IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ANTOINE STRATTON, on behalf of himself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	C.A. No. 08C-12-012 JRS CCLD
AMERICAN INDEPENDENT INSURANCE COMPANY,	)	
Defendant.	)	

Date Submitted: February 18, 2011
Date Decided: May 11, 2011

MEMORANDUM OPINION.
Upon Consideration of Defendant American Independent Insurance Company's Motion to Dismiss for Lack of Standing.
DENIED.

John S. Spadaro, Esquire, JOHN SHEEHAN SPADARO, LLC., Hockessin, Delaware. Attorney for Plaintiff.

Kevin J. Connors, Esquire, MARSHALL DENNEHEY WARNER COLEMAN & GOGGIN, Wilmington, Delaware. Attorney for Defendant.

SLIGHTS, J.

I.

In this opinion, the Court considers whether a putative class action representative has lost standing to pursue the class action now that he has received from the defendant all that he could have received in the prosecution of his individual claim. The defendant, American Independent Insurance Company ("AIIC"), has moved to dismiss the class action complaint brought by plaintiff, Antoine Stratton ("Stratton"), on the ground that Stratton lacks standing to pursue the class action claims because he has resolved his individual claims against AIIC. Stratton's complaint alleges that he was injured in an automobile accident that was not his fault and that AIIC, his automobile insurance carrier, failed to comply with its statutory obligation to recover his personal injury protection ("PIP") insurance deductible from the tortfeasor.[1] In its motion, AIIC alleges that it has now recovered all of the deductible to which Stratton is entitled, that it has forwarded these funds to Stratton and that Stratton has accepted and negotiated these funds.[2]

Stratton does not dispute that AIIC has recovered his PIP deductible and that he accepted (albeit unwittingly) a payment from AIIC that represented the full amount

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[1]As will be discussed below, Delaware's statutory automobile insurance scheme provides that only the PIP carrier can recover deductibles through a statutorily created subrogation process. Policy holders are not permitted to pursue direct claims against the tortfeasor for PIP deductibles or for PIP benefits paid by the carrier. *See generally* 21 *Del. C.* § 2118.

[2]Def.'s Mot. to Dismiss for Lack of Standing ("Def.'s Mot.") at 4.

of the deductible to which he was entitled. Nevertheless, he opposes the motion on the ground that AIIC has improperly attempted to "pick off" his class action claim by recovering his deductible only after the class action complaint was filed and then by transmitting the funds to him through improper channels and without full disclosure as to the purpose and potential consequences of the payment.

In an earlier decision, the Court addressed (as far as it could) the merits of Stratton's claim that a PIP insurer has a statutory duty to recover through subrogation any deductibles paid by its insureds and ruled that a final determination of this legal issue must await further proceedings and discovery.[3] Here, the Court confronts the narrow threshold issues of mootness and standing; specifically, (a) whether Stratton's receipt and subsequent negotiation of the check from AIIC in reimbursement of his recoverable deductible renders Stratton's claim moot, thereby eliminating his standing to pursue this class action, or (b) whether AIIC manufactured mootness and standing arguments by "picking off" Stratton's individual claim to evade litigation of the class action claims. After careful review of the parties' submissions, the Court has determined that AIIC has attempted to "pick off" Stratton's class action claim by causing Stratton involuntarily to settle his individual claim. Because he maintains an interest in this class action litigation, Stratton has standing to continue as the class

[3] *Stratton v. Am. Indep. Ins. Co.*, 2010 WL 3706617 (Del. Super. Ct. Sept. 16, 2010).

representative, at least until the issue of class certification is addressed. Therefore, the Motion to Dismiss must be **DENIED.**

II.

Stratton was injured in an automobile accident on January 27, 2006.[4] His automobile insurance policy with AIIC provides for the PIP coverage required by Delaware's no-fault insurance statute.[5] As permitted by statute, Stratton elected to subject his PIP coverage to a $1,000 per-accident deductible.[6] According to his complaint, Stratton incurred medical bills, exhausted his deductible to pay those bills, and then submitted claims over and above the deductible to AIIC for payment under his PIP coverage.[7] Stratton's PIP claim came to a close in March 2007, when AIIC made its final payment of PIP benefits.[8]

As early as June 19, 2006, AIIC recognized that it needed to pursue recovery of Stratton's PIP deductible through subrogation.[9] Nevertheless, for reasons unclear in the record, the AIIC claims representative who was directed to pursue subrogation

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[4]Am. Compl. ¶ 19.

