APRIL 15, 1955.

HON. ARCHIBALD S. ALEXANDER,
State Treasurer,
State House,
Trenton, New Jersey.

FORMAL OPINION—1955. No. 16.

DEAR MR. ALEXANDER:

This is in answer to your communication of March 9, 1955.

Your first question concerns whether or not any payments received or receivable by a plaintiff or his personal representative for temporary disability benefits, or benefits under an accident and health policy, hospitalization policy, or similar insurance policies shall be deducted from the amount due upon the judgment for payment of which claim is made upon the Unsatisfied Claim and Judgment Fund.

Under the common law, in an action for personal injuries, damages are not mitigated by reason of insurance paid to a plaintiff under a contract to which the tort-feasor was a stranger. This rule or law was adopted in New Jersey as early as 1873 when the old Supreme Court stated in *Weber v. Morris and Essex Railroad Co.,* 36 N. J. L. 213 (Supreme Ct. 1873):

> ". . . A person committing a tort cannot set up in mitigation of damages that somebody else, with whom he had no connection, has either in whole or in part indemnified the party injured."

This rule of law has been cited with approval in *Cornish v. North Jersey Street Railway Co.,* 73 N. J. L. 273 (Supreme Ct. 1906; *Skillen v. Eagle Motor Co.,* 107 N. J. L. 211 (Supreme Ct. 1930); *Rusk v. Jeffries,* 110 N. J. L. 307 (Err. & App. 1932).

However, this rule does not apply to the Unsatisfied Claim and Judgment Fund Law which provides in N. J. S. A. 39:6-71, as amended, in part, as follows:

> " . . . Any amount for compensation or indemnity for damages or other benefits which the plaintiff has received or can collect from any person other than the judgment debtor shall be deducted from the amount due upon the judgment for payment of which claim is made."

Furthermore, N. J. S. A. 39:6-83, as amended, provides that "a judgment against the director shall be reduced by any amounts which such plaintiff has received from any person mentioned in subparagraph (m) of section 10 (N. J. S. A. 39:6-70)." Subparagraph (m) of section 10 (N. J. S. A. 39:6-70) refers to "a judgment in an action against any other person against whom he has a cause of action in respect of his damages for bodily injury or death or damage to property arising out of an accident and . . . the amounts recovered upon such judgments or the amounts, if any, received for indemnity or other benefits for such injury or death or damage to property from any person other than the operator or owner of the motor vehicle causing such injury, death or damage."

In light of the above-cited statutory provisions, it is our opinion that payments received or receivable by a plaintiff or his personal representative for temporary disability benefits, or benefits under an accident and health policy, hospitalization policy, or similar insurance policies would constitute "other benefits" within the meaning of these statutes, which should be deducted from the amount due upon the judgment for payment of which claim is made against the Fund.

Your second question concerns how payment shall be made from the Fund in a case where there is an accident involving two or more persons whose total claims exceed $10,000.00.

N. J. S. A. 39:6-73 (1) limits to $5,000.00, exclusive of interest and costs, the amount payable from the Fund to one person in any one accident; N. J. S. A. 39:6-73(2) limits to $10,000.00, exclusive of interest and costs, the amount payable from the Fund as the result of any one accident.

You have asked specifically whether, in a case where there is an accident involving two or more persons whose total claims exceed $10,000.00, payment is to be made from the Fund on a pro rata basis after all claims have been adjudicated, or "in the order judgments are received."

N. J. S. A. 39:6-69 provides for application to the court in which the unsatisfied judgment was entered that said judgment be directed to be paid out of the Fund subject to the limitations cited above as to amounts. N. J. S. A. 39:6-70 provides for a court hearing upon the application for payment of judgment from the Fund. N. J. S. A. 39:6-71, as amended, which provides for an order for payment of judgment, is as follows:

> "The court shall make an order directed to the treasurer requiring him to make payment from the fund of such sum, if any, as it shall find to be payable upon said claim, pursuant to the provisions of and in accordance with the limitations contained in this act. . . ."

Examination of the Unsatisfied Claim and Judgment Fund Law reveals no express provision for the apportionment on a pro rata basis of claims under unsatisfied judgments of more than one person, totalling $10,000.00 or more as the result of a single accident. Neither does it deal with the problem which would arise in the event the Unsatisfied Claim and Judgment Fund Board were required, at one meeting, to pass upon the priority of two or more orders bearing the same date, for payment of judgments arising out of the same accident, and totalling more than $10,000.00. Nor does it deal with the problem which would arise if the Board were required, at one meeting, to pass upon the priority of two or more orders. either bearing different dates, or filed with the Board on different dates. Furthermore, it does not go into the problem of the rights of a person who gives the Board notice of an accident, but delays institution of a legal action, as against the rights of a person who gives notice and promptly reduces his claim to judgment.

