ALLSTATE NEW JERSEY INSURANCE COMPANY, ALLSTATE NEW JERSEY PROPERTY and CASUALTY INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, ALLSTATE FIRE & CASUALTY INSURANCE COMPANY, ALLSTATE NORTHBROOK INDEMNITY COMPANY, and ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

Appellants

V.

CARTERET COMPREHENSIVE MEDICAL CARE, P.C., d/b/a MONROE COMPREHENSIVE MEDICAL CARE, d/b/a COMPREHENSIVE MEDICAL CARE, d/b/a FASSST SPORT, d/b/a COMPREHENSIVE VEIN CARE, INIMEG MANAGEMENT COMPANY, INC., 311 POTSWOODENGLISHTOWN ROAD REALTY, L.L.C., 72 ROUTE 27 REALTY, L.L.C., SAME DAY PROCEDURES, L.L.C., MIDSTATE ANESTHESIA CONSULTANTS, L.L.C., NORTH JERSEY PERIOPERATIVE CONSULTANTS, P.A. INTERVENTIONAL PAIN CONSULTANTS OF NORTH JERSEY, L.L.C., d/b/a PAIN MANAGEMENT PHYSICIANS OF NEW JERSEY, d/b/a METRO PAIN

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-778-23

LAW DIVISION:
DOCKET NO. MID-L-1469-23

Civil Action

SAT BELOW:

Hon. Christopher D. Rafano, J.S.C.

FILED, Clerk of the Appellate Division, July 12, 2024, **A-000778-23**
FILED, Clerk of the Supreme Court, 04 Mar 2025, **090337**

CENTERS, d/b/a METRO PAIN and VEIN, SOOD MEDICAL PRACTICE, L.L.C., ONE OAK MEDICAL GROUP, L.L.C., d/b/a NEW JERSEY VEIN TREATMENT CLINIC, ONE OAK ORTHOPAEDIC & SPINE GROUP, L.L.C., ONE OAK HOLDING, L.L.C., JOSEPH BUFANO, JR., D.C., CHRISTOPHER BUFANO, MICAH LIEBERMAN, D.C., RICHARD J. MILLS, M.D., JENNIFER M. O'BRIEN, ESQ., GERALD M. VERNON, D.O., D.C., ALVIN F. MICABALO, D.O., JOSE CAMPOS, M.D., JOHN S. CHO, M.D., MICHAEL C. DOBROW, D.O., RAHUL SOOD, D.O., SACHIN SHAH, M.D., FAISAL MAHMOOD, M.D., RAVI K. VENKATARAMAN, M.D., MANGLAM NARAYANAN, M.D., SHANTI EPPANAPALLY, M.D.,

Respondents

BRIEF OF AMCI CURIAE THE INSURANCE COUNCIL OF NEW JERSEY AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION

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INTRODUCTION

Here, Allstate New Jersey Insurance Company, et al. (Allstate) filed suit against numerous defendants asserting claims, in part, under the New Jersey Insurance Fraud Prevention Act (the Fraud Act), N.J.S.A. 17:33A-1, et seq., and the New Jersey RICO Statute, N.J.S.A. 2C:41-2, et seq. They seek to recover compensatory damages, treble damages, attorney's fees, and the costs of investigation and suit. Significantly, several defendants filed Answers to the Complaint and asserted jury demands. Others moved to dismiss the plaintiffs' Complaint arguing that plaintiffs' claims are subject to mandatory "arbitration." The trial court granted those motions, dismissed the plaintiffs' Complaint, and remanded this matter to "arbitration." The trial court's rulings are erroneous.

Compelling this matter to be resolved via New Jersey's No-Fault Alternative Dispute Resolution (hereinafter "NFADR") process established by the Automobile Insurance Cost Reduction Act (hereinafter the No-Fault Act) deprives plaintiffs and those defendants who demanded a jury trial of their constitutional right to same. It also deprives all parties of their right to party discovery; non-party discovery; to compel witness testimony at depositions and at hearings; and to resolve this matter in one comprehensive hearing. The trial court's ruling not only deprives plaintiffs of their ability to obtain a damages award, but it also deprives the Commissioner of the New Jersey Department of

Banking and Insurance (DOBI) of its statutory right to intervene in the matter to collect statutory penalties and its ability to seek suspension of defendants' driving privileges. As a result, the trial court's ruling in this matter should be reversed.

PROCEDURAL HISTORY

The amici adopt Allstate's procedural history as if set forth at length herein.

STATEMENT OF FACTS

The amici adopt Allstate's statement of facts as if set forth at length herein.

POINT I

THE LEGISLATIVE HISTORY OF THE NEW JERSEY NO-FAULT ACT AND THE FRAUD ACT DEMONSTRATE THAT FRAUD ACT CLAIMS SHOULD NOT BE RESOLVED THROUGH NFADR. (Decided below, Pa0001-Pa0022)

The No-Fault Act was passed in 1972. See the Laws of 1972, Chapter 70. The act "encompassed the recommendations of the Automobile Insurance Study Commission, created under Joint Resolution 4 of 1970." See Sponsor's Statement to Laws of 1972, c.70. The Commission addressed four major concerns in its recommendations. They are "The Reparation objective; the Cost Objective; The Availability Objective; and the Judicial Objective. See Gambino v. Royal Globe Insurance Companies, 86 N.J. 100, 105-106 (1981),

citing the Automobile Insurance Study Commission, Reparation Reform for New Jersey Motorists at 7 (December 1971). The Gambino court noted that "the failure of many automobile accident victims to receive any, or adequate, reimbursement for their injuries was considered a major deficiency in the tort liability system that existed prior to the institution of the no-fault law and an unwarranted hardship upon unfortunate victims." 86 N.J. at 106. The court in Amiano v. The Ohio Casualty Insurance Company, 85 N.J. 85, 90 (1981), similarly stated that "the No-Fault Act is social legislation intended to provide insureds with the prompt payment of medical bills, lost wages and other such expenses without making them await the outcome of protracted litigation."

