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NEW JERSEY DEFENSE

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Dear Members of the New Jersey Defense Association and to New Jersey's esteemed Judiciary,

I cannot believe that it has been 8 months since I took over as President of NJDA. During my tenure, we have held many successful seminars as well as our first ever Civil Trial Seminar which was held in December and was a well attended event. We currently have our Medical College Seminar scheduled for April 5, 2019 and as promised, we are continuing with our networking events. The next networking event will take place at Steakhouse 85 in New Brunswick on April 3, 2019. I encourage all to attend, even if it to simply stop by and say hello.

In addition, NJDA has been striving to raise our profile within the legal community, not only through the hosting of seminars, but sponsoring events for the legal community. For the second year in a row, we will sponsor the Young Lawyers Luncheon at the New Jersey State Bar Association's Annual Meeting in Atlantic City.

I am also proud of our committees, whose members who have stepped up and provided our Editor-in-Chief, Michael Malia, with substantive law articles for this Newsletter. As always, I encourage everyone to not only join a committee, but to become actively involved. A list of committees can be found on the NJDA web site. If you are interested in serving as a leader in any committee, you can do so by reaching out to the committee chair or myself.

Finally, I am excited about our Annual Convention at Ocean Edge Resort in Cape Cod, Massachusetts from June 27 to June 30. Set on a 400-acre estate next to Cape Cod Bay, this upscale golf resort is centered around an 1890's mansion. Amenities include a golf course, spa, private beach and tennis courts, plus 5 pools (2 indoor). Our educational programs will be held on Friday, June 28 and Saturday, June 29, and offer 6 CLE credits, including 1 Ethics credit. I am excited to announce that this year's Convention will include a keynote presentation by J. Michael Weston, Esq., Past President of The Defense Research Institute, who will discuss defense strategies for openings and closings. Mike Weston is a founding member of Lederer Weston Craig, PLC and is a Fellow of the American College of Trial Lawyers. He has been a frequent speaker on substantive legal topics and the business of law, and has facilitated workshops and retreats on leadership and long range planning. I encourage everyone to register as soon as possible. We have had to add additional rooms to our booking, and the block will be filled soon. Registration and hotel information can be found on our website at www.njdefenseassoc.com.

ALDO J. RUSSO, ESQ.

CLOSING THE DOOR ON UCR IN CASES INVOLVING AMBULATORY SURGERY CENTERS (ASCS): THE APPELLATE DIVISION BRINGS AN END TO AN ERA OF PIP ARBITRATIONS AND LITIGATION

BY ROBERT A. CAPPUZZO, CHASAN LAMPARELLO MALLON & CAPPUZZO, PC

The ongoing question of whether or not an ambulatory surgery center (ASC) can be paid for services not listed on the fee schedule has recently been answered with an emphatic **"NO"** by New Jersey's Appellate Division. On January 29, 2019, the Appellate Division's decision in New Jersey Manufacturers Insurance Company v. Specialty Surgical Center of North Brunswick a/s/o Claire Fiore, and Surgicare Surgical Associates of Fair Lawn a/s/o Martino Chizzoniti (A-0319-17T1 & A0388-17T1) was approved for publication – putting an end to a hotly disputed issue among PIP practitioners.

For years, Forthright arbitrators (known as DRPs) have been fairly split on this issue. Some DRPs have been consistent in denying reimbursement to ASCs unless the ASC fee schedule includes a specified amount for the codes billed. Other DRPs have entertained arguments to allow ASCs in such circumstances to have their bill either (1) cross-walked to a similar service listed on the Hospital Outpatient Surgical Facility (HOSF) Fees; or (2) paid pursuant to UCR if Medicare allows reimbursement for such codes. Inevitably, this resulted in a substantial number of arbitrations involving ASC billing. In turn, this led the Department of Banking and Insurance (DOBI) to revise its published response to an FAQ to address this issue head-on. Superior Court judges were also split on how to resolve these disputes. As a result, both sides racked up quite a few wins by way of Orders to Show Cause. Again, this only led to more arbitrations and litigation since both sides now had judicial (albeit, unpublished) opinions to support their arguments. This issue finally came to a head recently when two NJM cases involving two different ASCs were heard together before the same Appellate Division panel of judges. Notably, the Insurance Council of New Jersey (ICNJ) and the Property Casualty Insurers Association of America (PCIAA) also participated in both cases amicus curiae. NJM, ICNJ & PCIAA are hereinafter referred to as "Respondents" for brevity.

The Facts:

Although both cases involved different ASCs who billed NJM on different claims, the Appellate Division heard these together since they involved a dispute over the same surgical code – CPT 63030. This code is not listed on the ASC fee schedule, but does appear on the HOSF with a reimbursement rate of $13,940.72 for the North Region.

In the Fiore case, the insured underwent a lumbar discectomy at Specialty Surgical Center of North Brunswick (Specialty Surgical) who billed $32,500 for CPT 63030. In the Chizzoniti case, the insured underwent lumbar decompression surgery at Surgicare Surgical Associates of Fair Lawn (Surgicare) who billed $49,000 for CPT 63030. Coincidentally, both procedures were performed at Specialty Surgical and Surgicare in November of 2015. NJM denied payment to both ASCs who then proceeded to file demands for arbitration with Forthright pursuant to N.J.A.C. 11:3-5.1(a).

The underlying DRPs and appellate DRP panels found against NJM's position in both cases and awarded payments to be made to the ASCs.

NJM then sought to vacate the awards pursuant to N.J.S.A. 2:A:23A-13 of the Alternative Procedure for Dispute Resolution Act (APDRA), arguing a mistake of law had been committed below. The trial judge vacated both awards and found that the ASCs were prohibited from receiving reimbursement of any kind in connection with ASC fees for CPT 63030.

Specialty Surgical and Surgicare appealed.

The Jurisdictional Issue:

The APDRA provides a party seeking to vacate, modify or correct an award the ability to bring a "summary action" in the Superior Court. That trial court level of review is intended by the enabling statute to provide the final level of appellate review. Looking to Mt. Hope Development Associate v. Mt. Hope Waterpower Project, 154 N.J. 141, 152 (1998), the Appellate Division recognized there were "'rare circumstances'…where public policy would require appellate court review."

