

Superior Court or Forthright? That Is the Question

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It is becoming more commonplace for plaintiffs to include PIP counts in their complaints for bodily injury claims, even though some medical providers may have taken assignments on behalf of the plaintiffs and proceeded to file PIP arbitrations in Forthright, which is the administrative organization designated by the Department of Banking and Insurance (DOBI) to administer dispute resolution proceedings regarding PIP benefits. Is it more advantageous and cost-effective to keep the matter in the Superior Court or remove it to Forthright? This is a question many defense attorneys face when it comes to these complaints. This article will discuss the pros and cons of each approach and, ultimately, determine which approach may be more advantageous and cost-effective on a case-by-case basis.

Many insurance policies contain a “Dispute Resolution” provision stating, “pursuant to N.J.A.C. 11:3-5-1, and the policy, any dispute submitted by an insured person that has not been resolved ... *may* be submitted through the Personal Injury Protection (PIP) Dispute Resolution process ... by initiating the process with Forthright.” Thus, plaintiffs have a forum choice when filing a claim for PIP reimbursement: Superior Court or Forthright. When a plaintiff chooses to file a complaint in Superior Court and includes a PIP count, the defendant must then determine whether that PIP count should be litigated in Superior Court or dismissed to Forthright. See N.J.S.A. 39:6A-5.1(b).

There are many advantages to litigating PIP counts in Superior Court, inclusive of the utilization of subpoena power and the rules governing New Jersey Civil Practice, mechanisms not available to parties in Forthright. These codified mechanisms can be used in Superior Court to force a plaintiff to comply with specific defense demands. See N.J.R. 4, et seq. For example, it may be necessary to compel deposition testimony of the plaintiff or an Independent Medical Examination (IME) of the plaintiff pursuant to the Rules of Civil Practice in order to properly defend the PIP count. If, however, the PIP count is dismissed from Superior Court and thereafter re-filed in Forthright, compelling testimony and an IME of the plaintiff would likely require the filing of an Order to Show Cause, as the New Jersey Civil Practice Rules are not applicable in Forthright. Rather, Forthright has its own set of codified rules that are less stringent than those of the Superior Court.

Despite the codified, advantageous position of the Superior Court, litigating a PIP count in Superior Court is usually more costly and time-consuming. The cost analysis of defending a PIP claim in Superior Court far outweighs removing the matter to Forthright. The Superior Court calls for: (1) answering the complaint; (2) completing written discovery; (3) attending party depositions (at minimum, plaintiff); (4) IMEs; (5) motion practice to sever the PIP count from the underlying bodily injury claims as there are no jury trials in PIP; and, (6) finally, having the matter heard before the court on a

bench trial, which would still require the defense to have medical experts appear and testify—costly for both the plaintiff and the defense. The expense of litigating a PIP count in Superior Court could escalate and become more costly than the benefits the plaintiff is seeking under the policy itself.

Statutorily speaking, Forthright appears to be the proper forum to adjudicate PIP claims. N.J.A.C. 11:3-5.1 dictates that PIP disputes shall be resolved by binding alternative dispute resolution. N.J.A.C. 11:3-5.1(a) provides in part:

The purpose ... is to establish procedures for the resolution of disputes concerning the payment of medical expense and other benefits provided by the [PIP] coverage in policies of automobile insurance. This subchapter implements N.J.S.A. 39:6A-5.1 and .2, which provide that PIP disputes shall be resolved by binding alternative dispute resolution as provided in the policy.

Pursuant to the New Jersey Automobile Insurance Cost Reduction Act (AICRA), N.J.S.A. 39:6A-5, et seq., some may argue that the plaintiff's PIP count should always be dismissed in its entirety from the Superior Court and heard in Forthright. The meaning and import of the statutory language of AICRA is set forth in *State Farm Mutual Automobile Ins. Co. v. Molino*, 289 N.J. Super. 406 (App. Div. 1996). In *Molino*, the Appellate Division held the arbitration provision of the No Fault Insurance Act statute was to be read broadly in order to achieve the public policies behind the act; that is, to reduce court congestion and to achieve "prompt and efficient resolution of PIP disputes without resort to the judicial process." *Id.* at 410, 416 (citing *Roig v. Kelsey*, 135 N.J. 500 (1994)). According to the court, "the word 'dispute' is unqualified." In fact, the court highlighted the word "any," which precedes the word "dispute," to make it clear that all

disagreements regarding the payment of PIP benefits are to be arbitrated under the No-Fault Insurance Act.