Section 4 of the No-Fault Act defines the benefits available under the act. They are medical expenses benefits, income continuation benefits, essential services benefits, survivor benefits and funeral expense benefits. See the Laws of 1972, Chapter 70. Section 4. Section 5 of the statute established when the above benefits were to be paid. It states, "Personal Injury Protection coverage 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." Id. at section 5[1]. Significantly, the act did not establish a procedure for resolving

[1] This was later expanded to 60 days. The carrier is allowed a 45 day extension. N.J.S.A. 39:6A-5.

disputes that arose under the act. Ibid. Therefore, personal injury protection ("PIP") suits were filed in the Superior Court to resolve same.

On August 30, 1983, the Legislature passed the Fraud Act. See Laws of 1983, Chapter 320. The Legislature stated that the

> "purpose of this act is to confront aggressively the problem of insurance fraud in New Jersey by facilitating the detection of insurance fraud, eliminating the occurrence of such fraud through the development of fraud prevention programs, requiring the restitution of fraudulently obtained insurance benefits, and reducing the amount of premium dollars used to pay fraudulent claims." [N.J.S.A. 17:33A-2.]

In part, a person or a practitioner violates the act if s/he "presents or causes to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that statement contains any false or misleading information concerning any fact or thing material to the claim." N.J.S.A. 17:33A-4(a)(1). A person or practitioner also violates the act if s/he conspires with others to violate the act or knowingly benefits from a violation of the act. See N.J.S.A. 17:33A-4(b) and (c). Unlike the No-Fault statute, the Fraud Act contains a provision for the resolution of disputes under the act. It states that "any insurance company damaged as a result of a violation of any provision of this act section may sue therefor in any court of competent jurisdiction to recover compensatory damages, which may include reasonable investigation expenses,

costs of suit and attorney fees." See N.J.S.A. 17:33A-7(a)[2]. The act also provides that "a successful claimant under subsection a. shall recover treble damages if the court determines that the defendant has engaged in a pattern of violating this act." Id. at. 7(b). The Fraud Act provides the Commissioner of the Department of Banking and Insurance (DOBI) with the ability to intervene for "the purpose of seeking judgment for the payment of a civil penalty authorized under Section 5 of this act." DOBI may also recover attorney's fees under the act. See N.J.S.A. 17:33A-7(d). The act also created the Division of Insurance Fraud Prevention within DOBI to investigate allegations of insurance fraud and to develop fraud prevention programs. The Insurance Fraud Division was directed to "promptly notify the Attorney General of any claim which involves criminal activity" and to "cooperate with the Attorney General in the investigation and prosecution of criminal violations." See N.J.S.A. 17:33A-8(a).

Three months after the Fraud Act was passed, the No-Fault Act was amended to require all automobile insurers to "provide any claimant with the option of submitting a dispute under this section to binding arbitration. Arbitration proceedings shall be administered and subject to procedures

[2] In 1997, the award of "reasonable investigation expenses, costs of suit, and attorney fees" as an element of the carrier's compensatory damages was made mandatory. See Laws of 1997, chapter, 151.

established by the American Arbitration Association." See, Laws of 1983, Chapter 362, Section 5(c) (emphasis added).

The No-Fault Act was next amended in a relevant way in 1998 with the passage of the Automobile Insurance Cost Reduction Act (AICRA). Thus, from 1983 until 1998, essentially, a two-track system existed to resolve disputes arising out of the No-Fault system. Claimants could file arbitration demands against insurance carriers to compel them to pay overdue PIP benefits and insurance companies could file Fraud Act claims in a "court of competent jurisdiction" to recover compensatory damages, attorney's fees, cost of suit, costs of investigation and, potentially, treble damages.

In passing AICRA, the Legislature stated that the amendments were prompted by several considerations. Initially, it stated that medical benefits available under the No-Fault Act were being used to overcome the verbal threshold established in 1988. The Legislature further stated that the American Arbitration Association system had not sufficiently eliminated payment for unnecessary treatment and testing. Moreover, the Legislature found that

> "fraud, whether in the form of inappropriate medical treatments, inflated claims, staged accident, falsification of records or in any other form has increased premiums and must be uncovered and vigorously prosecuted and while the pursuit of those who would defraud the automobile insurance system has heretofore been addressed by the State through various agencies, it has been without sufficient coordination to aggressively combat fraud, leading to the conclusion that greater consolidation of agencies

> which were created to combat fraud is necessary to accomplish this purpose." [See the Laws of 1998, Chapter 21, Section 1(b).]

Based upon these findings, the Legislature made significant changes to the No-Fault statute.[3] However, the Legislature did not make any meaningful changes to section 5 of the No-Fault Act in terms of the scope of issues that could be raised in the new NFADR process. The revised statute still required carriers to provide "any claimant with the option of submitting a dispute under this section to dispute resolution" instead of under the former arbitration process. See N.J.S.A. 39:6A-5(i) (emphasis added).

