFA action, applying Rule 8 general rules of pleading. *Kerr* focuses on the failure of the complaint to allege any connection to a sale or advertisement of insurance, as required by the DCFA. The plaintiff was permitted to amend his complaint, and the case settled prior to disposition. Thus, the Court was not called upon to make a final ruling on the amended complaint.

In two prior cases, this Court applied the particularity standard to DCFA actions. In *Rinaldi v. Iomega Corp.*,[18] this Court applied Rule 9(b) pleading requirements to the plaintiffs' allegations of a violation of the DCFA. The Court found that the consumer fraud allegations had not been pled with particularity but allowed the plaintiffs leave to amend the complaint.[19] In *Crowhorn v. Nationwide Mutual Insurance Company*,[20] this Court again applied the particularity standard to a complaint for statutory consumer fraud without debate from the parties. The Court reiterated that although a plaintiff need not present all known evidence in the complaint, the precise theory of fraud with supporting specifics must be alleged.[21] The Court observed that to require that the pleadings allege more than the ultimate facts is tantamount to saying that the evidence upon which the

---

[17]2007 WL 642072 (Del. Super.).

[18]1999 WL 1442014 (Del. Super.).

[19]*Id.* at 8.

[20]2001 WL 695542 (Del. Super.).

[21]*Id.* at 4 (citing *Nutt v. A.C. & S., Inc.,* 466 A.2d 18,23 (1983)).

ultimate facts are based must also be pled, thus destroying the distinction between ultimate facts, which alone must be pled, and the evidence and proof upon which these facts are based.[22]

Thus, even when applying the Rule 9(b) standard, this Court has been measured in its approach. Likewise, the Third Circuit has stated that nothing in Rule 9(b) requires allegations of date, place and time as long as a defendant is adequately put on notice of the charged misconduct.[23] The court cautioned against an excessive focus on particularity. Tunnel vision could impair the flexibility and the just determination of cases. [24] Other state and federal courts have also required Rule 9(b) particularity for statutory consumer fraud claims, and, in fact, in addition to *Kerr*, only one example to the contrary has been found.[25]

---

[22]*Id.* at *5 (citing *Strasburger v. Mars, Inc.*, 83 A.2d 101, 104 (Del. Super. Ct. 1951). In a subsequent decision in this case, the Court reiterated that although the elements of common law fraud and statutory fraud under the DCFA are different, a particularity requirement still applies.

[23]*Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d. Cir.), *cert. denied*, 469 U.S. 1211 (1985). Of course, a plaintiff alleging concealment need not plead time and place because a negative cannot be proven.

[24]*Id.* The Rules are intended to "secure the just, speedy and inexpensive determination of every proceeding." Super. Ct. Civ. R. 1.

[25]*See Silvas v. GMAC Mortgage, LLC*, 2009 WL 4573234 (D. Ariz); *Hirsch v. Optima, Inc.*, 920 N.E. 2d 547 (Ill,App.Ct. 2009); *Blake v. Career Education Corp.*, 2009 WL 140742 (E.D. Mo. 2009); *Windisch v. Hometown Health Plan, Inc.*, 2010 WL 786518 (D.Nev.); *Hoffman v. Hampshire Labs, Inc.*, 963 A.2d 849 (N.J.Super.Ct.App.Div. 2009); *In re Whirlpool Front-Loading Washer Products Liability Litigation*, 2009 WL 3712649 (N.D. Ohio); *Indianapolis Life Ins. Co. v. Hentz*, 2009 WL 36454 (M.D. Pa.).

In *Homsey v. Vigilant Ins. Co.,*[26] the District Court for the District of Delaware held that claims brought under the DCFA must be pled with particularity. However, in *State ex rel. Brady v. Publishers Clearing House,* the Court of Chancery held that Rule 9(b) does not apply to DCFA claims brought by the Attorney General.[27] Because both parties rely on *Homsey* and *Clearing House*, the Court addresses them in detail, as follows.

In *Clearing House*, the State asserted that the defendant mailed misleading sweepstakes solicitations to Delaware residents in violation of the DCFA.[28] The defendants moved to dismiss under Chancery Rule 9(b), and the State argued that imposing strict pleading requirements on consumer protection cases would be inconsistent with the remedial objective of the DCFA. The court noted that two Superior Court cases applied Rule 9(b) to DCFA cases but declined to follow that route because the issue was not raised in those cases and also because neither the Delaware Supreme Court nor the General Assembly had addressed the issue. The court further reasoned that the Delaware Supreme Court did not apply Rule 9(b) to actions for bad faith, and found the elements of such a claim analogous to a DCFA claim. Thus, the court concluded that Rule 9(b) standards should not be applied to DCFA actions.

---

[26]496 F. Supp. 433, 439 (D.Del. 2007).

