DRIVING WITHOUT INSURANCE- STRICT LIABILITY AND SUBSTANTIAL PENALTIES

By Kenneth A. Vercammen

The mandatory penalties imposed for driving without Insurance are greater than the first offender penalties for drunk driving or possession of marijuana. Mandatory penalties include automatic loss of license for one year, $300.00-$1000.00 fine and a period of community service to be determined by the Municipal Court. N.J.S.A. 39:6B-2 The no car insurance statute is one of the few strict liability statutes. "Every owner or registered owner of a motor vehicle registered or principally garaged in this state shall maintain motor vehicle coverage, under provisions approved by the Commissioner of Insurance." N.J.S.A. 39:6B-1. There are also court costs and insurance surcharges of $250.00 per year for three years. Failure to produce at the time of trial an insurance card or insurance policy covering the date of the offense creates a rebuttable presumption that the person was uninsured when charged with the offense.

In State v. Kopp 171 NJ Super 528 (Law Div. 1980), a Law Division Judge held that knowledge of lack of insurance is not a defense. The legislative intent is clear that knowledge of lack of insurance is not an essential element, which must b e proved in order to sustain a conviction of an owner who operates a car without insurance. However, the section, which imposes penalties against an individual who operates a motor vehicle without liability insurance, does not apply to a New Jersey resident who is driving an automobile owned by an out-of-state friend who had been in New Jersey for five weeks. State v. Arslanouk 67 NJ Super 387 (App. Div. 1979)

The most important no Insurance case is State v. Hochman 188 NJ Super 382 (App. Div. 1982). The Appellate division examined and reversed a conviction for operating without liability insurance where the State failed to carry its burden of

proving that an automobile liability insurance was lawfully canceled. In this fact specific case, defendant was charged with operating a vehicle he owned without insurance. It was stipulated that because of long hours defendant worked, he had asked his wife to look after household matters, including insurance matters, and gave her several thousand dollars each month to pay for them. Defendant Hochman's wife arranged through an insurance broker to have Allstate insure the vehicle. The insurance broker then arranged to finance the insurance premiums through a "Lee Finance" financial service. The defendant's wife then paid the broker and agreed to pay the balance to the financial service in monthly installments of $48.00. Id at 384.

Thereafter, defendant Hochman's wife made payments to the financial service through October 13, 1979. On October 15, 1979 Allstate informed defendant's wife by mail that there was due and owing a premium of $331.00 and payment should be made immediately. The defendant's wife notified the broker that she had received a letter from Allstate and reminded the broker that the insurance premiums were being financed through the finance agency pursuant to financing agreement arranged by it and therefore she did not have to pay the balance of the account.

The insurance broker informed the Defendant Hochman's wife that it would investigate the problem and contact her. In January 1980, because the defendant's wife had not heard from the insurance broker, she again contacted the insurance broker and informed him that she had received no further correspondence from Allstate. She inquired into the status of the insurance of the vehicle, the broker informed the defendant's wife they were still investigating the problem and would contact her when it had been resolved. It was further stipulated in Court that defendant was never told by his wife of the finance agreement or of the difficulties she had encountered with the insurance. In May 1980, defendant was transferred to another office and needed to use the car to get to work. According to stipulated facts, defendant's wife told the defendant that the vehicle could be driven. Defendant,

relying upon what his wife had told him and believing that the vehicle was insured, drove the vehicle until July 15, 1980 when he was charged with violating the compulsory insurance provisions of N.J.S.A. 39:6B-2.

The insurance broker in Hochman, as an agent, had issued an insurance identification card indicating the insurance would remain in effect from the period August 28, 1979 to August 28, 1980. In December 1979 defendant and his wife moved from the residence in Montclair and left a forwarding address. Thereafter in preparing for trial defendant learned that in October and November 1979 Lee Finance had liquidated without informing its clients, including defendant's wife.

Although Allstate claimed it mailed a cancellation notice, it stipulated that it had mailed the cancellation notice to an incorrect address, mailing it to 313 Park Street rather than 314 Park Street. The broker, First City, never informed defendant's wife, despite her inquiry, that Allstate had canceled the insurance policy or that the finance agency had liquidated, or that she could reinstate the policy by paying the balance due on the annual premium. The Appellate Division noted that in order to convict a defendant-owner of operating a motor vehicle in violation of the insurance provisions, the State did not have to show a culpable mental state, i.e., that defendant knew his vehicle was uninsured. The State simply had the burden of proving beyond a reasonable doubt that (1) defendant owned the vehicle, (2) the vehicle was registered in New Jersey, (3) defendant operated the vehicle or caused it to be operated upon any public road or highway in this State, and (4) the vehicle was without liability insurance coverage required by N.J.S.A. 39:6B-1. Id at 387.