Newly adopted N.J.S.A. 39:6A-5.1(a) provides that "Any dispute regarding the recovery of medical expenses benefits or other benefits provided under personal injury protection coverage … arising out of the operation, ownership, maintenance or use of an automobile may be submitted to dispute resolution on the initiative of any party to the dispute, as hereinafter provided." The statute then goes on to outline the contours of the dispute resolution organization to be created and the process to be fleshed out by DOBI. In its implementing regulations, DOBI stated that "The purpose of this subchapter is to establish procedures for the resolution of disputes concerning the payment

[3] See New Jersey Coalition of Healthcare Professionals, Inc., v. New Jersey Department of Banking and Insurance, 323 N.J. Super. 207 (App. Div. 1999), for a lengthy discussion of these various changes.

of medical expense and other benefits provided by the personal injury protection coverage and policies of automobile insurance." See N.J.A.C 11:3-5.1(a) (emphasis added.)

Significantly, DOBI also adopted a "loser-pays counsel fees" provision. See New Jersey Coalition of Health Care Professionals, Inc. v. NJ. Department of Banking and Insurance, 323 N.J. Super. 207, 260 (App. Div. 1999) (Coalition I). This provision stated that the Dispute Resolution Professional's (DRP) award "may include attorney's fees for a successful claimant or respondent in an amount consonant with the award and with Rule 1.5 of the Supreme Court Rules of Professional Conduct." Id. at 260 quoting then N.J.A.C. 11:3-5.6(d)(3).

Under AICRA's implementing regulations, a demand for No-Fault dispute resolution can be filed by "the injured party, the insured, a provider who is an assignee of PIP or the insurer in accordance with the terms of the policy as approved by the Commissioner." See N.J.A.C. 11:3-5.6(a). To avoid confusion as to what defenses a carrier could and could not raise before a Dispute Resolution Professional (DRP), DOBI defined the term "PIP dispute" at N.J.A.C. 11:3-5.2.

Contrary to the foregoing legislative history, the trial court here found that:

> "Allstate's common law fraud, unjust enrichment, IFPA, and RICO claims fall within the purview of the statute's arbitration provisions. Allstate's claims involve (1) a dispute by Allstate (2) involving defendants' recovery of PIP benefits that (3) one party wishes to send to arbitration. Notwithstanding, Allstate seeks to dress their PIP Benefits dispute in a different color sounding in fraud. The Court adheres to substance over form. Nothing in the statute provides that fraud-based claims warrant special treatment or should be carved out from mandatory arbitration, nor can the Court find any independent reason to do so." [Pa001]

In so holding, the trial court erred.

A. Rules of Statutory Interpretation

The first rule of statutory interpretation is that when the statute is clear on its face, it is applied as written:

> "Our task in statutory interpretation is to determine and effectuate the Legislature's intent. See D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119 (2007); Daidone v. Buterick Bulkheading, 191 N.J. 557, 565 (2007). As we have explained, in carrying out this important role, 'we look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.' Pizzullo v. N.J. Mfrs. Ins. Co., 96 N.J. 251, 264 (2008). We will, in this effort, read the words selected by the Legislature in accordance with their ordinary meaning, D'Annunzio, supra, 192 N.J. at 119–20, unless the Legislature has used technical terms, or terms of art, which are construed 'in accordance with those meanings,' In re Lead Paint Litig., 191 N.J. 405, 430, 924 A.2d 484 (2007). See N.J.S.A. 1:1-1 (declaring that 'words ... having a special or accepted meaning in the law, shall be construed in accordance with such ... meaning.'). Nor will we 'rewrite a plainly-written enactment of the Legislature ... [or] presume that the Legislature intended something other than that expressed by way of the plain language.' O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002). [Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 (2009)].

A court should not "resort to extrinsic interpretative aids" when "the statutory language is clear and unambiguous, and susceptible to only one interpretation . . .." Lozano v. Frank DeLuca Const., 178 N.J. 513, 522 (2004) (internal quotations omitted). On the other hand, if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, "including legislative history, committee reports, and contemporaneous construction." Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004) (internal quotations omitted). We may also resort to extrinsic evidence if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language. See Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 392-93 (2001).

B. THE TRIAL COURT'S RULING MISINTERPRETS WHAT CONSTITUTES A "PIP DISPUTE" UNDER THE 1983 AMENDMENT AND THE 1998 AMENDMENT TO THE NO-FAULT STATUTE.

The Legislature specifically limited the scope of PIP disputes to "disputes under this section" in both the original No-Fault act and AICRA. See Laws of 1983, Chapter 362 Section 5(c) and N.J.S.A. 39:6A-5.1(i). In both versions of the statute, the phrase "under this section" refers to the payment of overdue personal injury protection coverage benefits as outlined in section 5 of the statute. Before the passage of AICRA in 1998, only No-Fault claimants could institute arbitration proceedings. Thus, before AICRA, monies flowed in only one direction in the arbitration process, from the insurance carrier to the No-

Fault claimant. Given that the language in section 5 of the No-Fault statute did not change in any relevant ways with the implementation of AICRA, there is no basis for concluding that the scope of the issues that can be addressed in an NFADR hearing changed in any way.

In fact, in its implementing regulations, DOBI specifically construed the foregoing provisions and stated that "the purpose of this subchapter is to establish procedures for the resolution of disputes concerning the payment of medical expense and other benefits provided by the personal injury protection coverage in policies of automobile insurance." N.J.A.C. 11:3-5.1(a). DOBI's interpretation of AICRA as a system that resolves disputes concerning the payment of No-Fault benefits to claimants or their assignees (and nothing else) is entitled to deference. In Merin v. Maglaki, 126 N.J. 430, 436 (1992), the court gave deference to DOBI's interpretation of the Fraud Act. It stated, "We give substantial deference to the interpretation of the agency charged with enforcing an act. The agency's interpretation will prevail provided it is not plainly unreasonable." citing Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313, 327, 478 A.2d 742 (1984).

