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SUPREME COURT
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY

DOCKET NO. 090943

CRAIG CHIACCHERI,

Plaintiff-Appellant,

v.

ZURICH AMERICAN INSURANCE
COMPANY,

Defendant-Respondent.

On Petition for Certification of
Questions of Law
United States Court of Appeals
for the Third Circuit
Docket No.: 24-2563

Sat Below:

Hon. Tamika R. Montgomery-Reeves
Hon. Jane R. Roth
Hon. Thomas L. Ambro

Civil Action

**PLAINTIFF/APPELLANT'S AMENDED REPLY BRIEF
ADDRESSING CERTIFIED QUESTIONS**

On the brief and of counsel:

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LEGAL ARGUMENT

POINT I

The Legislature Enacted N.J.S.A. 17:28-1.1(f) to Provide Employees with Maximum Protection “Notwithstanding the Provisions of This Section or Any Law to the Contrary[.]”.

Defendant contends Plaintiff’s interpretation of N.J.S.A. 17:28-1.1(f) violates principles of statutory construction because it limits an employer’s ability to select UM/UIM limits under subsections (a) and (b). This misunderstands N.J.S.A.17:28-1.1(f)’s design. Db23. The Legislature expressly states subsection (f) operates “[n]otwithstanding the provisions of this section or any law to the contrary.”

A “notwithstanding” clause is a clear signal that the provision it introduces overrides conflicting statutory provisions. Kennedy v. Weichert Co., 257 N.J. 290, 310 (2024), quoting Cisneros v. Alpine Ridge Grp., 508 U.S. 10, 18 (1993) (“notwithstanding” clauses are used “to supersede all other laws, stating that ‘[a] clearer statement is difficult to imagine.’”); Shomber v. United States, 348 U.S. 540, 547-48 (1955). As Justice Scalia explained, such a clause is a “fail-safe way of ensuring that the clause it introduces will absolutely, positively prevail.” A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 127 (2012).

Here, the Legislature could not have been clearer in enacting section (f) “notwithstanding the provisions of this section” (i.e. N.J.S.A. 17:28-1.1) that section (f)’s requirements of maximum UIM coverage for employees prevail over the

company's desire to cut costs and the insurer's desire to limit exposure by choosing lesser limits under section (b), including the statutory minimum amounts set forth in section (a).

The statutory text reinforces this conclusion. While (a) and (b) do not mention businesses or corporations at all, subsection (f) expressly governs those policies. The Legislature deliberately singled out employees of business entities for enhanced protection and ensured that protection would prevail over cost-containment provisions adopted for other contexts.

Had the Legislature intended to preserve an employer's ability to provide employees only the limits it elected to purchase, it would have used language to that effect, which would have carved out an exception to the earlier "notwithstanding" language. They did not. Instead, they chose to require the maximum available coverage, which is equal to the liability limits.

The Legislature also could not have been clearer in enacting section (f) "notwithstanding the provisions of . . . any law to the contrary" that section (f)'s mandates for maximum UIM coverage overrides the "'New Jersey Automobile Insurance Freedom Choice and Cost Containment Act of 1984' and numerous other laws designed to keep insurance premiums down" the insurance industry relies upon. Db33.

POINT II

The Meaning of “Maximum [UM/UIM] Coverage Available Under the Policy” is the Maximum Amount that Can be Purchased Under a Given Policy.

Defendants argue that “available under the policy” refers only to the limits the policyholder chose and paid for. That argument cannot be squared with the ordinary meaning of the statutory language or with New Jersey insurance law. In New Jersey’s statutory framework, UM/UIM “maximum available” coverage is tied directly to the policy’s liability limits.

When interpreting a statute, courts give words their ordinary meaning and read them in context. DiProspero v. Penn, 183 N.J. 477, 492 (2005). In the UM/UIM context, “maximum available” coverage has a settled meaning: coverage that may be purchased up to the policy’s liability limits. Under N.J.S.A. 17:28-1.1(b), UM/UIM limits are tied to liability limits. Consistent with that framework, this Court has long recognized that the “maximum available” UM/UIM coverage equals the liability limits of the policy. The insurance industry asks this Court to substitute N.J.S.A. 17:28-1.1(f)’s use of the word “available” with the word “chosen.” If the Legislature meant the chosen amount, then the Legislature would have written “chosen under the policy” or “elected under the policy.” They did not. The Legislature specifically chose the word “available” under the policy.

