LIBERTY INSURANCE CORP. and LM INSURANCE CORP., Plaintiffs-Cross-Petitioners, vs. TECHDAN, L.L.C., EXTERIOR ERECTING SERVICES, INC., DANIEL FISHER, ROBERT DUNLAP, and CAROL JUNZ, Defendants-Petitioners.	SUPREME COURT OF NEW JERSEY Supreme Court Docket No. 086219 Appellate Division Docket Nos. A-3510-18 A-3524-18

BRIEF OF AMICUS CURIAE THE COALITION AGAINST INSURANCE FRAUD

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PRELIMINARY STATEMENT

The Coalition Against Insurance Fraud ("Coalition") respectfully submits this brief as amicus curiae in support of the cross-petition for certification of Plaintiffs Liberty Insurance Corp. and LM Insurance Group ("Liberty").

The Appellate Division vacated a multi-million dollar judgment in Liberty's favor arising out of a jury verdict finding the Defendants liable for, *inter alia*, violating the New Jersey Insurance Fraud Prevention Act, N.J.S.A. §17:33A-1, et. seq. ("IFPA"), common law fraud, workers' compensation fraud, conspiracy and aiding and abetting. The Appellate Division found the verdict flawed because the jury was not instructed to apportion fault under the Comparative Negligence Act ("CNA"). Amicus curiae Coalition raises a question of first impression: whether CNA apportionment or joint and several liability should apply to IFPA damages.

The question presented is both one of general public importance that has not been, but should be, settled by this Court and is in the interests of justice, since the decision below contradicts explicit legislative intent to: eliminate the occurrence of insurance fraud, require the restitution of fraudulently obtained insurance benefits and reduce insurance premiums. See R. 2:12-4 and N.J.S.A. §17:33A-2.

While it was undisputed that Liberty shared no fault, and no party raised CNA apportionment until after judgment was entered, the Appellate Division still found the trial court erred by not apportioning all parties' responsibility under the CNA. Requiring CNA apportionment is inconsistent with: the IFPA's plain language; Legislative intent; and common law imposition of joint and several liability for damages caused by concerted action. CNA apportionment would also hamper fraud fighting efforts and reduce the likelihood of full restitution to fraud victims, causing increased insurance costs.

INTEREST OF AMICUS CURIAE

This Court has repeatedly recognized that insurance fraud is a "problem of massive proportions" resulting in "substantial and unnecessary costs to the general public in the form of increased rates." Merin v. Maglaki, 126 N.J. 430, 436 (1992). According to the FBI, the total cost of insurance fraud (non-health insurance) is estimated to be more than $40 billion per year.[1] The New Jersey Office of the Insurance Fraud Prosecutor estimates that insurance fraud costs each New Jersey family over $1300.00 every year.[2]

[1] https://www.fbi.gov/stats-services/publications/insurance-fraud

[2] https://www.youtube.com/watch?v=zlpRfryV39c

Amicus curiae Coalition is the nation's only alliance uniting all groups against insurance fraud. Formed in 1993, the Coalition comprises 244 member organizations consisting of consumer advocates, insurers, regulators, legislators, state and local law enforcement officials, and other interested parties. The Coalition's goals are to: (1) combat all forms of insurance fraud, (2) reduce costs for consumers, and (3) promote fairness and integrity in the insurance system. To this end, the Coalition has played an active role in advocating for laws, regulations, and policies that help detect, prevent, deter, and prosecute insurance fraud.

The question before this Court invokes the Coalition's core interests of combatting insurance fraud, reducing costs for consumers, and promoting integrity in the insurance system. Because the Appellate Division's erroneous application of the CNA would substantially impede restitution and damages under the IFPA, thereby gutting a powerful tool for combatting all forms of insurance fraud, the Coalition's interests in the outcome of this case are substantial. Any limitation on the ability to seek and obtain insurance fraud restitution would have a chilling effect, inevitably passed on to consumers and policyholders, who would see an increase in premiums, undermining one of the IFPA's primary goals.

