CONCURRENT PIP AND PIP REIMBURSEMENT UNDER NEW JERSEY LAW.
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I. INTRODUCTION

The purpose of this Training Session is to provide a framework for determining when there is concurrent PIP and/or PIP reimbursement available for PIP payments made under New Jersey law. I have included the text of statutes and administrative regulations cited. I have also included cites to all court opinions discussed, the text of relevant parts of those opinions and a copy of one unreported case, Selective Insurance Company v. Paschall Truck Lines, A-544-95T3, Appellate Division, April 23, 1996.

II. THE PIP STATUTE

Every New Jersey automobile liability insurance policy provides for the payment of PIP benefits. There are seven types of PIP benefits; six created by statute; medical expense benefits, income continuation benefits, essential service benefits, death benefits, funeral expense benefits and additional personal injury protection coverage, and one created by administrative regulation, extended medical expense benefits.

N.J.S.A.'39:6A-4 provides:

39:6A−4. Personal injury protection coverage, regardless of fault

Every automobile liability insurance policy, issued or renewed on or after January 1, 1991, insuring an automobile as defined in section 2 of P.L.1972, c. 70 (C. 39:6A−2) against loss resulting from liability imposed by law for bodily injury, death and property damage sustained by any person arising out of ownership, operation, maintenance or use of an automobile shall provide personal injury protection coverage, as defined hereinbelow, under provisions approved by the Commissioner of Insurance, for the payment of benefits without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household who sustained bodily injury as a result of an accident while occupying, entering into, alighting from or using an automobile, or as a pedestrian, caused by an automobile or by an object propelled by or from an automobile, to other persons sustaining bodily injury while occupying, entering into, alighting from or using the automobile of the named insured, with the permission of the named insured, and to pedestrians, sustaining bodily injury caused by the named insured's automobile or struck by an object propelled by or from such automobile.

"Personal injury protection coverage" means and includes:

a. Medical expense benefits. Payment of reasonable medical expenses in an amount not to exceed $250,000 per person per accident. In the event benefits paid by an insurer pursuant to this subsection are in excess of $75,000 on account of personal injury to any one person in any one accident, such excess shall be paid by the insurer in consultation with the Unsatisfied Claim and Judgment Fund Board and shall be reimbursable to the insurer from the Unsatisfied Claim and Judgment Fund pursuant to section 2 of P.L.1977, c. 310 (C. 39:6−73.1).

b. Income continuation benefits. The payment of the loss of income of an income producer as a result of bodily injury disability, subject to a maximum weekly payment of $100.00. Such sum shall be payable during the life of the injured person and shall be subject to an amount or limit of $5,200.00, on account of injury to any one person in any one accident, except that in no case shall

income continuation benefits exceed the net income normally earned during the period in which the benefits are payable.

c. Essential services benefits. Payment of essential services benefits to an injured person shall be made in reimbursement of necessary and reasonable expenses incurred for such substitute essential services ordinarily performed by the injured person for himself, his family and members of the family residing in the household, subject to an amount or limit of $12.00 per day. Such benefits shall be payable during the life of the injured person and shall be subject to an amount or limit of $4,380.00, on account of injury to any one person in any one accident.

d. Death benefits. In the event of the death of an income producer as a result of injuries sustained in an accident entitling such person to benefits under this section, the maximum amount of benefits which could have been paid to the income producer, but for his death, under subsection b. of this section shall be paid to the surviving spouse, or in the event there is no surviving spouse, then to the surviving children, and in the event there are no surviving spouse or surviving children, then to the estate of the income producer.

In the event of the death of one performing essential services as a result of injuries sustained in an accident entitling such person to benefits under subsection c. of this section, the maximum amount of benefits which could have been paid such person, under subsection c., shall be paid to the person incurring the expense of providing such essential services.

e. Funeral expenses benefits. All reasonable funeral, burial and cremation expenses, subject to a maximum benefit of $1,000.00, on account of the death of any one person in any one accident shall be payable to decedent's estate.

Benefits payable under this section shall:

(1) Be subject to any option elected by the policyholder pursuant to section 13 of P.L.1983, c. 362 (C. 39:6A−4.3);

(2) Not be assignable, except to a provider of service benefits under this section, nor subject to levy, execution, attachment or other process for satisfaction of debts.

Medical expense benefit payments shall be subject to a deductible of $250.00 on account of injury in any one accident and a copayment of 20% of any benefits payable between $250.00 and $5,000.00.

No insurer or health provider providing benefits to an insured shall have a right of subrogation for the amount of benefits paid pursuant to any deductible or copayment under this section.

By administrative regulation, the Department of Insurance adds one additional coverage, N.J.A.C. '11:3-7.3(b) Extended Medical Expense Benefits:

' 11:3−7.3 Personal Injury Protection Policy Forms or Endorsements.
(a) All policy forms or endorsements that provide personal injury protection benefits required by N.J.S.A. 39:6A−4 shall specify that such benefits shall be afforded by the insurer of the injured person subject to any deductibles or exclusions elected by the policyholder pursuant to N.J.S.A.

39:6A−4.3. The required personal injury protection benefits are set forth below:

1. Medical expense benefits;
2. Income continuation benefits;
3. Essential services benefits;
4. Death benefits; and
5. Funeral expense benefits.

(b) Each policy form or endorsement covering an automobile as defined at N.J.S.A. 39:6A−2 shall include excess medical payments coverage, corresponding to Section II, Extended Medical Expense Benefits Coverage of the personal automobile policy. Insurers must include a minimum coverage of $1,000 and may offer coverage of $10,000.

(c) Each policy form or endorsement providing additional personal injury protection benefits shall specify that, pursuant to N.J.S.A. 39:6A−10, as amended by P.L. 1985, c.520, section 16, additional death benefits under the policy shall be payable without regard to the period of time elapsing between the date of the accident and the date of death provided death occurs within two years of the accident and results from bodily injury from that accident.

N.J.S.A. '39:6A-10 provides

39:6A−10. Additional personal injury protection coverage

Insurers shall make available to the named insured covered under section 4 of P.L.1972, c. 70 (C. 39:6A−4), and, at his option, to resident relatives in the household of the named insured, suitable additional first party coverage for income continuation benefits, essential services benefits, death benefits and funeral expense benefits, but the income continuation and essential services benefits shall cease upon the death of the claimant, and shall not operate to increase the amount of any death benefits payable under section 4 of P.L.1972, c. 70 (C. 39:6A−4) and such additional first party coverage shall be payable only to the extent that the claimant establishes that the amount of loss sustained exceeds the coverage specified in section 4 of P.L.1972, c. 70 (C. 39:6A−4). Insurers may also make available to named insureds covered under section 4 of P.L.1972, c. 70 (C. 39:6A−4), and, at their option, to resident relatives in the household of the named insured or to other persons provided medical expense coverage pursuant to section 4 of P.L.1972, c. 70 (C. 39:6A−4), or both, additional first party medical expense benefit coverage. The additional coverage shall be offered by the insurer at least annually as part of the coverage selection form required by section 17 of P.L.1983, c. 362 (C. 39:6A−23). Income continuation in excess of that provided for in section 4 must be provided as an option by insurers for disabilities, as long as the disability persists, up to an income level of $35,000.00 per year, provided that a. the excess between $5,200.00 and the amount of coverage contracted for shall be written on the basis of 75% of said difference, and b. regardless of the duration of the disability, the benefits payable shall not exceed the total maximum amount of income continuation benefits contracted for. Death benefits provided pursuant to this section shall be payable without regard to the period of time elapsing between the date of the accident and the date of death, if death occurs within two years of the accident and results from bodily injury from that accident to which coverage under this section applies. The Commissioner of Insurance is hereby authorized and empowered to establish, by rule or regulation, the amounts and terms of income continuation insurance to be provided pursuant to this section.

