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### **NO-FAULT INSURANCE WRAP-UP**

On Appeals, Medical Provider Incorporation, Hearsay

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The Appellate Division, Third Department, denied State Farm's motion for permission to appeal to the Court of Appeals the decision in [LMK Psychological Servs., PC v. State Farm Mut. Auto. Ins. Co.](#)[FN1] As previously noted in this space,[FN2] in LMK, the Appellate Division held that attorney's fees are to be granted on each NF-3 or functional equivalent submitted to the insurer rather than on the aggregate of the action, and that an insurer is not entitled to a tolling of statutory interest in cases where the insurer failed to properly or timely handle the claim.[FN3]

In a related matter, *East Acupuncture PC v. Allstate Ins. Co.*, the Appellate Division, Second Department, granted plaintiff's motion for leave to appeal from the Appellate Term's decision.[FN4] In that case, the Appellate Term determined that the reference to 'applicant' in the Insurance Regulations concerning interest on overdue payments includes an 'eligible injured person's assignee.'[FN5]

On April 30, 2008, the Court of Appeals will hear oral argument on [Fair Price Med. Supply Corp. v. Travelers Indem. Co.](#)[FN6] In *Fair Price*, the Appellate Division found that a defense based upon provider fraud must be preserved in a timely denial.

#### Default Judgments

There had been a trend of courts willing to vacate default judgments without much of a showing as to the reasonableness of the excuse and the existence of a meritorious defense. One recent decision has made it more difficult to vacate a default judgment and another has made it much more costly. In *Stracar Med. Servs., PC v. State Farm Mut. Auto. Ins. Co.*[FN7] the Appellate Term found that conclusory allegations of a meritorious defense were insufficient to warrant vacatur of the default judgment since defendant failed to establish its proffered defense was not precluded. The court likewise found the defendant's proofs concerning timely mailing of its denial insufficient.

In *Fortune Med., PC v. Eveready Ins. Co.*[FN8] the Appellate Term upheld the lower court's granting of defendant's motion to vacate a default judgment, but modified the Order to provide that the default shall only be vacated if defendant pays plaintiff \$750.

#### Medical Provider Incorporation Issues

Bromer Med. PC v. Chubb Indem. Ins. Co.[FN9] is the latest Appellate Term decision requiring an insurer to establish 'good cause' to be entitled to discovery concerning a medical provider's incorporation.

In Nagle Med. Plaza, PC v. Allstate Ins. Co.[FN10] the Appellate Term unanimously found that an examination under oath of plaintiff's owner, where the owner 'denied knowledge of many aspects of the everyday operations of plaintiff' was insufficient to establish, as a matter of law, that 'plaintiff's business manager, a non-physician, was the true owner of plaintiff.'

#### Peer Reviews and 'Signatures'

Insurers continue to be successful in dismissing providers' claims at the summary judgment stage based upon affirmed peer review reports. In *Be Well Medical Supply Inc. v. New York Central Mutual Fire Insurance Co.*[FN11] the Appellate Term, Second Department, granted the insurer's motion for summary judgment to dismiss the plaintiff's complaint where defendant came forward with admissible proof that it timely denied the claim pursuant to a peer review that found the medical supplies furnished were not medically necessary. The court noted such proof established defendant's prima facie entitlement to dismissal, thereby shifting the burden to plaintiff to rebut such. The court held, 'Inasmuch as plaintiff offered no medical evidence to rebut the defendant's prima facie case...defendant should have been granted summary judgment dismissing said cause of action.' The same result was reached by the Appellate Term in *Bath Medical Supply Inc. v. New York Central Mutual Fire Insurance Co.*[FN12] and *Eagle Surgical Supply Inc. v. Progressive Casualty Insurance Co.*[FN13]

While it still remains to be seen how detailed plaintiff's rebuttal evidence must be to defeat the insurer's motion for summary judgment, it is clear that an attorney's affirmation accompanied only by unsworn doctor's report is not sufficient.[FN14]

In [Vista Surgical Supplies Inc. v. Travelers Ins. Co.](#)[FN15] the Appellate Division, Second Department, granted plaintiff summary judgment, finding the peer review reports submitted by defendant in opposition to plaintiff's motion were inadmissible because, 'they contained computerized, affixed or stamped facsimiles of the physician's signature...without any indication as to who placed them on the reports, nor are there any indicia that the facsimiles were properly authorized.' Compare this case with *Mani Med., PC v. Everready Ins. Co.*[FN16] an earlier Appellate Term case where that court found, 'Although the signatures on the peer review reports at issue appear to have been affixed by stamp or generated by a computer...[such] merely demonstrated the existence of an issue of fact as to whether the peer review reports constituted evidence in admissible form, i.e., whether the purported signatures were facsimile signatures and placed thereon by the doctor in compliance with [CPLR 2106](#).'

