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| MID-CENTURY INSURANCE CO.,<br><br>Plaintiff<br><br>v.<br><br>JOHN FREEMAN, and NEW JERSEY INDEMNITY INSURANCE<br><br>Defendants | : | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION<br>MIDDLESEX COUNTY<br><br>DOCKET NO. MID-L-3753-15<br>CIVIL ACTION<br><br>OPINION |

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Honorable Arnold L. Natali Jr., J.S.C.:

The novel question presented by this application is whether costs and expenses paid pursuant to an insured's Extended Medical Expense Coverage ("Med-Pay") are subject to the collateral source rule expressed in N.J.S.A. §2A:15-97 and therefore not recoverable in a subsequent subrogation action. Although relevant statutory and common law authority have addressed the circumstances where costs and expenses related to an insurer's

payments pursuant to a policy's Personal Injury Protection ("PIP") coverage can be recouped by way of a subrogation action or reimbursement, no reported decision has addressed whether the collateral source rule embodied in N.J.S.A. §2A:15-97 precludes recoupment of Med-Pay payments by way of subrogation. For the reasons that follow, the Court holds that Med-Pay payments are subject to the collateral source rule embodied in N.J.S.A. §2A:15-97 and, accordingly, cannot be recovered by way of a subrogation action.

The Court bases its decision on two related grounds. First, the genesis for an insurer's Med-Pay obligation is found not within the express mandate of N.J.S.A. §39:6A-1, et seq., but rather N.J.A.C. §11:3-7.3(b) and as such cannot be considered an action brought "pursuant to" N.J.S.A. §39:6A-1, et seq. Such an interpretation is consistent with judicial decisions that recognize the distinction between Med-Pay and PIP payments. Second, the Med-Pay expenses at issue here can neither be characterized as workers' compensation nor life insurance proceeds but rather are "benefits" as the term is used in N.J.S.A. §2A:15-97 and therefore enjoy no exception from the collateral source rule's application. Accordingly, and consistent with New Jersey Supreme Court decision in Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001), those Med-Pay expenses are not recoverable by way of subrogation.

In this application, Mid-Century Insurance Company ("Mid-Century") seeks a "declaratory ruling" that a cause of action exists under New Jersey law for the recovery of Med-Pay benefits through subrogation against a tortfeasor. Defendant New Jersey Indemnity Insurance Company ("New Jersey Indemnity") opposes the application, cross-

moves to dismiss plaintiff's complaint, and contends that Med-Pay payments are subject to the scope of N.J.S.A. §2A:15-97.[1]

Mid-Century claims that at the time the no-fault statute at issue was initially adopted, subrogation for Med-Pay payments was clearly envisioned. In support of this proposition, Mid-Century relies upon the lack of reference to Med-Pay payments in the current, applicable AICRA statutory language and the collateral source rule of N.J.S.A. §2A:15-97. Further, it finds support in a February 22, 1973 "Circular Letter Automobile No. 9" issued by the New Jersey Department of Banking and Insurance. That circular provided:

Medical Payments and PIP

> Medical payments coverage with a minimum of $1,000 per person must be supplied and will be excess over other collectible insurance including PIP benefits, and will be subrogable.

In addition, Mid-Century maintains that New Jersey Indemnity should be judicially estopped from contending in this and subsequent proceedings that Med-Pay subrogation claims are barred by the New Jersey collateral source rule because it has taken contrary positions in numerous arbitrations and has, in fact, prosecuted such arbitrations seeking subrogation of Med-Pay benefits, including arbitrations conducted by Arbitration Forums, Inc.[2] In this regard, Mid-Century maintains that during the 2012-2015 time period, New

[1] Because the parties presented, and the Court considered, matters outside the pleadings, defendants' cross-motion was treated as "one for summary judgment and disposed of as provided by R. 4:46." All parties were given the opportunity to present all relevant material. See R. 4:6-2; R. 4:46; Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 337, 897 A.2d 373 (App. Div.), certif. denied, 188 N.J. 353, 907 A.2d 1013 (2006).

[2] According to Mid-Century, it and defendant New Jersey Indemnity are members of Arbitrations Forum, Inc., an intercompany arbitration organization for the insurance industry and both Mid-Century and New Jersey Indemnity are signatories to the "Med-Pay subrogation arbitration program." See Certification of Counsel for Mid-Century at paragraphs 5-6.