III. MOTOR BUS MEDICAL EXPENSE INSURANCE COVERAGE (BUS PASSENGER PIP)

Certain buses are also required to maintain PIP type coverage for their passengers.

17:28−1.6. Owner or operator of motor bus required to maintain no−fault medical expense benefits for passengers

a. Every owner, registered owner or operator of a motor bus registered or principally garaged in this State shall maintain medical expense benefits coverage, under provisions approved by the commissioner, for the payment of benefits without regard to negligence, liability or fault of any kind, to any passenger who sustained bodily injury as a result of an accident while occupying, entering into or alighting from a motor bus.

IV. REIMBURSEMENT BY THE UNSATISFIED CLAIM AND JUDGMENT FUND (UCJF)

The first source for recovery of automobile PIP payments is set forth within the text of the statute. The Legislature has provided that the cost of paying catastrophic medical expense benefits will be spread across all PIP insurers in New Jersey. To this end, the Legislature has provided that the UCJF will reimburse carriers for medical expense benefits payments in excess of $75,000.00. The UCJF will then apportion those catastrophic medical expenses to all carriers writing in New Jersey. This provision only applies to payment of medical expense benefits, not to any of the other six types of PIP benefits.

N.J.S.A. '39:6−73.1. Assumption of excess payment by fund; exceptions

In the event medical expense benefits paid by an insurer, in accordance with subsection a. of section 4 of P.L.1972, c. 70 (C. 39:6A−4), are in excess of $75,000.00 on account of personal injury to any one person in any one accident, the Unsatisfied Claim and Judgment Fund shall assume such excess up to $250,000 and reimburse the insurer therefor in accordance with rules and regulations promulgated by the commissioner; provided, however, that this provision is not intended to broaden the coverage available to accidents involving uninsured or hit−and−run automobiles, to provide extraterritorial coverage, or to pay excess medical expenses.

Pursuant to this section, the UCJF has promulgated regulations under which they will pay this reimbursement and the courts have interpreted the statute. The regulation, which was last amended and recodified on November 15, 1993, states as follows:

N.J.A.C. ' 11:3−28.7 Reimbursement of Excess Medical Expense Benefits Paid by Insurers.

(b) The Fund shall not reimburse an insurer for excess medical expense benefits if it is determined that there are multiple insurance policies applicable to a claim unless an insurer has expended medical benefits in an amount exceeding $75,000 on account of personal injury to any one person in any one accident. Where there are two or more different primary insurers liable, the Fund shall not reimburse such an insurer for excess medical expense benefits unless each primary insurer has expended medical benefits in an amount exceeding $75,000 on account of personal injury to any one person in any one accident.

The Fund's position is that where more than one carrier provides concurrent PIP coverage, each carrier must pay $75,000 before they will make any payments. This is without regard to how many cars each carrier may insure or any other limiting factors.

While the courts have not ruled directly on the regulation, they have discussed the application of the $75,000 limit in the statute in two cases.

In State Farm Mutual Auto Ins. Co. v. UCJF, 192 N.J. Super. 26, (App. Div. 1983), the question was whether or not both PIP carriers had to pay $75,000 before the UCJF was required to make any payments. The two carriers, Transamerica and State Farm agreed amongst themselves to split the PIP liability on a 1/3-2/3 basis in recognition of the fact that Transamerica insured one of the cars under which Anthony George was insured and State Farm insured two of the cars. The total amount of medical expenses paid was $130,852.62. State Farm paid $87,671.26, Transamerica paid $43,181.36. State Farm applied to the UCJF for reimbursement of the amount of its payments of $75,000. The Fund refused to pay reimbursement claiming that since there were two carriers involved, each carrier had to pay $75,000 before there was any liability to the Fund. The trial court accepted this argument and entered judgment for the UCJF. State Farm appealed. The Appellate Division rejected the UCJF's argument, reversed and entered judgment for State Farm. The Appellate Division reasoned that payments by each carrier were governed by N.J.S.A. '39:6A-11's requirement that each of the concurrent carriers pay "an equitable pro rata share" of the PIP payments. The court held that so long as the division between the carrier met that standard, the UCJF was required to reimburse any carrier that paid more than $75,000 without regard to whether another carrier paid less than the threshold amount.

Ten years later, in the case of USF&G v. Industrial Indemnity Co., 264 N.J. Super. 379 (App. Div. 1993), a concurrent coverage case, the Appellate Division discussed the UCJF threshold issue in a footnote to the opinion. Since the amount of medical expenses paid in the case was only $34,027.50, the issue of the interplay between two PIP carriers and the Fund was not before the court. However, the court, without citing the State Farm case suggested in Footnote 6 that it would now find that the Fund did not have to reimburse any PIP carrier in a concurrent coverage situation until all of the PIP carriers made payments of $75,000.

FN6. The current version of N.J.S.A. 39:6A−4a, enacted in 1990, seven years after Sec. 4.2 was adopted, establishes a $250,000 limit per person per accident for medical expenses as a result of the 1990 amendments. L.1990, c. 8, Sec. 4. The 1990 amendment continues the reimbursement obligation of the Unsatisfied Claim and Judgment Fund after the PIP carrier has paid $75,000 in medical expense benefits. In this case we do not address the impact of Sec. 4.2 and Sec. 11 on the relationship among the primary PIP carrier, the secondary PIP carrier and the Fund, because Hartley's medical expenses were less than $75,000. It appears, however, that our interpretation of Sec. 4.2 would postpone the Fund's duty to reimburse until the primary and secondary PIP carriers together had paid $150,000 in medical expense benefits.

The court's reasoning that the UCJF does not have to reimburse PIP medical expenses until all of the concurrent carriers have paid $75,000 fits the statutory purpose of spreading the risk of catastrophic payments among all New Jersey carriers better than an argument that the carriers can pro rate their responsibility. In those limited situations where concurrent coverage is still a factor, this is the procedure that the UCJF follows.

As a part of the settlement of a Law Division action entitled Continental Insurance Company v. Aetna Life & Casualty Company and UCJFB, Superior Court of New Jersey, Law Division, Morris County, Docket No: MRS-L-1424-97, the UCJF has now agreed to retroactive application of the “follow the family” exclusion for all open files. In those situations where they UCJF has previously rejected an EMB claim and the “concurrent” carrier has refused to pay reimbursement, the UCJF will now withdraw its determination of concurrency and consider the claim. In those situations where the UCJF rejected a claim for concurrent coverage and the “concurrent” carrier did

make payments and has now stopped making payments, the UCJF consider the balance of the claim for reimbursement. The UCJF will not refund any payments made for concurrent coverage by any carrier.

A. STATUTE OF LIMITATIONS

The time within which a claim can be made to the UCJF for payment of the excess medical expenses payments is governed by regulations of the Department of Insurance. The regulations provide that the carrier must notify the UCJF of any potential claim as soon as $50,000.00 in medical expense benefits have been made. Once the carrier has actually made payments of $75,000.00, a claim form must be filed with the UCJF within 90 days.