The New Jersey Department of Banking and Insurance confirm this understanding. New Jersey law requires insurers to provide a buyer’s guide explaining “all available policy coverages and benefit limits.” N.J.S.A. 39:6A-23. The mandatory Auto Insurance Buyer’s Guide explains that UM/UIM “[c]overage is *available up to amounts selected for liability coverage.*” See PaR005. Zurich’s own New Jersey Buyer’s Guide says the same. See PaR016.

When explaining “all available coverages” to its commercial insureds, Zurich advises those insureds that UIM “[c]overage is *available up to amounts selected for liability coverage.*” PaR016. Zurich also instructs their commercial insureds that UM and UIM coverage “are sold together and are available up to the limits you choose for liability coverage.” PaR027.

Throughout the buyer’s guide and coverage selection form there are references to “available” coverage. “Available” coverage is very different from the coverage chosen by the insured. For instance, the coverage selection form confirms that the “coverage options *available* to [the insured]” have been explained and separately, that their “*choices*” of the available coverage are shown. PaR029.

I have read Form U-CA-455-B (10/09) - New Jersey Auto Insurance Buyer's Guide Commercial PPA Edition For Individually Owned Private Passenger Automobiles Written on Commercial Insurance Policies outlining the coverage options available to me. My choices are shown above. I agree that each of these choices will apply for all vehicles insured by my policy and to each subsequent renewal, continuation, replacement or amendment until the insurer or its insurance producer receives my request that a change be made.

Clearly, the coverage “available” means the coverage options – which would include the maximum UIM coverage option equal to the liability limits. To the contrary, the

“choices” are wholly different. In other words, both the New Jersey DOBI and Zurich are advising insureds throughout New Jersey that “available” UM/UIM coverage under any policy extends up to the liability limits – exactly what Plaintiff is saying here. See PaR005, PaR016, PaR027. Further, Zurich and DOBI are advising insureds that this is the “common coverage option.” See PaR005, PaR016. These statutorily required forms by the insurance industry contradict the insurance industry’s arguments to this Court.

The Legislature’s phrasing – “available *under the policy*” – recognizes that the maximum available UM/UIM coverage varies from policy to policy depending on the liability limits selected. If liability limits are \$1 million, the *maximum available UM/UIM coverage under the policy* is \$1 million. If liability limits are \$2 million, the *maximum available UM/UIM coverage under the policy* is \$2 million. If liability limits are \$50,000, the *maximum available UM/UIM coverage under the policy* is \$50,000. That is precisely what the statute contemplates.

This understanding was also confirmed by the Supreme Court almost 35 years ago. In Weinisch v. Sawyer, 123 N.J. 333 (1991), the New Jersey Supreme Court examined “whether reformation is the appropriate remedy when an insurance agent negligently fails to inform an insured about *available coverage*” under N.J.S.A. 17:18-1.1. Id. at 336 (emphasis added). This Court held “when an insured sues the insurer and its agent for the agent’s failure to inform the insured of *available*

coverage, the proper remedy is reformation[.]” Ibid. (emphasis added). The Supreme Court in Weinisch consistently referred to the “optional higher limits of UM/UIM coverage” as the “available coverage.” Id. 336-37. See also Pizzullo v. N.J. Mfrs. Ins. Co., 196 N.J. 251, 256, 258 (2008) (discussing “available” coverage and confirming “maximum available” coverage equals the liability limits under the given policy); Sikking v. Nelson, 242 N.J. Super. 185, 188–90 (App. Div. 1990).