Jersey Indemnity has filed 42 subrogation claims with Arbitration Forums, Inc. in which it sought to recover Med-Pay payments from other automobile insurers.[3]

The facts underlying this dispute are not complicated. On December 6, 2013, Tanya Alvarado, an insured of Mid-Century, was a passenger in an automobile owned by Shore Service Co., Inc., that was struck in the rear by a vehicle owned and operated by defendant John Freeman, an insured of New Jersey Indemnity. Because Ms. Alvarado was a passenger in a taxicab, and not an automobile, she was not eligible for PIP benefits. See N.J.S.A. §39:6A-2.a. Accordingly, Mid-Century made medical payments in the amount of $5,206.34 on Ms. Alvarado's behalf under the Med-Pay provisions of her automobile policy.

On October 20, 2014, Mid-Century filed the first of two arbitration petitions with Arbitration Forums, Inc., against New Jersey Indemnity to recover the $5,206.34 in Med-Pay benefits it paid on behalf of its insured. In the first proceeding, New Jersey Indemnity asserted as an affirmative defense that New Jersey law bars recovery of Med-Pay payments. On December 23, 2014, Arbitration Forums, Inc., upheld Defendant's position and concluded that New Jersey's collateral source rule precluded recovery of Med-Pay benefits. On February 17, 2015, Mid-Century refiled its petition against New Jersey Indemnity with Arbitration Forums, Inc. On April 21, 2015, Arbitration Forums, Inc. again denied Mid-Century's request for reimbursement.

[3]As detailed at pp. 20-22, infra, the Court addresses the deficiencies with the motion record on this point.

The Automobile Insurance Cost Reduction Act of 1998 ("the 1998 Act" or "AICRA") "represents an effort on the part of the Legislature to reduce the costs of insurance while maintaining the rate of return of the carriers." Craig & Pomeroy, New Jersey Auto Insurance Law, Section 1:2-13 (Gann 2016) (citing N.J.S.A. §39:6A-1.1). The legislation achieves this result in three primary ways. First, the 1998 Act created various classes of coverage. Second, it limits mandatory minimum Personal Injury Protection ("PIP") "coverages previously required in New Jersey by making those coverages dependent on the choices made by consumers…" Finally, the 1998 Act imposes controls over the type of health care services that are available to covered insureds. Id.

A number of provisions of the AICRA statute, as amended over time, bear highlighting for the purposes of the issues presented in this motion. First, PIP benefits are available only to those insureds who are "occupying, entering into, alighting from or using" an "automobile" or if the insured is a pedestrian who was struck by an automobile. N.J.S.A. §39:6A-2a defines "automobile" as:

> a private passenger automobile of a private passenger or station wagon type that is owned or hired and is neither used as a public or livery conveyance for passengers nor rented to others with a driver; and a motor vehicle with a pickup body, a delivery sedan, a van, or a panel truck or a camper type vehicle used for recreational purposes owned by an individual or by husband and wife who are residents of the same household, not customarily used in the occupation, profession or business of the insured other than farming or ranching. An automobile owned by a farm family copartnership or corporation, which is principally garaged on a farm or ranch and otherwise meets the definitions contained in this section, shall be considered a private passenger automobile owned by two or more relatives resident in the same household.

Second, the AICRA statute prevents the double-recovery of certain specifically identified remedial benefits and permits set-offs as to others. These benefits and set-offs are identified in N.J.S.A. §39:6A-6, captioned Collateral Source, which accordingly provides:

> The benefits provided in sections 4 and 10 of P.L.1972, c.70 (C.39:6A-4 and 39:6A-10), the medical expense benefits provided in section 4 of P.L.1998, c.21 (C.39:6A-3.1) and the benefits provided in section 45 of P.L.2003, c.89 (C.39:6A-3.3) shall be payable as loss accrues, upon written notice of such loss and without regard to collateral sources, except that benefits, collectible under workers' compensation insurance, employees' temporary disability benefit statutes, Medicare provided under federal law, and benefits, in fact collected, that are provided under federal law to active and retired military personnel shall be deducted from the benefits collectible under sections 4 and 10 of P.L.1972, c.70 (C.39:6A-4 and 39:6A-10), the medical expense benefits provided in section 4 of P.L.1998, c.21 (C.39:6A-3.1) and the benefits provided in section 45 of P.L.2003, c.89 (C.39:6A-3.3).

