

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

ACCIDENT FUND INSURANCE	)	
COMPANY OF AMERICA, A/S/O	)	
VAUGHN HRUSKA AND	)	
RODNEY BETHEA	)	
	)	C.A. No. N13C-03-264 CLS
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	
Defendant.	)	

Date Submitted: July 2, 2013  
Date Decided: October 31, 2013

On Defendant Zurich American Insurance Company's Motion to Dismiss.  
**DENIED.**

**ORDER**

Louis J. Rizzo, Jr., Esq., Reger, Rizzo, & Darnall, LLP, Wilmington,  
Delaware. Attorney for Plaintiff.

Lee Ann Wurst, Esq., Marshall, Dennehey, Warner, Coleman, & Goggin,  
Wilmington, Delaware. Attorney for Defendant.

**Scott, J.**

## **Introduction**

Defendant Zurich American Insurance Company's ("Zurich") moves to dismiss Plaintiff Accident Fund Insurance Company of America's ("Accident Fund") Complaint pursuant to Del. Super. Ct. Civ. R. 12(b)(6) for failure to state a claim. In the Complaint, Accident Fund claimed that, as the workers' compensation carrier, it was subrogated to the rights of the injured employees in this case and entitled to reimbursement of payments made for benefits which were eligible to be paid by the Personal Injury Protection ("PIP") carrier.<sup>1</sup> Zurich argues that it is not required to reimburse Accident Fund under Delaware's Workers' Compensation Act, 19 *Del. C.* § 2301, et seq., or Delaware's No Fault Statute, 21 *Del. C.* § 2118. For the reasons below, Zurich's motion to dismiss is **DENIED**.

## **Background**

On or about December 3, 2010, Vaughn Hruska ("Hruska") and Rodney Bethea ("Bethea") sustained injuries as occupants of a vehicle involved in a motor vehicle accident in Delaware. The vehicle was insured under a motor vehicle insurance policy issued by Zurich and registered in South Carolina, which did not include minimum PIP coverage.<sup>2</sup>

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<sup>1</sup> Compl. at ¶ 7 (citing *Cicchini v. State*, 640 A.2d 650 (Del. Super. July 12, 1993) *aff'd*, 642 A.2d 837 (Del. 1994)).

<sup>2</sup> Under Delaware law, owners operating motor vehicles in Delaware, which are registered in another state or jurisdiction that does not require minimum insurance coverage, are required to have insurance on the motor vehicle equal to the minimum

Accident Fund provided worker's compensation benefits to Hruska and Bethea because they were injured in the course and scope of their employment. Hruska and Bethea submitted claims for workers' compensation. Accident Fund then paid \$10,340.68 to Hruska and \$35,239.63 to Bethea in benefits which were PIP eligible. On December 5, 2012, Accident Fund submitted a written request for payment to Zurich, but Zurich made no payments.

### **Standard of Review**

A motion to dismiss, brought pursuant to Superior Court Rule 12(b)(6), for failure to state a claim upon which relief can be granted is appropriate only when there appears to be no reasonably conceivable set of circumstances susceptible of proof under the complaint.<sup>3</sup> When determining whether to grant the motion, the Court must accept all well-pled allegations in the complaint as true.<sup>4</sup>

### **Discussion**

First, the Court notes that neither party disputes whether the injured employees would be entitled to a direct claim against Zurich for PIP benefits. Therefore, the only issue before the Court is whether Accident Fund, as the workers' compensation carrier and subrogee of the injured employees, has stated a claim for reimbursement from the Zurich, the PIP insurer.

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coverage required in Delaware. 1 *Del. C.* § 2118(b). Delaware's minimum requirements for PIP benefits are "\$15,000 for any 1 person and \$30,000 for all persons injured in any accident." § 2118(a)(2)(b).

