IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Defendant Below, Appellant, v. MELVIN DAVIS, Plaintiff Below, Appellee.	)	No. 10, 2013 On Appeal from the Superior Court of the State of Delaware in and for Sussex County C.A. No. S10C-09-005 ESB The Honorable E. Scott Bradley

ANSWERING BRIEF
OF APPELLEE MELVIN DAVIS

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March 20, 2013

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NATURE OF PROCEEDINGS

This insurance dispute was commenced by the plaintiff Melvin Davis on September 2, 2010. An amended complaint was filed on May 25, 2011, pleading the case as a proposed class action. The class-wide claims arise from State Farm's refusal to reserve Personal Injury Protection (or "PIP") benefits for payment of lost wages, even where the insured specifically requests that lost-wage benefits be paid before medical-expense benefits. Extensive legal research has failed to identify any instance in which any Delaware auto insurer (other than State Farm) has taken this position.

By stipulation and order the parties agreed to, and the Superior Court approved, a briefing schedule for cross-motions for summary judgment. Importantly, the summary judgment record established that several Delaware auto insurers, including Nationwide, GEICO, Liberty Mutual and others, routinely reserve PIP benefits for lost wages.

On September 26, 2012 the Superior Court decided the parties' cross-motions, largely in Mr. Davis' favor. *Davis v. State Farm Mut. Auto. Ins. Co.*, Del. Super. Ct., C.A. No. S10C-09-005 ESB, Bradley, J. (Sept. 26, 2012) (the "September 2012 Letter Opinion") (Ex. A).[1] In particular, the Superior Court concluded that the purpose of Delaware's PIP statute is best served by allowing insureds to reserve for lost wages:

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[1] The only claim on which State Farm prevailed was Mr. Davis' claim for intentional (or reckless) infliction of emotional distress. The September 2012 Letter Opinion granted summary judgment to State Farm on that claim due to the absence of evidence that State Farm's conduct caused physical harm to Mr. Davis. September 2012 Letter Opinion at 10-11.

> The underlying purpose of the PIP statute is to protect and compensate all persons injured in automobile accidents regardless of fault. Moreover, this section is entitled to be liberally construed in order to achieve its purpose. The purpose of [21 *Del. C.* §2118B] is to ensure the reasonably prompt processing and payment of sums owed by insurers to their policy holders and other persons covered by their policies pursuant to §2118 and to prevent the financial hardship and damage to personal credit ratings that result from the unjustifiable delays of such payments. Obviously, this applies to lost wages as well as medical expenses since a person can fall behind on bills other than medical expenses if they are unable to work and earn a living. Thus, the underlying purpose of the PIP statute focuses on the need to compensate the injured person in a timely manner.
>
> ***
>
> There are two choices for me here, making it a question of which choice best furthers the underlying purpose of the PIP statute. Do I allow the insurer to decide which bills get paid, or do I allow the injured person to make that decision[?] The first choice reduces the insurer's administrative costs and frustrates the injured person's wishes. The second choice furthers the injured person's wishes and increases the insurer's administrative costs. Given that the purpose of the PIP statute is to help injured persons and not to see that health care providers get paid or that the administrative costs of insurance companies are reduced, I hold that the legislature would want the PIP statute to be applied in such a manner that allows the injured person to reserve his or her PIP benefits that have otherwise not been properly paid for his or her lost earnings.

September 2012 Letter Opinion at 9-10 (Ex. A).

On December 10, 2012 the Superior Court issued a second letter opinion, denying State Farm's motion for reargument. *Davis v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 6845685 (Del. Super. Ct.) (Ex. B). This interlocutory appeal followed.

SUMMARY OF ARGUMENT

1. Denied. Delaware's Personal Injury Protection statute, 21 *Del. C.* §2118, establishes a strong public policy in favor of financial protection for persons injured in auto accidents -- hence the name Personal Injury ***Protection***. This policy requires insurers to manage PIP benefits so that the insured secures maximum financial protection. Accordingly, where the insured asks the insurer to reserve (but not prepay) such benefits for lost wages, the insurer must properly honor the request.

2. Denied. Section 2118B is expressly designed to prevent "financial hardship and damage to personal credit ratings[.]" That goal can best be served, and often can only be served, by allowing injured persons to reserve Personal Injury Protection benefits for lost wages.

3. Denied. As State Farm concedes, the fundamental purpose of sections 2118 and 2118B is to protect and compensate persons injured in auto accidents. A person in Mr. Davis' position -- that is, someone injured seriously enough to suffer a prolonged absence from work -- risks crushing debt, and perhaps financial ruin, if their PIP benefits are exhausted through payment of medical expenses. Similarly, persons with private health insurance can only be meaningfully protected by allocating their PIP benefits to lost wages.

4. Admitted. State Farm has led the public to believe that its refusal to reserve benefits for lost wages is justified by the insured's assignment of rights to care providers. This presumably explains why the Superior Court felt it necessary to address the

validity of the purported assignment that was executed in connection with Mr. Davis' medical care. Yet such assignments are necessarily directed to the right to collect ***medical benefits***. Since an assignment is limited in scope to the rights it actually assigns, these "medical expense" assignments have no effect on the right to collect lost-wage benefits. Therefore, this Court can and should resolve the issue on appeal as a matter of statutory construction, without regard to the existence or validity of any medical expense assignment.

STATEMENT OF FACTS

A. The September 2009 Collision

In September 2009 Melvin Davis was employed by Mountaire Farms, an agricultural food processing company with facilities in Delaware and other states. Deposition of M. Davis ("Davis") at 9 (B33).[2] On September 15, 2009, Mr. Davis was a passenger in a car driven by his coworker, James Sheppard, and insured by State Farm. Police report at 2 (B2). The police report indicates that Sheppard was driving while intoxicated. *Id.*

Driving westbound on Hollyville Road in Millsboro, Delaware, Sheppard lost control of the vehicle. The vehicle left the roadway, hit a ditch along with one or more other fixed objects, and finally smashed into a tree. *Id.* Mr. Davis flew through the windshield and landed in an open field. Davis at 10 (B34).

