

LEGAL NEWS IN BRIEF

News in a flash for Subrogation
and Defense Adjusters

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ASSIGNEE OF NJ PIP BENEFITS NEED NOT COOPERATE WITH INSURER

**Selective Ins. v. Hudson East Pain
Mgmt.**

**New Jersey Appellate Division
Docket No. A-0433-09T1
(October 7, 2010)**

The Appellate Division forbade Selective Insurance Company, a PIP carrier, from seeking expansive discovery in its declaratory judgment action against assignee health care providers after Selective suspected the providers of engaging in fraudulent self-referrals and kickbacks. Selective's cooperation clause in its policy, mandating its insured to cooperate in the investigation, settlement or defense of any related claim, cannot apply to the health care provider, because the insured's assignment of benefits to the provider does not by itself delegate the insured's duties to the provider. That duty of cooperation remains the insured's absent the provider's express consent otherwise. Moreover, N.J.S.A. 39:6A-13(g) already provides the permitted scope of discovery in PIP

claim payments, which does not include providers' corporate information, and the statute also limits the insurer's remedy for such outstanding discovery to a motion for resolution of the dispute at hand. Alternatively, Selective could have filed suit pursuant to the Insurance Fraud Prevention Act and thereupon seek related discovery.

NJ DEEMER STATUTE

Cupido v. Perez
**New Jersey Appellate Division
Docket No. A-4557-08T2
(August 27, 2010)**

The New Jersey Appellate Division applied N.J.S.A. 17:28-1.4, more commonly known as the "deemer statute," to Plaintiffs' personal injury suit, thereby limiting their recovery of non-economic damages. Plaintiffs, a married couple residing in Pennsylvania, sustained injuries in an automobile accident in New Jersey while operating and occupying a vehicle insured by Nationwide. Although Nationwide was not authorized to transact private passenger automobile or commercial motor

vehicle insurance business in New Jersey, it did control four affiliated insurance companies that were authorized to transact commercial motor vehicle insurance business in the State. The Appellate Division found that the deemer statute applies to insurers authorized to transact or transacting any form of "motor vehicle" insurance in New Jersey, even if they are not insuring "automobiles" in New Jersey. An automobile which is subject to the statute is subject to New Jersey minimum coverage when it is operated in New Jersey, and its occupants must meet the limitations-on-lawsuits threshold in order to recover for non-economic damages, where the limitations-on-lawsuits threshold found in N.J.S.A. 39:6A-8 is otherwise applicable.

EXCLUSION OF COVERAGE

Hammer v. Thomas
**New Jersey Appellate Division
Docket Nos. A-209-08T2 and
A-742-08T2
(August 9, 2010)**

A tortfeasor's automobile insurer prevailed in a declaratory

judgment of no coverage on the basis of its exclusion for any insured “[w]ho intentionally causes bodily injury or property damage.” Here, the tortfeasor was a paranoid schizophrenic who operated his vehicle after his parents confronted him as to whether he was taking his medications. While speeding, he saw Plaintiff’s vehicle traveling toward him in the opposite lane and let go of the steering wheel, thereby causing injuries to both drivers. The Appellate Division inferred the insured’s subjective intent from the insured’s subsequent statement to the trooper appearing on the scene that he “wanted to hit the other vehicle” because he “wanted to end it all,” of which Plaintiff’s injuries were an inherently probable consequence of the insured’s conduct.

NY SOL

Villa v. Sterling Ins. Co.
New York Appellate Term
2010 NY Slip Op 20284
(July 16, 2010)

Plaintiff sued her homeowner’s insurer for additional living expenses just over two years after the underlying fire that damaged her house. The related policy limited suit for any property claim to “2 years after the loss.” Defendant failed to define “loss” anywhere in the policy, and had indicated therein that it would provide coverage for additional living expenses on a monthly basis upon submission of reasonable proof

of the insured’s expenses. Moreover, the policy set forth that such expenses were “not limited by the policy period.” The Court construed these ambiguities against the insurer as drafter of the policy, determining that the statute of limitations starts to run upon the insurer’s breach of contract by its failure to pay.

USE OF VEHICLE

Mtr. of Arbit. Liberty Mut. Fire v.
Malatino
New York Appellate Division
2010 NY Slip Op 6204
(July 22, 2010)

Respondent sustained injuries from walking into a piece of sheet metal extending from her coworker’s parked vehicle located at their employer’s parking lot. After settling with her coworker’s automobile liability insurer, she sought supplemental underinsured motorist (SUM) coverage. The Court denied her insurer’s application for a stay of arbitration, determining that Respondent’s injuries accrued from “an accident arising out of such [underinsured] motor vehicle’s ownership, maintenance or use,” thereby warranting SUM coverage. Here, “use” of the vehicle comprised storing the sheet metal in the truck for later transport to a junkyard after work. One judge dissented, arguing that the standard of “use” should be whether the “circumstances constituted an ‘ongoing activity related to the vehicle.’”

EVIDENCE

Estate of Hanges v.
Metropolitan Property & Casualty
New Jersey Supreme Court
Docket No. A-62
(June 21, 2010)

The New Jersey Supreme Court permitted as admissible evidence the statement of a driver who crashed into an underpass wall, telling the police on arrival that a phantom vehicle had cut him off. At the time of the accident, the injured driver was consulting a psychologist; depressed, he committed suicide less than two months later. His estate sued for uninsured motorist benefits. New Jersey Rules of Evidence §804(b)(6) requires that a statement made by a person unavailable as a witness because of death must be “made in good faith upon declarant’s personal knowledge in circumstances indicating that it is trustworthy.” Here, the driver gave his statement to the police shortly after the accident; he also made subsequent, consistent statements of being in an accident (though not always mentioning the existence of a phantom vehicle). The Supreme Court determined that the trial court judge should not have inferred that the driver’s statement must be false merely because it was in his interest to lie about his own culpable behavior absent any objective proof of the driver’s deceit.