Likewise, in Pinto v. Garretson, 237 N.J. Super. 444 (App. Div. 1989), the Appellate Division found that Plaintiff’s auto insurer and agent were not liable to Plaintiff for professional negligence for allegedly failing to inform the insured that higher levels of UIM coverage were *available*, because the agent provided the necessary paperwork. The Court held:

even assuming that Pinto had purchased the *maximum available [UIM] coverage*, his motor vehicle would not have been an underinsured motor vehicle. The *maximum UIM coverage* that Pinto would have been able to obtain was \$100,000/\$300,000 – *the limit of his bodily injury and property damage liability insurance coverage*. See N.J.S.A. 17:28-1.1(b)

[Id. at 45 (emphasis added)]; see also Walker v. Atlantic Chrysler Plymouth, Inc., 216 N.J. Super. 255 (App. Div. 1987) (finding insurance broker may have had duty to inform insured of additional UIM coverage *available* beyond statutory minimum).

Defendants’ reliance on Pinto v. N.J. Mfrs. Ins. Co., 183 N.J. 405 (2005), is misplaced. In Pinto, the employer had elected \$1 million in UM/UIM limits, which

likely matched the liability limits. The Court had no occasion to distinguish between the chosen limits and maximum available limits – because they were the same. Nothing in Pinto suggests that “available” means only what the employer chose. This is also true for every other post-Pinto case. See Pb7-8. “[M]aximum [UIM] coverage available under the policy” can only reasonably be interpreted to mean the maximum coverage option available to be chosen under a given policy.

POINT III

James Does Not Limit N.J.S.A. 17:28-1.1(f) to the Elimination of Step-Down Provisions Alone.

Defendant states time and again that N.J.S.A. 17:28-1.1(f) prohibits the use of step-down provisions against employees in commercial auto policies. We agree. This is not in dispute. Defendant, however, suggests that since it prohibits step-down provisions, it cannot be read to do more. This is wrong and contrary to the intent and desire of the Legislature and clear language described to above. Section (f) addresses Justice Zazzali’s concerns that “we should not forget that there is a victim here . . . who sustained severe and permanent personal injuries and has not received adequate compensation” and recognizes the importance in ensuring real and meaningful coverage for those victims. Pinto, *supra*, 183 N.J. at 419; 421-22.

Defendant attempts to use the Court’s language in James v. New Jersey Mfrs. Ins. Co., 216 N.J. 552, 570-71 (2014) where the Court states N.J.S.A. 17:28-1.1(f) “simply thwarts implementation of [step-down] provisions for a certain class of

insureds who otherwise might be subject to them, namely employees of a corporate or business entity whose policy contains such a provision” as support for their position that section (f)’s sole purpose was to eliminate step-down provisions in these policies. Db6. However, when reading this snippet in context, this is not what the Court was saying. The issue the Court was addressing at that time was whether section (f) proscribed step-down clauses entirely. They confirm it does not. Specifically, they write:

as noted, a plain language construction of the operative terms of the new legislation reveals that it does not proscribe step-down provisions. It simply thwarts implementation of such provisions for a certain class of insureds who otherwise might be subject to them, namely employees of a corporate or business entity whose policy contains such a provision. The legislation does not prevent a step-down provision from operating for other persons subject to its terms.

[James, 216 N.J. at 570-71]. Thus, as recognized earlier in the opinion, step-down provisions are still enforceable in certain situations under corporate policies, for instances “a family member of an employee riding in a corporately registered car, or a non-employee permissive user of the vehicle, who was injured by an uninsured or underinsured motorist.” Id. at 567. They are “simply” proscribed for employees.

The Court never suggested that subsection (f) does nothing more than address step-downs. To the contrary, they recognize an independent and affirmative mandate: that policies issued to business entities “shall be deemed to provide the maximum [UM/UIM] coverage available under the policy” to employees. That clear

language has operative effect beyond the elimination of step-downs and this Court should give it full force and effect.

POINT IV

The “Drive Other Car Coverage” Endorsement Contained in the Travieso Policy is Irrelevant to the Court’s Statutory Analysis.

Defendants repeatedly invoke a “Drive Other Car Coverage” endorsement contained within the policy issued in Travieso, supra. Db 17-19; 24-25 as a “real world” example of how an owner can elect higher UM/UIM limits without being listed as a named insured on the policy and an example which would result in employees receiving higher UIM coverage than the principals of the company. Id. These are both wrong. “Drive Other Car Coverage” has absolutely no relevance to the issue before this Court.