Mr. Davis' injuries were catastrophic, and his life forever changed. As his personal injury lawyer, David Boswell, explained to State Farm prior to this litigation:

> Among other injuries, [Mr. Davis] sustained a traumatic stroke which has limited the use of the right side of his body, including his right arm, leg, and hand. Employed full time at Mountaire Farms at the time of this collision, Mr. Davis has remained totally disabled from this September 2009 collision to the present.
>
> Mr. Davis was in a coma for weeks, and was evicted from his residence for non-payment of rent while he was hospitalized.
>
> ***

[2] References to the alphanumeric sequence beginning with "B__" are to the accompanying appendix.

> With no income and no residence, Mr. Davis has been placed in a state of abject poverty since this collision, forced to seek shelter anywhere he can find it, including one or more homeless shelters.

B11, B12-13.

B. Mr. Davis' PIP Claim

By letter dated December 9, 2009, State Farm issued a reservation of rights under the State Farm policy's liability coverage. B6-7. The basis for the reservation of rights -- a "permissive user" defense -- would, if meritorious, have barred both liability and PIP coverage.[3] On January 5, 2010 attorney Boswell's paralegal, Karen Ranck, spoke by phone with a State Farm adjuster regarding the Davis matter. B11. *See also* Deposition of K. Ranck ("Ranck") at 30 (B23). The adjuster went further than the reservation of rights, stating affirmatively that coverage had been denied outright for lack of permissive use. B11; Ranck at 30 (B23).

On January 6, 2010, Mr. Boswell wrote to State Farm to request that it provide him with a PIP application for Mr. Davis' PIP claim. B8. This request was made pursuant to 21 *Del. C.* §2118B(b), which provides:

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[3] As the Superior Court recognized in *Harris v. Nationwide Mut. Ins. Co.*, 712 A.2d 470 (Del. Super. Ct. 1997),

> [It] is obvious that the General Assembly intended that insurance companies are only required to provide PIP and liability coverage to persons operating a motor vehicle with express or implied permission.

Harris, 712 A.2d at 473.

> When an insurer is notified in writing by the claimant that the claimant desires to file an initial claim for benefits pursuant to [the PIP statute] . . . the insurer shall, no later than 10 days following the insurer's receipt of said notification, provide that claimant with a form for filing such a claim.

It is undisputed, however, that State Farm never provided a PIP application at any time. Deposition of D. Boswell ("Boswell") at 36 (B30).

On January 8, 2010 State Farm sent a letter to the home address of Mr. Davis' mother, indicating that it had unilaterally decided to exhaust his $15,000 PIP limits through payment to care providers. The letter was not copied to Mr. Boswell, despite the fact that State Farm was aware (through Ms. Ranck's January 5, 2010 phone conversation) of his office's representation of Mr. Davis. B9. Mr. Davis, for his part, has no recollection of receiving the letter. Davis at 29-30 (B35-36).

Unaware that State Farm had already paid the PIP limits to care providers, Ms. Ranck phoned State Farm again on February 1, 2010. B12. During the call, she asked that Mr. Davis' PIP benefits be reserved for lost wages. Ranck at 58-59 (B24-25). In reply, the PIP adjuster disclosed for the first time that a) State Farm had reversed its stance on the "permissive user" issue; b) State Farm had paid the $15,000 PIP limits to care providers without the knowledge or consent of Mr. Davis or his lawyer; and c) in so doing, State Farm was following its corporate policy:

> Q. *** Do you recall actually asking Ms. Barillo, on February 1, 2010, to reserve any of the PIP benefits for lost earnings?
>
> A. Yes.
>
> Q. You do recall that?
>
> A. I do.
>
> Q. And tell me how you did that.
>
> A. I believe that I spoke with her. I was advised that the decision that State Farm had made denying his benefits was reversed by, I believe a manager. I asked her to reserve the PIP wages. She told me that, and this is just paraphrasing, it's obviously not word for word because I don't remember, but asking her to reserve the PIP for wages because Mr. Davis was in dire straits at the time. She told me it was not their policy, that they pay on a first come, first serve, and that the wages had already been paid to the hospital . . . .
>
> Q. When you say wages --
>
> A. I'm sorry, the PIP benefits had already been paid to the hospital that he had gone to.

Ranck at 58-59 (B24-29). *See also* B13 (attorney Boswell complains to State Farm that "to our great surprise, at the same time we learned that State Farm was agreeing to extend PIP benefits to Mr. Davis, on Monday, February 1, 2009 (*sic*), [we] were also informed that the entire PIP coverage limits of $15,000 have already been paid out and exhausted for medical bills -- without Mr. Davis' knowledge or consent.")

In following this corporate practice, State Farm is the exception and not the rule. As noted above, the summary judgment record established that Nationwide, GEICO, Safeco Insurance (a Liberty Mutual company), Foremost Insurance and Victoria Insurance all honor their

insureds' requests for reservation of PIP benefits for lost wages.[4] Attorney Boswell, meanwhile, described State Farm's conduct as unprecedented: "I knew that never had a PIP adjustor refused that request [to reserve PIP benefits for lost wages] in my career." Boswell at 56 (B31).

C. The Assignment

State Farm says that when it unilaterally exhausted the entirety of Mr. Davis' PIP limits, it did so "pursuant to a facially valid assignment of benefits." Opening brief at 5. To better understand this issue, some further facts are in order.

