NEW JERSEY INSURANCE FAIR CONDUCT ACT: A LOOK AT THE NEW LAW, BAD FAITH AND THE FUTURE FOR AUTO INJURY CASES

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NEW JERSEY INSURANCE FAIR CONDUCT ACT: A LOOK AT THE NEW LAW, BAD FAITH AND THE FUTURE FOR AUTO INJURY CASES

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In cooperation with the New Jersey State Bar Association **Auto Litigation and No-Fault Special Committee**

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New Jersey Insurance Fair Conduct Act

Michael S. Raff, Esq.

Relevant Case Law

Pickett v. Lloyd's, 131 N.J. 457 (1993)

Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474 (1974)

Taddei v. State Farm, 407 N.J. Super. 449 (App. Div. 2008) (*Taddei I*) and 2010 WL 183900 (App. Div. 2010) (*Taddei II*)

The Court in *Wadeer v. New Jersey Manufacturers*, 220 N.J. 591 (2015), stated "in our view, the goals of the entire controversy doctrine are not served by mandating that the plaintiff simultaneously file a first-party bad faith claim with the underlying breach of contract/UM lawsuit." Thus, "we agree that barring such claims on the basis of the entire controversy doctrine is inappropriate in the UM context." As a result, the Supreme Court referred Rule 4:30A to the Civil Practice Committee to review "whether our courts should allow first-party bad faith claims to be asserted and decided after resolution of the underlying, interrelated UM action." After consideration of the report of the Civil Practice Committee, the Supreme Court amended Rule 4:30A, to provide that "claims of bad faith, which are asserted against an insurer after an underlying uninsured motorist/underinsured motorist claim is resolved in a Superior Court action, are not precluded by the entire controversy doctrine." So, claims for bad faith need not be brought in the initial UM/UIM complaint but can be filed *after* the UM/UIM claim is resolved.

Miglicio c. HCM Claim, 288 NJ Super. 331 (App. Div. 1995)

Badiali v. New Jersey Mfrs. Ins., 220 N.J. 544 (2015)

All contracts impose an implied obligation of good faith and fair dealing in their performance and enforcement. *Sears Mortg. Corp. v. Rose*, 134 N.J. 326, 347 (1993)

Unlike with a typical commercial contract, in which [p]roof of bad motive or intention is vital to an action for breach of good faith, *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assocs*., 182 N.J. 210, 225 (2005), an insurer's breach of good faith may be found upon a showing that it has breached its fiduciary obligations, regardless of any malice or will, see *Bowers v. Camden Fire Ins. Ass'n*, 51 N.J. 62, 79 (1968).

One inherent fiduciary obligation of every insurer is the duty to settle claims. See *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 336 (1980). Whether an insurer has acted in bad faith and thereby breached its fiduciary obligation in connection with the settlement of claims must depend upon the circumstances of the particular case. *American Home v. Hermann's Warehouse*, 117 N.J. 1, 7 (1989).

NEW JERSEY ASSOCIATION for JUSTICE Inc.

THE INSURANCE FAIR CONDUCT ACT
A-1659 (2R)

WHAT IS "BAD FAITH"

Bad Faith occurs when it is determined in a court of law that an insurance company acted unreasonably against their policyholder by denying, delaying, or underpaying a valid claim.

WHAT IS THE CURRENT PENALTY IF AN INSURER ACTS IN BAD FAITH IN THE HANDLING OF THEIR OWN POLICY HOLDERS' CLAIM?

Nothing.

Under current law there is NO effective remedy for consumers whose claims have been unreasonably handled by their own insurer**.** If, after an unreasonable denial or underpayment of a claim, a consumer takes their own insurance company to court the most they can recover is the value of their damages up to the policy limit. This is what they were owed in the first place. And even this can take years.

WHAT DOES THE INSURANCE FAIR CONDUCT ACT DO?

A-1659 (2R) gives New Jersey consumers the right to present their case alleging bad faith handling of an uninsured/under-insured motorist claim in court. If an insurer has BROKEN THE LAW by handling an uninsured/underinsured motorist claim unreasonably a consumer can win damages up to a capped amount, as well as reasonable court costs. That is all.