Third, N.J.S.A. §39:6A-9.1 captioned "Recovery from Tortfeasor" permits those entities paying the statutorily specified costs to recover those amounts from a tortfeasor if the action is filed within two years and under the following circumstances:

> a. An insurer, health maintenance organization or governmental agency paying benefits pursuant to subsection a., b. or d. of section 13 of P.L.1983, c.362 (C.39:6A-4.3), personal injury protection benefits in accordance with section 4 or section 10 of P.L.1972, c.70 (C.39:6A-4 or 39:6A-10), medical expense benefits pursuant to section 4 of P.L.1998, c.21 (C.39:6A-3.1) or benefits pursuant to section 45 of P.L.2003, c.89 (C.39:6A-3.3), as a result of an accident occurring within this State, shall, within two years of the filing of the claim, have the right to recover the amount of payments from any tortfeasor who was not, at the time of the accident, required to maintain personal injury protection or medical expense benefits coverage, other than for pedestrians, under the laws of this State, including personal injury protection coverage required to be provided in accordance with section 18 of P.L.1985, c.520 (C.17:28-1.4), or although required did not maintain personal injury protection or medical expense benefits coverage at the time of the accident.

Finally, N.J.S.A. §39:6A-12 provides direction to trial courts regarding the admissibility of losses collectible under PIP coverage:

> Except as may be required in an action brought pursuant to section 20 of P.L.1983, c.362 (C.39:6A-9.1), evidence of the amounts collectible or paid under a standard automobile insurance policy pursuant to sections 4 and 10 of P.L.1972, c.70 (C.39:6A-4 and 39:6A-10), amounts collectible or paid for medical expense benefits under a basic automobile insurance policy pursuant to section 4 of P.L.1998, c.21 (C.39:6A-3.1) and amounts collectible or paid for benefits under a special automobile insurance policy pursuant to section 45 of P.L.2003, c.89 (C.39:6A-3.3), to an injured person, including the amounts of any deductibles, copayments or exclusions, including exclusions pursuant to subsection d. of section 13 of P.L.1983, c.362 (C.39:6A-4.3), otherwise compensated is inadmissible in a civil action for recovery of damages for bodily injury by such injured person.
>
> The court shall instruct the jury that, in arriving at a verdict as to the amount of the damages for noneconomic loss to be recovered by the injured person, the jury shall not speculate as to the amount of the medical expense benefits paid or payable by an automobile insurer under personal injury protection coverage payable under a standard automobile insurance policy pursuant to sections 4 and 10 of P.L.1972, c.70 (C.39:6A-4 and 39:6A-10), medical expense benefits under a basic automobile insurance policy pursuant to section 4 of P.L.1998, c.21 (C.39:6A-3.1) or benefits under a special automobile insurance policy pursuant to section 45 of P.L.2003, c.89 (C.39:6A-3.3) to the injured person, nor shall they speculate as to the amount of benefits paid or payable by a health insurer, health maintenance organization or governmental agency under subsection d. of section 13 of P.L.1983, c.362 (C.39:6A-4.3).
>
> Nothing in this section shall be construed to limit the right of recovery, against the tortfeasor, of uncompensated economic loss sustained by the injured party.

With respect to civil matters that are not subject to the AICRA statute, or no-fault law, parties are subject to the collateral source rule embodied in N.J.S.A. §2A:15-97 which provides:

> In any civil action brought for personal injury or death, except actions brought pursuant to the provisions of P.L.1972, c. 70 (C. 39:6A-1 et seq.), if

> a plaintiff receives or is entitled to receive benefits for the injuries allegedly incurred from any other source other than a joint tortfeasor, the benefits, other than workers' compensation benefits or the proceeds from a life insurance policy, shall be disclosed to the court and the amount thereof which duplicates any benefit contained in the award shall be deducted from any award recovered by the plaintiff, less any premium paid to an insurer directly by the plaintiff or by any member of the plaintiff's family on behalf of the plaintiff for the policy period during which the benefits are payable. Any party to the action shall be permitted to introduce evidence regarding any of the matters described in this act.

N.J. Stat. Ann. § 2A:15-97.

As noted, because Ms. Alvarado was injured while in a taxicab, she was not eligible for PIP benefits. She was, however, eligible and did receive Med-Pay benefits under her policy with Mid-Century. That Med-Pay coverage finds its support not in the aforementioned AICRA statutory language but rather pursuant to N.J.A.C. §11:3-7.3(b), a regulation promulgated by the New Jersey Commissioner of Banking and Insurance. See Ingersoll v. Aetna Cas. & Sur. Co., 138 N.J. 236, 649 A.2d 1269 (1994).

N.J.A.C. 11:3-7.3(b) mandates that every insurance policy "include excess medical payments coverage, corresponding to Section II, Extended Medical Expense Benefits Coverage of the personal automobile policy." Here, although the parties did not attach the relevant insurance policy, they do not dispute that Mid-Century provided Med-Pay coverage for the losses at issue consistent with the administrative mandate. See March 9, 2016 Certification of Counsel for New Jersey Indemnity at paragraph 4.