[5]*Id.* ¶¶ 6-7.

[6]*Id.* ¶ 22.

[7]*Id.* ¶¶ 21-22.

[8]Pl.'s Answering Br. In Opp'n. Def.'s Mot. Dismiss for Lack of Standing ("Ans. Br.") at 3

[9]Ans. Br. at Ex. F.

on Stratton's behalf closed the file without referring the claim to AIIC's subrogation department.[10] Stratton filed his class action complaint against AIIC on December 1, 2008, citing as the factual predicate AIIC's failure to make any effort to recover his (or other similarly situated insured's) PIP deductible through subrogation.[11] The law suit, in turn, apparently provided notice to AIIC that it had not yet pursued Stratton's deductible and prompted AIIC to begin subrogation through the statutorily-prescribed arbitration process.[12]

AIIC subsequently filed a motion to dismiss Stratton's claims on January 23, 2009.[13] On November 2, 2009, at a hearing on the motion attended only by counsel (not the parties), AIIC disclosed on the record that an arbitration panel had determined Stratton's fault for the January 2006 accident to be 30% and that AIIC would be issuing a check (adjusted for comparative negligence) to Stratton as reimbursement of his deductible.[14] Upon hearing this revelation, Stratton's counsel noted that there had been no negotiated agreement to pay Stratton his deductible and that this was the first he had heard of a possible resolution of Stratton's individual

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[10]Kim Dep. Tr. at 135-43.

[11]Ans. Br. at 3-4.

[12]Kim Dep. Tr. at 143-51.

[13]Tr. ID 23452759.

[14]Mot. Tr. at 4-9.

claim.[15] The Court adjourned the hearing so that the parties could confer about the litigation impact, if any, of the developments that had just been disclosed for the first time in open court.[16] AIIC's counsel sent a follow-up letter to the Court on November 12, 2009, copied to Stratton's class action counsel, in which AIIC advised that it would soon send a check to Stratton as reimbursement for his deductible (adjusted for comparative negligence).[17]

In late November 2009, Stratton received a $700 check from AIIC at his residence.[18] The check stub contained the reference: "reason: personal injury protection."[19] The check's face contained the reference: "2006-51660/70 % DED."[20] The check was not accompanied by a cover letter, a written release, or any other explanation of the purpose of the payment or the potential consequences of accepting it.[21] Stratton acknowledges that he read the writing on the check and then proceeded to cash it. He maintains, however, that he did not understand the various references

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[15] *Id.* at 6.

[16] *Id.* at 11.

[17] Def.'s Mot. at Ex. C.

[18] *Id*. at 4.

[19] *Id.* at Ex. E.

[20] *Id.* at 2.

[21] Ans. Br. at 5-6.

on the check or check stub, nor did he appreciate the reason(s) the check had been sent to him.[22]

On January 14, 2010, AIIC renewed its motion to dismiss for mootness and lack of standing, claiming that Stratton's signing and cashing of the check constituted abandonment and release of his individual claim against AIIC. On September 15, 2010, after considering AIIC's motion and Stratton's response, the Court concluded that the record regarding the circumstances surrounding AIIC's recovery and transmittal of Stratton's deductible was not clear enough to allow the Court to determine whether Stratton had standing to pursue this proposed class action.[23] The Court ordered limited discovery on the issue of whether AIIC had improperly attempted to "pick off" Stratton as a class representative.[24] That discovery is now complete and the parties have submitted the issue for decision.

III.

In support of its motion, AIIC argues that Stratton's endorsement and subsequent cashing of the check in satisfaction of his deductible constitutes a valid settlement of his claim against AIIC thereby mooting his individual claim and

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[22]*See* Def.'s Mot. at 2; Stratton Dep. Tr. at 17.

[23]*Stratton*, 2010 WL 3706617, at *8.

