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Workers' Compensation Carrier's Right to Subrogation Exists Despite Verbal Threshold Defense

In a significant and somewhat surprising Decision, a divided New Jersey Supreme Court Decision upheld the right of the workers' compensation carrier to seek subrogation reimbursement against the third-party despite the fact that the injured worker did not have a valid third party claim due to the verbal threshold (limitation-on-lawsuit option) permitted by the Auto Insurance Cost Reduction Act (AICRA). In the Decision of New Jersey Transit Corp. v. Sanchez, A-68-18 (NJ May 12, 2020), the plaintiff, New Jersey Transit (NJT), sought to recover workers' compensation benefits paid to its employee, David Mercogliano. Mercogliano sustained injuries resulting in an award of over \$30,000.00 in benefits. Mercogliano never sought or received PIP benefits under his personal policy. He also never sued the negligent driver, Sanchez, because he could not meet any exceptions under the limitation on lawsuit option (the old "verbal threshold.")

Despite the injured worker's inability to recover third party proceeds, NJT filed a Complaint against Sanchez to recoup the benefits they paid pursuant to NJSA 34:15-40. Section F of that statute allows an employer to seek reimbursement and pursue subrogation rights after one year from the loss if the injured worker does not pursue those rights.

Although the Trial Court granted summary judgment in favor of the defendants, the Appellate Division reversed agreeing with NJT that the benefits they provided related only to economic loss. It concluded that the subrogation action had no bearing on the limitation-on-lawsuit threshold imposed by the Automobile Act. Instead, the Appellate Division found that the employer could pursue the economic loss covered by the workers' compensation benefits.

Interestingly, the New Jersey Supreme Court was equally divided, and when that occurs, the Lower Court Decision is upheld. Accordingly, it is the Appellate Level Decision that is now the law. In a concurring opinion at the Supreme Court level, Justice Patterson concluded that the subrogation action limited to seeking reimbursement for economic loss did not contravene AICRA's provisions or undermine its goals.

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Comment: This is a significant Decision. The majority of New Jersey drivers opt for the limitation-on-lawsuit option in their policy since that lowers car insurance premiums. When this occurs, it was previously thought that the workers' compensation carrier/employer had to "stand in the shoes" of the injured worker and could not pursue subrogation if the injured worker could not continue the third party claim. This is no longer the case. Even if the injured worker cannot meet the verbal threshold, this does not prevent the workers' compensation carrier from seeking reimbursement of its economic loss against the negligent third party.

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