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Case Number 10,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF AMICUS CURIAE THE DELAWARE TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF BELOW/APPELLEES AND AFFIRMANCE

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IDENTITY, INTEREST, AND SOURCE OF AUTHORITY OF AMICUS CURIAE

Amicus Curiae the Delaware Trial Lawyers Association ("DTLA") respectfully submits this brief to address the issue of whether an automobile insurer is required to reserve no fault benefits for wages when requested to do so by an insured. DTLA is an association which includes hundreds of members of the Bar of the Supreme Court of the State of Delaware, and whose mission is to seek justice for all, to further the rule of law and the civil justice system, and to champion the cause of those who deserve redress for personal injuries they have suffered. The members of DTLA have thousands of clients whose rights will be affected by the outcome of this case.

ARGUMENT

I. STATE FARM'S FIRST IN FIRST OUT POLICY VIOLATES THE PURPOSE OF DELAWARE'S NO FAULT STATUTE AND AS SUCH AN INSURED HAS THE RIGHT TO DIRECT THE NO FAULT CARRIER TO PAY CERTAIN PIP ELIGIBLE EXPENSES OVER OTHERS

The PIP Statute's fundamental purpose is to protect and compensate persons injured in automobile accidents. *Gray v. Allstate Ins. Co.*, 668 A.2d 778,779 (Del. Super. Ct. 1995). Indeed, the plain language of the statute provides that:

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 polices pursuant to Section 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).

In interpreting the no fault statute Delaware Courts have consistently held that the PIP statute is entitled to be liberally construed in order to achieve its purpose. Cicchini v. State, 640 A.2d 650 (Del. Super. Ct. 1993), aff'd, 642 A.2d 837 (Del. 1994). Such a liberal approach in construing the statute has led Delaware Courts to consistently opine and hold that benefits, even from different sources, are to be maximized. In maximizing the different benefits, Courts have held that the insured can direct the insurer to pay certain benefits and withhold others from policies. Johnson v. Fireman's Fund Ins. Co., 1983 Del. Super LEXIS 762 (Del. Super. Ct. Aug. 8, 1983); Lane v. Home Ins. Co., 1988 WL 40013 (Del. Super. Ct. Apr. 14, 1988); Cicchini, 640 A.2d 650; Community Systems, Inc. v. Allen, 1999 WL 1568331 (Del. Super. Ct. Nov. 4, 1999). The seminal

case in this area is Judge Poppiti's decision in Johnson. In Johnson, the insured exhausted his PIP limits through the payment of medicals and wages before realizing that he had maximized this recovery by simply having his workman's compensation carrier pay the medicals first which would have freed up additional monies for wages. In Johnson, the Court wrote:

[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, 1983 Del. Super. LEXIS 762, at *3-4 (emphasis added).

Johnson was decided well before the enactment of 21 Del. C. § 2118B. The teaching of Johnson is that (1) claims should be processed in a way to avoid subjecting the insured from the hazards and delays in payment; (2) an insured is in the best position to make these decisions; and (3) an administrative burden in carrying out the insured's wishes is simply not relevant. Any doubt that the teachings of Johnson applies is settled by the plain words of § 2118B. The plain words of § 2118B indicate that the purpose of the statute is "to prevent the financial hardship and damage to personal credit ratings

that can result from the unjustifiable delays of such payments." 2118B(a). The language could be no more clear.

With this express statutory purpose in mind, it is clear that no fault carrier must comply with an insured's request to hold a certain type of no fault eligible benefit over another when requested to do so by the insured. It is only the insured, not the insurer, who knows her full financial picture and what resources are available to her to pay for PIP eligible expenses that will lessen any financial hardship and prevent damage to personal credit rating. Consider the following situations:

- 1. If an insured has medical insurance, 1 whether it be private or public, and no benefit that pays wages then an insured will better be able to withstand the financial hardship of an accident if no fault pays wages and not medicals. 2
- Where the insured has a large bank of vacation and/or sick time but no or limited medical benefits an insured may very well need to reserve medical benefits under the no fault policy.
- 3. In a typical personal injury case it is not unusual for a medical provider to accept a letter of protection which allows for the provider to provide services so long as the insured agrees to pay the provider out of any third party recover. In this instance a person with limited no fault benefits might choose wages over medical benefits.

¹ Nationally, 84.3% of the U.S. population has health insurance (http://www.census.gov/hhes/www/hlthins/data/incpovhlth/2011/highlight s.html). In Delaware, only eleven percent (11%) are uninsured (http://www.statehealthfacts.org/profileind.jsp?cat=3&sub=39&rgn=9)

² Sixty-nine percent (69%) of the private sector work force has no long term disability insurance (http://www.ssa.gov/pressoffice/basicfact.htm).

4. An insured has both adequate medical and wage coverage outside of his no fault policy but has no coverage from any source to pay for substitute services. Under the no fault statute substitute services are a proper PIP eligible expense. In this situation the insured may need to reserve benefits for those substitute services.

If the purpose of the statute is to prevent financial hardship and damage to credit ratings who is in the best position to make this decision, the carrier or the insured? The answer is obvious. As demonstrated above the decision of which benefits to use under a no fault policy will vary with the individual circumstance of the insured. It is the insured, and only the insured, who fully understands all of his assets and benefits available to him from every possible source.

State Farm's first in first out policy bears absolutely no relationship to what is in the best interest of a particular insured. It is an across the board policy meant to ease the administrative burdens and costs of handling no fault claims. The no fault statute requires claims to be timely processed and paid in order to prevent financial hardship to the insured. The claim itself must be handled on a case by case basis. The only method of handling no fault claims that is in accordance with the express purpose of the statute is to allow an insured the option to choosing what benefits should be paid. This was recognized by the Superior Court below. Judge Bradley's decision should be affirmed.

CONCLUSION

For the reasons stated above, the Delaware Trial Lawyers Association requests that the Superior Court decision of Judge Bradley be affirmed.

Dated: April 4, 2013

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