[27]*State ex rel. Brady v. Publishers Clearing House*, 787 A.2d 111 (Del. Ch. 2001).

[28]*Id.*

The *Clearing House* court also observed that the only element shared by both common law fraud and statutory consumer fraud is the making of a false or misleading statement or the concealment, suppression or omission of information, thereby creating a condition of falseness.[29] The court concluded that Rule 9(b) was inconsistent with the remedial goals of enforcement actions brought by the Attorney General to protect the consuming public.[30]

In *Homsey v. Vigilant Ins. Co.,* the United States District Court for the District of Delaware reached the opposite result.[31] The Homseys filed an action against their insurer, alleging that Vigilant failed to make good on the contractual provision that it would provide coverage of up to $10,000 per check, if any of the plaintiffs' checks were forged. The plaintiffs' ex-daughter-in-law forged numerous checks from her in-laws' account. Vigilant paid a total sum of $10,000, arguing that "any check" meant the aggregate of the checks, while the plaintiffs argued that "any check" meant each check. Among other things, the plaintiffs made a claim for consumer fraud, and Vigilant moved to dismiss for lack of particularity. The Court held that Rule 9(b) applied to the DCFA claim[32] and found that the *Clearing House* holding did not pertain to a private cause of action under

---

[29]*Id.* at 116.

[30]*Id.* at 117.

[31]496 F.Supp. at 433.

[32]*See also Eames v. Nationwide Mut. Inc. Co.*, 2008 WL 4455743 (D. Del.)(holding that the heightened pleading requirements of Rule 9 apply to claims arising under the DCFA).

the DCFA.[33]

Homsey stated that date, place and time allegations are not required to satisfy the particularity requirement.[34] If the pleadings put defendants on notice of the misconduct with which they are charged and protect defendants against false charges of immoral and fraudulent behavior, they suffice. *Homsey* found that these requirements were met by the allegations of a breach of the express promise to provide coverage under the insurance policy and breaches of the implied promises of good faith and fair dealing, similar to the pleadings in the case at bar. The pleadings also specified conduct giving rise to these alleged breaches, including alleged unreasonable delay in payment and alleged unreasonable construction of the policy. Again, the pleadings in this case make similar allegations regarding late payments and failure to pay interest on late payments.

The Court finds the reasoning of *Homsey, Crowhorn and Seville* is persuasive and therefore holds that Rule 9(b) pleading requirements apply to actions brought under the DCFA. *Homsey* states that the *Clearing House* court's rejection of Rule 9 standards for actions brought by the Attorney General does not reach to private causes of action,[35] and this Court agrees. Moreover, the DCFA is to be liberally construed, [36] but the General

---

[33]*Homsey* at 439.

[34]*Id.*

[35]*Id.* at 439.

[36]*See* 6 *Del.C.* § 2512.

Assembly could have amended the Act to impose a general pleading standard if it disagreed with the judicial decisions declaring that Rule 9(b) applies to the DCFA.

In addition, the Court rejects Hartford's argument that Plaintiffs challenge an administrative act rather than a contractual one. While payment itself may or may not be described as an administrative act, the promise to pay was a contractual act which created a contractual obligation. The claims handling procedures at issue obviously occurred after the parties entered into the contract.[37]

The remaining question is whether the Complaint meets the particularity requirements. As shown in the excerpts from ¶ 51 of the Complaint, the circumstances of the alleged fraud are pled sufficiently "to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior."[38] As previously indicated, Paragraph 51 alleges that the contract at issue contained an implied promise to pay covered PIP claims within 30 days, and that said promise was made in connection with the sale of the contract. Paragraph 51 also alleges that Hartford concealed its practice of failing to pay PIP within a reasonable period of time and that the contract contains an implied promise

---

[37]*Johnson v. Geico Casualty Co.*, 516 F.Supp. 351 (D.Del. 2007)(motion to dismiss claim of breach of contract for PIP claims denied where complaint pled basic components of cause of action.).

[38]*Homsey,* at 439 (citing *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.,* 742 F.2d 786, 791 (3d Cir. 1984)).

of good faith and fair dealing, which was broken. Hartford is on notice of the misconduct with which it is charged and is adequately protected against intentionally false charges. If the references to § 2513 of the DCFA are boilerplate, as Hartford contends, they are nevertheless necessary elements of a claim for fraud. In other words, the ultimate facts are pled, but the evidence and proof upon which they are based are not, as is appropriate.[39] For all these reasons, the Court finds these allegations to be sufficiently particular under Rule 9(b) Count V of the Complaint meets the pleading requirements of Rule 9(b) for allegations of fraud.

Defendant Hartford's Motion to Dismiss Count V of the Complaint is **DENIED.**

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary

---

[39] *Crowhorn*, at *5.