IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AMICI CURIAE BRIEF OF PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF DEFENDANT-APPELLANT

Phil Goldberg (*pro hac vice*)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com

Robert M. Greenberg (#4407)
TYBOUT, REDFEARN & PELL
750 Shipyard Drive, Suite 400
P.O. Box 2092
Wilmington, DE 19899-2092
Tel: (302) 658-6901
Fax: (302) 658-4018
Email: rgreenberg@trplaw.com

Attorneys for *amici curiae*

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INDENTITY OF *AMICI CURIAE*

As associations representing Delaware insurers, *amici* have a significant interest in the subject litigation and are well-suited to provide a broad perspective to this Court.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies, representing the broadest cross-section of any national trade association. PCI promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. PCI members write more than $190 billion in annual premium, 40 percent of the nation's property casualty insurance. Member companies write 46 percent of the U.S. automobile insurance market, 32 percent of the homeowners market, 38 percent of the commercial property and liability market, and 41 percent of the private workers compensation market. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI is interested in the resolution of the issue before the Court on behalf of its members and their interests.

Founded in 1895, National Association of Mutual Insurance Companies ("NAMIC") is the largest and most diverse property/ casualty trade association in the country, with 1,400 national, regional and local mutual insurance member companies serving more than 135 million auto, home, and business policyholders. These companies write in excess of $196 billion in annual premiums, accounting for 50 percent of the automobile/ homeowners market and 31 percent of the business insurance market. More than 200,000 people are employed by NAMIC members. NAMIC benefits its members through public policy development, advocacy, and member services.

STATEMENT OF FACTS

Amici adopt Defendant-Appellant's Statement of Facts as relevant to *amici's* argument here.

ARGUMENT

This Court should reverse the lower court ruling. The lower court improperly asserted its own judgment over that of the Delaware Legislature and the marketplace in striking down a proven, efficient and objective system for paying personal injury protection ("PIP") claims. In its place, the court required the use of an inefficient, subjective system whereby the insureds direct all PIP payments. As this brief will show, this new system, which has been barred in at least one other state, will frustrate the goals of Delaware's PIP insurance and

lead to greater potential for the types of fraud and abuse that have plagued PIP programs in other states.

I. PLAINTIFF'S DESIRE TO DIRECT PIP PAYMENTS DOES NOT GIVE RISE TO A CAUSE OF ACTION AND WOULD CREATE A SYSTEM FOR PAYING CLAIMS THAT IS INCONSISTENT WITH THE DELAWARE STATUTE

PIP programs, in Delaware and in the other states where they have been enacted, provide prompt no-fault payment of medical bills, lost wages, and specified economic losses associated with auto accidents. *See, e.g.*, 21 *Del. C.* § 2118; Insurance Research Council, *PIP Claiming Behavior and Claim Outcomes in Florida* (Malvern, PA: Feb. 2011), at 15 [hereinafter "IRC"] (PIP "was originally conceived as a means to deliver medical and wage-loss benefits to auto accident victims quickly – without attorney involvement or litigation").[1]

To achieve these goals, PIP programs must be "properly constructed" with cost containment measures that reduce transaction costs, align compensation with one's actual economic costs, assure prompt payment of claims, and reduce fraud. *See* Jeffrey O'Connell, *et al.*, *No-Fault Insurance at 40: Dusting Off an Old Idea to Help Consumers Save Money in an Age of Austerity*, NAMIC Issue Analysis (Dec. 2011), at 2-3 (detailing how PIP statutes in highly populated states, namely Florida, New York

[1] *See also The Impact of Reducing PIP Coverage in Michigan*, Prepared by Public Sector Consultants, Inc. (Aug. 2011), at 2 (PIP's purpose is to "direct resources to necessary care and treatment of victims of motor vehicle accidents")

and Michigan, have been highly scrutinized and regularly revised to help insurers meet these goals on behalf of their insureds).