Citing Kimba Med. Supply v. Allstate Ins. Co., 431 N.J. Super. 463 (App. Div. 2013), the Appellate Division found that public policy supports review of the trial court's decisions in these cases since continued conflicting interpretations of the fee schedule would likely lead to more litigation – contrary to the Legislature's intent behind AICRA. Specifically, the court here invoked the public policy exception because:

> "the issue before us: 1) had only been addressed in unpublished cases; 2) involved matters that 'should not be guessed at by the participants from case to case,' including '[t]he repeat players in the PIP system – claimants, insurers, DRPs, lawyers, and trial judges-' who could all 'benefit from definitive precedential guidance'; and 3) involved a matter of statutory interpretation."

Recognizing that both DRPs and Superior Court judges have been inconsistent in interpreting the applicable PIP regulations, with no published cases addressing this issue, the Appellate Division exercised their authority under the APDRA to review these cases. The Appellate Division also recognized that failing to act without guiding precedent would lead to more litigation, with associated costs and delays.

Parenthetically, the jurisdictional question was not challenged by any of the parties at oral argument. The consensus was that the PIP community needed clarity on this question.

The ASCs' Arguments:

The ASCs presented three arguments to the Appellate Division: (1) that ASC billing was consistent with the intent of AICRA in that it tended to be lower than the rates payable to hospitals for the same treatment; (2) that DOBI incorporated Medicare's payment guidelines "wholesale" into our PIP Regulations; and (3) that our PIP Regulations permit non-payable codes to be cross-walked to similar services listed on the HOSF fee schedule, or in the absence of any such similar services, UCR.

On the first argument, the ASCs suggested to the court that their billing comported with AICRA since they were a lower-cost alternative to having the same procedures performed in a hospital outpatient setting. However, upon questioning from the Appellate Panel, counsel for the ASCs reluctantly admitted that their client's billed rates for CPT 63030 were higher than the allowable HOSF rates. The ASCs then suggested that payment at the HOSF rates would be fair to all parties involved.

The ASC's second argument was that DOBI adopted Medicare "wholesale" when it implemented the current fee schedule. They cited N.J.A.C. 11:3-29.4(g) and argued that DOBI intended for the ASC fee schedule to be interpreted in accordance with the Medicare Claims Processing Manual. In the case of CPT 63030, they argued that although DOBI declined to include that code on the ASC fee schedule, Medicare updated its guidelines to permit reimbursement of that code when performed in an ASC. Therefore, the code should now be paid by PIP carriers.

This argument naturally flowed into the ASC's third argument—that the payable amount should be consistent with either the HOSF rates for the same codes, or in the alternative, UCR.

Respondents' Arguments:

In opposing the ASC's first argument, Respondents pointed out that the Claimants' billed rates exceeded the HOSF by a substantial amount, thereby belying the ASCs' contention that their billing comported with AICRA.

On the ASCs' second argument regarding Medicare, Respondents guided the Appellate panel to consider the plain meaning of N.J.A.C. 11:3-29.4(g) which starts out with the words:

> **"Except as specifically stated to the contrary in this subchapter**, the fee schedules shall be interpreted in accordance with the following, incorporated herein by reference, as amended and supplemented: the relevant chapters of the Medicare Claims Processing Manual, updated periodically by CMS, that were in effect at the time the service was provided."

(Emphasis added). Respondents then pointed to the language in N.J.A.C. 11:3-29.5(a) as DOBI's "statement to the contrary" where it says:

> **"ASC facility fees are listed in Appendix, Exhibit 1, by CPT code. Codes that do not have an amount in the ASC facility fee column are not reimbursable if performed in an ASC."**

Respondents further argued that N.J.A.C.11:3-29.4(e)(3) expressly prohibits consideration of a "similar services" analysis to determine payable amounts for ASC codes not listed on the fee schedule. That section plainly states:

> "3. Codes in Appendix, Exhibit 1 that do not have an amount in the ASC facility fee column are not reimbursable if performed in an ASC and are not subject to the provision in (e) above concerning services not set forth in or covered by the fee schedules."

Lastly, Respondents argued that DOBI's clear intent on this issue was crystalized in its original and revised answers to FAQ #6 which dealt with this precise question. The original version of DOBI's response to FAQ #6 read as follows:

> N.J.A.C. 11:3-29.5(a) states that services for which there is no fee in the ASC facility fee column of Appendix, Exhibit 1 are not

> reimbursable if performed in an ASC. Stated another way, the only facility fees for services that are reimbursable if performed in an ASC are those CPT and HCPCS codes that have facility fees listed in the ASC facility fee column of Appendix, Exhibit 1. HOWEVER, the Department inadvertently omitted the "N1" payment indicator from a number of services in Appendix, Exhibit 1 that are performed in ASCs. These "N1" payment indicators are found in CMS' Addendum AA – Final ASC Covered Surgical Procedures for CY 2011 (MS Excel); PDF version.
>
> The "N1" payment indicator means that the service can be performed in an ASC but a facility fee is not separately reimbursable because the service is included in another procedure. The list of codes for which the "N1" payment indicator should have been included in Appendix, Exhibit1 can be found here (MS Excel) (or PDF version).

Respondents highlighted the fact that after DOBI learned that some ASCs were seeking payment for non-listed codes via a Medicare theory (and succeeding in doing so at arbitration), DOBI revised its response to FAQ #6 to remove any doubt about their position on this issue. DOBI updated its response to FAQ #6 to read:

> N.J.A.C. 11:3-29.5(a) and 29.4(e)3 state that when there is no fee in the ASC facility fee column of Appendix, Exhibit 1 for a service, the facility fee for that service is not reimbursable if performed in an ASC. Stated another way, the only facility fees that are reimbursable for services performed in an ASC are those CPT and HCPCS codes that have facility fees listed in the ASC Facility Fee Column of Appendix, Exhibit 1. The fact that, subsequent to the promulgation of the fee schedule rule, CMS may have authorized additional procedures to be performed in an ASC does not permit an ASC to be reimbursed for those services unless there is an amount listed in the ASC Fee Column on Appendix, Exhibit 1 for the corresponding CPT code. However, certain codes that do not have fees in the ASC facility fee column have "N1" in the payment indicator column. The "N1" payment indicator means that the service can be performed in an ASC but a facility fee is not separately reimbursable because the service is included in another procedure. N.J.A.C. 11:3-29.5(a) and 29.4(e)3 apply only to facility fees and do not apply to physician services.