The Appellate Division in Hochman held that the first three elements of the offenses were proven beyond a reasonable doubt. The pivotal issue was whether the State had proven beyond a reasonable doubt the fourth element of the defense, that the vehicle was uninsured. The question was thus whether the liability insurance policy had been lawfully and effectively canceled when Defendant Hochman was

charged for the offense. The Court found that Allstate had not properly canceled the insurance policy. The Court held;

"A notice of cancellation of a policy of automobile liability insurance is effective in this State only if it is based on one or more statutorily enumerated reasons, including the nonpayment of premiums. N.J.S.A. 17:29C-7(A)(a). Moreover, prior to March 10, 1981, where, as here, the cancellation was for nonpayment of premiums, the notice of cancellation must have been mailed or delivered by the insurance carrier (here Allstate) to the insured (here either defendant or his wife) at least ten days prior to the effective date of cancellation and must have been accompanied by a statement of the reason given for such cancellation. N.J.S.A. 17:29C-8. Proof of mailing of the notice of cancellation to the named insured at the address shown in the policy was deemed sufficient proof of notice. N.J.S.A. 17:29C-10. Under this latter statue, cancellation was effective whether or not the insured actually received notice of cancellation because proof of mailing, not proof of receipt, was the determinative factor. See Weathers v. Hartford Ins. Group 77 N.J. 228, 234 (1978. Proof of mailing the notice, however, is not conclusive on the issue. The insured may still offer proof that he never received the notice "for the purpose of refuting the hypothesis of mailing." Id. at 235. Thus, in Weathers the Supreme Court held:

> 'Although the inference of non-mailing provided by evidence of non-receipt might in most cases be outweighed by the inferences of mailing which may be drawn from a certificate of mailing whose reliability has been established, we discern no cogent reason for depriving the trier of fact of such evidence by holding it inadmissible, they are not conclusive of that issue and do not preclude the existence of a genuine issue of material fact in the face of a claim of non-receipt so as to entitle the insurer to judgment as a matter of law. See Sudduth v. Commonwealth County Mutual Ins. Co. 454 S. W. 2d 196 (Tex. Sup. Ct. 1970); 9 Wigmore on Evidence (3d ed. 1940) Sec. 2519; cf. Fitzpatrick v. Merchants and Manufacturers Fire Ins. Co. 122 N.J.L. 468 (E. &A. 1939). The contrary holding of Womack v. Fenton 28 N.J. Super. 345 (App. Div. 1953), on this point is hereby overruled. Permitting the fact finder to consider the addressee-insured's denial of receipt of the notice of cancellation does not improperly add to the insurer's statutory burden of proving mailing by requiring it to prove actual receipt of the notice since such testimony is admissible only as the basis for an inference of its non-mailing. The insurer still need only prove constructive notice by adequately establishing that the notice of cancellation was mailed. Hochman at 388-389 Weathers at 235-236

The court noted that although Allstate claimed that a notice of cancellation was sent to the defendant's wife, this did not establish that the notice satisfied the statutory requirement of N.J.S.A. 17:29C-8. There is no proof that the notice mailed to the named insured (assuming that defendant's wife was the insured named in the policy) or that it was mailed to the address shown in the policy, or that its contents complied

with statutory requirements. The court held "thus, we are constrained to hold that the State failed to sustain its burden of proving beyond a reasonable doubt that the Allstate automobile liability insurance policy covering defendant's vehicle was lawfully canceled. The Allstate policy therefore was presumptively in full force and effect... and defendant's conviction for violating the compulsory insurance provisions of N.J.S.A. 39:6B-2 cannot stand. Hochman at 389-390.

Household member coverage

The insurance statutes under Title 19 of the New Jersey laws contain provisions which sometimes provide that all members of a household are covered under a policy issued to one member even if their name is not set forth on the policy. The uninsured defendant who lives with someone who owns an insured car may be included under that person's policy.

Operation is different in no-insurance matters than in drunk driving cases. A defendant who is seated in the driver's seat, behind the steering wheel of a vehicle that is under tow and was in physical control of the vehicle did not "operate" the vehicle for the purposes of prohibiting operating the vehicle while suspended, operating uninsured vehicle and operating unregistered vehicle, where the vehicle did not have an engine and incapable of being operated under its own power. Counsel can argue the state must prove the defendant drove the vehicle. State v. Derby 256 N.J. Super. 702, (Law Div. 1992).