Similarly, in N.J.S.A. 39:6A-5.1(c), the Legislature specifically outlined the various issues that could constitute a "PIP dispute" subject to the NFADR process. In doing so, it identified, essentially, a series of defenses that a carrier

could assert in opposition to a claimant's demand for payment of medical expense benefits. Significantly, the Legislature could have, but did not, include within the definition of a PIP dispute whether a No-Fault claimant, a medical provider with an assignment of benefits or an insured knowingly misrepresented material facts to an insurance carrier in connection with a claim, whether a person conspired with others to do so or whether a person knowingly benefited from other individual's violations of the Fraud Act, all of which would be actionable under the Fraud Act even though the Legislature was then making other changes to the Fraud Act.[4] Instead, the Legislature continued to vest exclusive jurisdiction over the resolution of the Fraud Act issues in a "court of competent jurisdiction." As the Merin court stated, "The words chosen [or not chosen] by the Legislature are deemed to have been chosen for a reason." Merin, 126 N.J. at 435 citing Gabin v. Skyline Cabana Club, 54 N.J. 550, 555, 258 A.2d 6 (1969). Under AICRA, the Legislature restructured the government to fight No-Fault fraud more comprehensively and with greater coordination. See N.J.S.A. 39:6A-1.1. The Legislature's explicit failure to grant DRPs

[4] Respondents argue that the Legislature could have carved out Fraud Act claims from the reach of the definition of what constitutes a PIP Dispute under N.J.S.A. 39:6A-5.1. We respectfully suggest that no such carve out was necessary because Fraud Act claims never came within the definition of a PIP Dispute as is evidenced by the procedural and constitutional difficulties discussed herein, none of which are addressed meaningfully in respondents' papers. Therefore, there was no need for them to opt into or out of the NFADR process to resolve Fraud Act claims.

jurisdiction over the resolution of Fraud Act disputes demonstrates that it was not the Legislature's intent to do so.

To find that AICRA changed jurisdiction over Fraud Act disputes from "courts of competent jurisdiction" to NFADR DRPs would constitute an implied repeal of section 7 of the Fraud Act. In Goff v. Hunt, 6 N.J. 600, 606 (1951), the court stated, "It has also been held many times that implied repealers are not favored in the law and that the requisite intent will not arise by implication unless the subsequent statute is plainly repugnant to the former and is designed to be a complete substitute for the former. Hartman v. Board of Chosen Freeholders, 127 N.J.L. 170, 21 A.2d 351 (Sup.Ct.1941). See also State Board of Medical Examiners v. Coleman, 132 N.J.L. 64, 67, 38 A.2d 689 (Sup.Ct.1944); Kaufman v. Samuelson, 134 N.J.L. 573, 576, 49 A.2d 479 (Sup.Ct.1946)." The Goff court further stated "that the inferential repeal of a statute is a pure question of intention and every reasonable intent will be made against such result. Ruckman v. Ranson, 35 N.J.L. 565 (E.&A.1871)". See 6 N.J. at 607. Similarly, in Swede v. City of Clifton, 22 N.J. 303, 317 (1956), the court stated,

> "The question of repeal is one of legislative intention; and there is a presumption as a matter of interpretative principle and policy against an intent to effect a repeal of legislation by mere implication. The purpose so to do must be free from all reasonable doubt. Repeals by implication are not favored in the law; and where the statutory provisions may reasonably stand

> together, each in its own particular sphere of action, there is not the repugnancy importing the design to repeal the earlier provision."

Reading AICRA as compelling resolution of Fraud Act disputes through NFADR not only ignores the plain language of N.J.S.A. 17:33A-7 and N.J.A.C. 11:3-5.1(a), but it also gives rise to the numerous procedural and constitutional issues discussed below which will serve to only weaken the insurance industry's ability to "confront aggressively the problem of insurance fraud in New Jersey" which is the goal of both the Fraud Act and AICRA. See N.J.S.A. 17:33A-2 and N.J.S.A. 39:6A-1.1(b). The mere fact that these various procedural and constitutional issues exist demonstrates that AICRA's NFADR process was not intended to be a "complete substitute" for the Fraud Act's designation of "courts of competent jurisdiction" as the appropriate venue for resolving Fraud Act claims. It is reasonable to assume that the Legislature and/or DOBI would have resolved these issues if NFADR was intended to replace the courts as the venue for Fraud Act claims. Instead, it is far more reasonable and consistent with the language of the statutes and regulations to read the Fraud Act and AICRA as applying "each in its own particular sphere of action", with the NFADR process resolving disputes over the payment of overdue No-Fault Benefits to claimants and courts of competent jurisdiction resolving disputes over whether, in part, a claimant knowingly misrepresented

material facts to the carrier in connection with a claim for payment and/or conspired with others to do so entitling the carrier to an award of compensatory and, potentially, treble damages.

Moreover, by its own terms, a dispute under the Fraud Act is not a "PIP dispute." In Fraud Act claims, the dispute is whether the defendant(s) violated section 4 of the Fraud Act. In part, the Fraud Act states that a person or practitioner violates the act if he "(1) Presents or causes to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy or the "Unsatisfied Claim and Judgment Fund Law," P.L.1952, c. 174 (C.39:6-61 et seq.), knowing that the statement contains any false or misleading information concerning any fact or thing material to the claim." N.J.S.A. 17:33A-7(a)(1). Thus, a dispute under the Fraud Act is not "a dispute concerning the payment of medical expense and other benefits provided by the personal injury protection coverage in policies of automobile insurance." N.J.A.C. 11:3-5.1(a). In a Fraud Act case that arises in the No-Fault setting such as the instant matter, the value of the medical expense benefits that the carrier seeks to recover serves only as a measure of the carrier's damages. (The carrier's attorney's fees and costs serve as other measures of its damages.) Accordingly, since a dispute under the Fraud Act is not a dispute concerning the payment of medical expenses benefits to a

claimant, this matter must be resolved in the Superior Court, "a court of competent jurisdiction" and not via the NFADR process where the DRP has limited jurisdiction and authority.