Karen Ranck, the paralegal employed by Mr. Davis' personal injury lawyer, twice testified that because Mr. Davis remained in a coma, his mother signed the hospital's assignment form:

> Q. Do you know who assigned the Assignment of Benefits form for Mr. Davis?
>
> A. For what provider?
>
> Q. For the initial providers, the initial hospital treatment that commenced on or about September 15, 2009?
>
> A. I believe it was his mother.
>
> Q. Elisia Downing?
>
> A. I believe so.
>
> ***
>
> Q. *** You knew there was an Assignment of Benefits form and you also knew that a relative, and most likely, Mrs. Downing, Davis' mother had signed the Assignment of Benefits forms; yes?

[4] *See* B37-44 (establishing, by affidavit and direct evidence, that these Delaware insurers routinely reserve PIP benefits for lost wages).

> A. I knew that she signed the one with the hospital.

Ranck at 61-62 (B26-27). What is more, the signer of the assignment form plainly identified herself, on the face of the form itself, as Mr. Davis' mother. B46.

To date, at least, State Farm has not contended that a mother can lawfully enter into contracts or incur debts on behalf of her adult son. That being the case, it is unclear why State Farm regards the assignment in question as "facially valid." The larger point, however, is that the assignment's terms limit the rights assigned to ***the right to collect medical benefits***:

> I assign and request payment of benefits to Christiana Care Health Services and to physicians providing hospital-based services (e.g. Emergency Department physicians, Anesthesiologists, Radiologists, Pathologists, etc.) for which I am entitled under the terms of any and all policies under which I have coverage. This assignment applies to all services related to my current [hospital] admission or, for outpatient services, until revoked.

B46. The assignment thus relates only to benefits for "hospital-based services," and services related to a hospital admission or outpatient care. It cannot sensibly be read as an assignment of lost-wage benefits. Indeed, nowhere does the document purport to assign the right to collect lost-wage benefits.[5]

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[5] State Farm also says that at oral argument, Mr. Davis' counsel withdrew his challenge to the assignment's validity. However, State Farm neglects to say that it did not produce the assignment until after the oral argument. B45.

D. State Farm's Rationale

Both sides agree that State Farm refuses to reserve PIP benefits for lost wages, even in cases of catastrophic injury. This much is clear. State Farm's justification for doing so, however, is inconsistent and unclear.

Responding in 2011 to the PIP claims of another of Mr. Boswell's clients, Richard Mosley, State Farm offered this analysis:

> State Farm has received your correspondence . . . regarding reserving PIP benefits for lost wages for Richard Mosley.
>
> *** State Farm requires documentation from the provides [that] they are willing to revoke the assignment of benefits signed by your client, Richard Mosley. ***
>
> Please have the providers advise in writing they are willing to revoke the assignments of benefits. If we do not receive this documentation within 30 days of receipt of the medical bills, we will have to honor the assignment of benefits we have on file.

B19. State Farm thus led Mr. Mosley to believe that if his care providers gave their blessing, State Farm would agree to reserve PIP benefits for lost wages. Similarly, in a letter sent just weeks ago, State Farm explained its position -- including its refusal to honor the Superior Court's September 2012 Letter Opinion during the pendency of this appeal -- by relying on "any applicable assignment of benefits." B47.

In dealing with the public, then, State Farm has justified its refusal to reserve for lost wages on the ostensible ground that when a patient assigns to her care providers the right to recover medical expenses directly from the insurer, that assignment precludes payment

of lost wage benefits. When in a litigation setting, however, State Farm has abandoned the "assignment" theme in favor of its "first-in, first-out" explanation. This may reflect State Farm's realization that its "assignment" theory makes little sense. After all, such assignments are ubiquitous in our modern health care system. If an assignment of benefits to one's doctor were enough to vitiate the obligation to pay lost wages, then State Farm would find itself giving priority to medical bills -- and either deferring payment of lost wages, or refusing "lost wage" coverage outright -- on nearly every claim. Since State Farm has no doubt paid lost wages and medical expenses simultaneously on countless Delaware claims (particularly where the PIP limits were sufficient to cover both species of benefit without risking exhaustion), the "assignment" theory could never have survived empirical scrutiny.

But whatever State Farm's rationale, it is clear that for claims like Mr. Davis', the company's refusal to reserve for lost wages allows it to avoid the administrative costs associated with maintaining an open file and paying lost wages on a periodic basis.

ARGUMENT

I. RESERVING LOST-WAGE BENEFITS IS CONSISTENT WITH THE PIP STATUTE AND DELAWARE LAW

A. Question Presented

Should the PIP statute, which must be liberally construed to promote its purpose, be interpreted to require insurers to reserve benefits for lost wages when requested to do so by the insured?

B. Scope of Review

The Court's review of the Superior Court's grant of summary judgment is *de novo*. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010). Questions of statutory interpretation are likewise subject to *de novo* review. *Bd. Of Adjustment of Sussex County v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

C. Merits of Argument

1. The Decision Below is Consistent with Public Policy and the PIP Statute's Fundamental Purpose

The Superior Court has repeatedly been asked to consider whether an insurer may manage PIP benefits in a manner most beneficial to its own interests, or whether it must instead manage such benefits so as to maximize its insured's recovery. In each case the answer has been the same: the guiding principle must always be the maximization of the insured's financial recovery.

Foremost among these cases is *Steager v. United States Auto. Ass'n*, 1997 WL 719087 (Del. Super. Ct.) (Ex. C). Though State Farm makes no mention of *Steager*, its precedential value should be obvious: in *Steager*, the Superior Court expressly required another Delaware PIP carrier, USAA, to reserve PIP benefits for lost wages. Indeed,

Steager reached this result even though (unlike this case) the insured requested the reservation of lost-wage benefits only ***after*** the carrier had paid out its full limits of liability for PIP coverage.

