MEMORANDUM

TO: Assembly Committee on Financial Institutions
FROM: Alida Kass, President and Chief Counsel
SUBJECT: Assembly Bill 4293
DATE: January 9, 2020

We appreciate the sponsors' concern with encouraging fair and efficient behavior from both carriers and claimants when settling cases. But the existing Offer of Judgment Rule exists to address precisely such concerns.

In fact, the New Jersey Supreme Court has repeatedly considered how incentives operate on policy holders and carriers. And in 2015, focusing specifically on the UM/UIM claims that would be addressed by this proposed legislation, it concluded that the existing Offer of Judgment mechanism, with adopted amendments, strikes the appropriate balance – deterring delay and unnecessary litigation, while protecting carriers' ability to investigate questionable claims and hold policies to their terms.

Recent Supreme Court Evaluation

In context of *Wadeer v. New Jersey Manufacturers Insurance Company* (2015), the Court considered the specific scenario raised by advocates for this legislation. The suggestion was that carriers have nothing to lose in challenging such claims, since their liability is capped at the policy limit, while policy holders are unlikely to litigate when attorney's fees would exceed the incremental benefit.

The Court considered whether the Offer of Judgment Rule becomes ineffective as claims approach the policy limit. And it further directed the Civil Practice Committee to consider whether the Rule worked well as-is, and if not, whether the best solution was a modest tweak to the Rule or more significant changes.

How the Offer of Judgment Rule Works

The Offer of Judgment Rule gives policy holders a powerful tool to secure prompt and fair payment on outstanding claims, and ensures they will be made whole if carriers engage in unfair settlement practices. A policy holder who makes a settlement offer and is vindicated by a verdict in excess of 120% of the offer is entitled, not only to *damages but also to attorney fees and interest* from the time the offer was made.

Thanks to recent amendments adopted at the recommendation of the NJ Civil Practice Committee, the Rule continues to operate effectively even for claims at the policy limit. Even excess verdicts

now trigger the Offer of Judgment awards of fees and interest – strengthening incentives for settlement and ensuring policy holders are made whole if forced to litigate for payment of claims.

Rejection of More Extreme Changes

The Court and Civil Practice Committee never contemplated a proposal as aggressive as the first and third-party treble damages provided in A4293. However, the Court did direct the Civil Practice Committee consider whether to *automatically* authorize fee awards to an insured who brings direct suit against its insurer to enforce any direct coverage. This alternative was *rejected*. The Committee expressed concern that the change *would cause premiums to rise*. It concluded that a modified Offer of Judgment Rule struck a better balance, and the New Supreme Court concurred in that assessment.

The New Jersey Supreme Court recognized the balance is critical. Shifting incentives too far towards deterring carriers from policing the terms of insurance contracts is not a benefit to consumers. Policies are priced according to their terms, not just as drafted, but as they are likely to be enforced. If policy limits cannot be enforced in a predictable fashion, then affordable policies with set policy limits will not be available.

We respectfully oppose A4293.

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