For these reasons, amicus curiae Coalition respectfully requests that the Court grant Plaintiff-Cross-Petitioner's Petition for Certification and reverse the Appellate Division's decision erroneously founded upon the Comparative Negligence Act.

LEGAL ARGUMENTS

POINT I: THE APPELLATE DIVISION ERRED BY REQUIRING CNA APPORTIONMENT, RATHER THAN APPLYING JOINT AND SEVERAL LIABILITY, TO DAMAGES UNDER THE IFPA.

A. Imposing Joint and Several Liability to IFPA Damages is Consistent with Legislative Intent of the IFPA and CNA.

Joint and several liability fulfills the IFPA's purpose[3] expressed in N.J.S.A. §17:33A-2:

> The purpose of this act is to confront aggressively the problem of insurance fraud in New Jersey by facilitating the detection of insurance fraud, eliminating the occurrence of such fraud through the development of fraud prevention programs, requiring the restitution of fraudulently obtained insurance benefits, and reducing the amount of premium dollars used to pay fraudulent claims.

This Court has held that "we must construe the [IFPA]'s provisions liberally to accomplish the Legislature's broad remedial goals." Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 173-174 (2006). New Jersey courts have recognized the public policy and purpose behind enacting the IFPA to combat fraud.

[3] "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. 466, 492 (2005)(citation omitted).

See Allstate New Jersey Ins. Co. v. Cherry Hill Pain and Rehab Institute, 389 N.J. Super. 130, 141 (App. Div. 2006)("[f]irst and foremost, we note '[t]hat there is a strong public policy in this State to root out insurance fraud'"). In pursuit of that goal, the "IFPA interdicts a broad range of fraudulent conduct." Land, 186 N.J. at 172; see also, State v. Sailor, 355 N.J. Super. 315, 319 (App. Div. 2001)("the IFPA is a comprehensive statute designed to help remedy high insurance premiums"). Accordingly, applying joint and several liability is consistent with the Legislature's intent when enacting the IFPA.

By contrast, imposing CNA apportionment is inconsistent with legislative intent underlying the CNA's 1995 Amendments. According to the Amendment's Sponsor statement, the Legislature limited joint tortfeasors' liability to address concerns about both the rising cost of insurance and increasing litigation: "[t]his Bill is intended to reduce the cost of general liability insurance for everyone by eliminating the so called 'deep pocket' sought by many defense (sic) attorneys when they file lawsuits with multiple defendants…" Erny v. Estate of Merola, 171 N.J. 86, 105-6 (2002). When comparing joint and several liability with CNA apportionment, this Court found that joint and several liability benefits victims and makes it much more likely that a plaintiff will recover fully. Id.

Therefore, imposing joint and several liability rather than CNA apportionment to IFPA damages is consistent with both the IFPA and CNA's legislative intent to reduce premiums. Additionally, the IFPA's plain language is consistent with case law imposing joint and several liability for concerted activity.

B. The IFPA's Plain Language Imposing Liability for Concerted Acts of Assisting, Conspiring or Urging is Consistent with Applying Joint and Several Liability for Damages.

Relying upon this Court's application of the CNA to the Consumer Fraud Act ("CFA") in Gennari v. Weichert, 148 N.J. 582, 608-09 (2007) and its observation that "the closest statutory analogue to IFPA in New Jersey is the [CFA]" in Land, 186 N.J. at 176, the Appellate Division reversed, holding that:

> Thus, the trial judge should have applied the CNA, and required the jury to determine "the extent, in the form of percentage, of each party's negligence or fault." N.J.S.A. §2A:15-5.2(a)(2). The claims at issue included fraud, breach of contract, and conspiracy. The determination of fault under the CNA encompasses those intentional torts. A021.[4]

The Appellate Division erred because in holding that the CNA applied to intentional conduct, including the Defendants' IFPA violations, it overlooked settled law that concerted acts causing harm to another result in joint and several liability for damages.

