

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

CARL A. LAWSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. N11C-07-172 PRW
	)	
KELLOGG MARINE, INC., a/k/a	)	
LAND 'N' SEA DISTRIBUTING,	)	
INC., a subsidiary of	)	
BRUNSWICK CORPORATION,	)	
	)	
Defendant.	)	

Submitted: April 5, 2013

Decided: April 18, 2013

Upon Defendant's Motion to Apply New Jersey's Deemer Statute.
DENIED.

OPINION AND ORDER

Heather A. Long, Esquire, Kimmel, Carter, Roman & Peltz, P.A.,
Newark , Delaware, Attorney for Plaintiff, Carl A. Lawson.

Gary H. Kaplan, Esquire, and Jessica L. Tyler, Esquire, Marshall, Dennehey,
Warner, Coleman & Goggin, P.C., Wilmington, Delaware, Attorneys for
Defendant Kellogg Marine, Inc.

Colin M. Shalk, Esquire, Casarino, Christman, Shalk, Ransom & Doss, P.A.,
Wilmington, Delaware, Attorney for State Farm Mutual Automobile
Insurance Company.

WALLACE, J.

I. INTRODUCTION

Defendant Kellogg Marine, Inc. (“Kellogg Marine”) moves this Court to apply *N.J.S.A.* 17:28-1.4, the so-called New Jersey “Deemer” statute, in the instant case.¹ The Deemer statute imposes on all insurance companies eligible to transact certain business in New Jersey the obligation to include in all automobile policies issued in the United States and Canada, provision of coverage at least equal to New Jersey’s statutory minimums, or to have those companies’ out-of-state policies “deemed” to have done so whenever an insured vehicle is used or operated in New Jersey.²

For the reasons that follow, Kellogg Marine’s motion in limine is **DENIED**.

II. FACTUAL BACKGROUND

On November 3, 2010, Plaintiff Carl Lawson (“Lawson”) was injured while riding as a front-seat passenger in a rented Dodge Charger that was driven by Jorell Wallace (“Wallace”) on southbound I-95 near Trenton, New

¹ Def. Motion in Limine to Apply the New Jersey Deemer Statute at 2 [hereinafter “Motion”]. Kellogg Marine also moves the Court to bar at trial any evidence of personal injury protection (“PIP”) benefits paid or payable by Lawson’s insurers. Lawson did not address this second claim in his written response. At oral argument, however, Lawson’s counsel stated that Lawson does not intend to introduce evidence of PIP benefits paid or payable by his insurer. (Transcript of Excerpt of Pretrial Conference Motion, Apr. 1, 2013, at 6:11-12 [hereinafter “Tr. at ___”]). Thus, the issue of PIP payment evidence is rendered moot, and it need not be addressed here. (Tr. at 6:13-17).

² *N.J.S.A.* 17:28-1-4 (2013).

Jersey.³ Wallace's car collided with the rear-end of a tractor trailer driven by a Kellogg Marine employee.⁴ There are two areas of contention in the upcoming trial: (1) whether Wallace or Kellogg Marine's driver was at fault in the collision; and (2) if Kellogg Marine has some liability to Lawson for damages, what is the extent of those damages and of Kellogg Marine's liability.

III. PROCEDURAL BACKGROUND

Lawson originally brought suit for negligence and negligent entrustment against Wallace, Kellogg Marine, State Farm Mutual Automobile Insurance Company ("State Farm"), Progressive Direct Insurance Company ("Progressive"), and Markel American Insurance Company ("Markel"). It happens Lawson may have had personal injury protection ("PIP") coverage as a resident relative⁵ under three separate insurance policies held by his parents, Carl and Sharon Lawson.⁶ Lawson's parents insured a 2003 Jaguar through State Farm, a 2004 Nissan Titan through Progressive, and a 2008 Harley-Davidson motorcycle through

³ Motion at 1.

⁴ *Id.*

⁵ See DEL. CODE ANN. tit. 21, § 2118(a)(2)(f) (2013).

⁶ State Farm Resp. Letter dated Apr. 5, 2013, trans. #51555264, at 2 [hereinafter State Farm Resp. Ltr.].

Markel.⁷ Wallace was covered by a Progressive policy for a 1997 Ford Explorer he owned.⁸ The Court was presented with no evidence of the insurer of Kellogg Marine's tractor trailer.

Kellogg Marine is the only remaining Defendant. Wallace, Progressive, State Farm, and Markel had each reached a settlement agreement with Lawson.⁹ Thereafter, on February 28, 2013, Kellogg Marine filed this Motion in Limine to Apply the New Jersey Deemer statute. In effect, Kellogg Marine, as the remaining Defendant, petitions this Court to: (1) ascribe a \$250,000 PIP medical expenses benefit to the State Farm policy for the benefit of Lawson; and (2) enforce the limitation-on-lawsuit threshold provision of New Jersey's no-fault statute against Lawson.¹⁰ While Kellogg Marine never clearly so states, it desires to increase State Farm's liability for PIP to \$250,000 so as to potentially lower its own liability as tortfeasor while triggering New Jersey law's "verbal threshold" to ban Lawson's claims for noneconomic damages. Lawson filed a response opposing application of the Deemer statute.