Moreover, a review of the quarterly reports that Forthright filed with DOBI demonstrate that it is a high volume/low value process not suited for resolving Fraud Act claims. In its report for the first quarter of 2023, Forthright noted that 11,027 new cases were filed. (ICAa 010). 11,128 cases were resolved by awards or settlements. The median amount awarded for medical expense benefits was $985.00. (ICAa 015). The median attorney's fee award constituted $1,000.00. Ibid. In the second quarter of 2023, Forthright reported that 11,798 new cases were filed. (ICAa 026). 11,006 cases were concluded in the quarter. The median amount awarded for medical expense benefits was $1,202.00. (ICAa 031). The median attorney's fee award was $1,000.00. Ibid. In the third quarter of 2023, Forthright reported that 11,272 new cases were filed. (ICAa 039). 10,428 cases were resolved. The median award of medical expense benefits had a value of $936.00. (ICAa 044). The median attorney's fee award was $1,000.00. Ibid. In the fourth quarter of 2023, 11,497 new cases were filed. (ICAa 052). 12,043 cases were resolved. The median award of medical expense benefits was $930.00. (ICAa 057). The median attorney's fee award was $1,000.00. Ibid. In the case of New Jersey Healthcare Coalition

v. New Jersey Department of Banking and Insurance, 440 N.J. Super. 129, 144 (App Div 2014), the Court noted that "few DRP hearings currently involved oral testimony." In fact, many of the matters filed before Forthright are resolved on the papers. See, (ICAa 052) which notes that 20% of the new cases filed were designated to be resolved on the papers. All of the foregoing is consistent with the objective of No-Fault which is to, in part, pay meritorious PIP claims in a quick and efficient manner. See Gambino v. Royal Globe Ins. Cos., 86 N.J. 100, 104 (1981) ("The Reparation objective.")

In contrast, the matter of Allstate v. Lajara, et al, Superior Court of New Jersey, Docket No. UNN-L-4091-08, involved 77 defendants. See E-courts jacket. The case was filed on December 15, 2008. Ibid. The trial of the matter commenced on January 4, 2016. Numerous witnesses testified and numerous documents were marked into evidence during the six-month long trial. Judgments were entered against three groups of defendants on June 29, 2016. (ICAa 062-064). The Judgements totaled $9,999,180. Ibid. Respectfully, it is submitted that Forthright does not have the resources to adjudicate Fraud Act cases such as the instant matter consistent with traditional notions of due process while perserving by the parties' constitutional rights as discussed below.

C. COMPELLING INSURANCE CARRIERS AND/OR DEFENDANTS TO RESOLVE FRAUD ACT CLAIMS THROUGH THE NFADR PROCESS DEPRIVES ALL PARTIES OF THEIR RIGHT TO A JURY TRIAL.

Here, three groups of defendants filed Answers to Allstate's Complaint in which a jury demand was asserted. [See Pa 152-333]. As a result, all parties had a right to rely upon these jury demands and to insist upon a jury trial to resolve the claims asserted under the Fraud Act. In Allstate v. Lajara, 433 N.J. Super 20, 29 (App. Div. 2013), the court stated,

> "Once one party demands a jury trial on all issues, 'the waiver provisions of subsection c of the rule [4:35-1] cannot be the basis for denying a jury trial to a party who has not demanded such a trial.' 500 Columbia Tpke. Assocs. v. Haselmann, 275 N.J. Super. 166, 170, 645 A.2d 1210 (App. Div. 1994). Consequently, trial by jury could be 'dispensed with only by consent of all the parties or their counsel,' including that of plaintiff. Ibid."

The Supreme Court held that all parties to a Fraud Act case have a constitutional right to a jury trial.[5] See Allstate v. Lajara, 222 N.J. 129, 134-135 (2015). Thus, the trial court's order here that compels Allstate and the answering defendants to resolve this matter via the NFADR process deprives Allstate and the answering defendants of their constitutional right to a jury trial. Thus, the trial court's ruling must be reversed.

[5] While all parties may waive their rights to a jury trial, here the trial court made no findings of such a waiver. [Pa001-0022]. Moreover, respondents argue that the Lajara court only recognized the defendants' right to a jury trial. They provide no support for this distinction and ignore the fact that the right to a jury trial depends on the cause of action and the damages available thereunder and not the identity of the party pursuing the claim.

D. INSURANCE CARRIERS CANNOT BE COMPELLED TO RESOLVE FRAUD ACT CLAIMS VIA THE NFADR PROCESS SINCE THEY CANNOT BE AWARDED DAMAGES.

The Fraud Act provides that a successful carrier is entitled to recover compensatory damages, cost of investigation, attorney's fees and cost of suit. The carrier is also entitled to recover treble damages if it demonstrates that the defendant(s) engaged in a pattern of violating the act. See N.J.S.A. 17:33A-7(b). Significantly, the Fraud Act vests the determination as to whether a carrier is entitled to treble damages in the court. It states, "a successful claimant under subsection a. shall recover treble damages if the court determines that the defendant has engaged in a pattern of violating this act." N.J.S.A. 17:33A-7(b) (emphasis added). Thus, a DRP does not have the authority to award treble damages thereby depriving carriers of a substantial remedy that the Legislature created to help them combat insurance fraud aggressively.