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[4] "A0" refers to Liberty's Appendix.

The IFPA specifically imposes civil liability for three forms of concerted action: "[a] person or practitioner violates this act if he knowingly assists, conspires with, or urges any person or practitioner to violate any of the provisions of this act." N.J.S.A. §17:33A-4(b).[5] New Jersey Courts have consistently held that these three forms of concerted activity result in joint and several liability for the plaintiffs' damages.

This Court has recognized that plaintiffs may recover damages jointly and severally under certain circumstances:

> New Jersey identifies comparative negligence as a liability doctrine [rather than a damages doctrine]. […] On the other hand, joint and several liability has been regarded generally as a damages provision. [Prosser and Keeton on Torts], §67 at 475-77. The law of joint and several liability addresses plaintiff's recovery of damages, and allows plaintiff under certain circumstances to recover the entire amount of damages from any one of several defendants, subject to that defendant's right to seek contribution. Id. §67 at 475 ("Most jurisdictions which have adopted comparative negligence have retained the common law rule of joint and several liability, by which a plaintiff is entitled to recover his judgment in whole or in part from any jointly liable defendant.").

Erny, 171 N.J. at 97-98. Here, the Appellate Division failed to analyze the Defendants' liability under traditional concepts of concerted action.

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[5] See also N.J.S.A. §17:33A-4(c) similarly imposing concerted act liability: "[a] person or practitioner violates this act if, due to the assistance, conspiracy or urging of any person or practitioner, he knowingly benefits, directly or indirectly, from the proceeds derived from a violation of this act."

"Civil conspirators are jointly liable for the underlying wrong and resulting damages". Banco Popular v. Gandi, 184 N.J. 161, 178 (2005). "[W]here as here the wrongdoers have conspired together to reap a profit out of a fraudulent transaction they are jointly and severally liable." Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 499-500 (1952).

Courts have relied upon Restatement of Torts 2d, §876 (1979), entitled "Persons Acting in Concert", to impose joint, or concert liability, for damages in different contexts. In Tarr v. Ciasulli, 181 N.J. 70, 84 (2004), a case brought under the Law Against Discrimination, a socially beneficial law like the IFPA, this Court found that Restat. §876(b) imposes concert liability on an individual if he or she "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."

Restatement §876 mirrors IFPA §4(b) and (c)'s three bases of concerted liability – assisting, conspiring or urging:

> Concerted action may be either by agreement (conspiracy) or substantial assistance (aiding and abetting). […] These two bases of liability correspond generally to the first two subsections in the Restatement (Second) of Torts, §876.

Podias v. Maires, 394 N.J. Super. 338, 353-54 (App. Div.), cert. den'd, 192 N.J. 482 (2007)(citations omitted). Podias further held that "urging" or "encouraging" another to commit a wrong creates joint liability. Id. at 353-54.

The Comments to Restat. Torts 2d, §876 define "concert liability" as being joint and several under each of its parts. See Restat.2d of Torts, §876, Comments on Clauses (a), (b) and (c). See also, National Conference of Commissioners on Uniform State Laws, Preface to "Uniform Apportionment of Tort Responsibility Act (2003)("As a general rule, where defendants have acted in concert, joint and several liability has been retained.").