In Ingersoll v. Aetna Cas. & Sur. Co., supra, 138 N.J. at 238, 649 A.2d 1269, the Supreme Court held that AICRA's statutory bar preventing stacking of PIP benefits did not apply to the recovery of extended medical expense benefits. In reversing the trial and

appellate courts, the Supreme Court acknowledged that the no-fault law prohibits stacking of PIP benefits. In support for this proposition, the Court relied on N.J.S.A. §39:6A-4.2 which provides:

> [T]he personal injury protection coverage of the named insured shall be the primary coverage for the named insured and any resident relative in the named insured's household who is not a named insured under an automobile insurance policy of his own. No person shall recover personal injury protection benefits under more than one automobile insurance policy for injuries sustained in any one accident.

After noting that that the aforementioned statutory language was enacted to "tighten statutory eligibility requirements for personal injury protection coverage so as to comport with the original intent of the no fault law," see Ingersoll, 138 N.J. at 239, 649 A.2d 1269, the court nevertheless excepted extended-medical-expense-benefits from the reach of Section 4.2 because such benefits were not a product of statutory grant but rather the legislative authority granted to the Commissioner of Insurance. Citing N.J.A.C. §11:3-7.3(b), the Court characterized the extended-medical-expense-benefits provision contained in the insurance policy (and mandated by N.J.A.C. §11:3-7.3(b)) as a "very narrow window of coverage to a limited class of persons who [like plaintiff in Ingersoll and Ms. Alvarado, plaintiff's insured, here], are ineligible for basic PIP benefits." The Court highlighted that the Commissioner of Insurance, under appropriate legislative authority, mandated first-party coverage of up to $10,000.00 in those unique and potentially devastating circumstances, such as when a plaintiff is not injured by use of an "automobile," where PIP coverage would be unavailable to cover any medical expenses. Ultimately, after considering potential ambiguities in the standard policy language that memorializes the

PIP and extended medical benefits coverage, the Court held that the "differences in the coverages furnished by basic PIP and Section II of the policy are sufficient to satisfy us that the Legislature did not intend to include the extended-medical-expense-benefits coverage in section 4.2's prohibition against stacking." Ingersoll, supra, 138 N.J. Super at 241, 649 A.2d 1269.

As noted, the central issue before this court is the ability of Plaintiff to recoup by way of subrogation the Med-Pay costs it expended on Ms. Alvarado's behalf. As such, a discussion of the collateral source rule and the New Jersey Supreme Court's decision in Perreira v. Rediger, 169 N.J. 399, 778 A.2d 429 (2001) is necessary. In Perreira, the Court held that a health insurer that paid benefits to an insured had nether a neither common law nor statutory subrogation right against the tortfeasor. In reversing the trial and appellate courts, the Supreme Court considered the common law history of the collateral source rule and the legislative history of N.J.S.A. §2A:15-97. According to the court, the collateral source rule embodied in N.J.S.A. §2A:15-97 serves two purposes. First, it bars "double recovery to plaintiffs that flowed from the common-law collateral source rule." Second, it "allocate[s] the benefit of that change to liability carriers." Perreira v. Rediger, 169 N.J. 399, 403, 778 A.2d 429 (2001).

In assessing the legislative history of the rule, the Supreme Court acknowledged that the Legislature's goal in enacting the statute was to contain rising insurance costs and to accomplish that end, the Legislature effectively had two options. It could benefit health insurers by enabling them to recoup payments made on a tort plaintiff or it could benefit liability carriers by deducting from a tort judgment the amount of health care benefits

received. Id. at 410. The Supreme Court found that the Legislature chose to benefit liability carriers, and therefore "the Legislature eliminated double recovery to plaintiffs, reduced the burden on the tortfeasors' liability carriers and left health insurers in the same position as they were prior to the enactment of N.J.S.A. §2A:15-97." Id.

The scope of the collateral source rule was further addressed by the court in County of Bergen v. Horizon, 412 N.J. Super. 126, 988 A.2d 1230 (App. Div. 2010). In County of Bergen, the Appellate Division held that N.J.S.A. §2A:15-97 precluded reimbursement by way of subrogation action or otherwise of a municipal entity's payments to its insured under a benefits plan. In that case, Bergen County established a self-insured benefit plan for its employees and dependents. County of Bergen, 412 N.J. Super. at 129, 988 A.2d 1230. The County sought reimbursement for medical expenses it paid on behalf of an employee whose son was born with a congenital disease. The employee also filed a medical malpractice action which settled for $18,000,000.00. After the County discovered that defendant did not intend to pursue a subrogation action or seek reimbursement for the medical expenses the county had paid, it sued. Defendant moved to dismiss Plaintiff's complaint pursuant to R. 4:6-2(e) and after the trial court denied Plaintiff's application, the Appellate Division granted leave to appeal and reversed.

