

To: Commission
From: Laura C. Tharney
Re: Request from Member of Public to Change N.J.S. 39:6A-3.3 “special automobile insurance policy”
Date: January 6, 2014

M E M O R A N D U M

I received a copy of a request from a member of the public to change the provisions of N.J.S. 39:6A-3.3, enacted in 2003. The letter requesting the change to the law was sent to the Commissioner of the Department of Banking and Insurance, three members of the Legislature, and to me as the Executive Director of the NJLRC.

The letter writer states that she was seriously injured in a car crash in which the driver had limited insurance and she seeks a change in the law to require additional coverage for accident victims. The writer explained that she was injured in a crash caused by a drunk driver, whose car struck two cars and a bicycle, injuring several individuals. The letter-writer’s injuries included broken vertebrae, a stroke, a loss of peripheral vision in one eye, and partial paralysis (including a limitation on the use of her hands). Since the crash that caused her injuries, this formerly self-supporting individual has required 24/7 care from nursing aides, daily home visits from a nurse, special equipment, transportation to and from therapy sessions and doctor’s appointments, and modifications to make her home accessible to her wheelchair, as she struggles to regain her “health and independence”. She requests a change in the law on the grounds that the law is improperly discriminatory and that it is not legal to permit a certain group of residents to “circumvent” a law with which others must comply.

As indicated above, the section of the law to which she directs the Commission’s attention is N.J.S. 39:6A-3.3, “Establishment of special automobile insurance policy”, enacted in 2003 “[i]n order to assist certain low income individuals in this State and encourage their greater compliance in satisfying the mandatory private passenger automobile insurance requirements”. The special insurance plan is “offered only to individuals who qualify for and are actively covered by designated government subsidized programs in the State” and the Commissioner was instructed to “limit availability to those persons eligible and enrolled in the federal Medicaid program.” N.J.S. 39:6A-3.3.

The special automobile insurance policy, also known as the “SAIP” or “Dollar-A-Day” policy, is offered as an alternative to “the mandatory coverage provided in...39:6A-3¹ and

¹ N.J.S. 39:6A-3 contains the compulsory automobile insurance coverage limits of \$15,000 for injury to or death of to one person in any one accident, \$30,000 for injury to or death of more than one person in any one accident, and \$5,000 for damage to property in any one accident.

39:6A-4²...or the alternative covered provided in...39:6A-3.1³". There are "three types of automobile insurance available" in New Jersey,

each providing a different level of coverage for medical expenses. A "standard policy" provides "personal injury protection coverage" up to \$250,000 for all "reasonable, necessary, and appropriate" treatment for bodily injuries. *N.J.S.A.* 39:6A-4. A "basic policy," which is available as "an alternative to the mandatory coverage[]" of the standard policy, affords more limited benefits. *N.J.S.A.* 39:6A-3.1. In particular, it provides "personal injury protection coverage" up to only \$15,000 for all "reasonable and necessary treatment" for bodily injuries and up to \$250,000 for specified treatments relating to certain permanent injuries. *Ibid.* Finally, the "special policy" provides only "emergency personal injury protection coverage" up to \$250,000 for emergency treatment immediately following an automobile accident and extending until the patient is discharged from acute care. *N.J.S.A.* 39:6A-3.3(b)(1). Coverage under a special policy also continues following discharge if the medical procedures or therapies qualify as continued treatment for "permanent or significant brain injury, spinal cord injury or disfigurement." *Ibid.*

Sanders v. Langemeier, 199 N.J. 366, 375-376 (2009).

N.J.S. 39:6A-3.2 provides that individuals who elect the special automobile insurance policy shall be required to do so in writing, and that the coverage selection form shall state that "election of a special automobile insurance policy will result in coverage only for emergency care" and that "election of a special automobile insurance policy...may subject the named insured to a claim or judgment for noneconomic loss which is not covered by the basic or special automobile insurance policy, and which may place his assets at risk, and in the event the named insured is sued, the insurer shall not provide legal counsel."

² N.J.S. 39:6A-4 contains the requirements for personal injury protection benefits, "for the payment of benefits without regard to negligence, liability or fault of any kind, to the named insured and members of his family residing in his household". Personal injury protection coverage includes: "medical expense benefits...for reasonable, necessary, and appropriate treatment and provision of services to persons sustaining bodily injury, in an amount not to exceed \$250,000 per person per accident", income continuation benefits, essential services benefits and death benefits subject to the statutory maximum limits.