N.J.A.C. ' 11:3−28.4 Notice of Change in the Amount of Reserves.
Whenever an automobile liability insurer has paid medical expense benefits on account of personal injury to any one person in any one accident in a total amount of $50,000, said insurer shall notify the Fund of any changes in the amount of reserves established for payment of the claim or closing of the file.

N.J.A.C. ' 11:3−28.5 Supplemental Form to Be Submitted to the Fund.
(a) UCJF Form 2(RR) (incorporated herein by reference as Form 2 in Appendix A), shall be filed with the Fund within 90 days after an automobile insurer has paid medical expense benefits on account of personal injury to any one person in any one accident in a total amount in excess of $75,000. Such form together with form UC−323 (incorporated herein by reference as Form 3 in Appendix A) shall be filed each quarter that the insurer seeks reimbursement.

(b) Any office of an insurer seeking reimbursement of funds from the UCJF for personal injury protection medical expense must also complete and file with UCJF a New Jersey Information Questionnaire, UCJF Form 4(W-9) (incorporated herein by reference as Form 4 in Appendix A).

V. CONCURRENT COVERAGE

With the New Jersey Supreme Court's decision in Rutgers Casualty Insurance Company v. The Ohio Casualty Insurance Company, 153 NJ 205 (1998)(Rutgers II) and the enactment by the Legislature of N.J.S.A. '39:6A-7b3, there are only limited situations where there is concurrent PIP coverage.

Every New Jersey automobile insurance policy includes a "follow the family" exclusion. The text of the exclusion from the ISO policy reads as follows:

The insurance under this endorsement does not apply to **bodily injury:**
(h) to any person other than the **named insured** or **relative** if that person is entitled to New Jersey personal injury protection coverage as a **named insured** or **relative** under the terms of another policy;
(i) to any **relative** if that person is entitled to New Jersey personal injury protection benefits as a named insured under the terms of another policy.

"**relative**" means a person related to the **named insured** by blood, marriage or adoption (including the ward or foster child) who is a resident of the same household as the **named insured**.

In the Rutgers II decision, the New Jersey Supreme Court upheld the “follow the family” exclusion as an exclusion from concurrent PIP contribution, but not from concurrent PIP coverage. The Legislature approved this ruling, which at the time was only the decision of a panel of the Appellate Division, Rutgers Casualty Insurance Company v. The Ohio Casualty Insurance Company, 299 N.J. Super 249 (App. Div. 1997), by enacting N.J.S.A. '39:6A-7b3. The statute, which became effective on December 22, 1997, reads as follows:

39:6A-7. Exclusions

a. Insurers may exclude a person from benefits under section 4 and section 10 of P.L.1972, c. 70 (C.39:6A-4 and 39:6A-10) where such person's conduct contributed to his personal injuries or death occurred in any of the following ways:
(1) while committing a high misdemeanor or felony or seeking to avoid lawful apprehension or arrest by a police officer; or
(2) while acting with specific intent of causing injury or damage to himself or others.
b. An insurer may also exclude from section 4 and section 10 benefits any person having incurred injuries or death, who, at the time of the accident:
(1) was the owner or registrant of an automobile registered or principally garaged in this State that was being operated without personal injury protection coverage;
(2) was occupying or operating an automobile without the permission of the owner or other named insured;
(3) was a person other than the named insured or a member of the named insured's family residing in his household, if that person is entitled to coverage under section 4 or section 10 of P.L.1972, c. 70 (C.39:6A-4 or 39:6A- 10), or both, as a named insured or member of the named insured's family residing in his household under the terms of another policy; or
(4) was a member of the named insured's family residing in the named insured's household, if that person is entitled to coverage under section 4 or section 10 of P.L.1972, c. 70 (C.39:6A-4 or 39:6A-10), or both, as a named insured under the terms of another policy.

There is still concurrent coverage in a limited range of cases. There is no longer concurrent coverage in the classic host-passenger situation. Most concurrent coverage cases will revolve around a minor child who is a member of one household where there is PIP coverage and also has a non-resident parent that maintains PIP coverage or situations where each spouse maintains there own automobile insurance policy. Thus a child who lives with his mother will be covered under both the PIP policy of the mother and the PIP policy of the non-resident father. This is because the minor child is a relative of both parents, but not a named insured under either policy. The same situation would apply where a minor child lives in a household where some other household member, perhaps a sibling or a grandparent, has PIP coverage as does the minor child’s parent. Federal Insurance Co. v. Liberty Mutual Insurance Co., 190 N.J. Super. 605 (App. Div. 1983).

Where there is concurrent coverage, the injured person may apply to any of the liable insurance companies for payment of PIP bills. However, the statute provides that the injured person should apply first to the carrier under which he or she is a named insured, or a household member of a named insured.

39:6A−4.2. Primacy of coverages

Except as provided in subsection d. of section 13 of P.L.1983, c. 362 (C. 39:6A−4.3), the personal injury protection coverage of the named insured shall be the primary coverage for the

named insured and any resident relative in the named insured's household who is not a named insured under an automobile insurance policy of his own. No person shall recover personal injury protection benefits under more than one automobile insurance policy for injuries sustained in any one accident.

The Commissioner of Insurance has promulgated a further regulation that specifies how to determine which policy should make the initial payment of benefits as follows,

N.J.A.C. ' 11:3−37.12 Eligibility Under Two or More Automobile Policies.
(a) If an insured is eligible for coverage of medical expenses under more than one automobile policy, the determination as to which automobile policy will assume coverage responsibility for that insured shall be as follows:
1. A named insured shall receive benefits for medical expenses under the terms of the automobile policy on which he or she, or his or her spouse, is identified as the named insured.
2. A family member who is a child of a named insured or the named insured's spouse shall receive benefits for medical expenses under the automobile policy of the named insured, subject to the following:
i. If the child is a child of more than one named insured or of more than one spouse of a named insured, the child shall receive benefits under the terms of the automobile policy of the named insured who has legal custody of that child or whose spouse has legal custody of that child.
ii. If the child is a child of more than one named insured or of more than one named insured's spouse, and legal custody of that child has either never been awarded, or has been awarded jointly, then the child shall receive benefits under the terms of the automobile policy of the named insured whose birthday occurs earliest in the calendar year.
iii. If the child is a named insured or the spouse of a named insured, (a)1 above shall apply.
3. If neither (a)1 nor (a)2 above apply to an adult or child family member, then that family member shall receive benefits for medical expenses under the terms of the automobile policy of the named insured whose birthday occurs earliest in the calendar year.
4. If an automobile policy identifies more than one person as a named insured on the automobile policy, the birthday of the named insured whose birthday occurs earliest in the calendar year shall be considered the determinant birthday on that automobile policy.
(b) An insured shall not receive benefits for medical expenses under more than one automobile policy.

(c) If an automobile policy PIP plan provides benefits for medical expenses for an insured who is eligible for medical expense benefits under more than one automobile policy PIP plan, the automobile insurer of the paying PIP plan may seek equitable pro rata contributions from the other automobile policy PIP plan(s) for the benefits actually paid by the paying PIP plan.