Moreover, unlike in the Consumer Fraud Act, attorney's fees are considered an element of the carrier's compensatory damages in the Fraud Act and, thus, are subject to trebling. See Allstate v. Lajara, 222 N.J. at 148 ("Notably, attorneys' fees, investigatory costs, and costs of suit are, by definition, compensatory damages under the IFPA, and therefore a successful

lawsuit initiated by an insurance company will necessarily involve an award of damages.")

However, in the Coalition I case, the Appellate Division stated that an insurance carrier is not entitled to an award of attorney's fees where it is successful in defeating a claim for payment of the No-Fault benefits. It stated, "We find nothing in the Legislature's findings and declarations contained within N.J.S.A. 39:6A-1.1(b) expressing an intention to permit an award of counsel fees to an insurance carrier against an insured or injured person in the statutory dispute resolution process." See Coalition, 323 N.J. Super. at 263. The court further noted that if the carrier is successful in the NFADR process, "there is no 'award.' Under such an interpretation, attorney's fees could not be granted against an injured party or insured." Id. at 263.

Similarly, in the case of Allstate Ins. Co. v. Lopez, 311 N.J. Super. 660 (Law Div. 1998), the Court expressly found that the Fraud Act designates the proper venue for resolution of disputes under the act. The Court stated,

> "The act designates the proper forum for the adjudication of issues of fraud: 'Any insurance company damaged as a result of a violation of any provision of this act may sue therefore in any Court of competent jurisdiction.' … Significantly, the Legislature did not provide for the arbitration of claims under the act; nor did it give arbitrators the power to award any of the specified damages under the act. The role of arbitration in automobile insurance matters is to provide for the prompt payment of PIP benefits to ensure that people legitimately injured as a result of an automobile accident receive reasonable and necessary medical treatment in a

> prompt and expeditious manner. See Kubiak v. Allstate Ins. Co. 198 N.J. Super 115, 119 (App. Div. 1984). As Judge Pressler so aptly expressed, 'arbitration by its nature does not provide a forum conducive to extensive issue and party joinder or to the according of a variety of remedies.'" Citing Jersey City Police v. Jersey City 257 N.J. Super 6, 14 (App. Div. 1992). [311 N.J. Super. at 678.]

In Ohio Casualty v. Garzon-Cardenas, Superior Court of New Jersey, Appellate Division, Docket No. A-6234-03T3 (Dec'd July 15. 2005), the court held that "A PIP arbitrator [sic] lacks the requisite authority to award damages pursuant to the Fraud Act, which awards special remedies to insurance companies. The present Fraud Act claims are not 'disputes' arising pursuant to Chapter 6A. Therefore, these claims can only be heard in the Law Division." Slip op. at 5-6.[6]

Recognizing that monetary awards do not get entered in favor of carriers, the "Demand for Arbitration" forms that are used by Forthright[7] (and approved by DOBI) do not inquire about the damages that an insurance carrier seeks to recover. Instead, the forms only ask claimants to list the No-Fault benefits that they seek to recover from the insurance carrier. See https://www.nj-no-fault.com/forms, page 3 (last visited May 17, 2024)[8]. These forms are consistent with DOBI's statement that the NFADR process is intended to

[6] A copy of this opinion is submitted herewith at ICAa 065.
[7] As is set forth below, Forthright is the current Dispute Resolution Organization contracted by DOBI to operate the NFADR process.
[8] The court may take judicial notice of these forms under N.J.R.E. 201(b)(1)-(3).

resolve disputes "concerning the payment of medical expense and other benefits provided by the personal injury protection coverage in policies of automobile insurance" to claimants and not a carrier's claim for damages under the Fraud Act. N.J.A.C. 11:3-5.1(a) The fact that an insurance carrier cannot even assert a claim for damages on Forthright's DOBI approved forms strongly suggests that carriers cannot recover any Fraud Act damages in an NFADR process.

As is stated above, the Legislature stated in 1983 that it is the purpose of the Fraud Act to "confront aggressively the problem of insurance fraud in New Jersey by facilitating the detection of insurance fraud, eliminating the occurrence of such fraud through the development of fraud prevention programs, requiring the restitution of fraudulently obtained insurance benefits, and reducing the amount of premium dollars used to pay fraudulent claims." N.J. S.A. 17:33A-2. Nine years after the Fraud Act was enacted, the Supreme Court stated, "Insurance fraud is a problem of massive proportions that currently results in substantial and unnecessary costs to the general public in the form of increased rates. In fact, approximately ten to fifteen percent of all insurance claims involve fraud. New Jersey Dep't of Ins. 1989 Annual Report, at 62–63." Merin, 126 N.J. at 436. AICRA was enacted in 1998, six years after the Merin decision. In passing AICRA, the Legislature declared,

> "Whereas, It is generally recognized that fraud, whether in the form of inappropriate medical treatments, inflated claims, staged accidents, falsification of records, or in any other form, has increased premiums, and must be uncovered and vigorously prosecuted, and while the pursuit of those who defraud the automobile insurance system has heretofore been addressed by the State through various agencies, it has been without sufficient coordination to aggressively combat fraud, leading to the conclusion that greater consolidation of agencies which were created to combat fraud is necessary to accomplish this purpose." [N.J.S.A. 39:6A-1.1(b)].

Given that fraud in the No-Fault system continued to grow from a "problem of massive proportions" in 1992 to one that required a restructuring of the State's fraud-fighting agencies to more "aggressively combat fraud" in 1998, it defies credibility to suggest that the Legislature intended to relegate the resolution of claims under the Fraud Act to the NFADR process despite the fact that this process is incapable of achieving one of the primary goals of the Fraud Act, namely providing for the restitution of fraudulently obtained insurance benefits. Since insurance carriers cannot recover their statutory remedies of compensatory damages, attorney's fees and/or treble damages in the NFADR process, it is evident that Fraud Act claims must be resolved in a "court of competent jurisdiction." To hold otherwise would leave an insurance carrier that has been successfully hoodwinked into paying claims with no ability to recover "restitution of fraudulently obtained insurance benefits" to the ultimate detriment to the rate paying public. See N.J.S.A. 17:33A-2.