The Appellate Division framed the issue before it as "whether the Collateral Source Rule bars plaintiffs, who expended funds on behalf of their insured, to recoup their payments through subrogation or contract reimbursement when the insured recovers against a tortfeasor in a post-verdict settlement." Id. at 131. As noted, the court concluded

that the collateral source rule embodied in N.J.S.A. §2A:15-97 barred recoupment of such costs.

The County of Bergen court's reasoning followed that of the Supreme Court in Perreira. Indeed, Judge Parrillo observed, as did the Perreira court, that N.J.S.A. §2A:15-97 was an abrogation of the common law collateral source rule, which prohibited a tortfeasor from reducing a judgment from amounts the injured party may have received from other, collateral sources. Relying on Perreira, the County of Bergen court noted the dual purpose behind N.J.S.A. §2A:15-97: to eliminate double recovery and the "containment of spiraling liability insurance costs." Id. at 133 (citing Perreira v. Rediger, 169 N.J. 399, 403, 778 A.2d 429 (2001) (emphasis supplied)). The court held that N.J.S.A. §2A:15-97's "broad language is only curtailed by its own statutory exceptions (workers' compensation benefits and life insurance proceeds), which are not applicable here, or when necessitated by an actual conflict with other statutory schemes that either preempt its operation by law or evince a countervailing legislative policy." Id. at 135. Because the court concluded that Bergen County's payments to its insured for medical payments were "benefits" as specified by the collateral source rule and were not exempted, those amounts were not recoverable by way of subrogation or reimbursement. Id. at 137. Finally, the Court concluded that nothing in the statutory language or legislative history excepted payments made by public agencies. The Court held:

> There is no evidence to suggest that the Legislature intended to favor public entities under Section 97 or that it was not intended to apply to amounts received by a tort plaintiff from public sources. The plain language of Section 97 states that it applies to "benefits" received by a tort plaintiff from "any" source, and, unlike workers' compensation benefits and the proceeds from a

> life insurance policy, amounts received from public sources, such as a self-funded County health plan, are not excepted from Section 97.

Id. at 138.

The recoverability of Med-Pay expenses was addressed by the Court in Warnig v. Atlantic City County Special Servs., 363 N.J. Super. 563, 833 A.2d 1098 (App. Div. 2003). In Warnig, the Appellate Division held that N.J.S.A. §39:6A-6 precludes reimbursement of Med-Pay benefits paid by an insurer in a workers' compensation proceeding. In that case, plaintiff, a bus aide, was injured while a passenger on a bus operated and owned by defendant. Warnig, 363 N.J. Super at 565, 833 A.2d 1098. Plaintiff initially received treatment for her injuries through her workers' compensation carrier. Id. at 566. After the workers' compensation carrier refused to extend payment for further treatment, plaintiff requested that Prudential Property & Casualty Insurance Company ("Prudential"), her automobile insurer, authorize continued payment pursuant to the PIP provisions of that policy. Because plaintiff was a passenger on a bus at the time of the accident she was ineligible for PIP benefits. Prudential did, however, pay certain of plaintiff's medical expenses consistent with the Med-Pay provisions of the policy. Id. Subsequently, Prudential moved to intervene in the workers' compensation proceeding to recover the Med-Pay payments. The Judge of Compensation denied Prudential's request and held that pursuant to the collateral source rule embodied in N.J.S.A. §39:6A-6, Prudential was not entitled to reimbursement. Id.

The Appellate Division affirmed and concluded, like the workers' compensation judge, that the collateral source rule embodied in N.J.S.A. §39:6A-6 precluded