³ N.J.S. 39:6A-3.1 contains alternate minimum coverage amounts of "for the reasonable and necessary treatment of bodily injury in an amount not to exceed \$15,000 per person per accident; except that, medical expense benefits shall be paid in an amount not to exceed \$250,000" subject to the statutory and regulatory provisions, and "[I]liability insurance coverage...for property damage sustained by any person arising out of the ownership, maintenance, operation or use of an automobile in an amount or limit of \$5,000...for damage to property in any one accident" as well as "optional liability insurance coverage...for bodily injury or death in an amount or limit of \$10,000, ...[for]... injury to, or death of, one or more persons in any one accident."

For purposes of N.J.S. 17:28-1.1 (which concerns uninsured and underinsured motorist coverage) subsection e.(2)(d) provides that an “uninsured motor vehicle” includes “an automobile covered by a special automobile insurance policy pursuant to section 45 of P.L.2003, c. 89 (C.39:6A-3.3).”⁴ As explained by the Court in *Sanders*, the special automobile insurance policy, or “Dollar-A-Day” policy, is the lowest cost policy offered in the State and,

although it provides emergency PIP, a death benefit, *N.J.S.A.* 39:6A–3.3(b)(2), and the “tort option” protection, *N.J.S.A.* 39:6A–3.3(b)(3) (citing *N.J.S.A.* 39:6A–8), it “shall not provide liability, collision, comprehensive, uninsured or underinsured motorist coverage.” *N.J.S.A.* 39:6A–3.3(c). As a result, for purposes of a liability claim by an individual involved in an accident with a driver covered by the special policy against that party's own insurer, it is considered to be an accident with an uninsured motorist, *see N.J.S.A.* 17:28–1.1(e)(2)(d), thereby triggering UM benefits. *See Shaw v. City of Jersey City*, 174 *N.J.* 567, 571–72...(2002).

Sanders v. Langemeier, 199 *N.J.* at 376.

In *Sanders*, the Court considered the case of a passenger injured in an automobile accident. Sanders did not own a car and had no automobile insurance of his own. The vehicle in which he was a passenger was insured by a “Dollar-A-Day” policy. The driver of the other car had a standard insurance policy, with PIP benefits, but her policy did not afford any coverage to Sanders. Because his non-emergency treatment was not covered under the policy of the driver of the car in which he had been riding, or the driver of the other car in the accident, Sanders concluded that he had an unsatisfied claim and sought payment from NJPLIGA (New Jersey Property-Liability Insurance Guarantee Association f/k/a UCJF (Unsatisfied Claim and Judgment Fund)). The Court determined that he was not entitled to such payment, explaining that although the UCJF was created by remedial legislation, entitled to broad construction, “it may not be expanded beyond the remedial purposes the Legislature clearly envisioned.” *Id.* at 379. The *Sanders* Court also explained that it had

⁴ In New Jersey, every insurer must provide a mandatory floor of UM coverage in the amount of \$15,000/\$30,000. *Taylor v. Nat'l Union Fire Ins. Co.*, 289 *N.J.Super.* 593, 601...(App.Div.), *certif. denied*, 145 *N.J.* 376...(1996). Unlike UM coverage, however, there is no mandatory floor for UIM coverage. *Ibid.* An insurer need only offer UIM coverage as an option to the named insured. *Allgor v. Travelers Ins. Co.*, 280 *N.J.Super.* 254, 259...(App.Div.1995). *N.J.S.A.* 17:281.1b provides “a statutory ceiling for both UM and UIM coverage, namely, an amount both not greater than the liability coverage and up to at least \$250,000 per person and \$500,000 per accident.” *Taylor, supra*, 289 *N.J.Super.* at 601...In other words, “an insured cannot purchase more UIM coverage than the liability coverage that has been purchased.” *Universal Underwriters Ins. Co. v. New Jersey Mfrs. Ins. Co.*, 299 *N.J.Super.* 307, 318...(App.Div.), *certif. denied*, 151 *N.J.* 73...(1997).