In the case of GEICO v. Mt. Prospect Chiropractic Center, 98 F. 4th 463, 469 (3rd Circuit 2024), the court found that GEICO would be entitled to recover damages in an arbitration proceeding citing to the American Arbitration Association's Commercial Arbitration rules.[9] However, as is stated above at length, those rules do not apply to NFADR. DOBI's rules and the rules promulgated by Forthright govern the NFADR process. See N.J.S.A. 39:6A-5(i), N.J.A.C. 11:3-5-1, et seq. generally and N.J.A.C. 11:3-5.3 to 5.6 in particular. Thus, this holding must be rejected.

E. THE INABILITY OF PARTIES TO OBTAIN DISCOVERY IN AND/OR TO COMPEL WITNESS ATTENDANCE AT NFADR PROCEEDINGS DEMONSTRATES THAT FRAUD ACT CASES ARE MEANT TO BE RESOLVED IN THE SUPERIOR COURT.

Under N.J.A.C. 11:3-5.2, DOBI is responsible for designating an organization to administer the NFADR process. Forthright is the current administrator of the New Jersey No-Fault PIP program. See www.nj-no-fault.com/home (last visited May 9, 2024).

Forthright's rules governing the NFADR process do not provide for discovery. See www.nj-no-fault.com/rules. [See also Pa0377] They do not mention interrogatories, depositions, subpoenas or document requests. This is

[9] Despite their citations to the GEICO case, respondents do not contest the point that damages are not available to a carrier under the actual NFADR rules that actually apply here.

understandable given that, during the No-Fault claims process, a medical provider is required to obtain pre-certification for the treatment and/or testing. If precertification is denied, the patient or treating provider is required to submit one or more appeals before filing a demand for NFADR. [Pa0504] Thus, the parties are well aware of the patient's/provider's basis for seeking additional care and the basis for the carrier's denial of same.

In Selective Ins. Co. of America v. Hudson East Pain Management, 416 N.J. Super. 418, 429-430 (App. Div. 2010), the court confirmed that carriers are only entitled to the limited discovery provided for by N.J.S.A. 39:6A-13(g) in the NFADR setting. Significantly, the Selective court advised that a carrier would be entitled to the broad discovery permitted under the Rules of Court upon the filing of a Fraud Act claim. It stated, "In an action filed pursuant to the IFPA for substantive remedial relief from claimed violations thereof, plaintiff would be bound by, and subject to, the ordinary rules of discovery governing civil actions in the Law Division, with their usual limitations as to relevance and protections against oppression and harassment." Id. at 435.

Here, the Complaint discusses various statements that Allstate obtained as part of its pre-suit investigation. [Pa0023] In an NFADR process, Allstate would be under no obligation to turn over those full statements to the adversaries until the hearing given the lack of discovery in NFADR.

Similarly, requiring parties to resolve a Fraud Act claim via the NFADR process also deprives them of the opportunity to compel non-party witnesses to appear and testify and produce documents at depositions and, ultimately, at a trial since Forthright's rules and/or DOBI's regulations do not grant subpoena power. Therefore, the defendants here would be unable to compel the above witnesses who gave favorable statements to Allstate to appear and testify and produce records at depositions so they could explore the strengths and weaknesses of those statements. Similarly, no party would be able to compel those witnesses to appear and testify in person at the NFADR hearing so that the DRP could assess their credibility.

Quoting its prior opinion in Greene v. McElroy, 360 U.S. 474, 496-497 (1959), the United States Supreme Court stated,

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. e.g., ICC v. Louisville & N.R. Co., 227 U.S. 88, 93—94, 33 S.Ct. 185, 187—188, 57 L.Ed. 431 (1913); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180—1181, 10 L.Ed.2d 224 (1963). What we said in Greene v. McElroy, 360 U.S. 474, 496—497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:
>
> 'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action[10] seriously injures an individual, and the reasonableness of

[10] Since use of the NFADR process is mandated by the State, government action is present here. See N.J.S.A. 39:6A-5.1.

> the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.'" [Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970).]

In State v. McAllister, 184 N.J. 17 (2005), the Supreme Court noted that proving actions grounded in financial crimes such as insurance fraud are particularly difficult. It stated,

> "identity theft and insurance fraud, often involve the shifting of money and other illicit dealings that are documented by bank records. See, e.g., N.J.S.A. 2C:21–17 (criminalizing impersonation of another person to obtain benefit by fraud). Finally, bank transfers can reveal the funding of terrorist activity. See Eric Lichtblau, U.S. Seeks Access to Bank Records to Deter Terror, N.Y. Times, April 9, 2005, available at 2005 WLNR 5598007 (quoting former 9/11 Commission member: "The idea is for the government to make it more difficult and more risky for terrorists to move money....").
>
> Crimes involving corruption and fraud depend on secrecy and misinformation. Those who commit them, when confronted, hide behind walls of silence, making detection difficult. See Addonizio, supra, 53 N.J. at 135, 248 A.2d 531 (recognizing that "a direct inquiry" of offender "is not likely to be productive"); United States v. Alexandro, 675 F.2d 34, 43 (2d Cir.) (acknowledging need for "special investigative techniques to

> uncover insidious corruption"), cert. denied, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982)." [184 N.J. at 39.]