In *Steager* the insured secured an award of PIP benefits through an arbitration proceeding under former Superior Court Civil Rule 16.1. USAA attempted to satisfy the award by paying down all outstanding medical expenses, and thereafter tendering to the insured the remaining balance of the $15,000 PIP limits. *Steager*, Op. at *1. The Superior Court noted that "Plaintiff gave no special advice to the PIP carrier prior to the payments as to whom payment should be made." *Id.* This is a far cry from the facts here, where Mr. Davis (through counsel) requested that benefits be reserved for lost wages before he even received a PIP application. Nonetheless, *Steager* denied the carrier's motion to enter the arbitration award as a final judgment, and instead required the carrier to honor the request for reservation of benefits. *Id.* at *1-2. By way of explanation, the *Steager* court stated that it was "sympathetic to the argument that payments should be allocated to maximize the recovery for the insured." *Id.* at *2.

A similar question arose in *Johnson v. Fireman's Fund Ins. Co.*, Del. Super., C.A. No. 82C-OC-63, Poppiti, J. (Aug. 8, 1983) (Ex. D). There the insured actually exhausted his PIP benefits through payment of both medical expenses and lost wages before realizing that he could have maximized his recovery by simply having his workers' compensation insurer pay medical expenses first, "freeing up monies for additional [PIP] benefits which could have been applied" to lost wages. *Johnson*, Op. at *1. Despite the fact that the PIP insurer had already paid out

its full PIP limits, the Superior Court held that additional PIP benefits for lost wage benefits were owed to the claimant:

> [I]s the claimant entitled to additional PIP benefits where, as in the instant case, after PIP benefits have been paid to their maximum amount it is determined *post hoc* that workmen compensation would have paid all of the claimed medical expenses, thus freeing up monies for additional [PIP] benefits which could have been applied to the claimant's net lost earnings? The court holds the answer to be in the affirmative. A correlative question is, given the legislative policy of both the statutory scheme of no-fault insurance and of workmen's compensation for the insurance carrier to respond to an injured party in a prompt and sure fashion in order to make compensation for injury, medical expenses and lost wages more direct, certain and economical without subjecting the injured person to the hazards and delays of a law suit, ***was it not the good faith obligation of the PIP insurer in the instant case to process the claim in such a fashion so as to maximize the benefits recoverable by the claimant*** to whose rights the PIP insurer becomes subrogated? The Court holds the answer to this question is also in the affirmative.

Johnson, Op. at *1-2 (emphasis added).

This same principle -- that the touchstone must always be the maximization of the PIP claimant's recovery -- was next upheld in *Lane v. Home Ins. Co.*, 1988 WL 40013 (Del. Super. Ct.) (Ex. E). In *Lane* the issue was whether PIP or workers' compensation would serve as the primary source of insurance where both were available, but the insured's recovery would be maximized by treating PIP as primary. The Superior Court determined that PIP coverage, and not workers' compensation, would serve as primary insurance. *Lane*, Mem. Op. at *3.

The same question led to the same result in *Cicchini v. State*, 640 A.2d 650 (Del. Super. Ct. 1993), *aff'd*, 642 A.2d 837 (Del. 1994). After observing that the PIP statute must be given a liberal construction to promote its purpose, *Cicchini* at 652, this Court expressly recognized the imperative of managing benefits to maximize recovery:

> [*Lane v. Home*] and the other cases referred to clearly stand for the proposition that not only is PIP coverage primary, but its interaction with the coverage provided under the workmen's Compensation Act must be managed in a fashion that the injured employee receives the maximum benefits available under both. The object is to provide for and protect the interests of such individuals.

Cicchini, 640 A.2d at 653.[6]

More recently, the question arose again in *Community Sys., Inc. v. Allen*, 1999 WL 1568331 (Del. Super. Ct.). *Allen*, however, was the rare case in which the insured's maximal recovery lay not in treating PIP coverage as primary, but in treating workers' compensation as primary. Based solely on the imperative of maximizing recovery for the PIP claimant, *Allen* gave primacy to the workers' compensation coverage:

> It is well settled in law in Delaware that to the extent that the benefits provided by no-fault coverage and workers' compensation overlap, no-fault provides greater benefits and therefore no-fault should control.

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[6] The requirement of liberal construction for Delaware's PIP statute was likewise noted in *Gray v. Allstate Ins. Co.*, 668 A.2d 778, 779 (Del. Super. Ct. 1995). *Gray* also noted the PIP statute's "fundamental purpose" to "protect and compensate all persons injured in automobile accidents." *Gray*, 668 A.2d at 779. This fundamental purpose is plainly frustrated by State Farm's policy of exhausting benefits through medical expense payments.

***

> This Court concludes that ***the purpose behind holding PIP coverage primary is to maximize the benefits to the employee***. In this case that goal would be advanced under the workers' compensation scheme. The no-fault statute does not indicate that the PIP coverage is exclusive, therefore, there is no reason to conclude that because Claimant has a PIP claim for his full-time employment, that he would be forced to accept PIP coverage . . . .

Allen, 1999 WL 1568331, Mem. Op. at *2-3 (emphasis added) (Ex. F).

Allen is important, because State Farm has sought to distinguish *Johnson*, *Lane* and *Cicchini* as cases involving the overlap of PIP and workers' compensation -- an issue that is admittedly not raised here -- and from this it has argued that they are inapposite. But *Allen* shows that the *ratio decidendi* of these cases has nothing to do with the intrinsic relationship between PIP and workers' compensation, and everything to do with a single prime directive: to manage benefits for maximal recovery. Thus does *Allen* employ the same analysis as *Johnson*, *Lane* and *Cicchini* while reaching the opposite result; and all with an eye toward maximizing insurance benefits.