DOES THIS BILL APPLY TO ALL INSURANCE CLAIMS?

No.

This bill only applies to uninsured/underinsured motorist claims. It does not apply to any auto claim that is not uninsured/underinsured motorist claim, flood insurance, homeowners insurance, health insurance, or any other form of insurance.

WHAT IS UNINSURED/UNDERINSURED MOTORIST COVERAGE?

Uninsured/underinsured motorist (UM/UIM) coverage is insurance you purchase so that if you have been injured by a driver without insurance or without enough insurance to cover your losses, and you can turn to your own company to provide coverage. It is coverage you

have already bought and paid for. This is a small, but important, piece of the insurance market.

WILL PASSING THIS BILL RAISE AUTO INSURANCE RATES?

No.

The bill states that if there were to be any additional costs incurred by insurers due to their own wrongdoing, those costs could not be passed on to policy holders. It is important to remember that auto insurance is regulated by the state.

Additionally, if an insurer is dealing with their policy holders in good faith they have nothing to worry about if this law passes. This law applies only when insurers have broken the law by unreasonably delaying, denying, or underpaying a valid uninsured or underinsured motorist claim.

IF THE LAW PASSES WILL INDIVIDUAL ADJUSTERS BE HELD LIABLE?

No.

Individual adjusters will not be personally liable. Claims adjusters are protected by the employer/insurer for their handling of claims and are never personally responsible for things they do on the employer's/ insurer's behalf unless there are acts of outright fraud.

DO OTHER ANY OTHER STATES HAVE A BAD FAITH INSURANCE LAW LIKE THIS?

Yes.

New Jersey would not be the first state to enact a bad faith insurance law, but it would have the most narrowly defined law. Other states that have enacted much broader laws include: Colorado, Washington State, Missouri, Georgia, Maryland, Montana, Florida, New Mexico, and our neighboring state of Pennsylvania.

Pennsylvania has had a much broader bad faith statute in effect since 1991. In addition to other remedies, that law provides consumers with the remedy of punitive damages if claims are unreasonably underpaid, delayed or denied. Pennsylvania continues to have a robust and competitive insurance market.

Washington State is the most recent state to enact a comprehensive bad faith law, which includes actual damages, pretrial interest, attorney fees, and court costs. The Washington State Insurance Fair Conduct Act was signed into law in 2007. The insurance industry initiated a ballot referendum in an attempt to overturn the law. The voters in Washington State upheld the law by a 14-point margin. Predicted rate increases never materialized.

INSURANCE COUNCIL OF NEW JERSEY
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January 13, 2022

The Honorable Phil D. Murphy
Governor, State of New Jersey
225 West State Street
Trenton, NJ 08608

RE: Respectfully Seeking Veto of Senate Bill 1559

Dear Governor Murphy,

On behalf of the Insurance Council of New Jersey (ICNJ) and the auto policyholders insured by our members, including the thousands who have written to your office and their legislators in opposition to Senate Bill 1559, I respectfully request that you VETO S-1559 due to the impact it will have on all auto insurance policyholders in New Jersey.

This misguided legislation would impose the broadest "bad faith" standard in the nation for uninsured or underinsured motorist (UM/UIM) claims by failing to require that conduct be intentional, reckless, or indicative of a broader business practice. The bill also establishes a simple negligence standard that is far lower than any other in the nation and would mark New Jersey as the only state to mandate the award of punitive damages for bad faith claims.

Fewer than 20 states have enacted statutory bad faith standards. Under both statutory and case law in most states, including our neighbors in Pennsylvania and the State of California, the conduct must be intentional, reckless, oppressive, or fraudulent. In every state, the awarding of punitive damages is at the discretion of the judge. However, the legislation on your desk applies mandatory punitive damages to simple negligence and goes further to allow suits against individual employees. This is unacceptable.