[24]*Id.*

removing his standing to bring the class claims. AIIC contends that the evidence does not support a finding that it intentionally attempted to "pick off" Stratton to defeat his standing.[25] In this regard, AIIC points out that nothing in the PIP statute sets a specific time frame within which a carrier must pursue subrogation of its PIP payments or the insured's PIP deductible.[26] Thus, AIIC argues that it should not be penalized for the timing of its decision to pursue recovery of Stratton's deductible (after the filing of the class action complaint) because it pursued the claim within the applicable statute of limitations and in accordance with the mandates of the PIP statute.[27]

Additionally, AIIC contends that Stratton's counsel had clear notice of a forthcoming payment in satisfaction of Stratton's deductible. He not only received notice from the November 2009 hearing, but also from the November 2009 letter to the Court in which AIIC's counsel explicitly stated that Stratton would be receiving a check in reimbursement of his recoverable deductible.[28] AIIC contends that Stratton's counsel had three weeks (the time between the hearing and letter to the Court and the date on which Stratton received the check at his residence) to notify

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[25]Def.'s Mot. at 14.

[26]*Id.*

[27]*Id.*

[28]*Id.* at 15.

AIIC or its counsel to whom the reimbursement check should be sent. Alternatively, AIIC contends that Stratton could have negotiated the check subject to a reservation of rights. Stratton, and his counsel, failed to take either measure.[29] Inaction in the face of knowledge that a check would be forthcoming, AIIC contends, undercuts Stratton's argument that he was somehow "picked off" by AIIC.[30]

Finally, AIIC contends that it followed its standard procedures for recovering and then reimbursing PIP deductibles checks to its insureds.[31] It did nothing out of the ordinary here. Accordingly, AIIC maintains that issuing the check directly to Stratton does not constitute an unfair claim settlement practice.[32] The check stub's reference to "personal injury protection" and the designation on the check itself, "70% DED," gave Stratton ample explanation of both the reason he was receiving the check and the specific claim AIIC intended to satisfy by the payment.[33] According to AIIC, Stratton has pointed to nothing in the record to suggest that AIIC engaged in any conduct specifically designed to thwart Stratton's personal and alleged class action

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[29] *Id.*

[30] *Id*. at 16-17.

[31] *Id.* at 17.

[32] *Id. See* 18 *Del. C.* § 2304(16).

[33] *Id.* AIIC contends that "DED" clearly stands for "deductible."

claims.[34] In response, Stratton argues that AIIC's payment of his deductible was not the product of a fair, voluntary or negotiated settlement of his individual or class action claims.[35] He alleges that, by sending the check directly to him and not his counsel, AIIC improperly interacted with him on an *ex parte* basis. This is particularly troublesome, he contends, when one considers that AIIC sent him a check with no cover letter, no explanation of the potential legal consequences that might result from cashing the check, no release, and no meaningful identification of the coverage to which the payment was related.[36]

According to Stratton, the existence of a voluntary and informed release is required for a valid settlement. And, he contends, he provided no such release of claims to AIIC either expressly or by acquiescence. On this latter point, Stratton urges the Court to take note of his lack of education and/or business experience and his lack of direct involvement in the litigation (including the hearing at which AIIC first disclosed its recovery of the PIP deductible).[37] Under the totality of these circumstances, Stratton argues that AIIC did not act with candor in resolving his

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[34] *Id.*

[35] Ans. Br. at 15.

[36] *Id.*

[37] *Id*. *See Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 462 (9th Cir. 1989), *cert. denied*, 498 U.S. 854 (1990) (reciting these and other factors).

individual claim and that it has improperly attempted to "pick him off" as class representative.[38]

IV.

The parties offered extraneous materials for the truth of their contents in support of their respective arguments regarding Stratton's standing to bring this action either individually or as class representative. Accordingly, the Court must convert AIIC's motion to dismiss to a motion for summary judgment and must employ the standard of review contemplated by Rule 56.[39]

In deciding a motion for summary judgment, the Court must determine whether genuine issues of material fact remain for trial.[40] Summary judgment will be granted only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[41] If the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court

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[38] *Id.* at 17.

[39] *See* Del. Super. Ct. Civ. R. 12(b) & 56(b); *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) ("When the trial court considers matters outside of the complaint, a motion to dismiss is usually converted into a motion for summary judgment and the parties are permitted to expand the record."); *Mell v. New Castle County,* 835 A.2d 141, 144 (Del. Super. 2003) ("If the extraneous matters have been offered to establish their truth, the court must convert the motion to dismiss to a motion for summary judgment.").

[40] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

[41] *Id.*

to apply the law to the factual record *sub judice*, then summary judgment must be denied.[42]

The moving party bears the initial burden of demonstrating that the undisputed facts support his claim for dispositive relief.[43] If the motion is properly supported, the burden shifts to the non-moving party to demonstrate that material issues of fact remain for resolution by the ultimate fact-finder and/or that the movant's legal arguments are unfounded.[44]

V.