Taken together, the *Steager*, *Johnson*, *Lane*, *Cicchini* and *Allen* cases constitute a uniform line of authority, developed over the course of 30 years, that requires PIP carriers to maximize their insureds' financial protection. The decision below is consistent with this formidable body of precedent, and consistent with the fundamental purpose of the PIP statute. It should be affirmed.

2. The Obligation to Reserve PIP Benefits Is Not an Obligation to Pay PIP Benefits

State Farm argues that because PIP benefits need not be paid until they are incurred, it need never reserve such benefits, even where a failure to do so would deprive the insured of all meaningful financial protection. This argument wrongly equates a reserved benefit with a paid benefit.

The obligation to reserve benefits on request is not an obligation to accelerate payment for future anticipated (but not yet incurred) losses. Surely an insurance giant like State Farm -- whose daily business operations require it to reserve staggering amounts of money against future estimated losses -- should grasp that point. The decision below thus imposes no obligation to accelerate or prepay lost-wage benefits; and it is wholly consistent with the concept of payment on incurrence of the loss.

3. The Decision Below Is Consistent with Section 2118B, And Would Not Expose State Farm to Any New Risk of Liability

State Farm argues that reserving PIP benefits for lost wages would undermine the statutory requirement, under section 2118B, that PIP claims be processed promptly. State Farm also says that the decision below will unfairly expose insurers to potential liability under section 2118B's statutory interest provision. Both arguments can be put to rest by simply reading the statute and reviewing the record evidence.

The purpose of section 2118B is stated plainly in the statute's preamble:

> The purpose of this section is to ensure reasonably prompt processing and payment of sums owed by insurers to their policyholders and other persons covered by their policies pursuant to § 2118 of this title, and to prevent the financial hardship and damage to personal credit ratings that can result from the unjustifiable delays of such payments.

21 *Del. C.* §2118B(a). This statement of legislative intent is consistent with the fundamental purpose of Delaware's no-fault scheme. *See Gray v. Allstate Ins. Co.*, 668 A.2d 778, 779 (Del. Super. Ct. 1995) (noting that the PIP statute's "fundamental purpose" is to "protect and compensate all persons injured in automobile accidents.")

Subsection (c) of the statute requires that claims be paid or denied within 30 days of the insurer's receipt of the claim (together with supporting documentation). 21 *Del. C.* §2118B(c). Where the claim is "wholly or partly denied," the insurer must "provide the claimant with a written explanation of the reasons for such denial." *Id.* Subsection (c) further provides that "[i]f an insurer fails to comply with the provisions of this subsection, then the amount of unpaid benefits due from the insurer to the claimant shall be increased" at specified monthly rates. *Id.*

In *Johnson, Lane, Cicchini* and *Allen*, the Superior Court repeatedly upheld an insured's right to allocate PIP benefits to maximize his or her financial protection. In *Steager*, and again in the September 2012 Letter Opinion, the Superior Court specifically upheld an insured's right to reserve PIP benefits for lost wages. Should this Court affirm, then the moment an insured instructs her insurer to reserve PIP benefits for lost wages, the insurer will be vested with a valid legal basis to deny or defer (in timely fashion,

of course) all claims for benefits that contravene the insured's instructions. With lost-wage benefits given the priority they deserve -- based on this Court's affirmance of the decision below and the insured's express instructions -- the insurer can readily respond to claims submitted by care providers in timely fashion, and with the appropriate written explanation. Once the work-related disability ends, the insurer can promptly revisit any outstanding medical bills; and assuming that 1) the bills are otherwise covered, and 2) the policy's PIP limits are not yet exhausted, the insurer can pay those bills as appropriate.

State Farm fails to explain how this common-sense approach would run afoul of section 2118B's 30-day provision, or why it would be unworkable in this digital age. Indeed, empirical evidence shows that other Delaware auto insurers follow this approach routinely:

- At page B43 of the accompanying appendix is an affidavit from Delaware attorney James Woods. He testifies that in the course of his ongoing representation of a Delaware PIP claimant,

> [o]n June 2, 2011, I wrote a letter to the Nationwide PIP adjuster assigned to this claim, Jennifer Purdum, asserting my client's right to reserve the full $15,000 PIP coverage for his lost wages.
>
> ***
>
> Ms. Purdum agreed to reserve PIP for lost wages and has informed my client's medical providers (one of which is owed over $120,000) of that fact. She has called me twice in the last 60 days, inquiring about the status of my client's lost wage documentation and confirming that she is not paying any medical bills.

- At page B44 of the appendix is a sworn certification from attorney Philip Edwards of Murphy and Landon. He testifies that:

> I recently represented a client in connection with a Personal Injury Protection (or "PIP") claim. Her claim arose under an auto insurance policy issued by Safeco Insurance, a Liberty Mutual company.
>
> ***
>
> In the course of this representation, I had occasion to ask Safeco to reserve the client's PIP benefits for lost wages. Safeco agreed to do so, and did so.

- Page B37 of the appendix is a letter from Foremost Insurance Company regarding yet another Delaware PIP claim. In that letter Foremost confirms that "we will be able to issue payment for the remaining lost wages as we are keeping the remaining $3,540.00 reserved for lost wages as you requested."

- Pages B38-40 consist of two documents provided by attorney William Peltz of Kimmel, Carter, Roman & Peltz. The first is an October 25, 2011 letter from Mr. Peltz to Victoria Insurance (a Nationwide company), stating "Per our conversation on 10/24/11, at this time please reserve all PIP benefits for [the claimant's] lost wages." The second document is a November 9, 2011 letter from Victoria to a medical provider, indicating that payment of its bill for medical services has been "[p]ended due to lost wage claim."