In sum, Respondents argued that the court should defer to DOBI's own guidance as to the interpretation of its own PIP regulations.

The Appellate Division's Decision:

In reaching its decision, the court acknowledged the long history of legal challenges posed against DOBI's regulation of ASC reimbursement in PIP cases. They noted that the current fee schedule provides reimbursement to doctors but not ASCs for CPT 63030. The Appellate Division concluded that ASCs should not receive reimbursement for 63030 since no reimbursement was listed on the ASC columns of the fee schedule. They interpreted this omission as a clear indication of DOBI's intent not to reimburse providers for this (and any other) non-listed procedures. The court found that Medicare's decision to add CPT codes to their fee schedule does not result in the automatic amendment of our PIP fee schedule. Rather, they concluded that DOBI, not Medicare, amends the PIP fee schedule.

Impact on PIP:

This decision signals the end of UCR disputes with ASCs for non-listed codes. Carriers now have the comfort of knowing their payment decisions in this regard should be upheld if challenged. Carriers no longer need to use a "similar service" analysis to cross-walk ASC codes. This case provides a bright-line rule which should be easy to implement going forward.

Only ten days after its published decision was released in these cases, the Appellate Division issued an unpublished decision on a companion case which was argued on December 11, 2018 along with the Specialty Surgical and Surgicare Surgical cases. This third case involved an ASC who billed CPT 62290 which is listed on the ASC fee schedule with no payment amount. In Endo Surgical Center a/s/o Bernadette Harper v. NJM Insurance Group (A-1934-17T3), the Appellate Division reversed a trial court's decision to award reimbursement for CPT 62290. In the underlying case, the trial court found that CPT 62290 was payable since Medicare added this code to its ASC fee schedule. On appeal, NJM argued that CPT 62290 is listed on Medicare's ASC fee schedule with an 'N1' modifier, meaning the code is for a packaged procedure which is not separately reimbursable. Although normally billed with other procedures and considered as included in other charges, CPT 62290 was the only code billed by the ASC in this case. Consistent with its arguments in the Specialty Surgical and Surgicare Surgical cases, NJM argued that DOBI's regulations and FAQ responses provide clear guidance that this code is not payable in PIP since it is listed on the PIP fee schedule with no payable amount. Citing the Specialty Surgical and Surgicare Surgical cases, the Appellate Division rejected the argument that the PIP fee schedule is amended when Medicare permits reimbursement to an ASC for a specific CPT code.

For medical providers, these decisions will likely cause such surgical treatment to occur in hospitals rather than in ASCs, which may still lead to UCR disputes for codes which are not listed on the HOSF fee schedule. However, the industry may cheer the fact that they have a definitive statement of where they stand against ASC UCR billing.

For DRPs and judges, this decision provides a much-needed interpretation of how to consistently determine ASC disputes involving non-listed CPT codes as well as CPT codes with no reimbursement amount listed on the ASC fee schedule. This likely will result in fewer Forthright arbitrations, Forthright appeals and Orders to Show Cause by either side seeking to overturn errant awards and decisions.

Relevance to BI practitioners?

For those BI attorneys asking why they've read this far into a PIP article, you may find some professional utility from this case. If facing a BI case with boardable medical bills which include ASC bills with CPT codes that are not payable pursuant to the PIP fee schedule, consider whether this case might support a pre-trial motion to limit that exposure.

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HOW FAR IS TOO FAR: SUCESSFULLY NAVIGATING HEARSAY OF NON-TESTIFYING EXPERTS SINCE JAMES V. RUIZ

BY THADDEUS J. HUBERT, IV, HOAGLAND, LONGO, MORAN, DUNST AND DOUKAS

Since the Appellate Division's decision in James v. Ruiz, 440 N.J. Super. 45 (App. Div. 2015) that the opinion of a non-testifying radiologist concerning results of a CT Scan violates N.J.R.E. 808 and is therefore inadmissible hearsay, the question which seems to arise in every case is which opinions of non-testifying experts can your expert specifically mention to the jury as support for his or her opinion and your case in general, without violating James. James applies to hearsay which is classified as "complex" and "disputed." However, even complex opinions may be admissible if not disputed. Further, recent case law as well as past precedent supports the conclusion that a variety of objective tests and physical exam findings are still admissible.

N.J.R.E. 808 is a rule of exclusion and various circumstances must be established before an opinion of a non-testifying expert is admitted.[1] It states:

> Expert opinion which is included in an admissible hearsay statement **shall be excluded** if the declarant has not been produced as a witness **unless** the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the **complexit**y of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

James applied N.J.R.E. 808 to bar the findings of a non-testifying radiologist since the findings were complex (interpretation of a CT scan) and disputed by defendant's expert. James and previous cases make clear interpretation of a diagnostic test such as a CT scan or MRI require the radiologist to testify in order to have his or her opinion provided to the jury.[2] But if an expert's opinions are not disputed then the complex opinion can be admitted.

Shortly after Judge Sabatino issued the Appellate Division panel's opinion in James, he had the opportunity to revisit his decision. In Gonzales v. Hugelmeyer, 441 N.J. Super. 451, 462-463 (App. Div. 2015) defendant appealed following a jury trial arguing that plaintiff's chiropractor improperly discussed the non-testifying radiologist's diagnosis of spondylosis. Thus, the issue in Gonzales was strikingly similar to the fact pattern in James. Judge Sabatino, writing for the Court, held that as long as the spondylosis diagnosis was undisputed, N.J.R.E. 808 would not apply. "The prohibition in N.J.R.E. 808 and case law on an expert's testimony about the complex hearsay opinion of a non-testifying expert does not apply if the opinion is undisputed." Id. at 463.