Depriving all parties of their ability to obtain discovery (first-party and third-party) and the lack of an ability to compel witness testimony will prevent Fraud Act claims from being resolved on their merits at an NFADR hearing, to the detriment of the due process rights of all parties and the interests of justice.

F. RESOLVING FRAUD ACT CLAIMS VIA NFADR VIOLATES THE GOALS OF THE ENTIRE CONTROVERSY DOCTRINE.

Arbitration and alternative dispute resolutions are the byproduct of a parties' agreement. The availability of compulsory arbitration is a contract question, which is "dependent solely on the parties' agreement." Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 101 (App. Div.), certif. denied, 117 N.J. 87 (1989). "Only those issues may be arbitrated which the parties have agreed shall be." Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 228 (1979). See also N.J.S.A. 2A:23A-2 (governing contracts to resolve disputes via alternative resolution.) In the No-Fault setting, the relevant contract is the policy of insurance. Under N.J.A.C. 11:3-5.6, the parties to an NFADR proceeding are the "injured party, the insured, a provider who is an assignee of PIP benefits pursuant to N.J.A.C. 11:3-4.9 … [and] the insurer" (emphasis added). Significantly, absent an assignment, even a patient's billing medical entity is not a proper party to an NFADR proceeding.

Here, in addition to the defendant medical providers who billed Allstate, Allstate sued a management company, several realty companies, Jennifer M. O'Brien, Esq., and layperson, Christopher Bufano, an alleged paper owner of defendant Carteret Comprehensive. Allstate is unable to join the foregoing individuals and entities in an NFADR proceeding, since they are neither parties to the insurance policy with Allstate nor billing medical entities who have taken an assignment of their patients' claims for payment. Similarly, since the billing medical entities (e.g. Carteret Comprehensive Medical Care, P.C.) are likely the parties that received the assignment of benefits from their patients, Allstate could not even join the principals of the defendant medical entities as parties in an NFADR proceeding since those principals have not individually taken assignments from their patients and, thus are not parties to a contract with Allstate or providers with an assignment of rights.

If the trial court's decision is upheld, Allstate will be required to litigate with the defendant medical provider entities via an NFADR process and it will be required to forego its claims against the realty entities, the laypersons, the attorney, and the real and paper owners of the medical entities (collectively the dismissed defendants) because plaintiffs' Complaint against all defendants was dismissed in its entirety. [Pa0001-23] Even if plaintiffs' Complaint against the dismissed defendants were reinstated, Allstate would be obligated to engage in

wasteful and duplicative litigation in court against the dismissed defendants and in NFADR against the billing medical entities who possess assignments of their patients' claims. This multi-track litigation gives rise to the possibility of inconsistent results and is highly inefficient for both the parties and the adjudicating bodies.

The purpose of the entire controversy doctrine is to "encourage comprehensive and conclusive litigation determinations, avoid fragmentation of litigation, and promote party fairness and judicial efficiency…. The rule as to claim joinder generally requires that all aspects of the controversy between those who are parties to litigation be included in a single action." See Pressler & Verniero, CURRENT N.J. Court Rules, (GANN), Comment R. 4:30A-1. The Court in Westinghouse Electric Corp. V. Liberty Mutual Insurance Company, 233 N.J. Super 463, 470-471 (App. Div. 1989), stated,

> "This kind of fractionalization is a most potent weapon in the arsenal of the litigant whose primary and subversive aim is to impose both upon the judicial system and the adversary by endlessly delaying the day upon which the entire controversy will finally come to an end and the respective rights of the litigants resolved – clearly, consistently and finally. It is only the single comprehensive action, designed to adjudicate the entire controversy between the litigants which can protect both the Court and the parties from that calculated imposition."

Insurance carriers should not be obligated to engage in fractionalized litigation to prove their claims under the Fraud Act. Thus, the entire matter should be

remanded to the trial court so it can be resolved in one consistent and comprehensive action by a "court of competent jurisdiction" as specifically required by the Fraud Act.

G. COMPELLING FRAUD ACT CLAIMS TO BE RESOLVED THROUGH THE NFADR PROCESS DEPRIVES THE COMMISSIONER OF INSURANCE OF ITS ABILITY TO INTERVENE IN THIS MATTER.

N.J.S.A. 17:33A-7(d) grants the Commissioner of the Department of Banking and Insurance the ability to intervene in Fraud Act cases to protect the public's interests and to penalize those who have engaged in insurance fraud. The Fraud Act imposes an obligation upon carriers who have filed Fraud Act claims to notify the Commissioner of its filing. Id. at 7(c). However, given that the Commissioner of Insurance is not a party to an insurance contract, it is not a party who can be joined to an NFADR proceeding under N.J.A.C.11:3-5.6. It also cannot initiate an NFADR case. Thus, compelling Fraud Act claims to be resolved through NFADR proceedings deprives the Commissioner of its ability to intervene. Compelling the Commissioner to file an independent action against the defendants also gives rise to the sort of disfavored fractionalized litigation discussed above.

Importantly, N.J.S.A. 39:6A-15 grants the Commissioner the ability to petition a "court of competent jurisdiction" to suspend the driving privileges of any person found to have violated the Fraud Act in the automobile insurance

setting. A DRP is without authority to grant this relief. The inability of the DRP to grant complete and consistent relief to the Commissioner strongly suggests that Fraud Act cases should be resolved in the Superior Court, a "court of competent jurisdiction."[11]

CONCLUSION

Based on the foregoing, the trial court's orders dismissing Allstate's complaint should be reversed and the matter remanded to the trial court.

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By:_____
Thomas O. Mulvihill, Esq.

Dated:

[11] The fact that the Commissioner has not yet intervened in this matter, which was filed only recently, should not deprive the Commissioner of its ability to do so on a going-forward basis in this or other similar matters.