In a case involving Personal Injury Protection/ No Fault PIP benefits the Appellate Division ruled that an insurance company did not properly mail a notice of cancellation, thus the policy was not canceled. In Hodges v. Pennsylvania National Insurance Company 260 NJ Super. 217, 222-23 (App. Div. 1992), plaintiff was in a motor vehicle accident operating a vehicle owned by her mother. Plaintiff filed a PIP suit against the insurance company, which had refused to pay medical bills and

property damage. Defendant's insurance company claimed it canceled Alva Hodge's policy on December 16, 1988 for failure to remit the premium payment. Defendant submitted two pages of a November 28, 1988 "JUA Mailing List," which indicated Alva Hodges as an insured who was scheduled to be sent a notice of cancellation. The mailing list contained two November 28 stamps of the Harrisburg Post Office and two stamps of postage for the numerous letters of $39.00 and $99.75. The two postage stamps together totaled $138.75. The list claimed a "total mailing" of 640 notices. Plaintiff pointed out that a mailing of 640 notices at $.25 per piece (the 1988 postage stamp price) should have totaled $160.00. Because defendant paid only $138.75, plaintiff contended that all the lists and notices may not have been mailed. The mailing list also contained a signature and certification of one of the defendant's employees.

Plaintiff's counsel in Hodges pointed out that the Post Office's standard proof of mailing procedure differed from defendant's use of a preprinted mailing list. Plaintiff pointed out that the US Postal Service utilizes a "Certificate of Mailing," PS Form 3817, for the purposes documenting proof of mailing by regular mail. Prior to the stamping of this receipt, the Postal Service employees individually compares the receipt with the item being mailed. These forms are available in advance from the Post Office. (A copy of the first class mailing Certificate of Mailing was included as a footnote to the Court's opinion.) The Hodges Court noted that N.J.S.A. 17:29C-10 specifically enumerates the circumstances on which a notice of cancellation is effective:

> "no written notice of cancellation or of intention not to renew sent by an insurer to an insured in accordance with the provisions of an automobile insurance shall be effective unless a. (1) it is sent by certified mail, or (2) at the time of the mailing of said notice by regular mail, the insurer has obtained from the Post Office Department a date stamped proof of mailing showing the name and address of the insured and b. the insurer has retained a duplicate copy of the mailed notice which is certified to be true.

Hodges v. Pennsylvania National Insurance Company 260 NJ Super. 217, 222-23 (App. Div. 1992)
[Emphasis added by the Court.]

In order to be effective, notice of cancellation "must be set in strict compliance with the provisions of N.J.S.A. 17:29C-10." Citing Lopez v. New Jersey Automobile Full Underwriting Association 239 NJ Super. 13, 20, (App. Div.), certif. den. 122 N.J. 131 (1990) (absence of proof of personal knowledge of mailing by postal employee or insurer employee renders notice ineffective). The Court questioned whether the stamped proof of payment of money in postage was proof of mailing. The Appellate Division in Hodges noted that our Courts have interpreted the statute to require a precise proof of mailing, usually the official "U.S. Postal Service Certificate of Mailing."

In Celino v. General Accident Insurance 211 N.J. Super. 538 (App. Div. 1986), the Court ruled that this specific postal certificate of mailing satisfied the statute's proof of mailing requirement. Celino at 540-541 (determining that the insurer's notice was ineffective because insured failed to retain a duplicate copy of the notice, thereby violating part (b) of the statute). The Appellate Division in Celino determined that defendant's proof of payment of postage and the employee's certification fell far short of the quality of proof inherent in an official post office certificate. Because the defendant's proofs were insufficient to establish compliance with the statute, there existed an unresolved issues of fact. The Appellate Division found that the trial court erred and granting in summary judgment and remanded the question as to notice for further proceedings.

If there is a question involving improper cancellation or improper notice, you could hire your attorney prepare a subpoena to the insurance company and hire a process server to hand deliver the subpoena to both the insurance broker and insurance company. You may discover notice of cancellation was improper or notices

mailed to the wrong address. Drivers all know the poor track record by insurance companies when it comes to mailing notices.

If a husband and wife, or both, are named in the policy, Lumbermens Mutual Casualty Co. v. Carriere 170 N.J. Super. 437, 450 (Law Div. 1979) supports the proposition that both husband and wife named in the policy should receive notice.