Examination of the statutes and case law on the general subject of the operation and effect of writs of execution after judgment would be of no avail towards a solution of the problem in point since we are here involved with a separate and distinct statutory field which is sui generis. Furthermore, an examination of cases dealing generally with insurance policies which fix limits of liability upon the part of the insurer discloses that the law is in an unsettled state.

A leading case which holds that judgment creditors are entitled to share pro rata in payments under a policy which restricts the amount of the insurer's liability is *Century Indemnity Co. v. Kofsky, et al.*, 115 Conn. 193, 161 Atlantic 101, (Supreme Court of Errors of Connecticut, 1932). We quote from this case, in which the insurance company paid the money into court, and interpleaded the contesting parties:

> "We would, in the absence of strong considerations to support such a ruling, be reluctant to apply legal principles which would recognize any priority between the judgment creditors. Where several creditors are restricted for satisfaction of their claims to a single fund inadequate to pay all, the general rule adopted is that of equality . . . Particularly would we be reluctant to recognize either of the claims of priority advanced in this case. A rule of priority dependent upon the time when actions are begun against the insured would be likely to lead to a race to begin such actions, with an added burden of litigation to parties and the courts and a tendency to prevent or render more difficult the settlement of claims. A rule of priority

made dependent upon the time when judgments were rendered against the insured would often make controlling the adventitious circumstances attending litigation, often beyond the control of the parties . . .

"The plaintiff has submitted to the court in a proceeding in equity the question of its liability to pay to the various defendants the amounts due, under the policy; justice requires that they share in equal proportions in the sums due under it on account of the particular kind of injuries suffered; and in the circumstances of this case, that result can be accomplished without violating any legal principle."

In *Bleimeyer v. Public Service Mutual Casualty Insurance Corporation,* 250 N. Y. 264, 165 N. E. 286, (Ct. of Appeals of N. Y., 1929), Justice Cardozo extended the pro rata doctrine in the case of a bond bearing limited liability on the part of the insurer. In that case, the plaintiff had filed a bond for an omnibus company under a New York statute which required that the bond need only be for a total sum of $5,000.00 for any one accident, "to be apportioned ratably among the judgment creditors according to the amount of their respective judgments." The question before the court was whether or not the limited fund had to be apportioned so as to include persons who had not reduced their claims to judgment, or who had not yet instituted legal action. In ruling in the affirmative, the court said:

"We think the proper form of remedy, where several persons have been killed or injured as the result of a single casualty and the wrongdoer is insolvent, is an equitable action by a judgment creditor suing in his own behalf and in behalf of any others similarly situated, to administer the proceeds of the bond as a fund created by the statute for ratable protection. *Guffanti v. National Surety Co.,* 196 N. Y. 452, 456, 457, 90 N. E. 174 (134 Am. St. Rep. 848) ; *Bottlers' Seal Co. v. Rainey,* 243 N. Y. 333, 153 N. E. 437; *Mann v. Pentz,* 3 N. Y. 415, 423. The statute is explicit to the effect that the moneys due under the bond are 'to be apportioned ratably among the judgment creditors according to the amount of their respective judgments.' This scheme will be frustrated if a single claimant may gain a preference over others and appropriate to his own use something more than his proportionate share of the general security. *Guffanti v. National Surety Co.,* supra. The appropriate remedy in such conditions is an action in equity for proportionate division. *Mann v. Pentz,* supra. We do not hold with the courts below that a claimant must postpone his action on the bond until the rights of other claimants have been barred by limitation. This might result in postponement for 21 years or longer, which would make the remedy illusory. The action is not premature, but its form must be adapted to the needs of the occasion. In an action in equity, the court may direct an interlocutory judgment requiring other judgment creditors to prove their claims within a stated time if they wish to share in the security. *Brinckerhoff v. Bostwick,* 99 N. Y. 185, 194, 1 N. E. 663; *Hirshfeld v. Fitzgerald,* 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839. If claims are in litigation, but have not yet been reduced to judgment, there may be a reasonable allowance of time, six months, or a year, or whatever other period may be fair in the light of all the circumstances, within which claims may be perfected. When the allotted time shall have elapsed, final judgment may be rendered for the division of the fund among the judgment creditors entitled."

However, there is a line of cases which rule against pro rata apportionment in analogous cases. In *Price v. Price,* 122 West Virginia 122, 7 S. E. 2d 510 (West Virginia Supreme Ct. of Appeals, 1940) the court preferred the equitable maxim that "equity aids the vigilant" to the maxim that "equity is equality." Thus, it gave priority to a judgment creditor upon the bond of a city treasurer over other

creditors who had not reduced their claims to judgment where the bond was insufficient to pay all claims in full. Many jurisdictions support this result.