The United States Constitution embodies the concept that federal courts will only hear actual "cases or controversies."[45] Although not of constitutional origin, "[t]he Delaware courts have announced justiciability rules that closely resemble those followed at the federal level."[46] Among these rules are the requirements that the plaintiff's claims present an "actual controversy" and that the plaintiff maintain

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[42]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[43]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[44]*See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[45]U.S. Const., art. III, § 2. *See also Poe v. Ullman*, 367 U.S. 497, 503 (1961) (observing that the "cases and controversies" limitation is based in part on the observation that the "adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity.").

[46]*Bebchuk v. CA, Inc.,* 902 A.2d 737, 740 (Del. Ch. 2006).

standing to bring the claims.[47] Thus, it has been recognized in Delaware that when, "by virtue of post-filing events, the controversy no longer exists, a court generally cannot grant relief."[48] Under such circumstances, the plaintiff is "divested of standing" and the mootness doctrine "will render the proceeding unnecessary."[49]

If not for the fact that Stratton purports to represent a class of similarly situated AIIC insureds, the facts as presented here would fall neatly within the doctrine of mootness. Stratton's individual claim, in essence, is that AIIC failed to comply with its statutory mandate to pursue his PIP deductible through subrogation. Whether inspired by the filing of this action or otherwise, it is undisputed that AIIC has now recovered from the tortfeasor all of the PIP deductible to which Stratton is entitled. And while Stratton may not be pleased with the manner in which AIIC communicated with him about the recovery of his PIP deductible, or the means by which it transmitted the payment to him, the fact remains that Stratton accepted the payment and negotiated the check. He has since spent the money. Under these circumstances,

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[47] *See Id.* at 742 (dismissing for failure to present an actual controversy plaintiff's claim challenging a bylaw because the stockholders had not yet voted to approve it); *Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 823 (Del. 1997) (recognizing that a party may loose standing to pursue its claim when the claim is rendered moot).

[48] *Energy Part., Ltd. v. Stone Energy Corp.,* 2006 WL 4782287, * 6 (Del. Ch. Sept. 22, 2006) (citing *Gen. Motors Corp.,* 701 A.2d at 823).

[49] *Id.*

the Court can envision no bases upon which Stratton could seek to undo the purported settlement of his individual claim. Simply stated, there would be nothing left to litigate if the Court set aside the settlement (for lack of a meeting of the minds or otherwise).[50] The Court is satisfied that Stratton's individual claims are moot and, in the absence of the class claims, he would no longer have standing to pursue his complaint against AIIC.

The "mootness doctrine" applies in all cases, including class actions.[51] "However, special mootness rules apply in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own."[52] It is settled law that once the class has been certified, "mooting of the class representative's claims does not moot the entire action because the class 'acquire[s] a legal status separate from the interest asserted [by its named plaintiff]."[53] Prior to class certification, however, mooting of the class representative's claim typically will require that the

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[50]Stratton may or may not have a basis to bring his complaints of unfair claims practices to the Insurance Commissioner or, perhaps, to pursue a separate claim in court but, given the small amount in controversy presented by his individual claim ($700), it is unlikely that he would actually do so.

[51]*Sosna v. Iowa*, 419 U.S. 393, 399 (1975).

[52]*Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992).

[53]*Id.* (citing *Sosna*, 419 U.S. at 399).

entire action be dismissed.[54] "In such a situation, 'there is no plaintiff (either named or unnamed) who can assert a justiciable claim against any defendant and consequently there is no longer a case or controversy within the meaning of Article III of the Constitution."[55]

The class proposed in Stratton's complaint has yet to be certified. Thus, at first glance, AIIC's payment to Stratton of all that he could by law receive as reimbursement of his PIP deductible, prior to the certification of the class, would appear to render Stratton's claims against AIIC moot and remove his standing to pursue the claims further on behalf of the putative class. It is, after all, an elementary principle that when a plaintiff voluntarily and knowingly settles his claims, he "has agreed to accept an amount that [he] believes is sufficient to make [him] whole" and has thereby extinguished his claim against the defendant.[56] And, it is likewise well settled that "the named plaintiff in a class action must be a member of the class he

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[54] *Id.* (string cite omitted). *But cf. County of Riverside v. McLaughlin,* 500 U.S. 44, 52 (1991) (holding that class action may continue even after named plaintiff's claim becomes moot before certification when the plaintiff's claim is "so inherently transitory that the trial court will not have enough time to rule on a motion for class certification before the proposed representative's individual interest expires."). Neither party has argued that the *McLaughlin* holding applies here and the Court likewise sees no basis to find that Stratton's claim against AIIC is of the "transitory" nature addressed in *McLaughlin.*

[55] *Id.* (citing *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1041 (5th Cir. 1981)).