Even though N.J.R.E. 808 is a rule of exclusion, the Gonzales decision illustrates substantive opinions of non-testifying doctors, including radiologists, may be admitted where no dispute exists. In other words, even when the opinion is "complex" the opinion is admissible if no dispute exists. This may not seem critical to success at trial, but can be used in conjunction with other facts to gain an advantage. Many adversarial experts will not review opinions of non-testifying doctors which are

not helpful to their opinion. If the expert does not review this information, he or she cannot be cross-examined regarding these opinions and/or documents. Corcoran v. Sears Roebuck and Co., 312 N.J. Super. 117, 130 (App. Div. 1998). However, if the adversary's expert did not review certain information, the findings may not be able to be disputed. Such a situation potentially allows your expert to provide opinions of non-testifying doctors that may not otherwise be admissible since Gonzales permits complex opinions of non-testifying doctors to be heard if not "disputed."[3]

For example, if a plaintiff's expert in a personal injury matter did not review prior MRI films or records of a treating doctor before the accident occurred, the expert may not be in a position to dispute any findings by those doctors. If plaintiff's treating doctor diagnosed plaintiff with diabetic neuropathy before the accident that opinion may be admissible based upon Gonzales through defendant's expert to prove (1) plaintiff had prior similar problems and (2) the current problems of a claimed radiculopathy are unrelated to the accident since the diagnosis cannot be disputed. Should the plaintiff's expert review material which may not be helpful to their case a discovery deposition may yield various admissions from the expert that he or she does not dispute opinions of other doctors which are helpful to your case.

Further, James does not prevent the admission of various physical exam findings. In Reid v. McKeon, 2018 N.J. Super. Unpub. LEXIS 1958 and Bartsch v. Lage, 2019 N.J. Super. Unpub. LEXIS 76 the Appellate Division allowed defendant's expert to apprise the jury of physical exam findings, including strength and sensation in the extremities, of non-testifying doctors since such findings were not complex and therefore did not fall under N.J.R.E. 808. This analysis is consistent with prior case law which predates James. See Blanks v. Murphy, 268 N.J. Super. 152, 164 (App. Div. 1993). Moreover, Reid emphasized the James holding was limited "to testimony about complex and disputed opinions." Reid, supra, at 11.

Using James and Gonzales as a guide, Counsel are still able to have their experts testify to opinions of non-testifying doctors which will bolster their case. Physical exam findings are admissible. Furthermore, Counsel should seek to identify matters that are not disputed during discovery so as to be prepared at trial and aggressively seek to admit information/opinions which were not reviewed by the adversary's expert as this information will likely be helpful and cannot be disputed rendering any "complexity" objection moot. Careful application of this case law and N.J.R.E. 808 can have a decided impact on the outcome of a trial.

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[1] Despite N.J.R.E. 808 being a rule of exclusion, James specifically articulated the rule would not always bar opinions of a non-testifying expert. See James, supra, at 78.

[2] Brun v. Cardoso, 390 N.J. Super. 409 (App.Div.2006) and Agha v. Feiner, 198 N.J. 50 (2009).

[3] Subject to N.J.R.E. 803(c)(6) and N.J.R.E. 703.

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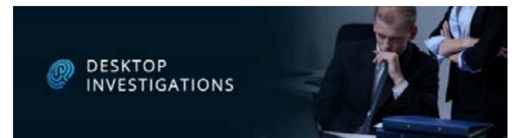

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THE STATUS OF NO PAY–NO PLAY IN NEW JERSEY

BY NATHAN J. BUURMA, ESQ.

New Jersey's Legislature adopted a "No pay-No play" statute in 1997. N.J.S.A.39:6A-4.5(a). Since the date that the statute was adopted, New Jersey's Courts have been called upon to interpret the extent of the statute's applicability to bar claims for damages that are asserted by the owners of an uninsured automobile. As recently as this past year, in the matter of Scholes v. Hausmann, Dkt. No. A-0980-17T3, 2018 WL 4997186 (Oct. 16, 2018), the Appellate Division was asked to decide whether the statute barred an injury claim asserted by a New Jersey resident who owned a vehicle that was insured in another State.

The No pay-No play statute

N.J.S.A. 39:6A-4.5 provides:

> a. Any person who, at the time of an automobile accident resulting in injuries to that person, is required but fails to maintain medical expense benefits coverage mandated by… 39:6A-4 … 39:6A-3.1 . . . or … 39:6A-3.3… shall have no cause of action for recovery of economic or noneconomic loss sustained as a result of an accident while operating an uninsured automobile.

In general, this statute bars a claim made by an injured party who was occupying an automobile that he or she was required, but failed, to insure as required by New Jersey law. Also known as the No pay-No play statute, the legislation was intended to advance a policy of cost containment by ensuring that an injured, uninsured driver does not draw on the pool of accident-victim insurance funds to which he did not contribute… and to give "the uninsured driver a very powerful incentive to comply with the compulsory insurance laws: obtain automobile liability insurance coverage or lose the right to maintain a suit for both economic and noneconomic injuries." Caviglia v. Royal Tours of Am., 178 N.J. 460, 471 (2004).

One by one, New Jersey Courts have examined each element of the statute.

Automobile requirement

Initially, the statute only applies to uninsured "automobiles." In Title 39, an "automobile" is defined as a "private passenger automobile of a private passenger or station wagon type that is owned or hired and is neither used as a public or livery conveyance for passengers nor rented to others with a driver; and a motor vehicle with a pickup body, a delivery sedan, a van, or a panel truck or a camper type vehicle used for recreational purposes owned by an individual or by husband and wife who are residents of the same household, not customarily used in the occupation, profession or business of the insured other than farming or ranching." N.J.S.A. 39:6A-2. An Appellate Division panel has found that the plain meaning of the No pay-No play statute restricts its application to automobiles only. Thus, for example, an operator of an uninsured motor scooter or motorcycle is not barred from bringing an action for recovery from an at-fault party. Solorzano v. Sapunarich, 386 N.J. Super. 323 (App. Div. 2006).