- In the letter reproduced at page B42 of the appendix, GEICO tells its insured's counsel that because she "has opted to reserve her Personal Injury Protection Benefits for lost wages," the company will pay medical bills "only should benefits remain after she has closed her wage claim."

- Page B18 of the appendix is a letter from Nationwide Mutual, acknowledging the insured's request for the reservation of PIP benefits, and confirming that "all bills received after [the date of your request] will be held for wages."

The decision below thus contemplates a prompt and orderly claims-handling process -- one that other Delaware insurers are routinely following, with no apparent fear of liability under section 2118B. Rather, it is State Farm that invites liability by refusing to honor its insureds' lawful requests; by stubbornly ignoring the considerable guidance offered by existing case law (*Steager*, *Cicchini* and the rest); and by rejecting the daily business practices of its fellow insurers.

II. STATE FARM'S INTERPRETATION OF THE PIP STATUTE WOULD WREAK HAVOC ON ORDINARY DELAWAREANS, AND FRUSTRATE THE STATUTE'S PURPOSE

A. Question Presented

Does State Farm's insistence on unilaterally exhausting PIP benefits through payment of medical expenses, in derogation of the insured's need to replace lost earnings, frustrate the PIP statute's fundamental purpose -- that is, the protection and compensation of injured persons?

B. Scope of Review

The Court's review of the Superior Court's grant of summary judgment is *de novo*. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010). Questions of statutory interpretation are likewise subject to *de novo* review. *Bd. Of Adjustment of Sussex County v. Verleysen*, 36 A.3d 326, 329 (Del. 2012).

C. Merits of Argument

According to the Social Security Administration, "Studies show that a 20-year-old worker has a 3-in-10 chance of becoming disabled before reaching retirement age."[7] For members of this state's workforce, then, the sudden loss of earning capacity through disability (whether temporary or permanent) is more than just a theoretical risk. That is why Delaware's social safety net includes statutory schemes for both workers' compensation and no-fault auto insurance -- programs that the people of this state, through their elected representatives, have established to safeguard public welfare.

[7] *See* http://www.ssa.gov/dibplan/index.htm (last visited March 19, 2013).

As State Farm concedes, the "fundamental purpose" of Delaware's no-fault scheme is to "protect and compensate all persons injured in automobile accidents." *Gray v. Allstate Ins. Co.*, 668 A.2d 778, 779 (Del. Super. Ct. 1995). Though State Farm cites *Bass v. Horizon Assur. Co.*, 562 A.2d 1194 (Del. 1989) for the proposition that the PIP statute's "focus" includes the financial well-being of care providers, this Court made clear in *Bass* that the statute's ***primary purpose*** is the protection of injured persons: "The primary objective of subsections (a)(2)a. and (a)(2)b. [of section 2118] is to allow an insured to recover regardless of fault." *Bass*, 562 A.2d at 1196. As a purely secondary purpose, the PIP statute also removes the uncertainty that might otherwise surround a care provider's compensation in a fault-based system: "As the Superior Court noted in its opinion '[the PIP statute] also serves a further social purpose of assuring to health care providers regardless of the cause of the accident that they will be compensated for care which they provide to those who are injured in an automobile accident.'" *Id.* (internal citation omitted). Consistent with *Gray* and *Bass*, therefore, the protection of injured persons is the PIP statute's primary and fundamental purpose. State Farm's interpretation of the statute defeats that purpose; and for proof of this, one need look no further than Mr. Davis' plight.

In the moments before the September 2009 collision Melvin Davis had a full-time job and a place to call home. The collision left him comatose for weeks, partially paralyzed, and totally disabled. Unable to work, and while still in a coma, he was evicted from his apartment.

Sadly, State Farm subjected Mr. Davis to a broad range of unlawful conduct. It violated the PIP statute by failing to provide Mr. Davis with a PIP application. It violated the statute again by failing to provide a meaningful written explanation of its (initial) denial of PIP claims. It denied coverage based on a permissive user defense for which it never offered evidentiary support. It took contradictory coverage positions on its permissive user defense. Finally, it unilaterally deprived Mr. Davis of all lost wage benefits, full in the knowledge that his medical bills alone would exhaust the policy's PIP limits; and knowing, too, that he had suffered partial paralysis (which would obviously limit his prospects for future employment).

So what came of Mr. Davis' encounter with State Farm? Without the $15,000 in lost wage benefits, he was left not just disabled but also homeless and destitute -- forced, at one point, to turn to a homeless shelter. This is apparently what State Farm means when it calls its FIFO approach "the best handling system for all parties concerned." Opening brief at 23.

State Farm also argues that its FIFO method protects the personal credit ratings of injured Delawareans by ensuring that their debts to care providers are paid. Here again, State Farm ignores the practical realities of our health care system. According to data compiled by the U.S. Census Bureau, nearly 90% of Delaware residents under the age of 65 (and therefore ineligible for Medicare) have health insurance.[8]

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[8] *See* http://www.census.gov/did/www/sahie/data/interactive/(last visited March 19, 2011).

Thus, even in the rare case where an insured's request to reserve benefits for lost wages leaves no remaining PIP limits for medical costs, care providers will still have a 90% chance of getting paid -- if not greater, when one adds in the population covered by Medicare.

In short, the choice before the Court is a stark one. If the Court allows injured Delawareans to maximize their no-fault protection -- as they have routinely done in their dealings with insurers other than State Farm -- they will be spared the risk of financial hardship, just as the General Assembly intended. Care providers will continue to be paid by a variety of sources, including the unexhausted portion of the patient's PIP limits; employee health insurance; group health insurance; individually purchased health insurance; workers' compensation benefits and other sources.