In an attempt to address the inevitable cost impact of the legislation, the Assembly adopted floor amendments that impose a "cap" on actual damages and trial verdicts to three times the coverage amount. This attempt missis the point, as the core problem with the bill remains: an extremely low legal bar which makes human error and simple negligence by an auto insurer and its employees the standard for being subject to a bad faith cause of action, standards that are out of sync with most New Jersey statutes which don't allow punitive damages for simple negligence or human error. Attorneys will use this low standard to pressure insurers to settle claims for artificially higher amounts to avoid costly litigation, regardless of a "cap" on damages. It's these settlements that will drive up premiums for all New Jersey drivers. How do we know? If enacted, S-1559 will put New Jersey on par with Florida, a state where the standards are so low and litigation so prevalent that UM/UIM insurance coverage costs are 188% more than the national average.

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In Florida, personal injury attorneys use the threat of a bad faith lawsuit and questionable tactics like time-limited demands or settlement offers with impossible conditions to drive up settlement costs even in cases that never make it to trial. That is the future that this bill envisions for New Jersey. The high cost of auto insurance in Florida has led to one out of every four cars being uninsured, half of all insured vehicles carrying no more than statutory minimums for insurance, and low-income residents, such as those in the tourism and service sectors, being unable to afford to insure their vehicles.

Based upon the horrific history of the bad faith cause of action in West Virginia and the devastating effect it had on consumers in terms of both affordability and availability, in 2005 the state legislature repealed its bad faith law as a resounding bipartisan victory.

It is critical to recognize that all insurers are obligated to act in good faith when evaluating, investigating, or responding to insurance claims. Any New Jersey policyholder who feels that they have been dealt with unfairly by any property and casualty insurer can already: file an internal appeal of the claim decision; access arbitration through the Department of Banking and Insurance; sue for breach of contract; leverage the Offer of Judgment rule to ensure their claim is fairly evaluated; and file a complaint with the Department of Banking and Insurance at no cost to them and without an attorney.

New Jersey's current 'bad faith' standards are based on the NJ Supreme Court's unanimous ruling in Pickett v. Lloyds, which found that in order to make a successful bad faith claim, the petitioner must establish that the insurer lacked "fairly debatable" justification to delay or deny the claim and that the carrier knew or should have known that they lacked a reasonable basis for delaying or denying benefits of the policy. More than 100 subsequent cases have further enshrined this standard over the past 30 years.

This legislation also risks the financial futures of thousands of insurance employees who could be held personally liable for simple errors they may make in the course of their employment. Despite employee liability being soundly rejected in almost every state, most recently in a unanimous decision by the Washington State Supreme Court in 2019, S-1559 specifically permits lawsuits against employees by defining insurer to include: "any individual…which is responsible for determining claims made under the policy." This passage allows lawsuits to be filed against insurance adjusters, fraud investigators, accident reconstructionists and defense counsel who have a role in claims processing.

While carriers will petition the court seeking to remove their employees as defendants in these suits and pay any judgements in these cases, simply being named in a lawsuit can have a lasting effect on an employee's credit. Employees will be forced to disclose that they are party to these lawsuits when applying for mortgages, student loans and even on some job applications.

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This legislation also will have a significant chilling effect on the investigation of potentially fraudulent insurance claims. In cases where fraud is suspected and time is necessary to thoroughly investigate a claim, the prospect of "unreasonable" delays will pressure insurers to settle, possibly overlooking fraudulent behavior.

The sponsors of S-1559 have argued that this bill is necessary due to New Jersey's current minimum liability limits that too often leave drivers with no recourse other than their own UM/UIM coverage. This accusation is not borne out by the facts. According to DOBI's June 2021 Private Passenger Auto Semi-Annual Report, more than 75% of drivers chose liability limits of $50,000 or higher, which is nearly triple the necessary coverage for an average auto accident, and fewer than 20% of drivers selected $15,000 or less. If the legislature is interested in revisiting our state's minimum liability limits, the ICNJ would welcome the opportunity to be a resource in those discussions. However, we strongly disagree that this legislation, which would incentivize lawsuits and render UM/UIM policy limits meaningless in those suits, is the way to address those concerns.

Because of these facts, I urge you to VETO this legislation.

Thank you for your consideration. Please do not hesitate to contact me if you require additional information.