Courts that found concert liability based on Restat.2d §876 imposed joint and several liability for damages. In Franklin Medical Assoc. v. Newark Pub. Schools, 362 N.J. Super 494, 510 (App. Div. 2003), physicians who bribed the school district's workers compensation coordinator to steer injured employees and to expedite payments to their medical practices (conduct which clearly could fall within the IFPA) "aided and abetted" the coordinator's breach of his fiduciary duty to the district and were "jointly and severally liable" to the district for damages equal to the amount of the bribes paid. The court in Franklin Medical relied upon Continental Management, Inc. v. United States, 527 F.2d 613, 619, n.4 (1975), which held that "the liability of a joint tortfeasor [for commercial bribery] is joint and several"; and Jaclyn, Inc. v. Edison Bros. Stores, Inc., 170 N.J. Super. 334, 368-73 (Law Div. 1979), which held

that "a third party who knowingly aids and abets the agent of another [by paying a bribe] is [jointly and severally] liable to the principal."[6]

Even though they may overlap, intentional acts and concerted acts are different, as this Court recognized in Blazovic v. Andrich, 124 N.J. 90 (1991). In Blazovic, this Court held that it was "well settled that the [CNA] was not limited to negligence actions" and that its "principles have also been applied to conduct characterized as wanton and willful." 124 N.J. at 98-99. While this Court mainly focused on the distinction between negligent and intentional conduct under the CNA, it also addressed the concerted nature of the assailants' acts, stating "[w]e also affirm that court's holding that the intentional tortfeasors, who acted together, and whose wrongful conduct was distinct from that of Plantation, should initially be treated as a single party for apportionment purposes … That procedure will prevent a jury from assigning a disproportionate

[6] Joint and several liability is especially appropriate because concerted activity is an aggravating factor in and of itself. Concerted acts "make possible the attainment of ends more complex than those which one criminal could accomplish", "increases the likelihood that the criminal object will be successfully attained" and "makes possible the attainment of ends more complex than those which one criminal could accomplish." State v. Roldan, 314 N.J. Super. 173, 182-83 (App. Div. 1998)(citations omitted). These concerns are no less compelling in civil matters, especially in the context of insurance fraud which the Legislature has recognized as a serious public policy issue.

percentage of fault to the intentional tortfeasors based solely on their number." Id. at 108-09.

Thus, this Court in Blazovic recognized that concerted action must be treated differently than intentional conduct, primarily motivated by the dissent below that apportioning fault among concerted actors "diluted the victim's recovery by the number of assailants". 124 N.J. at 96. Additional problems arise when determining fault in the context of a unitary injury.

The Court below overlooked the fact that concerted violations under IFPA §4(b) and (c) will almost always result in indivisible harm to the plaintiff. Just as it may be impossible to determine the specific bodily injuries caused by each of the five assailants in Blazovic, it will be impossible to apportion how each defendant in a concerted IFPA case contributed to the making of false or misleading statements to an insurer, or concealed an event affecting any person's right to payment, all as it relates to apportioning responsibility for damages, consisting of undeserved payment of claims or premium reductions for one specific actor's financial benefit.

By way of example, in this case, each defendant made false statements, resulting in unlawful premium reductions: Fisher and Dunlap misrepresented their ownership of Techdan and Exterior; Junz, Fisher and Dunlap misrepresented that Techdan and Exterior

had formed a joint venture; and Fisher falsely stated that no cash was transferred between Techdan and Exterior. A012-13. How could a factfinder reasonably decide who should be held more responsible, particularly when factoring in the responsibility of the corporate entities and especially when "the statutory language of the IFPA does not require proof of reliance on a false statement or resultant damages"? Id.; Land, 186 N.J. at 175.

Moreover, in a civil conspiracy, a plaintiff "need not prove that each participant in a [civil] conspiracy knew the 'exact limits of the illegal plan or the identity of all participants.'" Morgan v. Union County, 268 N.J. Super. 337, 365-66 (App. Div. 1993), cert. den'd 135 N.J. 468 (1994); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 82-83 (1954)(civil conspirators "who are not parties to the fraudulent plan when it is concocted but who join in promoting its accomplishment are equally liable for the resulting damage"). Under both criminal and civil conspiracies, "the acts and declarations of a conspirator in furtherance of the conspiracy are binding on all parties to the conspiracy". Morgan, 268 N.J. Super. at 366. How can a conspirator's liability be fairly apportioned when the conspirator need not know the plan's exact limits or the identity of their co-conspirators, or when a late-

joining conspirator is equally liable with pre-existing conspirators for resulting damages? What is the point of apportionment when one conspirator's acts and declarations are binding on all other co-conspirators? The decision below upends almost seventy years of civil conspiracy jurisprudence.