<sup>3</sup> *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

<sup>4</sup> *Id.*

The purpose of the no-fault statute is to “impose upon the no-fault carrier...not only primary but ultimate liability for the [injured party’s] covered medical bills to the extent of ... unexpended PIP benefits.”<sup>5</sup> Thus, in circumstances where no-fault and workers coverage overlap, no-fault coverage is primary over worker’s compensation coverage. In *Lane v. Home Ins. Co.*, 1988 WL 40013 (Del. Super. Apr. 14, 1988), a car dealership employee was injured in an accident cause by a third-party whose vehicle was not covered by an insurance policy. Home Insurance Company (“Home”) provided insurance coverage to the employee under the Workman’s Compensation Act and the no-fault statute, which included uninsured motorist compensation. The Court, considering the interplay between the no-fault and workers’ compensation laws, found that “the priority of responsibility falls upon the no-fault insurer and even if the workmen’s compensation benefits are available to an insured, the insured PIP benefits under an automobile liability policy are still primary.”<sup>6</sup> After determining that the no-fault carrier was primary, the Court found that the worker’s compensation insurer

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<sup>5</sup>*State Farm Mut. Auto. Ins. Co. v. Nalbhone*, 569 A.2d 71, 77 (Del. 1989)(quoting *Int’l. Underwriters, Inc. v. Blue Cross & Blue Shield of Del., Inc.*, 449 A.2d 197, 200 (Del. 1982)).

<sup>6</sup>*Lane v. Home Ins. Co.*, 1988 WL 40013, at \*3 (the Court’s finding was based on a review of *Home Ins. Co. v. Walls*, Del. Super. C. A. No. 77C-OC-90, Taylor, Judge (Oct. 19, 1979), *Johnson v. Fireman’s Fund Ins. Co.*, Del. Super., 82C-OC-63, Poppiti, Judge (Nov. 21, 1983), and *Pennsylvania Mfgs. Ass’n. Co. v. Oliphant*, Del. Super. C.A. No. 83C-AP-d, Bush, Judge ( Sep. 10, 1986)).

had a right of reimbursement from the proceeds received by the employee for uninsured motorist benefits from the no-fault policy.<sup>7</sup>

In *Cicchini v. State*, 640 A.2d 650 (Del. Super. July 12, 1993) *aff'd*, 642 A.2d 837 (Del. 1994), employees injured in an automobile accident in the course of their employment sought damages from their employers for failure to process their accident claims first through PIP coverage, instead of through workers' compensation coverage.<sup>8</sup> Based on prior case law, including *Lane*, the Court ruled that PIP coverage was primary and that "its interaction with the coverage provided under the Workmen's Compensation Act must be managed in such a fashion that the injured employee receives the maximum benefits available under both."<sup>9</sup> This general rule was repeated by the Court in *Community Systems, Inc. v. Allen*, 1999 WL 1568331, at \*2 (Del. Super. Nov. 4, 1999).

In *Peiffer v. City of Wilmington*, 1996 WL 527208 (Del. Super. Aug. 31, 1996), this Court acknowledged that, "in many cases, the worker's compensation carrier has paid out before the PIP carrier has paid."<sup>10</sup> After discussing the background of the 1993 amendment to 19 *Del. C.* 2363(e), the Court stated:

The Legislature, in enacting the amendment to 19 *Del. C.* § 2363(e), revised the procedure for a worker's compensation carrier to obtain reimbursement when PIP coverage was available. The new statute provides that if a worker's compensation carrier is entitled to

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<sup>7</sup> *Id.* at \*5.

<sup>8</sup> *Cicchini*, 640 A.2d at 650.

<sup>9</sup> *Id.* at 653.

<sup>10</sup> *Peiffer*, 1996 WL 527208 at \*3.

reimbursement where PIP is involved, then the worker's compensation carrier may recover only the maximum amounts of the third party's liability insurance coverage once the plaintiff's claim is settled or otherwise resolved. This means that if there is a trial, the special damages will not be introduced in accordance with 21 *Del.C.* § 2118(h). The worker's compensation carrier will have to look to the PIP carrier for reimbursement and not to the sums the plaintiff might recover. The plaintiff will receive money, and the PIP carrier ultimately will be responsible for the PIP benefits.<sup>11</sup>

Accident Fund has asserted that it is the employees' subrogee and it is undisputed that the injured employees are eligible to recover PIP benefits. Based on the public policy underlying the no-fault statute and the above case law, the Court finds that Accident Fund has stated a claim for reimbursement against Zurich. Accordingly, Zurich's Motion to Dismiss is **DENIED**.

**IT IS SO ORDERED.**

/s/Calvin L. Scott  
**Judge Calvin L. Scott, Jr.**

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<sup>11</sup> *Id.*; See also *Duphily v. Delaware Elec. Co-op., Inc.* 662 A.2d 821, 834-35 (Del. 1995).