Sincerely,

Christine O'Brien
President

cc: George Helmy, Chief of Staff
Parimal Garg, Esq., Chief Counsel
Ed Doherty, Esq., Counsel

New Jersey Defense Association

New Jersey's Defense Voice

Please reply to:

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Dear Assemblyman/Assemblywoman

The New Jersey Defense Association is comprised of attorneys who represent insurers and their customers in civil litigation in New Jersey, along with managerial level insurance industry personnel. On behalf of our members, we would like to express their strong opposition to Senate Bill 1559 (S-1559) and Assembly Bill 1659 (A-1659).

S-1559/A-1659 will create a new cause of action guaranteed to increase litigation and more jury trials. New Jersey law currently provides insurance customers with the means to pursue claims for bad faith utilizing a standard clearly defined by our State Supreme Court in Pickett v. Lloyds, 131 N.J. 457 (1993). In addition to the consequential damages that are permitted by the Pickett decision, New Jersey's Offer of Judgment Rule, R.4:58-2, was amended in 2010 to increase the number of UM/UIM cases that would allow for an award of counsel fees, costs and enhanced pre-judgment interest. As proposed, A-1659 replaces the current standard with one so ill-defined that it will take our Courts years, if not decades, to develop a body of case law establishing what constitutes "unreasonable" conduct by an automobile insurer. Faced with the uncertainties inherent in having their claims handling decisions "second-guessed" utilizing such uncertain tests, insurers' decisions will be dictated as much by the potential for extracontractual damages as they will be by the merits of the claims presented, artificially driving up the costs of settlements and costs to consumers in the bargain.

A1659's proposed remedy is as troubling as the uncertainty of its standard of review. Substituting "actual damages" occasioned by alleged unreasonable claims handling practices which already are recoverable under Pickett with "actual trial verdicts" in the UM/UIM action means that a claimant would be pursuing damages that were in excess of the policy limits chosen. As proposed, therefore, the measure of damages is punitive rather than compensatory, and exposing insurers to such awards without requiring the same type of clear and convincing evidence of malice, willful, wanton or reckless misconduct as would be required under our State's Punitive Damages Act is unfair and incredibly short-sighted. Singling out the insurance industry for such treatment is wholly unwarranted particularly in light of the Sponsors' representations that, in their view, the instances of bad faith in the claims handling process are exceedingly rare.

For all of these reasons, our Association requests that you vote "NO" to this Bill.

Ryan Richman

Ryan Richman, President

New Jersey Defense Association

CHAPTER 388

AN ACT concerning certain unreasonable practices in the business of insurance and supplementing Title 17 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

C.17:29BB-1 Short title.

1. This act shall be known and may be cited as the "New Jersey Insurance Fair Conduct Act."

C.17:29BB-2 Definitions.

2. As used in this act:

"First-party claimant" or "claimant" means an individual injured in a motor vehicle accident and entitled to the uninsured or underinsured motorist coverage of an insurance policy asserting an entitlement to benefits owed directly to or on behalf of an insured under that insurance policy.

"Insurer" means any individual, corporation, association, partnership or other legal entity which issues, executes, renews or delivers an insurance policy in this State, or which is responsible for determining claims made under the policy. "Insurer" shall not include an insurance producer as defined in section 3 of P.L.2001, c.210 (C.17:22A-28) or a public entity.

"Public entity" means the State, any county, municipality, district, public authority, public agency and any other political subdivision or public body in the State, including a joint insurance fund of a public entity.

C.17:29BB-3 Claimant's rights, civil action; unreasonable delay, denial.