The IFPA's plain meaning tangibly reveals that the Legislature intended joint and several liability for concerted IFPA damages. Uniquely, IFPA §4(c) provides that "a person or practitioner violates this act if, due to the assistance, conspiracy or urging of any person or practitioner, he knowingly benefits, directly or indirectly, from the proceeds derived from a violation of this act." Thus, the Legislature clearly intended to punish those who only knowingly profit, even if they never directly submit a false statement or claim.

For example, a jury will struggle to apportion liability in an IFPA action against a non-licensee clinic owner who conspires with six professional and clerical staff to unlawfully bill for services. To assure that all co-conspirators are liable and express their outrage at the lay owner who knowingly profited, the jury may assign 10% liability to each of the six lower-level conspirators and 40% liability to the absentee owner. Thus, the conspiracy's ostensible leader enjoys a 60% discount, which the Legislature could never have intended. Liability dilution is

exacerbated with each co-conspirator. The legislative goal of reducing insurance premiums is further frustrated when lower level conspirators are judgment proof.

Both the Restatement and the drafters of the Uniform Apportionment of Tort Responsibility Act recognized this problem. Restat. Torts 2d, §875 (1979), provides that "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm."

Similarly, the drafters noted in the Uniform Act's preface:

> It did not take long for the courts to recognize the injustice of a common law rule that required a claimant to prove which defendant caused what damages in cases where due to the nature of the injuries, it was not practicable to do so. As a result of this recognition, multiple tortfeasors were subjected to the rule of joint and several liability, not only in concerted action and common duty cases, but in cases where the conduct of multiple defendants resulted in indivisible harm.

National Conference of Commissioners on Uniform State Laws, Uniform Apportionment of Tort Responsibility Act (2003).[7]

Since concerted IFPA liability inevitably results in an indivisible injury, the CNA should not be applied. CNA

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[7] See also Reichert v. Vegholm, 366 N.J. Super 209, 221 (App. Div. 2004)("A plaintiff who suffers a unitary harm at the hands of multiple defendants, has been relieved of the burden of proving apportionment because joint liability was "the usual concomitant of concurrent negligence…Such plaintiffs may collect damages from the defendants jointly and severally unless the defendants can apportion the harm.")(citations omitted).

apportionment in IFPA lawsuits is contrary to legislative intent, contradicts concerted conduct jurisprudence, and poses practical problems in addition to those previously mentioned.

POINT II: Applying the CNA to IFPA Damages Places an Unreasonable Burden on Insurance Companies, Will Have a Chilling Effect on IFPA Lawsuits and Poses Practical Problems.

The Appellate Division concluded below that:

> The court should have: included plaintiffs on the jury verdict sheet; told the jury to calculate the total amount of damages that would be recoverable by the injured parties regardless of any consideration of fault pursuant to N.J.S.A. 2A:15-5.2(a)(1); and then allowed the jury to apportion fault among all of the parties, including plaintiffs, in the form of percentages pursuant to N.J.S.A. 2A:15-5.2(a)(2). Afterwards, the court should have molded the verdict to correspond with each party's properly apportioned fault. N.J.S.A. 2A:15-5.2; see also Ryan, 121 N.J. at 291-93 (explaining how to mold a verdict). A022-23.

Addressing the inherent problem arising from Liberty's lack of any fault, the court further concluded:

> We have long since recognized that fault must be allocated among defendants even when a plaintiff is free from fault, either on the facts or as a matter of law. Lee's Hawaiian Islanders, Inc. v. Safety First Prods., Inc., 195 N.J. Super. 493, 505 (App. Div. 1984). When a plaintiff is included on the verdict sheet, the jury may still apportion zero fault to them based upon the circumstances of the case. A023.

