

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

THOMAS A. EAMES, ROBERTA L. :  
EAMES, AND TAMMY EAMES, on :  
behalf of themselves and all :  
others similarly situated, :  
 :  
Plaintiffs, :  
 :  
v. : Civil Action No. 04-1324-JJF-LPS  
 :  
NATIONWIDE MUTUAL INSURANCE :  
COMPANY, :  
 :  
Defendant. :

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**MEMORANDUM OPINION**

September 30, 2008  
Wilmington, Delaware

  
Farnan, District Judge.

Pending before the Court are Plaintiffs' Objections to Magistrate Judge Leonard P. Stark's Report And Recommendations (D.I. 248), which was issued on March 31, 2008 (D.I. 247). Plaintiffs object to the Magistrate Judge's recommendation that Defendant's Motion to Dismiss (D.I. 167) be granted, but do not object to the Magistrate Judge's recommendation that their Motion for Reconsideration (D.I. 218) be denied. For the reasons discussed, the Court will adopt the Magistrate Judge's Report and Recommendations.

#### **I. Background.**

On August 20, 2004, the proposed class representatives, Thomas, Roberta, and Tammy Eames ("Plaintiffs") filed this action against Defendant Nationwide Insurance Company ("Nationwide") alleging that Nationwide misrepresented to Plaintiffs the limits of liability for Personal Injury Protection ("PIP") coverage in policies that Nationwide sold by referring to the statutory minimum coverage levels as "full" PIP coverage.<sup>1</sup> (D.I. 1, "Original Complaint"). This action was originally filed in the Delaware Superior Court on August 20, 2004, and removed to this Court on October 1, 2004. (Id.)

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<sup>1</sup> Delaware motor vehicle owners must carry PIP insurance of at least "15,000 for any 1 person and \$30,000 for all persons injured in any 1 accident." 21 Del. C. § 2118(a)(2)(b). This statutory minimum level of coverage is commonly referred to as "\$15,000/\$30,000."

In their Original Complaint, Plaintiffs asserted claims for breach of contract; bad faith breach of contract; declaratory judgment that class members are entitled to \$100,000/\$300,000 PIP coverage; violation of the Delaware Consumer Fraud Act ("consumer fraud claim"), 6 Del. C. § 2513; and civil conspiracy. (Id.) By Memorandum Opinion and Order dated February 2, 2006, Judge Jordan granted Nationwide's Motion To Dismiss concluding that: (1) Plaintiffs failed to state a claim for breach of contract, bad faith breach of contract and declaratory judgment, and (2) Plaintiffs failed to plead their claims for consumer fraud and civil conspiracy with particularity as required by Fed. R. Civ. P. 9(b). Judge Jordan also granted Plaintiffs leave to amend the fraud and civil conspiracy claims. (D.I. 15.)

By their Amended Complaint (D.I. 158), Plaintiffs reassert their claims for consumer fraud and civil conspiracy and base those claims on two theories, the maximum limit theory and the fullest available limit theory. With regard to the maximum limit theory, Plaintiffs contend that Nationwide falsely represents to customers that when they purchase "full" PIP coverage, they have purchased \$100,000/\$300,000 PIP coverage instead of the \$15,000/\$30,000 limits that "full" PIP actually covers. (D.I. 158 at ¶ 8). With regard to the fullest available limit theory, Plaintiffs contend that despite the actual availability of additional PIP ("APIP") in excess of statutory minimums,

Nationwide's use of the term "full PIP" represents to consumers purchasing full PIP that they have purchased the highest amount of coverage available to a policy holder, a claim independent of the dollar amount of the coverage actually purchased. (Id. at ¶ 10.) In addition, the Amended Complaint explains in more detail than the Original Complaint, the circumstances in which each of the Plaintiffs were told that they purchased policies with "full" PIP coverage, but were later informed that the policies provided only the statutorily required \$15,000/\$30,000 PIP limits. (Id. at ¶ 13a-g.)

In response to the Amended Complaint, Nationwide filed a second Motion to Dismiss. Specifically, Nationwide argued that: 1) Plaintiffs failed to plead fraud with particularity; 2) Plaintiffs failed to plead harm; (3) Plaintiffs' claims are barred by the statute of limitations; 4) Plaintiffs failed to state a claim for civil conspiracy; and 5) Plaintiff Tammy Eames has no standing. (D.I. 167).

By decision dated August 29, 2006, Judge Jordan granted in part Nationwide's Motion To Dismiss. Judge Jordan concluded that Plaintiff's consumer fraud and conspiracy claims based on the "maximum limit theory" were time-barred. However, Judge Jordan reserved judgment on the remaining claims pertaining to the "fullest available limit" theory, because (1) further development of the record was needed to show whether Plaintiff's claims were

time-barred, and (2) the partial dismissal raised a question concerning whether subject matter still existed over the remaining claims based on the amount in controversy. Judge Jordan ordered further briefing on the question of subject matter jurisdiction. (D.I. 216, 217. Shortly thereafter, Plaintiffs filed a Motion for Reconsideration of Judge Jordan's ruling that claims under the maximum limit theory were time-barred. (D.I. 218.)

On December 15, 2006, Judge Jordan was elevated to the United States Court of Appeals for the Third Circuit, and this case was initially reassigned to the judicial vacancy. (D.I. 232.) It was subsequently referred to Magistrate Judge Mary Pat Thyng and then to Magistrate Judge Leonard P. Stark. (D.I. 232, 236.) After Magistrate Judge Stark heard oral arguments on January 18, 2008 (D.I. 243), the case was reassigned to this Court on February 1, 2008. Because of Magistrate Judge Stark's familiarity with the case, the Court referred the case back to Magistrate Judge Stark on February 18, 2008, for all proceedings up to and including the pretrial conference. (D.I. 246.)