Accidents involving the uninsured automobile

The statute only applies to accidents wherein the vehicle owner is occupying the uninsured

automobile. The Supreme Court of New Jersey has confirmed that the statute applies regardless of whether the uninsured owner was a driver or a passenger in the uninsured vehicle. Perelli v. Pastorelle, 206 N.J. 193 (2011).
If a claimant owns a vehicle that he failed to insure but is occupying a different vehicle at the time of loss, then he is entitled to make a claim for non-economic loss. Note, however, that a culpably uninsured claimant is precluded from making a claim for PIP benefits and may not recover payment for medical bills from the at-fault driver of a private passenger auto. Dzuiba v. Fletcher, 382 N.J. Super. 73 (App. Div. 2005), aff'd o.b., 188 N.J. 339 (2006). In addition, the bodily injury claim would be subject to the verbal threshold. Chalef v. Ryerson, 277 N.J. Super. 22, 31 (App. Div. 1994).

Requirement for "injuries"

The statute only applies if the accident results in "injuries." The term "injuries" has been interpreted to mean bodily injuries. Mody v. Brooks, 339 N.J. Super. 392 (App. Div. 2001). So, if there is no evidence that the uninsured claimant sustained a bodily injury, then the claimant may maintain an action against the at-fault party for payment of property damages.

On the other hand, if there is evidence that the uninsured claimant sustained a bodily injury in the accident, then the claimant is barred from making a claim for any economic or non-economic damages. This result holds true even if the uninsured claimant sustained minor injuries for which no bodily injury claim was asserted. Rogers v. Carchesio, 366 N.J. Super. 181 (App. Div. 2004).

Automobiles that are mandated to carry New Jersey insurance coverage

New Jersey Courts continue to examine fact patterns that raise an issue as to whether the claimant is considered to have owned an uninsured automobile as contemplated by the No pay-No play statute. For the purpose of this statute, not every automobile is required to carry New Jersey's mandatory medical expense coverage. For example, the owner of an inoperable automobile who does not intend to operate his motor vehicle is not required to maintain medical expense benefits coverage. Carmichael v. Bryan, 310 N.J. Super. 34, 46 (App. Div. 1998). Likewise, the No pay-No play statute does not apply to an out-of-state resident who fails to insure his out-of-state vehicle. Rojas v. DePaolo, 357 N.J. Super. 115 (Law Div. 2002).
More recently, in the matter of Scholes v. Hausmann, Dkt. No. A-0980-17T3, 2018 WL 4997186 (Oct. 16, 2018), an appellate court addressed the issue of whether the No pay-No play statute applied to a vehicle that was titled, registered and insured in Florida even though the vehicle was principally garaged in New Jersey where the owner lived and worked. Consistent with previous case law, such as Martin v. Chhabra, 374 N.J. Super. 387, 391 (App. Div. 2005), the Scholes opinion stated that an out-of-state insured vehicle that is principally garaged in New Jersey was required to maintain mandatory automobile liability and medical expense coverage as mandated by New Jersey law. The Court found that the Florida insurance policy was not approved by the State of New Jersey, and it did not provide the mandatory medical expense coverage required by New Jersey law. Thus, the Court found Plaintiff to be culpably insured, and he was barred from recovering economic and noneconomic damages by virtue of N.J.S.A. 39:6A-4.5(a).

For the most part, New Jersey's Courts have strictly construed the language of the "No pay-No play" statute. N.J.S.A. 39:6A-4.5(a). Nonetheless, when the facts of a case fit squarely within the language of the statute, the Courts have not hesitated to enforce the terms of the law.

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PIP IMPLICATIONS WHEN OUT-OF-STATE RESIDENTS ARE INVOLVED IN NEW JERSEY ACCIDENTS

BY RICHARD W. FOGARTY, CHASAN LAMPARELLO MALLON & CAPPUZZO, PC

When an out-of-state resident travels to New Jersey and is involved in an automobile accident here, several questions may arise regarding that person's PIP coverage: What are the applicable coverage limits? If there is more than one PIP carrier potentially responsible for coverage, which one is liable? What requirements are imposed upon the claimant and medical providers?

The first issue that must be resolved is whether or not N.J.S.A. 17:28-1.4 applies. This section, commonly known as New Jersey's "deemer statute", provides that an automobile insurance policy issued in another state or in any province of Canada will be reformed to include New Jersey coverage requirements, including PIP coverage of $250,000 pursuant to N.J.S.A. 39:6A-4. In the case of out-of-state residents, the deemer statute applies when two conditions are met. First, the insurance carrier that wrote the out-of-state policy must be authorized to transact or transacting automobile or motor vehicle insurance business in this State, or controlling or controlled by, or under common control by, or with, an insurer authorized to transact or transacting automobile or motor vehicle insurance business in this State. Secondly, the automobile or motor vehicle insured under the out-of-state policy must be "used or operated in this State."

With regard to the first requirement, it is important to keep in mind that the specific company which wrote the out-of-state policy need not be authorized to transact automobile or motor vehicle insurance in New Jersey, as long as a subsidiary, parent, or commonly owned sister company is so authorized. Cupido v. Perez, 415 N.J. Super. 587, 593 (App. Div.), certif. den. 205 N.J. 16 (2010). In most cases, determining whether or not this prong of the statute is met should be relatively straightforward.