A. CONTRIBUTION AMONG INSURERS

Once the initial benefits are paid, the paying carrier may seek contribution from the other liable carriers for "equitable pro rata contribution." N.J.S.A. '39:6A-11, N.J.A.C. '11:3-37.12, Rutgers Casualty Insurance Company v. New Jersey Manufacturers Insurance Company, 294 N.J. Super 379 (App. Div. 1996), cert. den., 150 NJ 29 (1997), U.S.Fidelity & Guar. Co. v. Industrial Indem. Co., 264 N.J. Super. 379 (App. Div. 1993); Cokenakes v. Ohio Casualty Ins. Co., 208 N.J. Super. 308 (Law Div. 1985).

39:6A−11. Contribution among insurers

If two or more insurers are liable to pay benefits under sections 4 and 10 of this act for the same bodily injury, or death, of any one person, the maximum amount payable shall be as specified in sections 4 and 10 if additional first party coverage applies and any insurer paying the benefits shall be entitled to recover from each of the other insurers, only by inter−company arbitration or inter−company agreement, an equitable pro−rata share of the benefits paid.

' 11:3−37.12 Eligibility Under Two or More Automobile Policies.

(c) If an automobile policy PIP plan provides benefits for medical expenses for an insured who is eligible for medical expense benefits under more than one automobile policy PIP plan, the automobile insurer of the paying PIP plan may seek equitable pro rata contributions from the other automobile policy PIP plan(s) for the benefits actually paid by the paying PIP plan.

B. CONCURRENT COVERAGE IN INTER-COMPANY ARBITRATION

The contribution statute provides that the favored method of enforcing contribution among insurers is through "inter-company arbitration or inter-company agreement." Arbitration Forums Inc. is the usual site for inter-company arbitration. The courts have examined the finality of a determination by Arbitration Forums Inc. in two cases coming to two separate results.

In Selected Risks Ins. Co. v. Allstate Ins. Co., 179 N.J. Super. 444 (App. Div. 1981), the court concentrated on enforcing the statutory contribution provisions and vacated a contrary arbitration decision. The case involved two household policies. Selected Risks insured Richard Boland. Mr. Boland lived with his mother who was insured by Allstate Ins. Co. As a result of a July 9, 1977 accident, Selected Risks paid unspecified PIP benefits to Mr. Boland and then sought 50% contribution from Allstate. The case was decided in inter-company arbitration apparently with a three person panel. Arbitration denied the application and merely stated that "applicant failed to sustain the burden of proof." Selected Risks then filed suit in the Law Division asking for the court to vacate the arbitrator's award and enter an award for 50% contribution. The trial court dismissed the complaint and Selected Risks appealed. The Appellate Division reversed the trial court, vacated the arbitration award and remanded the case to the trial court to enter judgment in favor of Selected Risks for 50% of the PIP payments plus attorney's fees.

The Appellate Division based its decision on impermissible language in the Allstate policy which attempted to exclude PIP coverage, in violation of N.J.S.A. '39:6A-4, where a household member also had his own PIP coverage. The court said that "The statute is clear on its face. There are no exceptions from this coverage and there are not provisions here for relegating one insurer to a classification as the primary insurer and another as a secondary insurer." The court therefore reasoned that the arbitrators must have relied upon that illegal provision in reaching their decision. The court decided that the arbitrator's award could be vacated if based on a mistake of law. They held "Here it is clear that the arbitrators did not follow the applicable law and therefore the award will be vacated." Id. at 451-452. The court then remanded the matter to the trial court for the entry of judgment against Allstate for 50% of the current and future PIP payments.

In New Jersey Manufacturers Ins. Co. v. Travelers Ins. Co., 198 N.J. Super. 9 (App. Div. 1984), the court focused on the Arbitration Forums Inc. agreement and refused to vacated an award that it agreed was based on mistake of law. This case involved a household policy and a host policy. Bernard Czech was injured in a single car accident driving a car belonging to Sound Move, Inc. Travelers Ins. Co. insured the owner of the car. NJM provided the household coverage. NJM paid the PIP benefits and sought contribution for Travelers Ins. Co. through

Arbitration Forums Inc. The three arbitrators found NJM 100% responsible for payment of PIP benefits. NJM filed suit asking the court to overturn the arbitration award. The trial court vacated the arbitration award as an obvious mistake of law. Travelers Ins. Co. appealed. The Appellate Division, agreeing that the arbitrator's decision was based on a mistake of law, nevertheless reversed the trial court and dismissed the case. The appeals court did this by concentrating on the language of the inter-company arbitration agreement.

The court cited two provisions, the first provision stated that "The decision of the majority of the arbitrators is final and binding without right of rehearing or appeal." The second provision stated that "The decision of the arbitrators shall be based on law and equitable considerations consistent with accepted claims practices." Id. at 12.

The court held that the knowing waiver of the right of appeal was enforceable and would "supersede what arguably might be an error of law." The court went on to say that the phrase in the rules "consistent with accepted claims practices," permitted the arbitrators to ignore the settled law in favor of what might have been an accepted industry practice based on a mistake of law.

The current Arbitration Forums Inc. agreements governing Personal Injury Protection and Medical Payment Subrogation disputes has removed the complete sentence "The decision of the arbitrators shall be based on law and equitable considerations consistent with accepted claims practices." and replaced it with "The law of the locality in which the accident, insured event or loss occurred will control the decision on questions of liability." The current rules still retain the agreement that "A decision of an arbitration panel on issues of fact or law is final and binding with no right of rehearing or appeal."

C. PEDESTRIAN PIP

Under New Jersey law, every New Jersey liability policy must include a provision for pedestrian PIP. This includes liability policies for cars, N.J.S.A. '39:6A-4 as well as every other type of motor vehicle, N.J.S.A. '17:28-1.3.

N.J.S.A. '17:28-1.3
17:28−1.3. Pedestrians; personal injury protection coverage benefits

Every liability insurance policy issued in this State on a motor vehicle, exclusive of an automobile as defined in section 2 of P.L.1972, c. 70 (C. 39:6A−2), but including a motorcycle, or on a motorized bicycle, insuring against loss resulting from liability imposed by law for bodily injury, death, and property damage sustained by any person arising out of the ownership, operation, maintenance, or use of a motor vehicle or motorized bicycle shall provide personal injury protection coverage benefits, in accordance with section 4 of P.L.1972, c. 70 (C. 39:6A−4), to pedestrians who sustain bodily injury in the State caused by the named insured's motor vehicle or motorized bicycle or by being struck by an object propelled by or from the motor vehicle or motorized bicycle.

Pedestrians are entitled to PIP benefits for accidents involving buses, trucks, motorcycles and motorized bicycles in the same manner as accidents involving private passenger vehicles. In the event that the pedestrian is injured as a result of a collision involving two or more motor vehicles, none of which belongs to the pedestrian, the various policies are concurrent and contribution between the insurers is due pursuant to N.J.S.A. '39:6A-11. Lumpkins v. Market Transition Facility of New Jersey, 283 N.J. Super. 181 (Law Div. 1995).

D. STATUTE OF LIMITATIONS

There is no set time period to bring an action for contribution among insurers. The action must only brought within "a reasonable time." Ideal Mutual Ins. Co. v. Royal Globe Ins. Co., 211 N.J. Super. 336 (App. Div. 1986). In the Ideal case the court specifically held that neither the 2 year Statute of Limitations for bodily injury nor the 6 year Statute of Limitations for contracts applied. However, the accepted rule is that an action for contribution should be brought within 6 years of the date of loss.