Delaware's PIP statute, like those in Florida and New York, is structured to assure the efficient payment of valid claims. As Defendant sets forth in its brief, the statute has strict limitations on the types of claims that are to be paid: (1) the insured must be an "injured person"; (2) he or she must have incurred an enumerated expense; (3) the expense must be reasonable; (4) the expense must be necessary; and (5) the expense must be "incurred within 2 years of the accident." *See* Def. Br. at 9; 21 *Del. C.* § 2118(a)(2)a.

Once an insurer can determine that these five criteria are met, the statute requires the insurer to "promptly process the claim" and make payment within 30 days. 21 *Del. C.* § 2118B(c). If an insurer fails to meet this deadline, it is subject to specified penalties, including civil liability and the payment of its insured's attorneys' fees. *See id.*

The purpose of these provisions is to "ensure reasonably prompt processing and payment" of claims. 21 *Del. C.* § 2118B(a). As the Legislature explained in the statute, the intent of Delaware's PIP program is to prevent "financial hardship and damage to personal credit ratings" of the insured that "*can* result from the unjustifiable delays of such payments." *Id.*

A. Defendant's Use of the First In First Out Method for Paying PIP Claims Is Lawful and Supports the Intent of Delaware's PIP Statute

In some states, the PIP statutes specify the order in which claims are to be paid. In Florida and New York, for example, claims are "payable as loss accrues." Fla. Stat. § 627.736(4); N.Y. Ins. Law. § 5106(a) ("Payments of first party benefits and additional first party benefits shall be made as the loss is incurred."). These laws facilitate timely payments and minimize disputes.

In New York, the First In First Out ("FIFO") method is the preferred system for paying PIP claims: "the insurer is required to promptly pay . . . covered expenses as claims for those expenses are submitted to it." Priority of Payments in a No-Fault Claim, N.Y. Ins. Dept., Office of General Counsel Informal Opinion, Dec. 24, 2002 [hereinafter "N.Y. Ins. Dept. Guidance"]. To protect insurers that follow this method, the law further states that once the full amount of PIP coverage is exhausted, the insurer is not liable for any other claims, even if the "services rendered [were] prior in time to those which were paid." N.Y. Comp. Codes R. & Regs. tit. 11 § 65.15(n).

Delaware's PIP statute does not proscribe a specific process for the order in which claims are to be paid. In the instance in which it does, it leaves this decision to the discretion of the marketplace. *See* 21 *Del. C.* § 2118(a)(2)a.3

("The payment of these costs shall be either at the time they are ascertained or at the time they are actually incurred, at the insurer's option.").

In the instant case, the Defendant used the FIFO method. In addition to being required in New York for processing PIP claims, FIFO is used in other comparable liability systems because it is efficient and minimizes judgment decisions that lead to litigation or abuse. *See, e.g.*, 2002 Trust Distribution Process, Manville Personal Injury Settlement Trust, at 1 (Jan. 2012 Revision), *available at* http://www.mantrust.org/ (requiring the use of FIFO because it is an efficient system for processing claims on an "impartial" basis).

Here, Defendant's FIFO policy furthered the purpose of Delaware's PIP statute. There is no dispute that Defendant paid the claims presented to it within the proscribed time frame in an impartial manner. The insured received timely medical attention and, to the limits of the PIP policy, was protected from the financial hardships that can result from delayed payments. *See Bass v. Horizon Assurance Co.*, 562 A.2d 1194, 1196 (Del. 1989) (The "social purpose" of the PIP statute is assuring "health care providers [that] 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").

Thus, while Defendant was not required to choose FIFO in Delaware, FIFO is fully consistent with the Delaware statute and furthers its enumerated goals. There certainly is no support in this statute or elsewhere that would provide notice to an insurer in Delaware that using FIFO for paying PIP claims would be considered illegal and give rise to potential liability or statutory penalties.[2]

B. Allowing Each Insured to Direct PIP Payments Contradicts the Purpose of Delaware's PIP Statute

Notwithstanding the above, the underlying court took it upon itself to disallow this proven and objective method for paying PIP claims. *See* Op. at 9 ("Do *I* allow the insurer to decide which bills get paid, or do *I* allow the injured person to make that decision.") (emphasis added). In its place, the court's ruling would require all PIP insurers in Delaware to implement a subjective system whereby the policyholder has the sole right to direct all PIP payments. *See id.* at 10 (stating the insured must "be the one to decide how" claims are paid).