Additionally, Forthright is the better forum choice in terms of cost-effectiveness. The goal of AICRA was to compensate a larger class of citizens than the traditional tort-based system, with "greater efficiency" and at a lower premium cost while providing for mandatory PIP benefits, payable without regard to fault. N.J.S.A. 39:6A-4; *New Jersey Coalition of Health Care Professionals v. N.J. Department of Banking and Ins., Div. of Ins.*, 323 N.J. Super. 207, 215-16 (App. Div.), cert denied, 162 N.J. 485 (1999). Forthright was specifically designed by DOBI to deal with PIP disputes exclusively in order to keep the courts from being bogged down with the handling of these matters. The costs associated with both filing a demand for arbitration and defending the arbitration in Forthright equate to much less in terms of discovery practices (which in Forthright is minimal) and appearing for depositions, filing motions, etc. Therefore, overall, it would appear, on its face, that Forthright would be the more favorable choice from a business perspective to satisfy not only the carrier's needs, but to effectively reduce costs and expenses for both sides.

Moreover, public policy in the state of New Jersey favors litigating PIP claims in Forthright. In *Coalition for Quality Health Care v. N.J. Dep't of Banking and Ins.*, 348 N.J. Super. 272 (App. Div. 2002), the Appellate Division held that an insurer may require the submission of all PIP cases to the dispute resolution process. The court held that the AICRA scheme permits not only the claimant, but any party to a PIP dispute, to choose dispute resolution rather than a traditional Superior Court action. The DOBI's approval of insurance policy provisions that steer PIP disputes to dispute resolution is consistent with the policy goals of AICRA in that it will foster prompt resolution of disputes without resort to protracted litigation, ease

court congestion and reduce costs to the automobile insurance system. This action also furthers the general public policy of this state, which favors arbitration.

Finally, PIP disputes filed in Forthright are adjudicated much more quickly than those filed in Superior Court. In Forthright, claims are heard usually within six to nine months following the filing of a Demand for Arbitration, as compared to the one to three years it could take to come to a resolution in Superior Court following the filing of a civil complaint. However, despite a likely quicker result and the lower costs associated with litigating a PIP claim in Forthright, most defense attorneys would argue that Forthright dispute resolution professionals (DRPs) are claimant-biased.

Even with this type of bias, Forthright arbitrations are being filed daily, and defense attorneys are handling these claims at a rate much higher than those PIP claims being filed in Superior Court. PIP claims are more efficiently handled and can be resolved at a much quicker rate than in the Superior Court, which is why medical providers, and now some plaintiffs, usually choose Forthright over the Superior Court because they know they will obtain a final resolution much more quickly in Forthright. The efficiency with which these claims are turned around in Forthright allows the claims to be cleared from the desks of clients/carriers who are handling these claims, thereby improving efficiencies as the claims are closed out on a shorter timetable as opposed to keeping a claim open for several years while it is in litigation. Litigating the claim in

Forthright, as opposed to Superior Court, allows claim representatives to avoid having to answer to management as to why a PIP claim seeking, for example \$1,200, has been open for two years, costing the carrier much more in legal fees to defend than the actual claim may be worth.

Overall, whether to choose to continue to defend claims seeking PIP benefits in Superior Court or to file the appropriate motion to have the PIP count dismissed to Forthright is done on a case-by-case basis and, ultimately, is a business decision for the carrier. There are advantages and disadvantages to each approach, which should be discussed prior to moving forward in defense of the claim. Clearly, on its face, it appears to be much more cost effective and conducive, as far as time between filing and resolution of the claim, to dismiss the PIP count and remove it to Forthright. But, if your case has complex issues or requires obtaining a greater amount of discovery, depositions and motion practice, usually not permitted in Forthright, then the Superior Court is the place you want to be in order to have the ammunition you need to properly defend the claim.

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