N.J.S.A. 17:28-1.1(f) protects employees while operating employer-owned and insured vehicles. “Drive Other Car Coverage” endorsements apply only when designated executives or their spouses operate vehicles *not* owned, hired, or borrowed by the company. By its plain terms, such an endorsement does not apply to company-owned vehicles.

The “Drive Other Car Coverage” endorsement applies to “[a]ny ‘auto’ ***you don’t own, hire or borrow*** . . . while being used by any individual named in the Schedule or by his or her spouse while a resident of the same household[.]” See Da7 (emphasis added). “You” is defined in the “Auto Dealers Coverage Form” as “the

Named Insured shown in the Declarations[.]” See PaR033. Thus, under the plain terms of the endorsement, the “Drive Other Car Coverage” does not apply to autos owned by the company or insured under the commercial auto policy.

Accordingly, the endorsement cannot be used to suggest that Plaintiff’s interpretation would result in employees receiving greater coverage than owners when driving company vehicles. When an owner drives a company-owned vehicle, coverage is governed by the commercial auto policy itself, not by a “Drive Other Car” endorsement. In that circumstance, subsection (f) applies equally, and the owner – like any employee – would be entitled to the maximum UM/UIM coverage available under the policy.

POINT V

Subsection (f) Eliminates All Step-Down Provisions as to Employees and Separately Guarantees Them Maximum Available UM/UIM Coverage.

Defendant suggests the first operative sentence of N.J.S.A. 17:28-1.1(f) only prohibits limited step-down provisions, while the second operative sentence prohibits all additional forms of step-down provisions. Db17-18. Specifically, Defendant argues “the first sentence is geared toward prohibiting step-down provisions based on the status of the insured as opposed to the existence of other insurance.” Db17. They contend that “the second sentence precludes companies from seeking to circumvent the first sentence by scheduling higher limits for the

entity's principals and executives *without* listing them as 'named insureds', a term that refers to the names listed in the policy's declarations." Id. They offer absolutely no support for this contention, aside from a hypothetical based upon the completely irrelevant "Drive Other Cars Coverage" endorsement explained above. This interpretation is simply another attempt by the Defense to throw things at the wall, in hopes that something sticks.

The Supreme Court in James confirmed the first operative sentence eliminates all step-down provisions, thus guaranteeing that the "level of UM/UIM coverage for a 'named insured' in a policy shall be the same level that is provided to employees of the corporation or business entity . . . as directed through the first sentence of the new legislation." James, 216 N.J. at 568.

The Legislative statement is also clear. S-1666 first confirms its purpose of "prohibiting step-down provisions in [corporate] policies." Id. It does not address certain step-down provisions, or only step-down provisions "based on the status of the insured" as Defendant alleges. It prohibits *all* step-down provisions.

The statement goes on then, to address the portion of section (f) that guarantees employees the "maximum available [UM/UIM] coverage available under the policy[.]" Nowhere in that explanation do they mention step-downs. They could not be clearer in their declaration. In addition to prohibiting any type of step-down provision in these policies, section (f) "expressly provides . . . the maximum

[UM/UIM] coverage available under the policy to any individual employed” by the company. Id. It does so indiscriminately of who that employee is or what that employee’s job title is. It does so regardless of whether that employee is an additional named insured on the policy, a named insured on any other policy or covered under any other policy.

POINT VI

Defendant’s Public Policy Arguments Lack Support in the Record and Cannot Override the Statute’s Plain Language.

Defendant’s public policy arguments are baseless. Defendants argue that enforcing the Legislature’s plain language of subsection (f) as written will increase premiums and undermine New Jersey’s cost-containment policies. These assertions are unsupported by evidence. Defendant offers no data showing how many noncompliant policies exist, what compliance would cost or whether premiums would increase at all.