The second requirement, that the "automobile or motor vehicle insured under the policy is used or operated in this State", has been a source of greater dispute. In Cooper Hospital Univ. Med. Ctr. v. Prudential Ins. Co., 378 N.J. Super. 510 (App. Div. 2005), a resident of Pennsylvania was a passenger in his own vehicle and was involved in an accident in New Jersey, while he was a passenger in that vehicle. The vehicle was insured by Prudential under an automobile policy issued in the State of Pennsylvania. Pursuant to Pennsylvania law, the medical expense limits on that policy were $5,000. As a result of the accident, the insured incurred medical bills in excess of $120,000. In reversing the Trial Court's ruling that the deemer statute did not apply, the Appellate Division stated "the deemer statute effectively mandates that out-of-state policies within its ambit are automatically construed as New Jersey policies when the covered vehicle is involved in a New Jersey accident." Id., at 515.

The Appellate Division provided further clarification as to what the term "used or operated in this State" means in Leggette v. Government Emples. Ins. Co., 450 N.J. Super. 261 (App. Div. 2017). There, a Virginia resident drove her Virginia-registered and insured vehicle to New Jersey to visit her daughter, who was attending Princeton University. After parking her car in a parking lot, plaintiff locked the car doors, walked away from the vehicle, and exited the parking lot before being struck as a pedestrian while crossing the street. She sustained injuries and underwent medical treatment costing in excess of $113,000. The Court held that under these circumstances, there was no substantial nexus between the use of the vehicle and the accident. At the time she was struck, her use of the vehicle had ended. As a result, the deemer statute did not apply and plaintiff was not entitled to New Jersey PIP coverage. Id., at 270.

Once it is determined that the deemer statute applies, the out-of-state policy is automatically construed as providing New Jersey coverage and New Jersey law applies. See, Adams v. Keystone Ins. Co., 264 N.J. Super. 367 (App. Div. 1993). For instance, New Jersey PIP coverage applies immediately, and not only after the out-of-state benefits have been exhausted. See, State Farm v. Crocker, 288 N.J. Super. 250 (App. Div. 1996). Further, the application of New Jersey law is not limited to the amount of PIP coverage available to the insured. Rather, New Jersey's statutory and regulatory scheme permitting either party to a PIP dispute to elect to have the matter resolved in arbitration applies as well. Id.; see also, N.J.S.A. 39:6A-5.1; N.J.A.C. 11:3-25.1, *et. seq*. New Jersey's PIP requirements regarding pre-certification of medical treatment, internal appeals processes, and processing of bills will also apply. See, N.J.S.A. 39:6A-4.6; N.J.A.C. 11:3-4.1, *et. seq.*; N.J.A.C. 11:3-29.1, *et. seq.*

On the other hand, when the deemer statute does not apply, determining which state's law will apply becomes less clear. Under these circumstances, a choice of law analysis is required.

In State Farm v. Estate of Simmons, 84 N.J. 28 (1980), the Supreme Court noted that a choice of law analysis regarding an automobile insurance policy involved principles of both contract and tort law. The Court was presented with a situation where an insured purchased an automobile in the State of Alabama and registered and insured the vehicle in that State. He then joined the U.S. Marine Corps and was assigned to New Jersey. He maintained his home in Alabama with his mother and spent his leaves there. Although the insured did not initially bring his automobile to New Jersey, he later returned to Alabama on leave and returned with his car. A few weeks after bringing his car to the base, the insured agreed to let a fellow Marine borrow it to drive to the bank and cash his paycheck. The agreement was that the car would be returned immediately. However, the borrowing Marine did not return the car as agreed. In fact, there was a confrontation when the owner saw him and some friends leaving a nightclub and entering the car, at which point he explicitly refused to return the car. Early the next morning, the insured was informed that his car had been involved in an accident and all occupants were killed. Id., at 30-32.

The Simmons Court was called upon to determine whether the driver of the insured vehicle

was a permissive user, which would entitle him to liability coverage in connection with the accident. Although not a dispute over PIP benefits, the Court's analysis would prove instructive in a PIP context. After analyzing both contract and tort principles, the Court expressed a rule that the state where the policy was entered into will typically govern. It was reasoned that such a rule would comport with the reasonable expectations of the parties. However, this is not an absolute rule and can be overcome if another state has a more significant relationship with the dispute. Applying that analysis, the Supreme Court in Simmons determined that Alabama law should apply in determining whether or not the driver that borrowed the insured car was a permissive user. The vehicle had been insured in Alabama and was only in New Jersey for a matter of weeks when the accident occurred. The insured's presence in New Jersey was temporary and he intended to return to Alabama. Under such circumstances, New Jersey did not have a significant enough interest in the dispute to overcome Alabama's interest as the place where the policy was entered into. Id., at 37-38.

Applying a choice of law analysis to a PIP dispute, the Appellate Division in North Jersey Neurosurgical Assoc. v. Clarendon National Ins. Co., 401 N.J. Super. 186 (App. Div. 2008) had to determine whether New York or New Jersey law would apply where a New Jersey resident was involved in a New York accident. The result of this analysis would determine whether PIP benefits were provided by the insurer of the host vehicle in the amount of $50,000 (under New York law) or by the patient's resident relative's policy in the amount of $250,000 (under New Jersey law). In this instance, the court determined that New Jersey law should apply because the policy was issued in New Jersey, the patient lived in New Jersey, and all of the medical treatment occurred in New Jersey. Therefore, New Jersey had a greater interest in protecting its insured and assuring his medical treatment. Id.

As evidenced above, an out-of-state resident's PIP benefits are determined by first analyzing whether or not the deemer statute applies. In such circumstances, the out-of-state resident is entitled to New Jersey PIP coverage and New Jersey law automatically applies to the claim. Although not relevant to the PIP claim, it is worth noting that the deemer statute also subjects the out-of-state resident to the limitation on lawsuit threshold. However, in those circumstances when the deemer statute does not apply, a choice-of-law analysis is required and the outcome is less clear. The result of these disputes can impact which carrier is responsible for the coverage, how much coverage is available, how bills are processed, and how disputes are resolved.

EVERY ROSE HAS ITS THORN—THE VERBAL THRESHOLD DEFENSE DOES APPLY TO A DOMESTIC PARTNER—THE SEQUEL[1]

BY DENISE M. LUCKENBACH, ESQ.

So strummed Poison in the iconic tune and so ruled the Honorable Thomas Vena on September 26, 2018, in Essex County, granting partial Summary Judgment to the tortfeasor and preserving the defense.