The Appellate Division erred by concluding that Lee's Hawaiian created a *per se* rule that "fault must be allocated among defendants even when a plaintiff is free from fault, either on the facts, or as a matter of law." In Lee's Hawaiian,

the plaintiff restaurant, which was without fault, suffered damage caused by defects in two separate products: a deep fryer which caused a grease fire and a fire protection system that failed to contain that fire. 195 N.J. Super. at 497. Lee's Hawaiian merely held that:

> [I]rrespective of plaintiff's negligence, a joint tortfeasor's right of contribution, whether asserted by cross-claim or third-party complaint, is to be determined by a percentage allocation pursuant to the [CNA] rather than by pro rata contribution pursuant to the Joint Tortfeasors Contribution Law.

Id. at 506. There is no suggestion in Lee's Hawaiian that it established a broad rule that the CNA must be applied even when a plaintiff is "free from fault as a matter of law".

The Appellate Division overlooked several practical problems caused by its decision. The IFPA authorizes two separate causes of action to enforce the statutory scheme: a State action brought by the Commissioner of the Department of Banking and Insurance, N.J.S.A. §17:33A-5; and a private civil action brought by insurers "damaged as the result of" any IFPA violation. N.J.S.A. §17:33A-7.

If fault is to be allocated to the plaintiff in IFPA actions, would the Commissioner, simultaneously pursuing civil penalties, be required to share in such apportionment? Would a jury be asked to apportion responsibility to plaintiffs in a case like Allstate v. Lajara, 222 N.J. 129 (2015), which was

jointly pursued by six Allstate/Encompass insurance companies and the Commissioner? If so, how? Would the verdict sheet separately list the Commissioner and insurance company plaintiffs? If not, and seen as one party, how would they be identified? Since insurance companies and the Commissioner are joint victims, why should a jury even consider their responsibility? What happens if a jury apportions 51% or more responsibility to the plaintiff, completely barring recovery?[8] All of these scenarios contradict the Legislature's intent as it could never have intended for the CNA to reduce damages or bar an insurance company or the Commissioner from pursuing an IFPA lawsuit.

The decision below makes it easier for an IFPA defendant to reduce responsibility than a negligence defendant ever could. The Appellate Division below made it clear (A022-23) that an IFPA defendant is not required to allege or prove that a plaintiff insurance company is responsible, whereas a negligence defendant must prove plaintiff's negligence and proximate cause, before a jury considers apportioning responsibility to a plaintiff. See Model Jury Charges (Civil), 7.32. All of the above are important questions/problems left unanswered and not

[8] See Model Jury Charges (Civil), 7.31, "[i]n order for the plaintiff to recover against any defendant, plaintiff's percentage of fault must be 50% or less."

considered by the Appellate Division's deeply flawed decision, clearly mitigating against CNA apportionment in IFPA cases.

To the extent that it calls for a jury to evaluate an IFPA plaintiff's fault, the decision below is contrary to this Court's previous statement that "[o]ne who engages in fraud [. . .] may not urge that one's victim should have been more circumspect or astute." Jewish Ctr. of Sussex v. Whale, 86 N.J. 619, 626 n.1 (1981). It is also contrary to the court's finding in Varano, Damian & Finkel, L.L.C. v. Allstate Ins. Co., 366 N.J. Super. 1 (App. Div. 2004) that equitable doctrines, such as in that case estoppel, "cannot be interposed to protect an active wrongdoer." Simply put, there is nothing in the IFPA's plain language or legislative intent, that warrants apportioning responsibility to an insurance carrier or the Commissioner.