Until now, the marketplace, within the constraints set forth in the Delaware PIP statute, has decided the order in which PIP claims are paid. In some instances, insurers may have

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[2] The United States Supreme Court has stated that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

taken direction from their insureds, *see id.* at 5, n. 10. Even if there can be benefits to allowing this option on a case-by-case basis, requiring all insurers to implement this approach for all PIP claims would frustrate the enumerated goals, as discussed above, that the Legislature put into the PIP statute.[3]

First, giving insureds the authority to micromanage the order in which bills are paid would place a substantial burden on the PIP system because insurers would be required to seek the approval of their insureds before making any PIP payments. Some insureds, as in this case, may want the money directly "instead of seeing that [their] health care providers get paid." *See* Op. at 10. Others might want their medical bills paid immediately to assure timely care that could minimize effects of an injury. Also, some insureds, such as those with traumatic brain injuries or lingering injuries might not be able to make a determination within the insurer's 30-day time frame for paying claims.

Second, insurers would not be able to pay claims during the statutory required period if the insured does not provide its express consent. The underlying court's ruling would allow payments made in accordance with the criteria set forth in the PIP statute to be challenged even after the 30-day deadline for

[3] As Defendant explains in its brief, the underlying court also did not have the authority to mandate the business practice that all insurers must use for all of their PIP claims. *See* Def. Br. at 14-18.

paying claims has passed. Here, Plaintiff submitted his reservation request on February 5, 2010, nearly five months after the September 15, 2009 accident in which substantial medical bills were incurred, and more than 30 days after Plaintiff was notified, on December 29, 2009, that Defendant would pay PIP benefits. *See id.* at 2-3. Thus, the court's ruling would allow an insured to direct the full $15,000 of PIP coverage well after the insured knew medical bills were incurred and after Defendant's statutory time frame for paying existing PIP claims had been triggered.[4]

Third, as Defendant explains in its brief, the court's ruling would allow future, speculative expenditures to have priority over costs that have already been incurred. *See* Def. Br. at 10-12. Such as system, as Defendant explains, would contradict current law and practice. *See id.*; 18 Del. Admin. Code § 603-4.0 (providing that the "[p]ayment of lost earnings is to be at the time they are actually lost").

The court's ruling, therefore, would dramatically change the PIP program. Rather than facilitating prompt payment of claims for medical and other expenses from an auto accident, the

[4] The Court states that the issue over the assignment of benefits made the case "easier" to determine, *see* Op. at 7, but its holding that insureds must have the sole authority for directing the distribution of PIP funds is not contingent upon the determination of whether the assignment of benefits was valid in this instance.

new system would be slow, inefficient, and unpredictable. Indeed, New York has gone so far as to bar insureds from having input in the order in which claims are paid, stating that "[a] claimant may not indicate to the No-Fault insurer which particular bills for elements of basic economic loss of to be paid by the insurer, or how benefits are to be allocated."[5] N.Y. Ins. Dept. Guidance.

This Court should reverse the lower court's ruling so as not to endorse the judicial imposition of a PIP payment system for Delaware that has been barred elsewhere and would contradict the stated goals of Delaware's PIP statute.