reimbursement of the Med-Pay payments. The Court held that because Med-Pay was not mentioned in the statute it was clear as "to the specific benefits not subject to collateral source treatment." Warnig, supra, 363 N.J. Super. at 569, 833 A.2d 1098. Second, relying on Perreira, supra, the Court acknowledged that N.J.S.A. §39:6A-6, changed the common law collateral source rule. As such, the court reasoned that statutes that are in "derogation of the common law must be strictly enforced." Id. at 570. Third, the Warnig court observed that the Legislature had recently amended N.J.S.A. §39:6A-6 and "made no provisions for Med-Pay under the amended version of the collateral source rule." Id. at 572. The Court further reasoned that based on the Supreme Court's decision in Ingersoll, supra, the Legislature was on notice that Med-Pay benefits did not fall within the purview of the collateral source statute. The Warnig court held that if the "Legislature was dissatisfied with the current framework, it could have chosen to extend coverage of the collateral source rule to include Med-Pay benefits when it amended the statute in 2003." The court inferred from such inaction that it accepted the current interpretation of the statute. Id. at 571 (citing Advance Electric Company v. Montgomery Twp. Board of Education, 351 N.J. Super 160, 175, 797 A.2d 216 (App. Div. 2002)). Finally, the Court concluded that Med-Pay benefits are available only to those who are ineligible for PIP benefits. Id. at 571-72. In light of these limited benefits, the Warnig court held that the Legislature did not intend to place them on equal footing with PIP benefits. Id. at 572.

Against this legal background, the Court concludes that the Med-Pay payments at issue are not subrogable. First, no provision of N.J.S.A. §39:6A-1, et seq., addresses or provides for Med-Pay benefits. The Warnig Court so found with respect to N.J.S.A. 39:6A-

6 and there is nothing in the language of N.J.S.A. §39:6A-12 or N.J.S.A. §39:6A-9.1 that mandates a contrary result. See e.g. Ingersoll, supra, 138 N.J. at 239. On this point, plaintiff agrees. Indeed, counsel candidly acknowledges that "[i]t is clear that the collateral source rule set forth in N.J.S.A. §39:6A-12 does not apply to Med-Pay payments. The statute refers expressly to PIP benefits, i.e., amounts collectible or paid under a standard automobile policy pursuant to [N.J.S.A. §39:6A-4 and 10], amounts collectible or paid under a basic automobile insurance policy pursuant to [N.J.S.A. §39:6A-3.1], and amounts collectible or paid under a special automobile insurance policy pursuant to [N.J.S.A. §39:6A-3.3]." See Plaintiff's Memorandum of Law at 5.

In the face of such an interpretation of N.J.S.A. 39:6A-4 and N.J.S.A. §39:6A-6 provided by the Ingersoll and Warnig courts, and the acknowledgment that N.J.SA. §39:6A-12 does not cover or address Med-Pay payments, plaintiff posits that the collateral source rule embodied in N.J.S.A. §2A:15-97 is not preclusive of its subrogation rights because that statute excepts from its mandate "actions brought pursuant to the provisions of P.L. 1972, C.70 (C.39:6A-1, et seq.)." Thus, the reasoning proceeds, if this action is one brought pursuant to N.J.S.A. §39:6A-1, et seq., the collateral source rule is inapplicable and Perreira would not, therefore, preclude a related subrogation action.

Plaintiff's argument is without merit for at least two reasons. First, an action to recover Med-Pay payments is not, by its terms, an "action brought pursuant to" N.J.S.A. §39:6A-1, et seq. As noted, supra, this is a claim for the recovery of Med-Pay payments, not the PIP expenses or other enumerated expenses or costs that the Legislature chose to include within the aforementioned statutory regime. Indeed, Med-Pay payments are only

available in that "narrow window of coverage to a limited class of persons who . . . are ineligible for PIP benefits." Ingersoll, supra, 139 N.J. at 240, 649 A.2d 1269 (emphasis supplied). Relatedly, it is undisputed that Ms. Alvarado is ineligible for PIP benefits because she was not injured in an "automobile" as defined in N.J.S.A. §39:6A–2.a. That lack of eligibility, along with the limited scope of Med-Pay benefits, which indisputably do not flow from any provision of N.J.S.A. §39:6A-1, et seq., require the Court to conclude that this matter does not relate to an "action brought pursuant to" N.J.S.A. §39:6A-1. Indeed, not every claim that involves motor vehicles are within the ambit of the AICRA or no-fault statute.

Second, in reaching its decision, the court applied well-established principles of statutory consideration. In State v. Hudson, 209 N.J. 513, 529, 39 A.3d 150 (2012), the court instructed that "[t]he overriding goal is to determine as best we can the intent of the Legislature, and to give effect to that intent." Discerning the Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language. DiProspero v. Penn, 183 N.J. 477, 874 A.2d 1039 (2005) (citation omitted). Further it is not the role of a court to "rewrite a plainly-written enactment of the Legislature […] or presume that the Legislature intended something other than that expressed by way of plain language.'" Id. At 492 (quoting O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002)). Here, the plain language of N.J.S.A.39:6A-2.a is clear and leads to the conclusion that Ms. Alvarado was not in a covered "automobile" and as such was not eligible for PIP benefits. None of the relevant statutes cited by the parties or otherwise factually support any argument that Med-Pay payments are within N.J.S.A.