3. a. In addition to the enforcement authority provided to the Commissioner of Banking and Insurance pursuant to the provisions of P.L.1947, c.379 (C.17:29B-1 et seq.) or any other law, a claimant, who is unreasonably denied a claim for coverage or payment of benefits, or who experiences an unreasonable delay for coverage or payment of benefits, under an uninsured or underinsured motorist policy by an insurer may, regardless of any action by the commissioner, file a civil action in a court of competent jurisdiction against its automobile insurer for:

(1) an unreasonable delay or unreasonable denial of a claim for payment of benefits under an insurance policy; or

(2) any violation of the provisions of section 4 of P.L.1947, c.379 (C.17:29B-4).

b. In any action filed pursuant to this act, the claimant shall not be required to prove that the insurer's actions were of such a frequency as to indicate a general business practice.

c. No rate increase shall be passed on to the consumer or policyholder as a result of compliance with P.L.2021, c.388 (C.17:29BB-1 et seq.) and dissemination of inaccurate or misleading information to policyholders or consumers concerning P.L.2021, c.388 (C.17:29BB-1 et seq.) shall be strictly prohibited.

The commissioner may determine whether an insurer's rates are constitutionally adequate pursuant to the provisions of P.L.2021, c.388 (C.17:29BB-1 et seq.). If the commissioner determines that rate relief is necessary, the commissioner shall determine an appropriate rate adjustment.

d. Upon establishing that a violation of the provisions of this act has occurred, the plaintiff shall be entitled to: (1) actual damages caused by the violation of this act which shall include, but need not be limited to, actual trial verdicts that shall not exceed three times the applicable coverage amount; and

(2) pre- and post-judgment interest, reasonable attorney's fees, and reasonable litigation expenses.

e. If any portion of P.L.2021, c.388 (C.17:29BB-1 et seq.) is determined to be invalid, the remaining portion of P.L.2021, c.388 (C.17:29BB-1 et seq.) shall remain in full force.

4. This act shall take effect immediately.

Approved January 18, 2022.

About the Panelists…

Kelly P. Corrubia is a Partner in Hall Booth Smith P.C. in Saddle Brook, New Jersey, where she concentrates her practice on wide range of litigation defense, including insurance, premises liability and general liability, and represents clients in public entity cases and insurance coverage matters. She represents clients in Title 59 claims and other insurance-related cases. Prior to joining Hall Booth Smith she was Managing Partner at a boutique litigation defense firm with offices in the New York/New Jersey region.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and Third Circuit Court of Appeals, Ms. Corrubia is a member of the New Jersey State and Passaic County Bar Associations and the Defense Research Institute. She is also a member of the New Jersey Defense Association and Vice President of the Association's Northern Region.

Ms. Corrubia is a member of the Justice Robert Clifford and the Brennan-Vanderbilt American Inns of Court. She is the author of "Bad Faith Claims arising under claims for UM/UIM benefits permitted under the *New Jersey Insurance Fair Conduct Act*," National Insurance Coverage Blog, January 2022.

Ms. Corrubia received her B.A. from The College of New Jersey and her J.D., *magna cum laud*e, from Seton Hall University School of Law, where she was a member of the Order of the Coif and the recipient of the Raymond Del Tufo Constitutional Law Award. She was a judicial intern for the Honorable Daniel P. Mecca, Superior Court of New Jersey, and served as a judicial law clerk to the Honorable Robert P. Contillo, Superior Court of New Jersey.

Lauren D. Fraser is a Partner in Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, P.C. in Morristown and Newton, New Jersey, where she concentrates her practice in motor vehicle, premises liability and trucking litigation, with a focus on spine and brain injury. She has resolved cases for injured clients through settlement and jury verdict, having obtained some of the largest verdicts for injured clients in New Jersey. She also represents individuals in Superior and Municipal Court when they are charged with possession/use of drugs, traffic violations and DUI/DWI; and represents victims of assault and sexual assault.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court, Ms. Fraser is a Board Member of the New Jersey Association for Justice (NJAJ), Co-Chair of the American Association for Justice (AAJ) Jury Bias Litigation Group, and a former Trustee of the New Jersey State Bar Association. She is Past President of the Sussex County Bar Association; a member of the AAJ Motor Vehicle, Trucking and TBI Groups; and a Fellow of the Melvin M. Belli Society.

A member of the faculty for AAJ's Case Plus, Jury Focus Group, Ms. Fraser is a frequent lecturer for the AAJ and NJAJ on trial preparation and presentation, law firm marketing and focus groups topics. She is the recipient of several honors.