Defendant believes Plaintiff’s plain meaning interpretation of the statute is “fundamentally unfair because it would reform every affected commercial auto policy covering vehicles garaged or registered in the State of New Jersey to provide significantly increased UM/UIM limits that the policyholders did not elect or purchase or pay for.” Db33. They also argue that Plaintiff’s plain meaning interpretation (which they incorrectly call “new law” when it has been the statutory language for the past 18 years) will “drive up premiums and make insurance less

affordable in violation of New Jersey’s public policy favoring cost containment.” Db33. However, Defendants still offer absolutely no support in the record as to how enforcing N.J.S.A. 17:28-1.1(f)’s plain language will increase premiums for Plaintiff’s employer, let alone premiums statewide.

As Defendant points out, three separate insurance industry lobbying groups¹ appeared as amicus in the Third Circuit. Certainly, one of those special interest groups would have the data to support these allegations. But no data or facts have been provided. Defendant simply suggests that the insurance industry lobbying groups’ involvement alone supports their position. However, the courts and the public are aware that the insurance industry’s sole interest is in collecting premiums and limiting their exposure – not lowering premiums. This was aptly acknowledged by Judge Baime as the insurance industry’s “‘unholy mantra’ of ‘we collect premiums; we do not pay claims.’” Owens-Illinois, Inc. v. United Ins. Co., 264 N.J. Super. 460, 491 (App. Div. 1993); see also Araya v. Farm Family Cas. Ins. Co., 353 N.J. Super. 203, 210 (App. Div. 2002).

There is nothing “unfair” about requiring employers and insurers to satisfy the Legislature’s clear statutory mandate requiring employees receive *maximum UIM*

¹ The Insurance Council of New Jersey is “the leading property and casualty insurance advocacy group acting on behalf of insurance companies” in New Jersey and “The Voice of NJ’s Insurance Industry.” See www.ICNJ.org.

coverage available under the policy. To the contrary, an insurer cannot contract out of its statutory obligations. Pb15-16.

The Supreme Court in James recognized:

Insurers cannot cry foul for the legislative determination to implement a mid-policy alteration for accidents occurring after the effective date for, as we recently stated, “[i]n a highly regulated industry, such as insurance, businesses have no ‘contractual expectation’ that a naturally fluid regulatory scheme, ‘subject to change at any time,’ will remain in an unalterably fixed state.” Farmers Mut. Fire Ins. Co. v. N.J. Prop. Liab. Ins. Guar. Ass’n, 215 N.J. 522, 547 (2013).

[216 N.J. at 569]. This is even more true here – where the legislation is clear and has been in place for almost 20 years. The fact that Zurich attempted to contract around their statutory obligations with hopes they would not be caught is not a public policy concern.

Finally, Defendant suggests that Plaintiff’s plain language reading of N.J.S.A. 17:28-1.1(f) is seeking to “force every business from the smallest ‘mom and pop’ shop to large corporations to purchase excess insurance towers.” Db33. This is yet another nonsensical overreaching of tort-reform. Plaintiff is not seeking to force anyone to do anything, other than satisfy the statutory requirements of N.J.S.A. 17:28-1.1(f).

Obviously, the insurance needs of the “smallest ‘mom and pop’” will differ greatly from those of a \$50,000,000,000 per year multi-national corporation like TJX. Neither the Legislature nor Plaintiff are requiring any employer to obtain any

insurance exceeding the statutory minimum. If that “mom and pop” only needs the statutory minimum amount of liability insurance coverage under their corporate auto policy, then they are freely entitled to purchase that amount of liability coverage, and by extension UM/UIM coverage. Each company is entitled to evaluate their needs and choose the amount of liability coverage they need to protect themselves. They will then, by extension, be required to carry the same amount of protection for their employees by way of UM/UIM coverage.

CONCLUSION

N.J.S.A. 17:28-1.1(f) reflects a deliberate legislative choice to protect employees by guaranteeing them the maximum UM/UIM coverage available under their employer’s automobile policy “notwithstanding” any other law or statute that would limit these protections, including sections (a) and (b) or any “cost containment” laws. The statute’s text, structure and history compel that result. The Court should enforce the statute as written and reject the insurance industry’s attempts to dilute its clear mandate in hopes of eliminating meaningful employee protections and limiting insurance industry exposure.

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