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# INSURANCE COUNCIL OF NEW JERSEY

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To: **THE CHIEF JUSTICE AND ASSOCIATE JUSTICES  
NEW JERSEY SUPREME COURT**

From: **INSURANCE COUNCIL OF NEW JERSEY  
NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES**

Date: **MARCH 21, 2016**

Re: **CIVIL PRACTICE COMMITTEE REPORT ON CERTAIN RULES  
REFERRED IN WADEER V. NEW JERSEY MANUFACTURERS CO.**

The Insurance Council of New Jersey (ICNJ), a New Jersey insurance trade association, having participated in the oral argument before the Supreme Court in Wadeer v. New Jersey Manufacturers Insurance Company, 220 N.J. 581 (2015), and the National Association of Mutual Insurance Companies (NAMIC), a national insurance trade association, respectfully submit their comments for consideration by the Court on the revisions to the three Civil Rules referred in Wadeer recommended by the CPC.

## **RULE 4:30A ENTIRE CONTROVERSY DOCTRINE**

ICNJ and NAMIC concur in the recommended revision as the underlying first party UM/UIM issue should be determined prior to pleading a bad faith cause of action.

**RULE 4:58-2 CONSEQUENCES OF NON-ACCEPTANCE OF CLAIMANT'S OFFER**

ICNJ and NAMIC concur in the recommended revision that the allowances provided by the Rule should be triggered in a first party UM/UIM proceeding by the verdict. They further suggest that section (b), third line, be amended to read: "verdict, (adjusted to reflect comparative negligence, or other offset, if any)." This addition envisions an offset for collateral sources, counterclaim recoveries, avoidable consequence, apportionment between parties, and credits for the tortfeasor's available liability insurance coverage.

**RULE 4:58-3 CONSEQUENCES OF NON-ACCEPTANCE OF OFFER OF PARTY NOT A CLAIMANT**

ICNJ and NAMIC concur with the recommended revision with the further amendments to sections (a) and (b) suggested above. They further concur that section (c) should be deleted or equitably revised so as to permit recovery of attorneys' fees by the prevailing party, whether plaintiff or defendant.

**RULE 4:42-9 COUNSEL FEES**

ICNJ and NAMIC join the **CPC majority** in its view that Rule 4:42-9 should not be amended to provide for the collection of counsel fees for a prevailing claimant in a UM/UIM matter. The revisions

to Rule 4:58-2 in the first party UM/UIM context successfully address the issue as framed by this Court, by enhancing the allowance of equitable attorneys' fees. At the same time, ICNJ and NAMIC are extremely concerned by the **Subcommittee's** precipitous suggestion that Rule 4:42-9 be expanded to all direct actions against an insurer. Any broadening of Rule 4:42-9 undoubtedly will burden the courts with litigation motivated by the lure of attorneys' fees. A first party claim is in essence a breach of contract claim for which attorneys' fees are not recoverable. Permitting fees would represent an unwarranted major departure from that well established principle, without any empirical evidence supporting the supposition that "most" claimants cannot find counsel and recognizing that most such disputes stem from a good faith reasonable disagreement between the parties as to valuation. So too, there is no succinct objective method to denominate a "successful" claimant in the first party context. Is the claimant who is awarded 15%, or 40%, or 60% of the demand considered "successful"? Opening the door by allowing such fees is sure to generate an unending spate of fee-motivated first party claims and also encumber the courts with litigation to determine the elusive boundaries of the "successful" claimant. The unintended consequence is sure to eviscerate the long-standing American Rule prohibiting such fees. Prudence also counsels that the CPC should be restrained

from embarking on an exploratory expansion of Rule 4:42-9 so as to allow an ample passage of time to assess the results of the revised Offer of Judgment Rule in the first party UM/UIM context. ICNJ and NAMIC strongly urge any study at the present of Rule 4:42-9 is unwarranted, unwise and certainly premature.

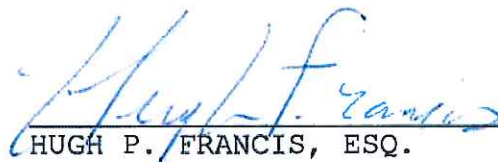
Respectfully submitted,



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Dated: March 22, 2016