§39:6A-1 et seq.'s statutory scheme. See e.g., N.J.S.A. 39:6A-4; N.J.S.A. §39:6A-6 and N.J.SA. §39:6A-12.

A similar result occurs when the Court analyzes the clear and unambiguous language of N.J.S.A. §2A:15-97. First, the $5,206.34 in Med-Pay expenses are certainly "benefits" as expressed in the statute. As noted by the County of Bergen court, the "Legislature intended that 'benefits' under Section 97 were to include 'insurance-type benefit[s]' such as life or health insurance policies, social security, welfare payments and pension benefits". County of Bergen, supra, 412. N.J. Super. at 137 n.4, 988 A.2d 1230 (citing Kiss v. Jacob, 138 N.J. 278, 282, 650 A.2d 336 (1994)). Further, the Med-Pay benefits at issue are clearly not workers' compensation benefits nor do they represent life insurance proceeds. Consequently, they are not excepted from the effect of the collateral source rule and the Perreira court's holding barring subrogation actions.

In further support of its decision, the Court notes, as did the Warnig court, that the no-fault legislation was amended numerous times since its initial enactment, and subsequent to the Supreme Court's 1994 decision in Ingersoll. At no time did the Legislature act to amend N.J.S.A. §39:6A-1, et seq., to include Med-Pay payments or make exception for such costs in the collateral source rule of N.J.S.A. §2A:15-97 or N.J.S.A. §39:6A-6. As the Warnig court held, it is therefore fair to "infer from the non-action by the Legislature that it accepted the court's current interpretation of the statute." Warnig, supra, 393 N.J. Super. at 571, 833 A.2d 1098.

Next, the Court concludes that the cited 1973 Department of Banking and Insurance Circular No. 9 does not mandate a contrary result. The document, some four decades old,

pre-dates the initial legislation at issue, all of its subsequent and numerous iterations, the collateral source rule embodied in N.J.S.A. §2A-15-97 and the Supreme Court's decision in Perreira. It simply cannot be said that it is reflective of current Legislative intent, statutory authority or interpretation or that it should alter the Court's conclusion.

Finally, Plaintiff maintains that Defendant New Jersey Indemnity should be judicially estopped and precluded from contending in arbitrations (and assumedly here) that "Med-Pay subrogation claims are barred by New Jersey's collateral source rule (N.J.S.A. §2A:15-97)" and request a remand of the matter for further proceedings before the parties' selected arbitrator. The motion record here does not permit the Court to impose the relief requested, including the remedy of judicial estoppel.

It is well settled that courts should proceed with caution when invoking the extraordinary remedy of judicial estoppel. As detailed by the Appellate Division in Kimball Intern. v. Northfield Metal., 334 N.J. Super. 596, 760 A.2d 794 (App. Div. 2000):

> The purpose of the judicial estoppel doctrine is to protect "the integrity of the judicial process." Cummings v. Bahr, 295 N.J. Super. 374, 387, 685 A.2d 60 (App. Div. 1996). A threat to the integrity of the judicial system sufficient to invoke the judicial estoppel doctrine only arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding. Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 620, 581 A.2d 91 (App. Div. 1990), aff'd o.b., 124 N.J. 520, 591 A.2d 943 (1991); Brown v. Allied Plumbing & Heating Co., 129 N.J.L. 442, 446, 30 A.2d 290 (Sup. Ct.), aff'd, 130 N.J.L. 487, 33 A.2d 813 (E. & A. 1943); Bell Atl. Network Servs., Inc. v. P.M. Video Corp., 322 N.J. Super. 74, 95, 730 A.2d 406 (App. Div.), certif. denied, 162 N.J. 130, 741 A.2d 98 (1999) (footnote omitted). "[T]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained." In re Cassidy, 892 F.2d 637, 641 (7th Cir.), cert. denied, 498 U.S. 812, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990)…
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> Consequently, "[a]bsent judicial acceptance of the inconsistent position, application of [judicial estoppel] is unwarranted because no risk of inconsistent results exists. Thus, the integrity of the judicial process is unaffected; the perception that either the first or second court was misled is not present." Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982) (other citations omitted) ….
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> It is also generally recognized that judicial estoppel is an "extraordinary remedy," which should be invoked only "when a party's inconsistent behavior will otherwise result in a miscarriage of justice." Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996) (quoting Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 424 (3d Cir.) (Stapleton J., dissenting), cert. denied, 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988)) (other citation omitted)…Thus, as with other claim and issue preclusion doctrines, judicial estoppel should be invoked only in those circumstances required to serve its stated purpose, which is to protect the integrity of the judicial process. (footnote omitted).