VI. PIP REIMBURSEMENT

An insurance carrier has no right of subrogation for any PIP payments made pursuant to N.J.S.A. '39:6A-4 or 10. Aetna Ins. Co. v. Gilchrist Brothers, Inc., 85 NJ 550 (1981), N.J.S.A. '39:6A-9. The Legislature has provided an insurance carrier with a limited right of PIP reimbursement for automobile PIP payments and Bus passenger PIP payments pursuant to statute, N.J.S.A. '39:6A-9.1.

39:6A−9.1. Recovery of personal injury protection benefits from tortfeasor

An insurer, health maintenance organization or governmental agency paying benefits pursuant to subsection a., b. or d. of section 13 of P.L.1983, c. 362 (C. 39:6A−4.3) or personal injury protection benefits in accordance with section 4 or section 10 of P.L.1972, c. 70 (C. 39:6A−4 or 39:6A−10), as a result of an accident occurring within this State, shall, within two years of the filing of the claim, have the right to recover the amount of payments from any tortfeasor who was not, at the time of the accident, required to maintain personal injury protection or medical expense benefits coverage, other than for pedestrians, under the laws of this State, including personal injury protection coverage required to be provided in accordance with section 18 of P.L.1985, c. 520 (C. 17:28−1.4), or although required did not maintain personal injury protection or medical expense benefits coverage at the time of the accident. In the case of an accident occurring in this State involving an insured tortfeasor, the determination as to whether an insurer, health maintenance organization or governmental agency is legally entitled to recover the amount of payments and the amount of recovery, including the costs of processing benefit claims and enforcing rights granted under this section, shall be made against the insurer of the tortfeasor, and shall be by agreement of the involved parties or, upon failing to agree, by arbitration.

When evaluating an accident in order to determine whether PIP reimbursement is available the following factors should be noted:

1. Were benefits paid under N.J.S.A. '39:6A-4 or N.J.S.A. '17:28-1.6?
2. Did the accident occur within New Jersey?
3. Has it been less than 2 years since the PIP claim was filed?
4. Is the defendant responsible for the accident?
5. Is the defendant not an "automobile" and therefore not required to maintain PIP coverage or an "automobile" required to maintain PIP coverage that has failed to do so?

1. Were benefits paid under N.J.S.A. '39:6A-4 or 10 or N.J.S.A. 17:28-1.6?
The statute specifically provides that PIP reimbursement is only available for PIP payments. The courts have interpreted the PIP reimbursement statute as also applicable for Bus passenger PIP payments. Park v. Providence Washington Insurance Company, 309 N.J. Super. 312 (App. Div. 1998).

2. Did the accident occur in New Jersey?
The statute only applies to accidents that take place within New Jersey. If the accident takes place in another state, even if it involves a New Jersey resident, there is no cause of action for PIP reimbursement.

3. Has it been less than 2 years since the claim was filed?

The statute provides as a part of the cause of action, that the claim for PIP reimbursement must be brought "within two years of the filing of the claim." The two year time period does not run on the date of loss, but on the date that the claim is filed with the carrier. NJAFIUA By and Through CSC v. Liberty Mutual Ins. Co., 270 N.J. Super. 49 (App. Div. 1994). This date is the date that the carrier receives the insured's signed Application for PIP Benefits. The date on which the claim is filed is not the date of the accident, not the date the a PIP application is sent to the insured, not the date that the carrier is notified of the accident not the date of the first PIP payment, and not the date of the last PIP payment. The PIP claim is filed when the insured signs and return the Application for PIP Benefits. Proving this date is not always easy. In order to pinpoint this date, a carrier should date stamp the PIP application when received, note the file activity sheets and acknowledge receipt of the application by letter to the insured.

As an example, an accident takes place on January 1, 1998, the PIP application is sent to the insured on January 6, 1998, the application is signed by the insured on February 6, 1998, received by the carrier on February 10, 1998 and the first payment is made on March 6, 1998. The two year time period begins to run on February 10, 1998, when the claim is filed.

In order to satisfy the Statute of Limitations, "a formal demand for arbitration must be filed within two years of the filing of the PIP claim..." NJAFIUA at 53-54. A "demand for arbitration" is a specific document that initiates AAA arbitration. Since PIP reimbursement actions will most likely be pursued through Arbitration Forums, Inc. or litigation, either the Arbitration petition must be filed within two years for member companies, or a demand to consent to arbitration must be served upon the non-member company, rejected and suit filed within the two year time period. Selective Ins. Co. v. Paschall Truck Lines, Inc., A-544-95T3, Appellate Division, April 23, 1996 (a copy of the decision in this unreported case is annexed.)

4. Is the defendant responsible for the accident?
PIP reimbursement is only available against a "tortfeasor." The other vehicle must have caused the accident. If the insured caused the accident, there is no cause of action.

5. Is the defendant not an "automobile" and therefore not required to maintain PIP coverage or an "automobile" required to maintain PIP coverage that has failed to do so?
Only those vehicles defined by N.J.S.A. '39:6A-2a as an "automobile" are required to maintain PIP coverage. PIP reimbursement is available against any other type of vehicle or tortfeasor. PIP reimbursement is also available against one who is required to, but failed to maintain PIP coverage.

N.J.S.A. '39:6A−2. Definitions

As used in this act:

a. "Automobile" means 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. An automobile owned by a farm family copartnership or corporation, which is principally garaged on a farm or ranch and otherwise meets the definitions contained in this section, shall be considered a private passenger automobile owned by two or more relatives resident in the same household.

Determining whether a vehicle is an "automobile" is based on the shape of the vehicle, the ownership of the vehicle and the common use of the vehicle.

As a general matter every motor vehicle that looks like a car or a station wagon is defined as an "automobile." Thus, in Wagner v. Transamerica, 167 N.J. Super. 25 (App. Div. 1979), the Appellate Division found that a Ford LTD, with dealer plates, driven by a car salesman on his way to show the car to a potential customer, was an "automobile." The insurance carrier argued that the car was not an "automobile" because at the time of the accident it was being used for business. The court rejected this notion and found that a car is, unless excluded for some other reason, an "automobile."

This reasoning was followed in Favell v. Hernandez, 261 N.J. Super. 348 (Law Div. 1992). In that case the motor vehicle was a station wagon that was registered as a commercial vehicle, insured under a commercial business policy and used for business purposes. The court found that even though the vehicle was used for business, it was an "automobile" because it was a station wagon.

The main situation where a vehicle that looks like a car is not an "automobile" is a limousine rented with a driver. The statute specifically excludes from the definition of an "automobile" a vehicle that is "used as a public or livery conveyance for passengers nor rented to others with a driver." Thus in Bello v. Hurley Limousines, Inc., 249 N.J. Super. 31, 591 A.2d 1356 (App. Div.1991) a vehicle described by the court as a "1983 Chevrolet 4-door sedan" was determined not to be an automobile because it was generally rented with a driver. This was so even though at the time of the accident, the car was not carrying any passengers, was not involved in a business pursuit and the accident happened because of a domestic dispute.

Taxi Cabs are also excluded from the definition of an "automobile" on the same grounds. A hearse should also be excluded.

For vehicles that do not look like cars, the issue is who owns them and what is their use. If the motor vehicle is a pickup truck, delivery sedan, van, panel truck or a camper, it will be an "automobile" if (1) it is owned by an individual or husband and wife and (2) the vehicle is not used in their "occupation, profession or business ... other than framing or ranching."