II. GIVING INSUREDS THE AUTHORITY TO SUBJECTIVELY DIRECT PIP PAYMENTS CAN LEAD TO FRAUD AND ABUSIVE BAD FAITH CLAIMS

In addition to creating an inefficient system, increasing the subjective nature of PIP payments is certain to lead to fraud and abuse, which will "increase the total injury coverage costs of the system." Stephen J. Carroll, *et al.*, No-Fault Approaches to Compensating People Injured in Automobile Accidents (Santa Monica, CA: RAND Institute for Civil Justice, 1991), at 276. As other states have discovered, PIP's no-fault payment system already is a "target[] for the unscrupulous who

[5] This guidance was written in NY under a situation similar to the one here, as the claimant sought to reserve monies for an anticipated expense, there, certain medical care.

would run up questionable PIP expenses so they could sue." O'Connell, *supra*, at 4.

A. PIP No Fault Coverage Already Creates Fraud Problem for Insurers

The requirements that Delaware and other states have to facilitate prompt no-fault payment of PIP claims also has created an environment where there can be "insufficient time to investigate the legitimacy of claims." *Id.* at 7; *see also* Robert E. Hoyt, et al., *The Effectiveness of State Legislation in Mitigating Moral Hazard: Evidence from Automobile Insurance*, 49 J.L. & Econ. 427 (2006) (concluding that PIP's no-fault system and time requirements for prompt payment "increase[s] moral hazard by decreasing the probability that fraud will be detected and punished"). Because of these pressures, PIP "has been subject to more abuse and even fraud than any other health insurance system." O'Connell, *supra*, at 7.

The most common forms of PIP "fraud occurs when a claimant, attorney, medical provider, or other participant in the claim materially misrepresents all or some aspects of the claim." IRC at 17; *see also* Mark K. Delegal & Allison P. Pittman, comment, *Florida No-Fault Insurance Reform: A Step in the Right Direction*, 29 Fla. St. U.L. Rev. 1031 (2002) (discussing how "[u]nethical attorneys" manipulate PIP).

The concern with requiring insureds to direct the payment of claims is that it could facilitate "claim buildup," which "occurs when injuries are exaggerated or reported losses are inflated by unnecessary or excessive treatment." IRC at 17. Nationally, around twenty percent of all PIP claims involve "claim buildup." *See id.*

Delaware can learn from experiences in Florida, New York, and New Jersey with respect to the impact that "claim buildup" and other fraudulent practices can have on PIP systems. *See id.* at 18 (reporting that in 2007, 38 percent of claim fraud in Florida was due to fictitious injury and an additional amount from the deliberate misrepresentation of lost wages). In Florida, the legislature enacted reforms in 1998, 2001, 2003, and 2007 to battle such fraud. *See* Mark J. Rose, *Florida's No-Fault Law and the 2012 Statutory Amendments*, 31 No. 3 Trial Advoc. Q. 23 (2012) (explaining that these changes were "designed to combat fraud and excessive litigation").

New York has "experienced a similar cycle of PIP abuse and legislative reform." Statement by August D'Aureli, Supervising Investigator of the Insurance Frauds Bureau in the New York State Insurance Department, before the New York Senate Standing Committee on Insurance (Feb. 9, 2004). In New Jersey, where insurers pay 23 percent more in PIP funds than they collect, insurers are now required to staff special investigation units

to cut down on fraud. *See* Keith J. Roberts, *Insurance Fraud Litigation Reaches New Heights*, 244 N.J. Law. 31, Feb. 2007.

Before Delaware shifts entirely to a system for claim payments directed solely by the subjective decisions of insureds and their attorneys, it should carefully assess the potential for this new system to facilitate fraud and abuse.

B. Giving Insureds Ability to Second-Guess PIP Payments Would Lead to Proliferation of Abusive Bad Faith Claims That Will Drive Up Consumer Insurance Costs

Another concern is that PIP policies, which are intended to provide prompt payment for claims without regard to fault, could be transformed into mere stepping stones for protracted bad faith litigation. The increased cost to defend such claims and the possible loss of policy limit protection for insurers will certainly lead to increased costs for consumers in the form of increased policy premiums. This is contrary to the purpose of the Delaware PIP program.