Id. at 606 – 607, 760 A.2d 794.

Because the sole support for Plaintiff's claims of judicial estoppel is found in counsel's certification, a detailed discussion of its contents is necessary. In the submitted certification, counsel avers that "plaintiff Mid-Century is a member of Arbitration Forums, Inc., an intercompany arbitration organization for the insurance industry, and a signatory of the Med-Pay subrogation arbitration program of Arbitrations Forum, Inc." Certification of Counsel for Mid-Century at paragraph 5. New Jersey Indemnity Insurance Company is also claimed to be a member and signatory to the same arbitration program. Id. at paragraph 6. None of these statements are disputed. In paragraph 15 of counsel's certification, counsel informs that an information subpoena was served on Arbitration Forums, Inc. and based on the information obtained for the periods 2012-2015, "New Jersey Indemnity has filed 42 Med-Pay subrogation arbitration petitions with Arbitration

Forums, Inc. as applicant seeking recovery of Med-Pay payments from other motor vehicle insurers, including insurers of private passenger vehicles." The Certification continues that after obtaining case information statements for a "number of Med-Pay petitions filed by New Jersey Indemnity," Defendant has taken a position contrary to that expressed in this case; namely, that "[a]pplicant's insured's claims falls under the policy provision of Med Pay. Therefore, all statutes pertaining to NJ No fault are not applicable. As such, the applicant is not barred from seeking recovery of medical expense payments."

In support of the aforementioned factual statements, counsel attaches a number of referenced documents. Exhibit I, referenced in support of the statement that New Jersey Indemnity filed "42 Med-Pay subrogation arbitration petitions with Arbitration Forums, Inc. as applicant seeking recovery of Med-Pay payments from the motor vehicle insurers, including insurers of private passenger vehicles" is a three page, double-sided document that does not appear to contain the information referenced. Rather, it is comprised of columns of data indecipherable in both form and content. Further, Exhibit J, the purported Med-Pay arbitration case information statements, is also incomplete and, accordingly, do not permit the Court to reach the conclusions offered in the certification of counsel. First, Exhibit J contains 14 of the aforementioned case information statements, 8 of which appear incomplete. Indeed, those submissions contain only partial pages of the entire document. Critical information that is contained in the assumedly complete forms is missing such as the "declared evidence" and "decision information" sections. In addition, the applicant in the submitted case information statements does not appear to be defendant New Jersey Indemnity but rather New Jersey Manufacturers Insurance Company, an entity whose

corporate relationship to New Jersey Indemnity has not been established in this motion record.

These are not insignificant defects, particularly when one considers the preclusive relief that would result upon application of the judicial estoppel doctrine. The evidentiary defects are further highlighted when the Court applies the proscriptions contained in R. 1:6-6 which provides in pertinent part that "[i]f a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein." Here, the incomplete exhibits, and the averment by counsel, do not comply with R. 1:6-6.

In addition, even if the Court considered the materials submitted, judicial estoppel would not be appropriate. First, the parties have not satisfactorily explained the role that Arbitrations Forum, Inc. had in the prior proceedings or the circumstances under which those arbitrations occurred. In addition, the submitted documents do not clearly establish that New Jersey Indemnity previously took the specific position that the collateral source rule of N.J.S.A. §2A:15-97 at issue barred Med-Pay payments. While certain of the submissions do suggest that in prior arbitrations New Jersey Manufacturers, a party not in this case, argued that the no-fault act did not preclude Med-Pay claims, the defects in the motion record regarding (1.) the relationship between New Jersey Indemnity and New Jersey Manufacturers, and (2.) the lack of information regarding the facts and

circumstances of those arbitration proceedings, militate against application of the doctrine here.

Further, as noted, a party must have successfully convinced a court to accept the prior position before the judicial estoppel doctrine is invoked. The Court concludes that this foundational point also has not been established on this record. Absent such acceptance which, by necessity would require proofs that the precise issue was presented to a prior court or arbitrator, i.e., that the collateral source rule of N.J.S.A. §2A:15-97 bars Med-Pay subrogation actions, there is no risk of inconsistent results which would warrant application of the doctrine as the "integrity of the judicial process" would not be implicated. Accordingly, and the aforementioned reasons, plaintiff's application is denied and defendants' cross-motion is granted.

Dated: May 16, 2016