A pickup truck owned by a corporation, no matter what its use, is not an "automobile." A van owned by an individual is an "automobile" so long as it is not used for business purposes. Cheatham v. Unsatisfied Claim and Judgment Fund Bd., 178 N.J. Super. 437 (App. Div. 1981).

Buses, trucks, motorcycles, motorized bikes and off road vehicle are not "automobiles." Muto v. Kemper Reinsurance Co., 189 N.J. Super. 417(App. Div.1983), Wilno v. New Jersey

Manufacturers Ins. Co., 89 N.J. 252 (1982) per dissenting opinion of Judge Allcorn, 180 N.J. Super. 146, (App. Div. 1981), Wagner v. Transamerica Ins. Co., 167 N.J. Super. 25, 400 A.2d 497 (App. Div. 1979), cert. den. 81 N.J. 60 (1979).

Those buses which are required to maintain N.J.S.A. '17:28-1.6 Bus passenger PIP, even though they do not meet the definition of "automobile," frequently claim that they are immune from a PIP reimbursement action. There is currently no controlling case law on this issue.

A situation that is occurring with more frequency concerns vehicles that do not look like automobiles and which are owned by corporations but leased for private use. When the No-Fault statute was written in 1972 car-leasing was an unusual way for an individual to have a car. Generally, individuals owned automobiles and businesses owned other vehicles such as trucks, pickup trucks, vans and jeeps. There were no minivans. Pickup trucks were used by farmers. While there were some leased vehicles, these were generally used by a business. The No Fault statute was written with these assumptions in mind. The Legislature wanted to ensure that medical bills for all automobile occupants would be paid by some kind of insurance. The statute therefore requires that all Aautomobiles@ have PIP coverage. It was assumed that those other vehicles used by businesses would be covered by workers compensation. There would be some overlap in situations were an employee is assigned a company car. However the Legislature assumed that the company car would also be used for family use and therefore lumped all cars under the definition of vehicle that required PIP coverage. The law reflects this understanding.

The situation we now find ourselves with centers around leased vehicles that do not look like traditional cars. When we see a pickup truck or a minivan owned by XYZ Corporation we have to determine whether that vehicle is a commercial vehicle against which an action for PIP reimbursement can be brought or an automobile which is required to maintain PIP coverage. One method is to look at the license plate. If the vehicle has an X or commercial plate, it is probably not going to be a private passenger vehicle. Another method is to look at the configuration and use of the vehicle. In the Giordano case, the court tried to provide a rule for evaluating minivans. The court held that the term Aminivan@ was a marketing term with no legal significance. The court wrote that a minivan was more like a station wagon which would be used by a family than a van which would be used by a business because it was configured to carry passengers rather than cargo. However the court held that the actual determination as to whether a minivan was an automobile, would be based on the configuration of the vehicle and its use. If the minivan had seats and was used to carry around a family, it was an automobile. If it had a cargo area and was used to transport goods, it was not an automobile but a van.

A. SOURCES OF PIP REIMBURSEMENT RECOVERY

The cause of action for PIP reimbursement belongs to the carrier and not to the insured. The insured cannot release the PIP reimbursement right of the carrier. Buoni v. Browning Ferris Industries, 219 N.J. Super. 96 (Law Div. 1987).

If the primary liability coverage is exhausted, an excess or umbrella carrier's coverage provides a source of funds. Liberty Mutual Ins. Co. v. Selective Ins. Co., 271 N.J. Super. 569 (Law Div. 1993), aff'd; 271 N.J. Super. 454 (App. Div. 1993).

A PIP reimbursement action is also available where the responsible party is not a motor vehicle at all. In Allstate Insurance Company v. Coven, 264 N.J. Super. 240 (App. Div. 1993) a PIP reimbursement action was brought as a result of a medical malpractice action.

B. LIMITATIONS ON THE PIP REIMBURSEMENT ACTION

When the tortfeasor is insured, the right of recovery for PIP reimbursement is limited.

When the tortfeasor is insured, the tortfeasor has no personal liability and the cause of action only runs against the insurer. Sherman v. Garcia Const. Inc., 251 N.J. Super. 352 (App. Div. 1991).

A PIP reimbursement claim for an insured tortfeasor can only be paid out of the liability limits of the insurance policy. Once those limits are exhausted there is no enforceable cause of action. IFA Ins. Co. v. Waitt, 270 N.J. Super. 621 (App. Div. 1994), cert. den, 136 NJ 295 (1994).

When there is both a PIP reimbursement claim and a bodily injury action pending, the liability carrier will generally refuse to consider the PIP reimbursement claim until the bodily injury claim has been concluded. The legal support for this manner of handling claims stems from a 1975 case that concerned payments for PIP subrogation. Pennsylvania Manufacturers Association Insurance Company v. GEICO, 136 N.J. Super. 491 (App. Div. 1975), aff'd, . In that case, the court held that a liability carrier would not be able to apply any payment made for PIP subrogation to its liability limit until any insured person was made whole.

In 1997, the court discussed this same issue in the context of an N.J.S.A. 39:6A-9.1 PIP reimbursement claim and came to the opposite conclusion. That case, Knox v. Lincoln General Insurance Company, 304 N.J. Super. 431 (App. Div. 1997), concerned a situation where a PIP reimbursement claim was paid in response to an award of Arbitration Forums, Inc. while a death case was still pending. The attorney representing the death case filed suit seeking to have the payment returned to the liability carrier for the benefit of the death case. The Appellate Division refused, holding that under the PIP reimbursement statute, the PIP carrier had the same right to the proceeds of the liability policy as did any other claimant.

"We must decide whether the legislative plan embodied in the Act contemplates that a carrier such as Harleysville [the PIP carrier], which pays PIP benefits to its injured insured, must make sure that the tortfeasor's liability policy will be sufficient to provided complete recovery to the claimant before seeking reimbursement from the tortfeasor's commercial carrier pursuant to N.J.S.A. 39:6A-9.1. " Id. at 435.

"… we glean a legislative intent in dealing with statutory reimbursement schemes. The carriers, whether paying PIP benefits or worker's compensation benefits, both have a right to be made whole even through reimbursement may reduce the pool of available insurance coverage to which the claimant or injured employee may look for recovery. [citations omitted]. The fact that a PIP carrier is given a degree of priority in being reimbursed is understandable. The Act requires the injured motorist's medical expenses to be paid up-front by the PIP carrier without regard to the motorist's fault even before there has been a determination of ultimate liability for the accident, in order to afford the injured motorist a prompt measure of relief not available were he/she related to a conventional common-law negligence action. [citation omitted] Thus, the possibility that PIP reimbursement may be charged against the tortfeasor's liability coverage is a fair trade-off." Id. at 437.

"All is not lost for the injured claimant. Recovery may be sought under the underinsured motorist coverage of the tortfeasor's policy or even against the tortfeasor's excess liability insurer, if such coverage exists. Beyond insurance coverage, the injured claimant still has a full cause of action for recovery from the tortfeasor, although in the case of an underinsured or impecunious tortfeasor that course may not be fully satisfactory." Id. at 437.