Selective Ins. Co. of Am. v. Hojnoski, 317 *N.J. Super.* 331, 336-37 (App. Div. 1998).

observed that “[t]he purpose of the UCJF is to ‘provide a measure of relief to persons who sustain losses inflicted by financially irresponsible or unknown owners and operators of motor vehicles, where such persons would otherwise be remediless.’ ” *Jimenez v. Baglieri*, 152 N.J. 337, 342...(1998) (quoting *Dixon v. Gassert*, 26 N.J. 1, 5...(1958)); see *Giacobbe v. Gassert*, 29 N.J. 421, 425...(1959). At the same time, we have recognized that

the [UCJF] was never intended to make every claimant whole or to compensate all accident victims; rather, it was intended to “offer some measure of relief to those who come within the class intended to be protected, to prevent a claimant from being forced to absorb the entire economic loss caused by the accident.” [citation omitted]

Id. The objective of the Legislature in creating the Fund was “to protect the public from a noninsured, financially irresponsible motorist, not one who is insufficiently insured.” *Gorton v. Reliance Ins. Co.*, 77 N.J. 563, 572...(1978).” *Id.* The “UCJF is a remedy of last resort, rather than one that will serve as a supplement to other remedies. See *Caballero v. Martinez*, 186 N.J. 548, 555...(2006); *Shaw, supra*, 174 N.J. at 572...” *Id.*

The *Sanders* Court found “no basis on which to conclude that the Legislature intended the UCJF to create a remedy for one who is covered under a policy that affords PIP coverage that is limited or that is modest; rather, the UCJF was designed to provide benefits for one who would otherwise be left with no remedy after an automobile accident.” *Id.* at 380. The *Sanders* Court also explained that the Plaintiff’s claim that

he should be considered remediless because the Legislature designated a vehicle covered by a special policy as the equivalent of an uninsured motorist for UM purposes, see N.J.S.A. 17:28–1.1(e)(2)(d), is similarly unavailing because it confuses the purposes of PIP with the different aims of liability coverage. That line of reasoning fails to appreciate that although the Legislature has chosen to create policies that will ensure payment for medical care through PIP regardless of fault, it has also elected to authorize an individual to seek UM compensation through his or her own automobile insurer. In that context, because the special policy provides no liability coverage, it must be interpreted as the equivalent of an uninsured motorist for liability purposes and for UM coverage.

Nothing in those legislative choices suggests an intention to create an additional avenue of relief for an individual covered by a special policy to seek non-emergency care through the UCJF. The Legislature’s clear expression of its intent through its statutory pronouncements compels the conclusion that plaintiff received the full benefits of the special policy and is entitled to nothing more through the UCJF.

Id.

Since its enactment, the courts in this State have had the opportunity to consider the “Dollar-A-Day” policies in a small number of cases. Preliminary research conducted by Staff did not reveal any determination by a New Jersey court that the policies were constitutionally infirm, discriminatory or that they otherwise ran afoul of New Jersey law.

To the contrary, the courts discussed those policies as shown above in the *Sanders* case, and in *Repossession Specialists v. Geico Ins. Co.*, 423 N.J. Super. 518, 525 (App. Div. 2012), in which the Court noted that “[e]vident in numerous amendments to our compulsory automobile insurance laws is an intent to control cost and enhance the affordability of compulsory personal automobile insurance in New Jersey.” The Court in *Repossession Specialists* specifically made reference to the need, in that case, to consider the “*Assembly Banking and Insurance Committee, Statement to S. 63*, enacted as *L. 2003, c. 89* (May 5, 2003) (discussing “comprehensive set of solutions to the automobile insurance availability and affordability challenges facing insurers, consumers, and regulators”), and to avoid a contract interpretation that would undermine those affordability goals.” *Id.*

A preliminary review of the statutory provision in issue suggests that, although it may lead to results that appear unsatisfying or unjust, it was the result of a deliberate action and a policy determination by a Legislature faced with the challenge of balancing legitimate and competing goals. Over the last decade, this determination has not been altered by the Legislature or called into question by the courts. Since policy determinations of the sort raised by the concerned citizen who brought this matter to the attention of the Commission are the province of the Legislature, and not the Commission, and since this matter has already been brought to the attention of members of the Legislature by way of the same letter received by the NJLRC, it does not appear that there is a role for the Commission to play at this time.