⁷ *Id.*

⁸ *Id.* at 1.

⁹ Def. Mot. in Limine to Produce Non-Redacted Releases at ¶ 6; Pltf. Resp. to Def. Mot. in Limine Seeking Production of Pltf's Settlement Agreements at ¶ 1.

¹⁰ Motion at 3; *N.J.S.A.* 39:6A-8(a).

At oral argument, noting that the motion as pled might implicate rights of State Farm, who was not then a party, by increasing that insurer's liability, the Court reserved decision and granted Kellogg Marine leave to have the motion considered again only once State Farm had an opportunity to be heard.¹¹ Counsel for State Farm wrote a timely letter to the Court opposing any attempt by Kellogg Marine to reform State Farm's policy, which was issued to Lawson's parents and which provided Lawson PIP coverage.¹² State Farm argued that the Deemer statute does not apply because the vehicle owned by Lawson's parents and insured by State Farm was not operated in New Jersey.¹³

IV. DISCUSSION

As described by the New Jersey Supreme Court, when applicable, the Garden State's "'Deemer Statute' – provides benefits and burdens to out-of-state drivers insured by companies authorized to do business in New Jersey."¹⁴ Here, Kellogg Marine seemingly wishes the Court to (1) confer

¹¹ Order dated Apr. 2, 2013 at ¶ 8.b.

¹² State Farm Resp. Ltr. at 2. In its letter, State Farm also suggested that each of the four insurance policies at issue in the current case, not just State Farm, should be involved in any discussion of the Deemer statute as it relates to this case. *Id.* at 3. Given the Court's holding here, nothing further is needed from the other insurers.

¹³ *Id.* at 2-3.

¹⁴ *Zabilowicz v. Kelsey*, 984 A.2d 872, 873-74 (N.J. 2009).

on Lawson – at the cost to a company that insures not one of the drivers nor either of the vehicles involved in the subject collision – the increased PIP benefits required by New Jersey law;¹⁵ and (2) subject Lawson to the limitation-on-lawsuit threshold which restricts one’s right to sue for “noneconomic loss” if injured in an accident in New Jersey.¹⁶ Because at least one (if not several) essential fact is missing, New Jersey’s Deemer statute is inapplicable and the Court can and will do neither.

First, Kellogg Marine requests the Court apply the Deemer statute and “conform[] Plaintiff’s insurance policy to meet the personal injury protection coverage of \$250,000,” required under New Jersey law.¹⁷ Yet, it is doubtful that Kellogg Marine, as a third-party non-beneficiary of the contract between State Farm and the insureds, even has standing to petition for this type of reformation of the policy. The better view under Delaware law, is that the right to reform a policy in this way “belongs solely to the contracting party, the insured, and not to other persons who may benefit from the policy

¹⁵ See *N.J.S.A.* 39:6A-4 (PIP benefits include “[p]ayment of medical expense benefits in accordance with a benefit plan . . . for reasonable, necessary, and appropriate treatment and provision of services to persons sustaining bodily injury, in an amount not to exceed \$250,000 per person per accident.”).

¹⁶ *N.J.S.A.* 39:6A-8.1 (election of tort option); *N.J.S.A.* 6A-2(i) (“Noneconomic loss” means pain, suffering, and inconvenience.”).

¹⁷ Motion at 4.

coverage.”¹⁸ And it is clear that this provision of the New Jersey Deemer statute itself only creates a right in the insured or, where applicable, an intended third-party beneficiary.¹⁹ Secondly, Kellogg Marine has not demonstrated to the Court that its vehicle would also be subject to the Deemer statute, which it must so do before it is able to invoke the limitation-on-lawsuit threshold against Lawson.²⁰

Numerous defenses were raised by Lawson’s and State Farm’s filings and argument, but one quickly resolves the issue here: the State Farm-insured vehicle (Lawson’s parents’ 2003 Jaguar) was not involved in the accident that occurred on I-95 in New Jersey during which Lawson was injured. The Deemer statute reads in pertinent part:

¹⁸ *Starr v. Nationwide Mut. Ins. Co.*, 548 A.2d 22, 28 (Del. Ch. 1988).

¹⁹ *D’Orio v. West Jersey Health Sys.*, 797 F. Supp. 371, 373 (D.N.J. 1992) (“Section [17:28-]1.4 creates a cause of action for an out-of-state resident injured in a New Jersey automobile accident”); *See also Cooper Hosp. Univ. Med. Ctr. v. Prudential Ins. Co.*, 876 A.2d 335 (N.J. Super. Ct. App. Div. 2005) (Requiring automobile insurer to pay PIP benefits to health-care provider who treated a non-resident driver involved in a car accident in New Jersey).