C. THE EFFECT OF NON-PIP MEDICAL PAYMENT COVERAGE

Another issue concerns the assertion by various carriers that their vehicles have PIP

coverage and are therefore not responsible for PIP reimbursement. This issue was brought before the Appellate Division in the case of Loftus-Smith v. Henry, 286 N.J. Super. 477 (App. Div. 1996). That case involved an accident in which one of the defendants was an out of state vehicle insured by a carrier that did not do business in New Jersey, North American Indemnity Company. As such, the Deemer Statute did not apply. The out of state carrier argued, however, that its policy provided by its terms the same coverage as New Jersey PIP. The carrier therefore claimed that it was entitled to the benefits of New Jersey's No-Fault law. The Appellate Division disagreed stating

The primary issue is whether a non−resident automobile driver insured by a foreign insurance company not authorized to transact business in New Jersey but whose policy requires the company to afford personal injury protection (PIP) benefits to the same extent as the state in which an accident occurs is an "exempt" person under N.J.S.A. 39:6A−8a qualified to raise the verbal threshold as an affirmative defense. We hold that such a non−resident insured is not entitled to the benefit of the exemption.

The court based its holding on the fact that the out of state defendant was not subject to the New Jersey No-Fault scheme.

...a private contract which includes some of elements that would have been mandated by law had there been some basis for jurisdiction in this state does not satisfy the Statute. The coverages provided by such an insurance policy are strictly a private contractual matter between the insurer and the insured. In order to avail oneself of the benefits and defenses of the New Jersey No-Fault Law, one must be subject to the statutory scheme.

Id. at 486.

This same reasoning applies to those carriers that provide some type of medical payments coverage for commercial vehicles, trucks, motorcycles, buses and the like. The exception for those vehicles subject to PIP coverage means those vehicle subject by statute to the No-Fault scheme, not to vehicles which have coverage that may look like PIP coverage.

Buses that are required to maintain Bus passenger PIP pursuant to N.J.S.A. '17:28-1.6 frequently claim that they are immune from an action for PIP reimbursement. There is currently no controlling case law on this issue.

D. THE DEEMER STATUTE

What happens when an out of state motorist operates his or her car in New Jersey and is involved in an accident resulting in bodily injury? New Jersey has a "Deemer Statute" that provides that any out of state insurance coverage written by a carrier doing business in New Jersey will provide New Jersey coverage when the out of state driver operates the car in New Jersey. N.J.S.A. '17:28-1.4.

17:28−1.4. Automobile or motor vehicle liability policy; mandatory coverages; construction of policy; written certification of compliance; "automobile" defined

Any insurer 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 insurance business in this State, which sells a policy

providing automobile or motor vehicle liability insurance coverage, or any similar coverage, in any other state or in any province of Canada, shall include in each policy coverage to satisfy at least the liability insurance requirements of section 1 of P.L. 1972, c. 197 (C. 39:6B−1) or section 3 of P.L. 1972, c. 70 (C. 39:6A−3), the uninsured motorist insurance requirements of subsection a. of section 2 of P.L. 1968, c. 385 (C. 17:28−1.1), and personal injury protection benefits coverage pursuant to section 4 of P.L. 1972, c. 70 (C. 39:6A−4) or of section 19 of P.L. 1983, c. 362 (C. 17:28−1.3), whenever the automobile or motor vehicle insured under the policy is used or operated in this State.

Any liability insurance policy subject to this section shall be construed as providing the coverage required herein, and any named insured, and any immediate family member as defined in section 14.1 of P.L. 1983, c. 362 (C. 39:6A−8.1), under that policy, shall be subject to the tort option specified in subsection a. of section 8 of P.L. 1972, c. 70 (C. 39:6A−8).

Each insurer authorized to transact or transacting automobile or motor vehicle insurance business in this State and subject to the provisions of this section shall, within 30 days of the effective date of P.L. 1985, c. 520, file and maintain with the Department of Insurance written certification of compliance with the provisions of this section.

"Automobile" means an automobile as defined in section 2 of P.L. 1972, c. 70 (C. 39:6A−2).

How does this statute effect PIP reimbursement? Are medical payments made pursuant to his home state's coverage, are they made pursuant to New Jersey law or are then made pursuant to home state coverage to the extent that the home state coverage does not conflict with New Jersey law? When an out of state motorist operates a vehicle in New Jersey, is his policy immediately transformed into a New Jersey policy?

In State Farm Mutual Auto Ins. Co. v. Crocker, 288 N.J. Super. 250 (App. Div. 1996) the Appellate Division dealt with these issues. Eileen Crocker was a Pennsylvania resident. She purchased automobile insurance from State Farm in Pennsylvania to cover her Pennsylvania registered car. She was thereafter involved in an automobile accident in New Jersey and sustained personal injuries. Crocker claimed that the Deemer Statute converted her policy to a New Jersey policy as soon as she entered New Jersey. State Farm claimed that the policy was not converted unless the Pennsylvania coverage was somehow exhausted. The court held that the statute took effect as soon as the car crosses the river into New Jersey. There need be no determination as to whether the home state coverage is better, worse or the same as the New Jersey coverage. The court wrote

Rather than take effect at some unspecified time in the future, depending upon the individual policies and the laws of the various states from which vehicles travel, the Deemer statute mandates that the policies "automatically be reformed to provide the PIP coverage required under the laws of New Jersey." Adams v. Keystone Ins. Co., 264 N.J. Super. 367, 371 (App. Div.1993); see also Lusby ex rel. Nichols v. Hitchner, 273 N.J. Super. 578, 589−90 (App. Div.1994) (noting that no formal reformation of a policy is required after an accident, but that policies to which the deemer statute applies are read as if the coverage actually were included); Watkins v. Davis, 268 N.J. Super. 211, 212−13 (App. Div.1993) (citing the Adams court's "automatic reformation" approach). The statutory mandate is a continuing one; the requisite coverage exists the moment the subject vehicle "is used or operated" in New Jersey. N.J.S.A. 17:28−1.4. This is true notwithstanding that, as a practical matter, nonresident claimants may initially pursue coverage according to the

procedures of the states in which they reside and the explicit provisions of their out−of−state policies.

Id. at 254.

Thus when a New Jersey accident involves an out of state person insured by a carrier writing in New Jersey, their coverage is New Jersey coverage and may be evaluated without reference to the foreign policy.

Even though the coverage is treated as New Jersey PIP, the out of state carrier paying that PIP is not entitled to the same reimbursement opportunities as a carrier paying under a domestic New Jersey policy.

In Martin v. Home Ins. Co., 141 N.J. 279 (1995), the New Jersey Supreme Court considered two cases where out of state polices became New Jersey policies in accordance with the Deemer Statute for payment of PIP benefits as a result of an accident in New Jersey. In both cases, the amount of medical expense benefits paid was in excess of $75,000.00. Both carriers made application to the UCJF for reimbursement and were denied. The Martin accident was caused by the out of state driver hitting a pedestrian, the second accident was caused when a tractor-trailer hit an out of state driver. In the tractor-trailer accident, the Robinson case, the carrier paying PIP also sought PIP reimbursement from the tractor trailer.

The Supreme Court ruled that there was no policy reason to allow the out of state carrier to benefit by reimbursement from the UCJF. The court further asked the Legislature to consider the ruling and change it retroactively if it did not meet Legislative intent. The court further went on to find that the PIP reimbursement action was available against the tractor trailer stating:

The claim for subrogation in the Robinson case is not against a vehicle required to maintain the full measure of PIP benefits. N.J.S.A. 39:6A−9.1 now allows for reimbursement in certain such instances but requires that the claims be resolved by intercompany agreement or arbitration.