Conversely, should the Court uphold State Farm's position, victims of future auto accidents will lose substantial income. Their lives, and the lives of their families, will be severely disrupted; and in extreme cases they will be forced into personal bankruptcy, or left destitute like Mr. Davis. Their care providers will be paid with PIP benefits while their health insurance sits idle. This cannot be the legislative intent behind the PIP statute. *Cf. Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 495 A.2d 1242,1247 (Del. 1985) ("The golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result.")

III. AFFIRMANCE WILL NOT CAUSE A CLAIMS HANDLING CRISIS

A. Question Presented

Would affirmance of the decision below, thereby requiring State Farm to manage PIP benefits in the same way its competitors manage them, wreak havoc on the claims-handling process?

B. Scope of Review

The Court's review of the Superior Court's grant of summary judgment is *de novo*. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

As shown above, the undisputed record shows that Nationwide, GEICO, Liberty Mutual and other Delaware insurers routinely reserve PIP benefits for lost wages. Yet the record is devoid of any evidence that "havoc" has befallen these companies as a result. The conclusion thus compels itself that State Farm's dire warnings are divorced from (and belied by) reality.

Nor do State Farm's gloomy predictions fare any better in other no-fault states. For example, Florida's PIP statute is substantially similar to Delaware's, even to the point of imposing a 30-day payment regime. *Compare* 21 *Del. C.* §2118B(c) (requiring PIP insurer to pay or deny claims "no later than 30 days following the insurer's receipt of [the claim]") *with* Fla. Stat. ch. 627.736(4)(b) (providing that "[p]ersonal injury protection insurance benefits . . . shall be overdue if not paid within 30 days after the insurer is furnished written notice of the fact of a covered loss and of the amount of same.") It is therefore revealing that State Farm has twice rejected

an insured's request to reserve PIP benefits for lost wages under the Florida statute -- and twice been turned back by the courts.

In *Holloway v. State Farm Mut. Auto. Ins. Co.*, 370 So.2d 452 (Fla. Ct. App. 1979) the insureds purchased both PIP coverage and separate medical payments (or "medpay") coverage from State Farm. The medpay coverage, however, applied only to medical bills incurred within one year of the accident. Moreover, the insureds possessed a substantial claim for lost earnings, which were covered only under PIP. *Holloway*, 370 So.2d at 454. They therefore "sought to take maximum advantage of the coverages available by initially limiting their claim under the PIP coverage to one for lost income." *Id.* In this way, "if the entire $5,000.00 of PIP coverage went to a claim for lost income, the [insureds] would still have $5,000.00 of coverage available for first year medical bills under the medical payments coverage." *Id.* The Florida appellate court held that State Farm's insureds "had the right to apportion their claims so as to secure the maximum benefits available." *Id.*

More than a decade later, State Farm again sought to avoid reserving benefits in *Bennett v. State Farm Mut. Auto. Ins. Co.*, 580 So.2d 217 (Fla. Ct. App. 1991). As in *Holloway*, the insured in *Bennett* had both PIP and medpay. When the insured submitted her claim under both coverages, State Farm "applied the payments of medical bills in the manner it chose and, in so doing, exhausted the PIP benefits before using up the medical payment benefits, thereby leaving no further benefits available to cover Bennett's lost wages." *Bennett*, 580 So.2d at 218. This is substantially similar to what

State Farm has done in Mr. Davis' case -- though here State Farm rushed to exhaust benefits before Mr. Davis was even in a position to submit a PIP claim.

State Farm argued that because the insured never asked that lost wages be given priority, it was under no duty to maximize the insured's recovery -- a somewhat inconvenient argument here, where State Farm has disclaimed any duty to maximize benefits even in the face of its insured's request. *Bennett* at 218. The Florida appellate court rejected this argument as unfair:

> Few insureds can foresee exactly how an accident will affect their lives. *** We do not feel that it is right to deny insured's benefits for which they have clearly paid, because they did not have the insight to determine how their payments should be apportioned.
>
> State Farm chose to exhaust the PIP benefits first, despite the fact that the majority of the claims submitted were for medical expenses. ***State Farm should have been more concerned about their obligation to provide their insured with the maximum benefits allowable under their contract.***

Id. (emphasis added).

Kentucky's no-fault statute expressly authorizes insureds to reserve benefits for lost wages or medical expenses as they see fit. Thus, under the Kentucky statute,

> An insured may direct the payment of benefits among the different elements of loss, if the direction is provided in writing to the reparation obligor [that is, the PIP insurer]. A reparation obligor shall honor the written direction of benefits provided by an insured on a prospective basis.

Ken. Rev. Stat. Ann. §304.39-241. Similarly, New York's PIP statute allows the policyholder to elect a dedicated coverage called "optional

basic economic loss," under which the injured party may specify that benefits "be applied to loss of earnings from work and/or psychiatric, physical or occupational therapy and rehabilitation" once basic coverage is exhausted. N.Y. Ins. Law §5102(a)(5).

As the nation's largest auto insurer, State Farm obviously does extensive business in these other no-fault states. Yet it presented the Superior Court with no evidence of the supposed inefficacy of a "reservation of benefits" approach from any of these states, or (indeed) from any no-fault state in the country. The absence of such evidence confirms that, as with State Farm's Delaware competitors, auto insurers in other states are adhering to a "reservation" regime with no ill effects.

IV. AN ASSIGNMENT OF MEDICAL BENEFITS IS NOT AN ASSIGNMENT OF LOST-WAGE BENEFITS

A. Question Presented

Should this Court resolve the "reservation of benefits" issue without regard to the validity *vel non* of the medical assignment form that Mr. Davis' mother purported to sign on his behalf?

B. Scope of Review

The Court's review of the Superior Court's grant of summary judgment is *de novo*. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

As shown above, State Farm has led the public to believe that its refusal to reserve PIP benefits for lost wages is justified whenever an injured party executes a medical-expense assignment in favor of a care provider. For purposes of this appeal this issue is neither here nor there, because 1) State Farm has apparently abandoned that position, and 2) medical-expense assignments are (by definition) beside the point.