In view of the failure of the Unsatisfied Claim and Judgment Fund Act to deal with the problem, and in further view of the impossibility of discerning a clear and consistent rule of law from the reported cases, we suggest that steps be taken by means of supplementary legislation to clarify this area of the law. When the Board has established a policy on the matter which it wishes to recommend to the Legislature, we shall be pleased to confer with the Board on the preparation of the proposed legislation. If no supplemental legislation is enacted, the safest policy would be for the Board to pay the money into court, and have the court adjudicate the conflicting claims by way of an interpleader action.

Your third question concerns whether or not the Board, under N. J. S. A. 39:6-72, as amended, has authority to arrange installment payments for the judgment debtor. This section gives the Board authority, under certain stated conditions, to consent to settlements in excess of $1,000 between the plaintiff and defendant, subject to the approval of the court. It also gives an insurer to whom a claim has been assigned authority to settle, under certain stated conditions, any claim involving less than $1,000 with the approval of the Director of Motor Vehicles and any other one member of the board, without court approval. This section deals with lump sum settlements, and makes no provision for installment payments to the Board for payment made by the Fund pursuant to such settlements.

The only reference to installment payments which the legislation appears to make is found in N. J. S. A. 39:6-87, which provides as follows:

> "Where the license or privileges of any person, or the registration of a motor vehicle registered in his name, has been suspended or cancelled under the Motor Vehicle Security-Responsibility Law of this State, and the treasurer has paid from the fund any amount in settlement of a claim or towards satisfaction of a judgment against that person, the cancellation or suspension shall not be removed, nor the license, privileges, or registration, restored, nor shall any new license or privilege be issued or granted to, or registration be permitted to be made by, that person until he has
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> (a) Repaid in full to the treasurer the amount so paid by him together with interest thereon at four per centum (4%) per annum from the date of such payment; and
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> (b) Satisfied all requirements of said Motor Vehicle Security-Responsibility Law in respect of giving proof of ability to respond in damages for future accidents, provided, that the court in which such judgment was rendered may, upon ten days, notice to the board, make an order permitting payment of the amount of such person's indebtedness to the fund, to be made in installments, and in such case, such person's driver's license, or his driving privilege, or registration certificate, if the same have been suspended or revoked, or have expired, may be restored or renewed and shall remain in effect unless and until such person defaults in making any installment payment specified in such order. In the event of any such default, the director shall upon notice of such default suspend such person's driver's license, or driving privileges or registration certificate until the amount of his indebtedness to the fund has been paid in full . . ."

It should be noted that under this section, only the court may permit the restoration or renewal of a driver's license or a registration certificate while installment payments set by the court are being made. Otherwise, the section specifically provides against such restoration or renewal until the judgment debtor has "repaid in full to the Treasurer the amount paid by him together with interest thereon at the rate of 4% per annum from the date of such payment."

It is our opinion that there is no prohibition in the legislation against the Board arranging for the collection by an installment method of the entire amount paid by the Treasurer plus 4% interest. However, there is no authority for said installment payments being used as a basis for renewal or restoration of driving privileges without the express authority of a court order to that effect as provided by N. J. S. A. 39:6-87 (b).

Very truly yours,
GROVER C. RICHMAN, JR.,
Attorney General.
By: CHARLES S. JOELSON,
Deputy Attorney General.

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APRIL 20, 1955.

ALFRED T. DAVIS, Chairman,
Hudson County Board of Elections,
591 Summit Avenue,
Jersey City 6, New Jersey.

FORMAL OPINION—1955. No. 17.

DEAR MR. DAVIS:

Receipt is acknowledged of your request for my opinion as to the legal qualifications for newspapers publishing resolutions, official proclamations, notices or advertising in this State.

R. S. 35:1-2.1 (P. L. 1953, Chapter 411, page 2067, section 1) provides:

> "Whenever it is required to publish resolutions, official proclamations, notices or advertising of any sort, kind or character, including proposals for bids on public work and otherwise, by this State or by any board or body constituted and established for the performance of any State duty or by any State official or office or commission, the newspaper or newspapers selected for such publication *must* meet and satisfy the following qualifications, namely: said newspaper or newspapers shall be entirely printed in the English language, shall be printed and published within the State of New Jersey, shall be a newspaper of general paid circulation possessing an average news content of not less than thirty-five per centum (35%), shall have been published continuously in the municipality where its publication office is situate for not less than two years and shall have been entered for two years as second-class mail matter under the postal laws and regulations of the United States. * * *"

It will be noted that this section requires that such newspaper or newspapers shall be entirely printed in the English language, shall be printed and published within the State of New Jersey, shall be a newspaper of general paid circulation possessing an average news content of not less than thirty-five per cent, shall have been published continuously in the municipality where its publication office is situate for not less than two years and shall have been entered for two years as second-class mail matter under the postal laws and regulations of the United States.

These statutory conditions are prerequisites for advertising of the kind mentioned in the statute.

Yours very truly,
GROVER C. RICHMAN, JR.,
Attorney General.
By: JOSEPH LANIGAN,
Deputy Attorney General.

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