[56] *Watkins v. Wachovia Corp.*, 92 Cal.3d 409, 420 (Cal. Ct. App. 2d 2009).

purports to represent."[57]

But Stratton argues that this scenario fits within an emerging body of cases where the courts have held that defendants may not "force mootness upon plaintiffs and [thereby] prevent them from employing the class action device."[58] The practice -- usually implemented when the defendant tenders an offer of judgment[59] to the named plaintiff in the full amount of his individual claim prior to class certification - - "has been labeled by many courts, including the United States Supreme Court, as the 'picking off' of named plaintiffs."[60] While there is by no means consensus on the issue, courts increasingly identify the practice of "picking off" named plaintiffs as a threat to the class action device.[61] It has been observed that, "[a]s a practical matter, allowing [] class action[s] to be mooted [by a pick off] would prevent the class from ever becoming certified . . . leaving class certification at the mercy of the defendant

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[57] *Wallace v. GEICO Gen. Ins., Co.*, 108 Cal. Rptr. 3d 375, 381 (Cal. Ct. App. 4d 2010) (citing *First Am. Title Ins. Co. v. Superior Court*, 53 Cal. Rptr. 3d 734 (Cal. Ct. App. 2d 2007)).

[58] David Hill Koysza, Note, *Preventing Defendants From Mooting Class Actions By Picking Off The Named Plaintiff*, 53 Duke L.J. 781 (2003) (hereinafter Koysza, at __).

[59] *See* Fed. R. Civ. P. 68 (and the Delaware counterpart, Del. Super. Ct. Civ. R. 68).

[60] Koysza, at 781.

[61] *See Liles v. Am. Corrective Couns. Serv., Inc.*, 201 F.R.D. 452, 453-54 (S.D. Iowa 2001); *Crisci v. Shalala*, 169 F.R.D. 563, 568 (S.D.N.Y. 1996); *Hoban v. Nat'l City Bank*, 2004 WL 2610543, *3 (Ohio Ct. App. Nov. 18, 2004).

. . . ."[62]

As stated, the "pick off" usually follows the defendant filing an offer of judgment pursuant to Rule 68.[63] This procedural device allows the defendant to place real pressure on the plaintiff to accept the offer since the plaintiff's failure to obtain a result at trial more favorable than the offer of judgment can result in the plaintiff being assessed costs and perhaps counsel fees.[64] By submitting the offer of judgment prior to class certification, the defendant takes two important steps towards the goal of "pick off": (1) he compels a plaintiff otherwise uninterested in settlement to resolve his claims for fear of suffering the Rule 68 repercussions; and (2) he forces the issue of settlement prior to class certification and thereby avoids the United States Supreme Court precedent that allows class actions to continue once certified even after the named plaintiff's claims are rendered moot.[65]

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[62] *Hoban*, 2004 WL 2610543, at *3.

[63] *See* Koysza, at 789.

[64] *See* Del. Super. Ct. Civ. R. 68.

[65] *See* Koysza, at 790 ("The practice of picking off named plaintiffs in this manner requires precise timing. Because of the Supreme Court's willingness to allow properly certified class actions to continue even after the named plaintiff's claim is rendered moot, the full offer of judgment must certainly be conveyed before the class is certified by the trial court."). *See also Sosna*, 419 U.S. at 397-403 (holding that a certified class action will continue even after individual claim is rendered moot); *Colbert v. Dymacol, Inc.*, 2002 WL 1974538 , at * 2 (3d Cir. Aug. 28, 2002) (holding that defendant's offer of judgment filed before class certification rendered named plaintiff's claim moot), *vacated on unrelated procedural ground*, 344 F.3d 334 (3d Cir. 2003).