Ms. Fraser received her B.A. from Rutgers College, where she was Vice President of the Rutgers College Governing Association, and her J.D. from Seton Hall University School of Law,

where she was a Senator in the Student Bar Association and VP for Membership and Recruitment, Federalist Society.

Honorable Harry D. Norton, Jr., JMC is a Partner in Hall Booth Smith P.C. in Woodland Park, New Jersey, where his practice areas include insurance defense, litigation of personal injury protection and reimbursement claims, the defense of Title 59 defendants, the defense of uninsured and underinsured claims, and the investigation and prevention of insurance fraud on behalf of insurance carriers. In addition to his private practice, Judge Norton serves as a Municipal Court Judge in Allendale, Upper Saddle River, Ho-Ho-Kus and Montvale, and has served as Borough Attorney or Special Counsel to Saddle River, Ramsey and Ridgefield Park. He has served as an Arbitrator for the American Arbitration Association, the Superior Court of New Jersey and the United States District Court; is recognized as a *Rule* 1:40 Qualified Mediator; and is frequently appointed by the Court to mediate complex commercial disputes.

Admitted to practice in the state courts of New Jersey and New York, and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the Supreme Court of the United States, Judge Norton has been a Trustee of the New Jersey Institute of Local Government Attorneys and has also served by appointment of the Supreme Court as a Volunteer III Investigator for the Office of Attorney Ethics. He has been a member of the Bergen and Passaic County Bar Associations, the Defense Research Institute and the New Jersey Defense Association; has served in several sections of the American Bar Association; and has been Co-Chair of the New Jersey State Bar Association's Automobile Litigation and No-Fault Committee. He is Past Chair of the District XI Ethics Committee.

Judge Norton has served on the Faculty of the National Business Institute and is the recipient of the Bergen County Bar Foundation's Lawyer Achievement Award, among other honors. He has lectured at both the New Jersey State Bar Association Annual Meeting in Atlantic City and the Mid-Year Meeting in Rome, Italy, as a panelist on the program Hot Topics for Civil Litigators.

Judge Norton received his B.A. from Lafayette College and his J.D. from Seton Hall University Law School. He served as Law Secretary to the Honorable John L. Ard, J.A.D.

Christine O'Brien is President of the Insurance Council of New Jersey (ICNJ) in Trenton, New Jersey, where she oversees the general operations of the organization and serves as primary spokesperson for New Jersey's property-casualty industry. She has more than 30 years of experience in the field of public affairs, specializing in executing legislative initiatives, public relations campaigns and grass-roots mobilization efforts.

A Leadership New Jersey Fellow, Ms. O'Brien was formerly a Partner with the lobbying firm GluckShaw, which focused on the New Jersey Legislature and Executive branches, specifically in property-casualty and health insurance, utilities and energy alternatives, health care and social services. Prior to GluckShaw, she was the Director of Trenton operations for MWW/Strategic Communications, a global government affairs and communications firm. In addition to working in the private sector, Ms. O'Brien served as the Director of Scheduling & Advance for Governor Jim Florio's re-election campaign and as Legislative Chair for the state Million Mom March-Brady Campaign to Prevent Gun Violence. She is Chair of the Mercer County Board of Social Services, an appointed position by the County Executive.

Ms. O'Brien received her B.S. from Syracuse University.

Michael S. Raff, Certified as a Civil Trial Attorney by the Supreme Court of New Jersey, is a Partner in Raff & Raff**,** LLP, with offices in Paterson, New Jersey. His law practice is limited to plaintiffs' personal injury matters.

Admitted to practice in New Jersey and New York, Mr. Raff is a member of the Board of Governors of the New Jersey Association of Justice (NJAJ). He is also a member of the American Association of Justice (AAJ) and the Passaic County Bar Association, as well as the Northern New Jersey Chapter of the American Board of Trial Advocates (ABOTA). He is a frequent lecturer at personal injury/wrongful death continuing legal education seminars.

Mr. Raff received his B.A., *magna cum laude*, from New York University, where he was elected to *Phi Beta Kappa*, and his J. D. from Fordham School of Law.

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