In an appreciated effort, plaintiff's counsel opposed the motion, attempting to argue that pursuant to United States v. Windsor, 570 U.S.744 (2013), the United States Supreme Court granted same sex couples the right to marry and, therefore, Domestic Partnership or Civil Union Acts were now unconstitutional. Plaintiff specifically advocated that pursuant to Garden State Equality v. Dow, 434 N.J. Super. 163 (Law Div. 2013), the New Jersey Domestic Partnership Act was deemed unconstitutional. This, however, as was quickly acknowledged by the Court, is simply false.

Rather, in granting the defense's Motion for Partial Summary Judgment, Judge Vena first found that the very language of the Policy itself controlled and plaintiff could not ask the Court to ignore a clause specifically stating insured parties included both a spouse in a civil marriage and a domestic partner in a civil union. Additionally, plaintiff was specifically included on the declarations page as an additional driver.[2] And, finally, Judge Vena held that contrary to plaintiff's position following the rationale of the United States Supreme Court in Windsor, the New Jersey Court in Garden State Equality emphasized that labels do not control benefits or burdens. As Judge Jacobson additionally specifically stated in Garden State Equality at 217, "Since plaintiffs have shown an equal protection violation of the New Jersey Constitution that will be remedied by the Court's Order requiring the State to provide same-sex couples with access to civil marriage, the Court will **not** pass upon the constitutionality of the Civil Union Act itself." So a rose is, in fact, a rose – exactly as it was intended. And undoubtedly as the rose desires – thorn and all.

Denise M. Luckenbach, Esq. is a Partner with Sellar Richardson, P.C. in Livingston. She is a member of the NJDA Philanthropy and ADR Committees and regularly litigates and tries automobile liability cases.

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[1] This article is the sequel to the article published in the New Jersey Defense's Fall 2018 publication entitled, "A Rose is a Rose: or is it? The application of the Verbal Threshold Defense to a Domestic Partner pursuant to the New Jersey Civil Union Act."

[2] Page 4 of the Policy provided by ** further includes in its definitions:

J. "Family Member" means:

1. A person who is related to you by…a lawfully recognized civil union under New Jersey law and **resides in your** household.

Page 5 of the Policy provided by ** defines:

W. "You", "your" and "named insured" mean:

(b) Domestic partner who is registered as such under any state's domestic partner or civil union law;

If that person resides in the same household as the **named insured** and is not a **named insured** under a New Jersey Basic Automobile Policy…

CONGRATULATIONS FOR THE DEFENSE WINS!

SUPREME COURT VICTORY

Congratulations to Katelyn E. Cutinello on the defense win in the New Jersey Supreme Court's March 4, 2019 decision in Alexandra Rodriguez v. Wal-Mart Stores, Inc. (A-2/3-17; 079470).

APPELLATE DIVISION VICTORIES

Congratulations to Robert A. Cappuzzo on the defense win in the New Jersey Appellate Division's February 7, 2019 decision in Endo Surgical Center a/s/o Bernadette Harper v. NJM Insurance Group.

Congratulations to Patricia W. Holden and NJDA Secretary-Treasurer John V. Mallon on the defense win in the New Jersey Appellate Division's October 16, 2018 decision in Jeffrey E. Scholes v. Stephen M. Hausmann, et al.

TRIAL COURT VICTORIES

Jeff Czuba, Partner at Hoagland, Longo, Moran, Dunst & Doukas, LLP, recently prevailed in a personal injury trial involving the Verbal Threshold. On October 4, 2018, Jeff completed a four day trial before Hon. Philip Paley at the Middlesex County Courthouse. After 27 minutes of deliberation the jury unanimously found that plaintiff failed to meet the Verbal Threshold as she failed to prove she sustained a permanent injury caused by the accident and rendered a verdict in favor of the Defendant.

Nicole M. Downs, Partner at Hoagland, Longo, Moran, Dunst & Doukas, LLP, recently prevailed in a personal injury trial. The matter arose out of a motor vehicle accident that occurred in Mays Landing, New Jersey. After a week- long trial, the jury deliberated for less than thirty minutes and returned a verdict in favor of Defendant finding Plaintiff did not sustain a permanent injury. The jury also found Plaintiff was not entitled to economic loss in the form of unpaid medical expenses.

DECADE-LONG LEGAL BATTLE RESULTS IN VICTORY FOR SEWERAGE AUTHORITY—AND POTENTIAL PAYMENTS OF HUNDREDS OF MILLIONS OF DOLLARS

The Rockaway Valley Regional Sewerage Authority (RVRSA) recently won a huge victory in its decade-long battle with the City of Jersey City in a ruling that will likely be worth hundreds of millions of dollars. In a Superior Court ruling, in Jersey City Municipal Utilities Auth., et al. v. Town of Dover, et al., the judgment affirms the responsibility of Jersey City to pay its share of the annual cost of operating and maintaining the RVRSA wastewater treatment facilities – currently approximately $3.5 million – for as long as the facilities are maintained in operation. The RVRSA facilities protect the water quality of the Rockaway River, a source of public water supply for Jersey City. On December 13, 2018, the Appellate Division rejected the Plaintiffs' request for an interlocutory appeal of the trial court decision. The Rockaway Valley Regional Sewerage Authority, was represented by a three-attorney team from 12-lawyer Maraziti Falcon, LLP comprised of Joseph Maraziti, Jr. Andrew Brewer and Christopher Miller. Christopher Miller explained that over the nearly nine years of litigation the issues were narrowed before trial by summary judgment motions that foreclosed the City from litigating issues it previously waived in the 1984 Settlement.

While it was a substantial victory for the RVRSA, there will be a second trial, likely in mid-2019, to determine the amount of damages arising from the breach by Jersey City. The initial decision did not involve the payment of damages for past obligations, but rather held in a remarkably significant decision that the plaintiffs are still contractually obligated to pay a portion of the RVRSA's annual operation, repair and maintenance costs for the indefinite future.