The engineering of bad faith claims already is a growing problem for insurers, as claimants and attorneys have become skilled at eroding traditional requirements for bad faith claims. *See* Victor E. Schwartz & Christopher E. Appel, *Common-Sense Construction of Unfair Claims Settlement Laws: Restoring the Good Faith in Bad Faith*, 58 Am. U. L. Rev. 1477, 1479-81 (2009). For example, individuals have created bad faith claims through delay tactics such as ignoring calls and letters from an

insurer attempting to settle a claim, returning checks sent for policy limits, presenting claim forms with deliberately few specifics, and playing "gotcha" games with multi-conditional payment demands. *See, e.g.*, Victor E. Schwartz, *Restoring the Good Faith in Florida's "Bad Faith" Insurance Litigation*, Florida Justice Reform Institute (2011), at 18-23.

If similar tactics are permitted here, an insured could manipulate the payment of a fraudulent claim where a sufficient investigation to validate the accuracy of that claim could not have been achieved in a 30-day time frame. The costs of this abuse would ultimately be borne by honest policyholders in the form of higher premiums. *See* John J. Pappas, *A State in Crisis*, Mealey's Litig. Rep.: Insurance Bad Faith, vol. 20, no. 20, at 33 (Feb. 20, 2007) ("Initially, this amount may come out of an insurer's profits, but eventually the someones [who pay these costs] are the other insureds, whose premiums are increased.").

Again, Delaware should assess the impact of this new system on the potential for abusive bad faith claims before imposing such a system for all PIP claims.

III. THE COURT SHOULD YIELD TO THE LEGISLATURE BEFORE MAKING FUNDAMENTAL CHANGES TO PIP COVERAGE

If, despite the above concerns, this Court believes the PIP payment process offered by Plaintiff and the underlying court is worth pursuing, this Court should defer to the Legislature to

create it. While courts can make decisions based only on the facts of an isolated case, the Legislature can hold hearings and consider the potential consequences of shifting PIP to an insured-directed system and try to tailor the system to maximize the goals of the system and avoid abuse. *Cf. Am. Elec. Power, Co.*, 131 S. Ct. 2527, 2539-40 (2011) (noting that "[j]udges may not commission scientific studies or convene groups of experts for advice" or invite "input by any interested person").

The Legislature may decide, in agreement with the underlying court, that the goal of PIP is to maximize benefits to the insured. It may decide, though, that the best way to achieve this goal is to make health insurance the primary insurer for medical costs arising out of auto accidents rather than PIP. *See* The Impact of Reducing PIP Coverage in Michigan, *supra*, at 13 (assessing the impact of changes to PIP on state Medicaid programs). Alternatively, it could decide, as the Florida Legislature has, that medical care is the priority. *See* Fla. Stat. § 627.736(4)(c) ("the insurer must reserve $5,000 of personal injury protection benefits for payment to physicians"). It also may decide to leave the current system of letting the marketplace determine the order in which claims are to be paid.

Regardless of the specific path chosen, though, changing the PIP system to such a significant degree is best left to the Legislature, where each of these decisions could be based on

what is best for the entire state of Delaware. Certainly, using the proven FIFO method is a reasonable method for carrying out an insurer's responsibilities under current Delaware law.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's September 26, 2012 order, vacate the entry of partial summary judgment in Plaintiff's favor, and grant summary judgment to State Farm.

Respectfully submitted,

/s/ Robert M. Greenberg

Robert M. Greenberg (#4407)
TYBOUT, REDFEARN & PELL
750 Shipyard Drive, Suite 400
P.O. Box 2092
Wilmington, DE 19899-2092
Tel: (302) 658-6901
Fax: (302) 658-4018
Email: rgreenberg@trplaw.com

Phil Goldberg (*pro hac vice*)
SHOOK, HARDY & BACON L.L.P.
1155 F Street, NW, Suite 200
Washington, DC 20004
Tel: (202) 783-8400
Fax: (202) 783-4211
pgoldberg@shb.com

Attorneys for *amici curiae*

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