At its core, then, a "pick off" is nothing more than a tactical mechanism employed by defendants to thwart class actions by: (1) compelling the representative plaintiff to settle his claim prior to class certification and then (2) moving to dismiss the entire class action on the ground that the plaintiff's claim is moot and, therefore, the plaintiff lacks standing to represent the class.[66] As best as the Court can tell, whether and under what circumstances a defendant can defeat a class representative's standing to pursue class claims by payment of the individual claim has not been addressed in Delaware. Accordingly, the Court has looked elsewhere for guidance.

A. Has AIIC Engaged In A "Pick Off"?

It is undisputed that AIIC did not employ an offer of judgment to force a settlement upon Stratton. The coercive elements of the offer of judgment, therefore, are not in play here. Here again, at first glance, it would appear that AIIC simply did what it was, by statute, supposed to do - - it pursued the statutorily created inter-company arbitration on Stratton's behalf and ultimately recovered his deductible (less the percentage assigned to Stratton for comparative negligence) from the tortfeasor's carrier. It then transmitted reimbursement of the deductible directly to Stratton. To the extent this course represents a voluntary settlement of Stratton's claim, Stratton

[66] *See Lusardi*, 975 F.2d at 977-82.

cannot be heard to argue that AIIC has picked him off as a class representative.[67]

On the other hand, a class action defendant need not rely exclusively on the offer of judgment as the means to coerce an unwitting class plaintiff into folding his cards prior to class certification. Other tactics can achieve the same result. The holding in *Lusardi*, where the court found that a plaintiff's voluntary settlement of his individual claim precluded his argument that he was "picked off,"[68] prompts the Court to look carefully at the circumstances surrounding Stratton's purported settlement with AIIC to determine if the settlement was, in fact, knowing and voluntary. In this regard, AIIC admits that it did not pursue recovery of the deductible until after, and in response to, the filing of Stratton's class action complaint.[69] It then bypassed Stratton's attorney by transmitting the payment directly to Stratton without any notice to his class action counsel.[70] Stratton received the check at his residence

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[67]*Id.* at 979-80 (suggesting that plaintiff had not been "picked off" because he entered into a knowing and voluntary settlement with the defendant).

[68]*Id.* at 968 (noting that plaintiff had settled his claim following "lengthy settlement negotiations" and pursuant to a detailed "memorandum of understanding" which resulted in a "full and unconditional release" of the individual claims).

[69]Kim Dep. Tr. at 135-39.

[70]AIIC's only effort at involving Stratton's counsel in the process was to notify him (along with the court) on the record that AIIC had recovered Stratton's deductible and would be reimbursing Stratton with what it had recovered. It is undisputed that there was no explicit notice to Stratton's counsel, in writing or otherwise, that the check would be sent to Stratton directly. Moreover, Soo Kim, the subrogation manager at AIIC during the relevant time period, testified in her deposition that AIIC typically would secure a written release of claims from their insureds in exchange for payment

unaccompanied by a cover letter describing the purpose of the check or the repercussions of cashing it. Although the check itself contained the "2006-51660/70% DED" indication on its face, there are no facts in the record from which the Court can conclude that, at the time Stratton cashed the check from AIIC, he was consummating a knowing and voluntary settlement of his claim for reimbursement of the PIP deductible.[71]

AIIC's tactics - - (1) pursuing the recovery of Stratton's PIP deductible only after he filed his class action complaint; (2) bypassing his attorney by transmitting the reimbursement check to him directly contrary to typical company practice (and, arguably, in violation of Delaware Lawyers' Rule of Professional Conduct 4.2);[72] and (3) failing to provide any meaningful explanation to Stratton of the purpose of the check or the consequences of cashing it - - when considered together, reveal an intent to "pick off" Stratton as a class representative. Having determined that a "pick off" has occurred here, the Court must now consider whether the "pick off" should have

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of the claim. She acknowledged that no such release was obtained from Stratton. Kim Dep. Tr. at 31. Kim also testified that AIIC typically negotiates any settlement of claims with an insured's counsel if represented. *Id.* at 32-33.

[71]By all accounts, Stratton is not sophisticated in matters of business or personal finances. He has limited formal education and works as a laborer in a poultry processing plant. Stratton Dep. Tr. at 40. His denial of knowledge of the purpose for which AIIC sent him the check, therefore, makes perfect sense. Stratton Dep. Tr. at 19-20.