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O'TOOLE'S COUC

Tucked into a corner of the property bordering on Mount Pleasant Ave, Parsippany Road and Route 10 in Whippany, was a three-story red building known as "Billy and Madeline's Red Room Tavern." The establishment, opened in 1933 by Billy's parents, was originally called "Fornaro's Tavern." It was then taken over by Billy in 1959 and took the name "Billy's Red Room." In 1980, when Billy married Madeline, "Billy and Madeline's Red Room Tavern" became its final name. It continued as such until the building burned down in 2017.

I'm sure everyone remembers the television series, "Cheers," and the Red Room was a dead-ringer for that show. At Billy's there was no question that "everybody knows your name." In fact, the sign hanging above the front door read: "There are no strangers here, just friends we haven't met." There was standing-room only on Friday and Saturday nights, and the bar was packed most of the time. If you chose to sit at the bar, you were guaranteed to participate in some interesting, over-the-top conversations. Many years ago, Billy passed out "TUITS" that were good for a free drink when you got around "to it." So, you didn't say you wanted to buy someone a drink, you bought them a TUIT. (I may still have a couple of these stashed away somewhere.)

Billy ran the business from his chair at the top end of the bar, but no one questioned that Madeline kept things running smoothly. Billy greeted the patrons and frequently escorted them to their tables, which usually meant the first (and not the last) drink was on the house. It also wasn't uncommon to get a free appetizer, maybe a small taste of their great chili, their cherries soaked in God knows what, or even a small piece of fresh fish that Billy caught the day before. If I had written this article before the fire, I would have told you that when you go to Billy's you must order the tuna special, which had no equal. No matter how fancy a restaurant I went to, none compared to that tuna.

The décor was strictly seafaring. There was a large aquarium as you entered, filled with beautiful tropical fish. The tank was always decked out to match the appropriate season. There was also fishing memorabilia scattered throughout. Additionally, if you brought your children there, they were given a small bag of gummy fish (and a dollar or two from Billy.) The walls were decorated with hundreds of photos of fish that both Billy and Madeline caught over the years, thus providing fresh fish for the tavern. However, that meant during the week they might be at the shore fishing or, in the winter, in Florida. They were missed, but Madeline's sister, Katie, was an equally charming hostess.

Christmas was always a festive occasion at the Red Room. A large roof-top tree greeted you from afar as well as a multitude of outdoor lights (Clark Griswald look out!). I always said if you weren't in a good mood at Christmas, a visit to the Red Room was sure to put a smile on your face. As you surely know, Santa Claus is

H THE RED ROOM

always in great demand on Christmas Eve, but Billy had a special arrangement with the Big Guy who came around 5:00 bearing small gifts for all the children and, of course, providing Kodak moments. The patrons would inquire before that day as to when Santa was expected. His loud "Ho Ho Ho" was greeted with much excitement from the wide-eyed children and their parents. (Curiously, many people seemed to think there was a strong resemblance between Santa and me – Go figure. I would gladly honor you with my "Ho Ho Ho, Merry Christmas" if you would like to compare.) Many bars and restaurants like to close early on Christmas Eve, but Billy and Madeline knew there were many lonely people, especially seniors, who had no place else to go and were happy to share the Christmas Eve festivities around the bar.

It wasn't uncommon for Sunny and me to stop at Billy's after church on Saturday. Invariably there were other couples we knew enjoying the food, drink and friendly, welcoming atmosphere. The TUITS had long been a thing of the past, but buying someone a drink continued to be a tradition.

Another thing we miss celebrating at the Red Room are our grandchildren's birthdays. I know, many people might take their grandchildren to Chucky Cheese or some other thought-to-be appropriate kid-friendly restaurant, but not us. After dinner the kids would wait for the bartender to ring the bell and announce "We have a birthday." Cupcakes would then be brought out, and everyone in the place would sing "Happy Birthday!" (OK, you had to bring your own cupcakes because there were no desserts at Billy's and if you didn't bring the cake, the candles were put in a meatball.) I am sure our grandchildren will always remember these unique celebrations.

In November 2017 we lost the Red Room to a fast-moving fire, but thankfully no one was seriously hurt. Smoke inhalation was experienced and, of course, the fish tank inhabitants didn't survive. Thanks to some courageous passers-by, Billy, Madeline and their pet dog were quickly rescued from the burning building. Now all that is left is an empty lot and a "For Sale" sign. The Township of Hanover and surrounding communities suffer the loss of this iconic tavern that was so ingrained in our culture.

Initially we had hoped Billy and Madeline would rebuild this treasured corner tavern, but it is not going to happen. They had a long-run, appreciated by so many people. Who knows, maybe there will be a Billy's in heaven and the TUITS will be back in use.

Billy and Madeline – "Thanks for the memories!"

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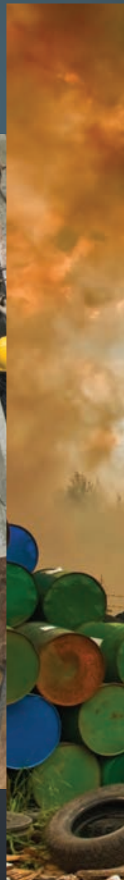
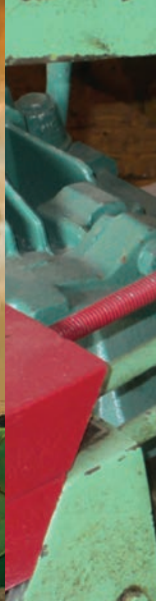

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UPCOMING EVENTS

WEDNESDAY, APRIL 3, 2019

NETWORKING EVENT
6:30 p.m. – 8:30 p.m.
Steakhouse 85 / New Brunswick, NJ

FRIDAY, APRIL 5, 2019

2019 MEDICAL COLLEGE
8:30 a.m. – 1:00 p.m.
APA Hotel Woodbridge / Iselin, NJ

THURSDAY, MAY 16, 2019

NJSBA YOUNG LAWYERS LUNCHEON (SPONSORED BY THE NJDA)
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