As State Farm acknowledges, an assignment is a contract like any other. As with any contract, courts do not create an assignment where none exists; nor do they construe assignments more broadly than they are written. *See Hallowell v. State Farm Mut. Auto. Ins. Co.*, 443 A.2d 925, 926 (Del. 1982) ("[W]hen the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning because creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented.") Under settled principles of

contract law, then, an assignor's rights against the obligor can only be extinguished through "[a]n unequivocal ***and complete*** assignment . . . ." *Aaron Ferer & Sons Ltd. v Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir. 1984) (emphasis added). This necessarily means that an assignment of the right to collect medical benefits (as was purportedly made in this case) does not assign the right to collect other species of benefits. Thus, the Missouri appellate court in *Marvin v. State Farm Mut. Auto. Ins. Co.*, 894 S.W.2d 712 (Mo. Ct. App. 1995) (on which State Farm relies) expressly treated the assignee-provider as "the insured for the purposes of receiving the medical benefits." *Marvin*, 894 S.W.2d at 713.

There are also other problems with State Farm's treatment of the assignment issue. For example, Ms. Ranck testified that the assignment was executed by Mr. Davis' mother while Mr. Davis remained in a coma. State Farm challenges that testimony as hearsay. But Ms. Ranck merely related the happening of an historical event -- not the statement of an out-of-court declarant. Thus, her testimony does not meet the familiar definition of hearsay.

Again, however, these issues should not be dispositive on this appeal. Though patient assignments are ubiquitous in doctor-patient relations, they invariably assign the right to collect payment for medical services rendered -- not the right to snatch away the patient's lost-wage benefits.[9]

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[9] For a typical patient-provider assignment, *see Champlost Family Med. Practice v. State Farm Ins.*, C.A. No. 02-3607, 2002 WL 31424398, slip op. at *2 (E.D. Pa. Oct. 29, 2002) (assigning the "rights . . . to recover payment for services rendered to me") (Ex. G).

V. THE ARGUMENTS OF THE INSURANCE INDUSTRY AMICI LACK MERIT

A. Question Presented

Have the insurance industry amici shown that State Farm's FIFO regime is a "proven and objective method" whose adoption is necessary to prevent systemic fraud?

B. Scope of Review

The Court's review of the Superior Court's grant of summary judgment is *de novo*. *Brown v. United Water Delaware, Inc.*, 3 A.3d 272, 275 (Del. 2010).

C. Merits of Argument

The insurance industry amici duplicate certain of State Farm's arguments. For example, they equate reservation of benefits with payment of benefits; and from this they wrongly conclude that the decision below would require insurers to accelerate payment for not-yet-incurred lost wages. Like State Farm, the amici insist that the FIFO method proved a boon to Mr. Davis, who (they claim) was thereby "protected from . . . financial hardships[.]" Amici brief at 6. Having addressed these arguments above, we need not address them here.

The amici's other arguments, meanwhile, are equally wrong. First, they claim that State Farm's FIFO approach is a "proven and objective method," any departure from which "would dramatically change the PIP program." *Id.* at 7, 9. Yet their only basis for characterizing FIFO as "proven" is their (mistaken) assertion that New York's no-fault statute prohibits insureds from reserving benefits for lost wages. As shown above, the New York statute allows consumers to elect "optional basic economic loss," under which the injured party

may specify that benefits "be applied to loss of earnings from work" once basic coverage is exhausted. N.Y. Ins. Law §5102(a)(5). As to FIFO's "objectivity," the amici appear to suggest that benefit-management decisions made by State Farm are objective, while those made by insureds are subjective. Or perhaps they believe that subjective judgments are needed to distinguish lost wages from medical bills. In either case, the amici are wrong.

We have also shown that 1) insurers other than State Farm routinely reserve Delaware PIP benefits for lost wages, 2) the Superior Court permitted such a reservation in *Steager*, and 3) other states allow their citizens, by common law or statute, to make such reservations. It is thus State Farm, and not Mr. Davis, who seeks radical change in the PIP program.

The amici next argue that State Farm's use of the FIFO system should not render it liable for overdue payments under section 2118B(c), because it had no notice that reservation of benefits would be permitted under Delaware law. This issue has not yet been decided below, and is not properly a part of this appeal. We note again, however, that *Steager* (decided over 15 years ago) upheld the insured's right to maximize benefits by allocating them to lost wages. Similarly, *Johnson* and its progeny have alerted the insurance industry, over the course of 30 years, to the simple imperative of maximizing the insured's financial protection.

The amici also claim that the decision below will encourage fraud. Precisely how or why this will occur, they do not say. Nor do they present any evidence of fraud arising from the practices of other

Delaware insurers, who (as we have seen) routinely reserve PIP benefits for lost wages. Should fraud occur, however, insurers will have recourse to the Delaware Insurance Fraud Prevention Act, a formidable weapon. *See* 18 *Del. C.* §2401 *et. seq.*

Finally, the amici urge this Court to leave the issue on appeal to the General Assembly. Statutory construction, however, is uniquely the province of the courts. Even where "the Court is faced with a novel question of statutory construction, it must seek to ascertain and give effect to the intention of the General Assembly as expressed by the statute itself." *In re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993). Delaware courts have repeatedly, and without difficulty, gleaned from the PIP statute a fundamental policy in favor of maximizing the insured's financial protection. The Superior Court correctly recognized that this fundamental principle is controlling; and this Court should apply the same principle on this appeal, with no need for further resort to the legislature.

CONCLUSION

For the reasons set forth above, Mr. Davis respectfully requests that the decision below be affirmed.

Respectfully submitted,

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