[72]The Court notes that there is absolutely no evidence to suggest that AIIC's counsel of record in this case was involved in AIIC's decision to transmit the settlement funds directly to Mr. Stratton.

any bearing on Stratton's continued standing to prosecute the class action he purports to bring against AIIC.

B. Does The "Pick Off" Restore Stratton's Standing?

There is by no means consensus regarding the propriety of the "pick off" in the class action context. For instance, a series of decisions in the United States District Courts for the Eastern and Southern Districts of New York have implicitly sanctioned the practice by granting motions to dismiss class action complaints after defendants have served full offers of judgment upon the named plaintiffs prior to class certification.[73] The crux of these decisions is that the offer of judgment is a device that is meant to encourage settlements (a good thing) and that efforts to settle individual claims in the class action context prior to motion practice for class certification should likewise be encouraged, not discouraged.[74] Other decisions have rejected the *Ambalu* view of the "pick off" and have held that class action defendants cannot "force"

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[73] *See Ambalu v. Rosenblatt*, 194 F.R.D. 451, 453 (E.D.N.Y. 2000) (dismissing class action complaint brought under the Fair Debt Collection Practices Act after defendant served an offer of judgment upon the named plaintiff for the full amount ($1000) plaintiff could recover individually under the Act); *Edge v. C. Tech Collections, Inc.*, 203 F.R.D. 85, 88 (E.D.N.Y. 2001) (following *Amblau*); *Tratt v. Retrieval Masters Creditors Bureau, Inc.*, 2001 WL 667602, at *2 (E.D. N.Y. May 23, 2001) (same); *Wilner v. OSI Collections Servs., Inc.*, 198 F.R.D. 393, 395 (S.D.N.Y. 2001) (same).

[74] *See Ambalu,* 194 F.R.D. at 453. *See also Lusardi,* 975 F.2d at 975 ("[A] named plaintiff whose individual claim has expired may continue in his representative capacity to litigate class certification issues . . . [for the] limited purpose[] [of] . . . argu[ing] a certification motion *that was filed before his claims expired* and which the [] court did not have a reasonable opportunity to decide.") (emphasis supplied).

mootness upon a putative class representative by tendering an offer of judgment on the individual claim.[75] These decisions have recognized that the "unique responsibilities" of the putative class representative to the class are implicated "[b]y the very act of filing a class action."[76] And they have aptly discerned that allowing class action defendants to "pick off" the class representative without consequence prior to class certification "would encourage a 'race to pay off' named plaintiffs very early in the litigation" and would thereby allow defendants to prevent the named plaintiff from discharging its "special responsibility to protect [the putative class'] interests."[77]

The Court is satisfied that the decisions that have rejected the notion that class

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[75] *See Liles v. American Corrective Couns. Serv., Inc.*, 201 F.R.D. 452, 454 (S.D. Iowa 2001) (expressly rejecting *Ambalu* and noting that the named class representative has "a responsibility to members of the putative class" from the moment the class action complaint is filed). *See also Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978), *aff'd sub. nom., Deposit Guaranty Nat'l Bank, Jackson Miss. v. Roper*, 445 U.S. 326 (1980) ("By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a ceasefire may not be pressed upon them by paying their claims."); *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996) ("Judgment should be entered against a putative class representative on a defendant's offer of payment only where class certification has been properly denied and the offer satisfies the representatives entire demand for injuries and costs of suit."); *Weiss v. Regal Collections,* 385 F.3d 337, 347 (3d Cir. 2004) (noting that determining the "pick off" issue by reference to the "bright line" of class certification "may not always be well-founded" and holding that a "pick off" can occur prior to the plaintiff seeking class certification); *Hoban v. Nat'l City Bank*, 2004 WL 2610543, *4-5 (Ohio App. Nov. 18, 2004)(rejecting argument that a "pick off" cannot occur pre-certification); *Vega v. Credit Bureau Enter.*, 2003 WL 21544258, *2 (E.D.N.Y. July 9, 2003) (same); *Bond v. Fleet Bank*, 2002 WL 373475, *7-8 (D.R.I. Feb. 21, 2002) (same).

[76] *Roper,* 578 F.2d at 1110.