²⁰ *See Zabilowicz*, 984 A.2d at 878 (“Simply stated, an out-of-state defendant who is not eligible to receive New Jersey PIP benefits cannot find shelter under *N.J.S.A.* 39:6A-8(a) and may be sued for pain and suffering damages without regard to the threshold.”). Although Lawson’s counsel disputed whether State Farm is an insurer “authorized and licensed to do business in New Jersey,” Pltf. Resp. to Def. Mot. in Limine Requesting Application of the New Jersey Deemer Statute at 4, State Farm does not dispute that it is a covered insurer under the Deemer statute; New Jersey case law too indicates that State Farm’s automobile policies are subject to the Deemer statute when it is applicable. *See Zabilowicz*, 984 A.2d at 874 (“State Farm Mutual Automobile Insurance Company . . . is authorized to do business in New Jersey.”).

[A]ny insurer authorized to transact or transacting automobile or motor vehicle insurance business in this State . . . which sells a policy providing automobile or motor vehicle liability insurance coverage . . . in any other state or in any province of Canada, shall include in each policy coverage to satisfy at least the . . . 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 herein²¹

As explained by at least one New Jersey court, the Deemer statute follows insured vehicles, not people.²² Assuming, without deciding, that a choice of laws analysis would allow use of the statute in this lawsuit²³, by its very terms New Jersey's Deemer statute is inapplicable. In order to trigger

²¹ *N.J.S.A.* 17:28-1.4 (emphasis added).

²² See *Karamisakis v. Blumberg*, 2005 WL 3148500 at *3 (N.J. Super. Ct. App. Div. Nov. 28, 2005).

²³ If the Deemer statute is found to apply by a New Jersey court in a New Jersey suit, there is no choice of laws analysis required with respect to the reformation of the insurance policy. *Cooper Hosp.*, 876 A.2d at 338 (“Generally speaking, the deemer [sic] 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.”); *Canal Ins. Co. v. F.W. Clukey Trucking Co.*, 684 A.2d 953, 956 (N.J. Super. Ct. App. Div. 1996) (Out-of-state “[p]olicies written by insurers subject to *N.J.S.A.* 17:28-1.4 that do not contain express provisions complying with this statute are deemed to have been amended to comply.”). Although Kellogg Marine argued for the automatic application of the Deemer statute here in this Court, Tr. at 5:11-23, Delaware case law suggests that Delaware’s adopted choice of laws approach would be used to determine whether New Jersey’s verbal threshold, *N.J.S.A.* § 39:6A-8, immunizes a tortfeasor from a plaintiff’s claim for noneconomic damages. *E.g., Kent v. Nationwide Prop. & Cas. Ins. Co.*, 844 A.2d 1092, 1095-96 (Del. Super. Ct. Mar. 10, 2004).

the Deemer statute so as to enforce the \$250,000 PIP coverage against State Farm in Lawson's lawsuit in the instant case, the vehicle insured by State Farm would have had to have been (1) operated in New Jersey, and (2) involved in the accident that caused Lawson's injuries.²⁴ Neither condition applies to this case.

Lawson's parents insured one vehicle, a 2003 Jaguar, through a policy with State Farm, which by its terms also provided Lawson with PIP coverage as a resident relative.²⁵ That Jaguar was not operated in New Jersey in connection with the accident that Lawson claims caused his injuries. Therefore, the Deemer statute does not apply, and the Court will neither reform the State Farm policy nor limit Lawson's lawsuit thereunder.

²⁴ See, e.g., *Martin v. Home Ins. Co.*, 661 A.2d 808, 809 (N.J. 1995) ("To achieve the purposes of the No-Fault Law . . . the Legislature in 1985 required that any policy issued by an insurance company qualified to do business in New Jersey covering a vehicle *while it is being operated in New Jersey* be construed as providing the same type of PIP benefits as are required under New Jersey law. (emphasis added)); *Adams v. Keystone Ins. Co.*, 624 A.2d 1008, 1011 (N.J. Super. Ct. App. Div. 1993) ("*N.J.S.A.* 17:28-1.4 applies only to 'automobiles' which are 'used or operated in New Jersey.'"); *Gov't Employees Ins. Co. v. Allstate Ins. Co.*, 818 A.2d 474, 477 (N.J. Super. Ct. App. Div. 2003) ("The deemer [sic] statute requires some insurers to include in their out-of-state policies PIP and other New Jersey coverages to be available *whenever the insured automobile is operated within this State.*" (emphasis added)).

²⁵ State Farm Resp. Ltr. at 2.

V. CONCLUSION

For the foregoing reasons, Kellogg Marine's motion in limine to apply New Jersey's Deemer statute is **DENIED**.

IT IS SO ORDERED.

/s/ Paul R. Wallace

Paul R. Wallace, Judge