On March 31, 2008, Magistrate Judge Stark issued his Report And Recommendations Regarding Plaintiffs' Motion For Reconsideration And Defendant's Motion To Dismiss, And Order Regarding Defendant's Motion To Strike. (D.I. 247.) Magistrate Judge Stark recommended the denial of Plaintiffs' Motion For

Reconsideration on the grounds that Plaintiffs "failed to meet the stringent standards" necessary to warrant reconsideration of Judge Jordan's decision that Plaintiffs' claims pursuant to the "maximum limit theory" were time-barred. (D.I. 247 at 11.). Magistrate Judge Stark also considered those portions of Nationwide's Motion To Dismiss which remained outstanding after Judge Jordan's August 29, 2006 decision, and recommended that Nationwide's Motion To Dismiss be granted. In addition, Magistrate Judge Stark resolved Nationwide's Motion To Strike concluding that it was moot.

## **II. STANDARD OF REVIEW**

When objections are filed to a magistrate judge's report and recommendation, the court reviews de novo the parts of the magistrate judge's disposition which are subject to the objections. Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(C) (2008). The court may accept, reject, or modify the magistrate judge's recommendations. The court may also receive further evidence or return the matter to the magistrate judge with instructions for proceeding. Id.

## **III. DISCUSSION**

Plaintiffs' primary objection to the Report and Recommendation is that, despite Judge Jordan's prior determination that Plaintiffs alleged misrepresentation sufficient to withstand dismissal under Rule 12(b)(6), the

Magistrate Judge improperly revisited this subject, even though it was not briefed anew in Nationwide's second Motion To Dismiss. Plaintiffs further contends that the merits of their fraud claim should have been left to a jury.

Nationwide contends that the Magistrate Judge's decision is not inconsistent with prior rulings by Judge Jordan in the case, because the Magistrate Judge's dismissal is framed in the context of Rule 9(b). Stated another way, Nationwide contends that "the Report and Recommendation did not dismiss the statutory fraud count simply because there was no misrepresentation alleged. Rather, there was simply no misrepresentation alleged **with sufficient particularity.**" (D.I. 251 at 9) (emphasis in original).

In pertinent part, Fed. R. Civ. P. 9(b) provides that a party alleging fraud "must state with particularity the circumstances constituting fraud. . . . Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The circumstances of the alleged fraud must be plead with sufficient particularity "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." Seville Industrial Machinery Corp. V. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984).

These heightened pleading requirements apply to claims arising under the Delaware Consumer Fraud Act. See Johnson v. Geico Cas. Co., 516 F. Supp. 2d 351, 359 (D. Del. 2007). In order to state a claim under the Delaware Consumer Fraud Act, a plaintiff must, at a minimum, allege with the required particularity that the defendant negligently omitted or concealed a material fact, and that the defendant "intended that others rely on the omission or concealment." Stephenson v. Capano Dev. Inc., 462 A.2d 1069, 1074 (Del. 1983).

In addition, claims of civil conspiracy are not independent causes of action. Rather, these claims must be predicated on an underlying wrong. Tracinda Corp. v. DaimlerChrysler AG, 197 F.Supp.2d 42, 72 (D. Del. 2002).

Reviewing de novo the decision of Magistrate Judge Stark, the Court concludes that Magistrate Judge Stark did not err in his determination that Plaintiffs failed to plead their claims with the specificity required by Rule 9(b). Although the Magistrate Judge's Report and Recommendations can be read as holding that Plaintiffs failed to plead a misrepresentation in the first instance, it appears to the Court that the Magistrate Judge's determination that there was no actionable misrepresentation was also made within the context and requirements of Rule 9(b). For example, the Magistrate Judge recognized that Plaintiff was required to plead "at least a

negligent misrepresentation or omission of material fact by Nationwide with the intent that Plaintiffs rely on such misrepresentation or omission," and went on to state:

Because Rule 9(b) applies to claims arising under [the Delaware Consumer Fraud Act] . . . Plaintiffs must plead such misrepresentation or omission with particularity. In my view, Plaintiffs have failed to do so.

(D.I. 247 at 16) (emphasis added).

In any event, the Magistrate Judge clearly invoked Rule 9(b) as, at least an alternate ground, to support his recommendation of dismissal, and reviewing the allegations of the Amended Complaint de novo in the context of the requirements of Rule 9(b), the Court agrees with and adopts the Magistrate Judge's reasons for concluding that Plaintiffs failed to plead their fullest available limit theory claims with the required particularity. (Id. at 4, 19, 20). In addition, the Court agrees with Judge Stark's determination that Plaintiffs should not be permitted a third opportunity to satisfy the requirements of Rule 9(b) where, as here, Plaintiffs are represented by counsel and Nationwide has already had to defend itself against two complaints.

As for Plaintiff's other objections, the Court likewise concludes that the Magistrate Judge's decision was not erroneous. Accordingly, the Court agrees with and adopts the Magistrate Judge's Report and Recommendations that Plaintiffs consumer fraud

and civil conspiracy claims be dismissed.

#### **IV. CONCLUSION**

For the reasons discussed, the Court will adopt Magistrate Judge Stark's Report and Recommendation.

An appropriate Order will be entered.

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FOR THE DISTRICT OF DELAWARE

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NATIONWIDE MUTUAL INSURANCE :  
COMPANY, :  
 :  
Defendant. :

O R D E R

At Wilmington, this 30th day of September 2008, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiffs' Objections to Magistrate Judge Leonard P. Stark's Report and Recommendation (D.I. 248) dated March 31, 2008 (D.I. 247), are OVERRULED.

2. Magistrate Judge Stark's Report and Recommendation (D.I. 247) is ADOPTED.

  
UNITED STATES DISTRICT JUDGE