CNA apportionment protects the active wrongdoer and unfairly shifts the risk to the innocent victim. A jury assigning a percentage of liability to all defendants limits the possibility of obtaining full recovery only to a single defendant found 60% or more responsible. Under the CNA, a jury can never apportion 60% (or more) responsibility to more than one defendant regardless of how many wrongdoers are found liable, meaning that only one defendant is at risk for the full

amount of damages.[9] By contrast joint and several liability allows the plaintiff to collect the full amount of damages awarded from all liable defendants in any combination, thereby placing the risk of insolvency on the defendants. See Schettino v. Roizman Development Inc., 158 N.J. 476, 484 (1999)(explaining that "'[j]oint and several liability was designed to obviate a plaintiff's burden of proving which share of the injury each of several defendants was responsible for; the burden of proof is removed from the innocent plaintiff and placed upon the wrongdoers to determine among themselves.'")(quoting Lee & Lindahl, Modern Tort Law: Liability & Litigation §19.02 at 652 (Rev. ed. 1994). See also, Restat. Torts 3d, Apportionment of Liability, §10 (2000)("The rationale for employing joint and several liability and thereby imposing the risk of insolvency on defendants - that as between innocent plaintiffs and culpable defendants the latter should bear this risk - does not coexist comfortably with comparative responsibility.").

[9] The dilution issue is exacerbated in cases involving far more defendants than this case, as for example Allstate v. Lajara, supra, Allstate v. Schick, 328 N.J. Super. 611 (Law Div. 1999) and Allstate v. Northfield, 228 N.J. 596 (2017). If CNA apportionment occurs in concerted action cases, each defendant will inevitably be responsible for a smaller and smaller amount of damages as the number of defendants increases. This will force IFPA victims to spend substantially more money to collect a smaller amount of money in post-judgment collection efforts, all contrary to the Legislature's intent.

Joint and several liability also makes sense when considering the IFPA's remedies. The IFPA authorizes an insurance company to pursue compensatory and treble damages against a violator. N.J.S.A. §17:33A-7(a), (b). Unique to the IFPA, "compensatory damages" include not only actual damages, but also "reasonable investigation expenses, costs of suit and attorneys' fees"; and those compensatory damages, including attorneys' fees and costs, are trebled "if the court determines that the defendant has engaged in a pattern of violating" the Act. Id.; Lajara, 222 N.J. at 148 ("[n]otably, attorneys' fees, investigatory costs, and costs of suit are, by definition, compensatory damages under the IFPA, and therefore a successful lawsuit initiated by an insurance company will necessarily involve an award of damages.").[10]

Therefore, in any IFPA case where a jury finds at least one defendant liable, the jury will decide compensatory damages, such as, for example, reimbursement; and the trial judge will decide compensatory damages of attorney's fees and costs. As

[10] See also State v. Goodwin, 224 N.J. 102, 114 (2016)(when "the carrier's investigation reveals the fraud before money passed hands ... investigations spurred by false statements necessarily result in the expenditure of a carrier's resources that eventually lead to increased insurance costs...") and Liberty Mut. Ins. Co. v. Land, 2009 N.J. Super. Unpub. LEXIS 955, *13 (A044)("trebling of counsel fees may serve an important deterrent effect, especially in cases where the fraud may be blatant but the insurer's out-of-pocket non legal expenses are small.").

stated in Cogar v. Monmouth Toyota, 331 N.J. Super. 197, 211 (App. Div. 2000), counsel fees should not be apportioned according to a percentage of liability as that would "dilute the significant policy underpinnings of the fee provision of [fee shifting] legislation." Therefore, the trial judge's determination of compensatory damages of attorney's fees and costs would necessarily be joint and several, thereby nullifying CNA apportionment. Applying joint and several liability to IFPA damages will result in consistency of application regardless of who determines compensatory damages.

CONCLUSION

In this case, the Plaintiffs' cross-petition for certification should be granted and the Appellate Division's flawed application of the CNA to an IFPA lawsuit should be reversed.

Respectfully submitted,

By:_____
Michael A. Malia, Esquire

Respectfully submitted,

By:_____
Thomas Hall, Esquire