The policy concerns and the probable intent of the Legislature regarding the verbal threshold, tort immunity, and subrogation, are different from the concerns regarding reimbursement from the UCJF. In one case, the issue is one of a level playing field for the conduct of litigation in New Jersey and in the other, the issue involves an uneven playing field for entitlement to reimbursement from the UCJF. The occupants of an out−of−state car are treated the same as the occupants of an in−state car. The question is whether the insurance companies of those two cars must be treated in the same manner.

Id. at 288.

VII. EXTENDED MEDICAL PAYMENT BENEFITS

Another question concerns recovery of Extended Medical Payment Benefits. While extended medical payment benefits are required to be included in PIP policies, they are not PIP payments. Under the terms of the policy form, and supported by what administrative material and case law there is, the carrier has a right either to a lien for payment of extended medical expense benefits, or the right to subrogate for those payments.

The ISO policy form Reimbursement and Trust Agreement reads as follows:

Subject to any applicable limitations set forth in the New Jersey Automobile Reparations Reform Act, in the event of any payment to any person under this endorsement:

(a) the Company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the "bodily injury" because of which such payment is made; and the Company shall have lien to the extent of such payment notice of which may be given to the person or organization causing such "bodily injury," his agent, his insurer or court having jurisdiction in the matter;

(b) such person shall hold in trust for the benefit of the Company all rights of recovery which he shall have against such other person or organization because of such "bodily injury";

(c) such person shall do whatever is proper to secure and shall do nothing after loss to prejudice such rights;

(d) such person shall execute and deliver to the Company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the Company established by this provision.

The Reimbursement and Trust Agreement is unenforceable for PIP payments. N.J.S.A. 39:6A-9, N.J.S.A. 39:6A-12, Cirelli v. Ohio Casualty Ins. Co., 72 NJ 380 (1977), Aetna v. Gilchrist Northeast, 85 NJ 550 (1981). The question then becomes whether Extended Medical Benefits Payments are PIP payments or something different.

The No Fault statute, N.J.S.A. 39:6A-4 does not make any direct mention of Extended Medical Benefits Payments. It is only speaks about medical expense benefits, income continuation benefits, essential service benefits, death benefits and funeral expenses benefits. Extended Medical Benefits Payments, which were a part of the personal automobile policy when the No Fault statutes were enacted, are required by administrative regulation, N.J.A.C. 11:3-7.3(b).

N.J.A.C. 11:3-7.3 Personal injury protection policy forms or endorsements

(a) All policy forms or endorsements that provide personal injury protection benefits required by > N.J.S.A. 39:6A-4 shall specify that such benefits shall be afforded by the insurer of the injured person subject to any deductibles or exclusions elected by the policyholder pursuant to > N.J.S.A. 39:6A-4.3. The required personal injury protection benefits are set forth below:

1. Medical expense benefits;
2. Income continuation benefits;
3. Essential services benefits;
4. Death benefits; and
5. Funeral expense benefits.

(b) Each policy form or endorsement covering an automobile as defined at > N.J.S.A. 39:6A-2 shall include excess medical payments coverage, corresponding to Section II, Extended Medical Expense Benefits Coverage of the personal automobile policy. Insurers must include a minimum coverage of $1,000 and may offer coverage of $10,000.

(c) Each policy form or endorsement providing additional personal injury protection benefits shall specify that, pursuant to > N.J.S.A. 39:6A-10, additional death benefits under the policy shall be payable without regard to the period of time elapsing between the date of the accident and the date of death provided death occurs within two years of the accident and results from bodily injury from that accident.

There is only limited discussion of Extended Medical Benefits coverage.

The Department of Insurance in Circular Letter New Jersey Automobile 9, dated February 22, 1993, explaining its position on PIP coverage, takes the position that Extended Medical Benefits Coverage payments “will be subrogable.”

There is only one reported decision on Extended Medical Benefits Coverage, Ingersoll v. Aetna Casualty and Surety Company, 138 NJ 236 (1994). The question in that case was whether Brian Lihou, who was injured while riding a motorcycle in a collision with an automobile, could stack the Extended Medical Benefits Coverage of his auto policy and his parents’ household auto policy. The two insurance carriers refused to stack the coverage, relying on N.J.S.A. 39:6A-4.2. The court disagreed and permitted stacking the two policies. The Supreme Court based its decision on the following reasoning:

The policy makes the extended coverage furnished by Section II unavailable to an insured person who is entitled to basic PIP benefits. Finally, the Section II coverage "does not apply to loss or expense to the extent that benefits are payable or are required to be provided therefore under any other automobile no- fault law."

Although the matter is by no means without doubt, as we understand the statutory scheme, the Commissioner's implementation thereof, and the insurance industry's accommodation thereto, the extended-medical-expense-benefits provision represents a very narrow window of coverage to a limited class of persons who, like plaintiff in this case, are ineligible for basic PIP benefits. Recognizing the unavailability of basic PIP's unlimited (now $250,000) medical coverage but wishing nevertheless to address in some small measure the medical-expense disaster that can befall those injured by use of a "highway vehicle" (as distinguished from an automobile), the Commissioner, acting under legislative authorization, has mandated first-party coverage of up to $10,000 in medical expenses. The Aetna policy, which follows the standard form, recognizes the difference between that coverage and basic PIP by declaring the extended coverage inapplicable if the insured person is entitled to basic PIP benefits.

We recognize that the arrangement of the standard policy form might be viewed as creating some ambiguity: it sets forth its extended-medical-expense- benefits coverage in Section II of an endorsement entitled "Personal Injury Protection Endorsement," Section I of which is labeled "Basic Personal Injury Protection." To the extent that that arrangement bears on the substantive question of policy interpretation, it tends to support Aetna's argument: (1) both section 4.2 and the policy prohibit the stacking of PIP benefits; (2) extended medical-expense benefits are PIP *241 benefits; therefore, (3) plaintiff may not stack extended medical-expense benefits. On the other hand, that same arrangement points up the industry's recognition of a significant functional difference between basic PIP coverage and Section II coverage--a
difference that is underscored by the disallowance of Section II benefits when the insured person is entitled to basic PIP coverage. On balance, we view the insurance-policy arrangement as hardly critical to our determination. The differences in the coverages furnished by basic PIP and Section II of the policy are sufficient to satisfy us that the Legislature did not intend to include the extended-medical-expense-benefits coverage in section 4.2's prohibition against stacking.

Id. at 240-241.

The court went on to point out the limited holding of this decision.

Supporting our determination are sound public-policy considerations, perhaps best illustrated by the circumstances of this case. Plaintiff's medical expenses exceed $35,000. He has no access to

the formerly-unlimited basic PIP coverage for those *242 expenses. His own automobile insurer, JUA, has paid $10,000 under its extended-medical-expense-benefits coverage. Against the total expense of $35,000, the JUA's $10,000 payment must be credited, leaving a balance of $25,000. Requiring Aetna to pay its $10,000 limit--the maximum that the carrier can provide under the Commissioner's regulation--will result in no windfall to plaintiff, no double recovery of any medical expense, and indeed plaintiff will be left with a balance of over $15,000 in uncompensated expenses. We do not believe that public policy, legislative intent, or the Commissioner's exercise of administrative authority are offended by our result. And if we have erred, our mistake is correctable with little more than the stroke of the legislative pen.

Id. at 241.