[77] *Liles,* 201 F.R.D. at 454.

certification marks a bright line - - before which a "pick off" is proper and after which it is not - - present the most thoughtful approach to the mootness and standing analyses in these situations. "Hinging the outcome of [a] motion [to dismiss for lack of standing] on whether or not class certification has been filed is not well-supported in the law nor sound judicial practice."[78] As one commentator has observed:

> If the survival of the class action hinges on whether the defendant's offer is conveyed before or after the certification motion is filed, both defendants and plaintiffs have great motivation to file Rule 68 offers or class certification motions as quickly as possible. On its face, this might seem like a benefit, in that it would result in the expeditious resolution of certification issues. But hinging the court's jurisdiction on who can get to the courthouse first does nothing but create a race between the parties to file documents with the court. Taking this to its logical (and foreseeable) extreme, named plaintiffs would be required (contrary to Fed. R. Civ. P. 23(c)(1)(A)) to file class certification motions concurrently with the complaint in order to prevent a Rule 68 offer from reaching them first.[79]

When a class plaintiff has not voluntarily relinquished his standing, by settlement or otherwise, it is "appropriate that the class action process should be able to 'play out' . . . and [the Court] should permit due deliberation by the parties and the court on the class certification issues."[80] By not allowing the defendant to "pick off"

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[78] *Liles*, 201 F.R.D. at 455.

[79] Koysza, at 795 (citing *Asch v. Teller, Levit & Silverhurst,* 200 F.R.D. 399, 400 (N.D. Ill. 2000)).

[80] *Weiss,* 385 F.3d at 348. *See also* Koysza, *at* 797-98 ("[A]llowing defendants deliberately to moot class actions before certification would deny the [] court the [] ability to reach the

a class representative prior to class certification, the court not only encourages efficiency, it also preserves the integrity of the class action as an effective means by which to present and, when appropriate, to "vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."[81] The "pick off" clearly "frustrates" this important objective of the class action device.[82]

As the Court noted in its previous opinion, to determine whether a plaintiff may still seek class certification after his claim on the merits expires (by settlement or otherwise), the Court must focus on the plaintiff's "personal stake" in class certification.[83] Where a plaintiff continues vigorously to advocate for his right to class certification in a concrete and factual setting capable of judicial resolution, he has a personal stake in obtaining class certification.[84] A "desire to shift to successful class

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certification question. . . . If the class is worthy of certification, and thus worthy of status distinct from that of the named plaintiff, the trial court should at least be given the chance to say so.").

[81] *Roper,* 445 U.S. at 338.

[82] *Id.* at 339. *See also Bond,* 2002 WL 373475, at *6 (noting that the "pick off" effectively "render[s] the class action mechanism a nullity.").

[83] *Stratton,* 2010 WL3706617, *7. *See Also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980) ("[I]n determining whether the plaintiff may continue to press the class certification claim, after the claim on the merits 'expires,' we must look to the nature of the 'personal stake' in the class certification claim.").

[84] *Id.* at 404.

litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation" provides a sufficient "personal stake" to maintain standing under these circumstances.[85]

Stratton's Amended (proposed class action) Complaint seeks not only the receipt of his deductible, but also a declaration that AIIC must in the future conduct reasonably prompt and good-faith evaluations of its obligation to recover PIP deductibles for all of its Delaware PIP insureds in a manner consistent with title 21, section 2118 of the Delaware Code.[86] Because Stratton's allegations may be capable of repetition but would, upon dismissal, evade review, the Court is satisfied that he retains a sufficient personal stake in the litigation to move to the next phase of these proceedings.[87] Accordingly, Stratton will be given the opportunity to continue as class representative. His ability to represent the class under Del. Super. Ct. Civ. R. 23 will be further developed and reviewed on the proper motion for class certification.

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[85] *Roper*, 445 U.S. at 334 n.6.

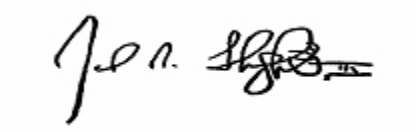
[86] Am. Compl. ¶ 44.

[87] *See Gen. Motors Corp. v. New Castle County*, 701 A.2d 819, 824 n.5 (Del. 1997) ("Two recognized exceptions to [the] mootness doctrine are situations that are capable of repetition but evade review and matters of public importance."); *Hoban*, 2004 WL 2610543, at *5 ("[T]here are serious questions as to whether this dispute is capable of repetition but evading review.").

VI.

Based on the foregoing, AIIC's Motion to Dismiss the Amended (Proposed) Class Action Complaint is hereby **DENIED**.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

JRS, III/sb

Original to Prothonotary