A cancellation notice is invalid if issued before the premium due date. Recently, in Christian v. Ormsby 267 N.J. Super 237, 266-67 (Law Div. 1993), the court held under N.J.S.A. 17:29C-8, an automobile insurer may not issue a cancellation notice to the insured for non-payment of premiums before the date on which the premium is due. (This case also dealt with the incompetent JUA.) The Christian notices of cancellation and a reminder notice were mailed by Liberty Mutual. However, the court found that the notice was ineffective to cancel the policy before the accident Plaintiff Christian was involved in. The court found that although the notice issued by Liberty Mutual to the Christians on October 21, 1987 stated its reason for cancellation as "non-payment of premium," the court found that, on the date the notice was mailed, the Christians' premium to the JUA was not past due and the Christians' were not yet in default.

The court also rejected the JUA's argument that the cancellation notice could have been mailed at any time after the premium notice, so long as it did not become effective until after the due date. The court interpreted the statutory language requires 15 days notice of cancellation in a language referring to "non-payment of premium" together to imply a legislative intent to provide with a 15-day grace period after default in the payment of an automobile insurance policy premium before the insurer is able to effectively cancel the policy. The purpose is to allow defaulting policyholders an opportunity during that grace period to pay their premiums and to keep the policy in force. Consequently, any cancellation notice issued before such default is premature and invalid.

A bad check will permit insurer to cancel insurance policy. In Abdel-Rahman v. Ludas 266 NJ Super 46, 48 (App. Div. 1993), an insurer's acceptance of a check in payment of a premium is conditioned upon payment by the drawee institution. An insured's failure to pay the premium, which occurs when the check is dishonored, entitles the insurer to cancel the policy. On August 13, 1990, Ohio Casualty issued a three-month, short-term reinstatement of policy. Included in the reinstatement letter to the insured was a notice advising the reinstatement would be considered void from its inception if the check accepted in payment of the reinstatement was dishonored when presented to the drawee bank. On August 22, Ohio Casualty learned that the check was dishonored by the insured's bank. Having a policy of presenting a check twice for payment, Ohio Casualty redeposited the check that same date. The check was again returned for insufficient funds on August 24. On both occasions the bank mailed notices of the dishonoring to the insured. The insured's bank statement also indicated that the checks had been dishonored.

Ohio Casualty canceled insured Ludas' policy on September 6, 1990. On September 12, 1990, the company informed Ludas of the cancellation, which was retroactively effective July 29, 1990. The insured did not dispute the facts but claimed that the family made a mistake and deposited the money into the wrong account. Both the motion judge and the Appellate Division in Abdel-Rahman found that mere delivery of the check, "a worthless piece of paper," to the insurer was not enough to keep the policy in effect.

The non-insurance NJSBA 39:6B-2 statute provides there is a rebuttable presumption of no insurance if no card or policy produced. Remember, however, that a presumption does not equal guilty.

Non-Owner Operated Cases

The charge of simple operation without insurance in non-owner operated cases presents additional viable defenses to the charge of no insurance. There is not a strict liability provision involving mere operators. The State must prove the operator knew or should have known from the attendant circumstances that the motor vehicle was without motor vehicle liability coverage. Such facts can be gathered from the relationship between the parties, whether or not the vehicle had a valid inspection sticker and testimony by the owner who often is also issued an uninsured motorist charge.

In Matlad v. US Services 174 NJ Super. 499 (App. Div. 1980), where husband canceled policy without telling wife, deletion was void as against public policy and coverage continued for wife. The defendant/owner must operate or cause the car to be operated. If a driver took the car without permission that day, the owner did not cause the vehicle to be operated.

The State is still required to provide discovery. Occasionally a case is dismissed because the State failed to provide discovery.

About the Author

Kenneth A. Vercammen is a trial attorney in Edison, Middlesex County, New Jersey. He often lectures for the New Jersey State Bar Association, New Jersey Institute for Continuing Legal Education and Middlesex County College on personal injury, criminal / municipal court law and drunk driving. He has published 140 articles in national and New Jersey publications on municipal court and litigation topics. He has served as a Special Acting Prosecutor in seven different cities and towns in New Jersey and also successfully defended hundreds of individuals facing Municipal Court and Criminal Court charges.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters. He has appeared in Courts throughout New Jersey several times each week on many personal injury matters, Municipal Court trials, civil hearings and contested administrative law hearings.

Since 1985, his primary concentration has been on litigation matters. Mr. Vercammen gained other legal experiences as the Confidential Law Clerk to the Court

of Appeals of Maryland (Supreme Court), with the Delaware County, PA District Attorney Office handling Probable Cause Hearings, Middlesex County Probation Dept as a Probation Officer, and an Executive Assistant to Scranton District Magistrate, Thomas Hart, in Scranton, PA.