#### Out-of-State Affidavits

[CPLR §2309\(c\)](#) requires that out-of-state affidavits be accompanied by a certificate of conformity. As of recent, there was some confusion as to whether the failure to attach such certificate was a fatal defect. A recent decision has cleared up any confusion. *Impulse Chiropractic, PC v. New York Cent. Mut. Fire Ins. Co.*[FN17] held that where the defect is 'duly objected to,' the defect is indeed fatal as to the underlying out-of-state affidavit. Compare this case with *Mani Med., PC v. NY Cent. Mut. Ins. Co.*[FN18] where the court held defects in the affidavit were waived by plaintiff because such were brought up for the first time on appeal.

#### Workers' Compensation:

In a case of apparent first impression, the Supreme Court in *Westchester Med. Ctr. v. American Tr. Ins. Co.*[FN19] determined that a defense that the claimant is eligible for Workers' Compensation rather than **no-fault** is waived if not set forth in a valid and timely denial.

## Hearsay

Hearsay continues to be a hot topic in **no-fault** litigation, with most motions and trials involving the admissibility of varied items. As previously noted in this space,[FN20] the Appellate Division, Second Department, in [Hochhauser v. Electric Ins. Co.](#)[FN21] held that in the context of the insured/insurer relationship, because there is no business duty to report, but rather only a contractual one, statements made by claimants and reports based thereon are inadmissible under the business record exception to hearsay. In [Mary Immaculate Hosp. v. Government Employees Ins. Co.](#)[FN22] Judge Daniel Palmieri addressed this very issue in the **no-fault** context. In that case, defendant, in support of its claim that the accident was an intentional act, relied on a computer entry reflecting a statement of its insured, as well as an emergency room record that contained a statement from the assignor. Judge Palmieri, relying on Hochhauser, held the statements inadmissible as business records:

It is not a business record because the source of the information was under no business duty to convey her knowledge. CPLR §4518(a), [Hochhauser v. Electric Ins. Co.](#), 46 AD3d 174 (2nd Dept. 2007) and does not constitute an admission because the information is not a party to this action. Prince-Richardson on Evidence §8-201 (11th Edition 1995).

The court also found that the emergency room record was inadmissible.

## Trial Court: Medical Necessity

In *A.M. Medical Services, PC v. Deerbrook Ins. Co.*,[FN23] defendant's peer review doctors said that, based on the information provided by plaintiff, the services rendered were not medically necessary. On cross-examination, plaintiff questioned whether the doctors reviewed records of the patient's medical history prior to the accident.

Both doctors testified that they had no such records and the medical reports submitted by plaintiff made no mention of any prior trauma. In finding for the defendant, Judge Sylvia Ash of Civil Court, Kings County, held it is plaintiff's burden to submit such records to the peer reviewer, so long as the reviewer can form an opinion that the services were not medically necessary based upon the records that were submitted. The court held:

It is incumbent upon the Plaintiff to submit the patient's entire records including the patient's medical history and all ancillary information used by the treating physician to make the determination that the tests ordered are medically necessary for the treatment and care of the patient.

It is unclear from the decision whether there was any testimony that the defendant insurer forwarded the complete medical records in its possession to the third-party vendor and whether the third-party vendor, in turn, sent the complete record to the peer doctor for review. However, going forward, at least before Judge Ash, plaintiff medical providers had better make sure they supply all relevant medical records to the peer reviewer.

## Bad Faith Cause of Action?

Recently, there have been several indications that a bad faith cause of action may exist. First, and most importantly, in [Bi-Economy Mkt. Inc. v. Harleystville Ins. Co. of N.Y.](#),[FN24] the Court of Appeals found that an insured may sue an insurer for its breach of contract[FN25] based upon the covenant of good faith and fair dealing implicit in all contracts and that the insured can sue and recover beyond the policy limits. This decision has generated a fair amount of controversy among attorneys.[FN26]

Right before the Bi-Economy decision, the Insurance Department, by opinion letter,[FN27] indicated that an insurer must attempt 'to effectuate settlements in good faith' when liability is reasonably clear.

Taken together it would appear as if a bad faith cause of action would be available to **no-fault** plaintiffs under the right set of circumstances. However, this is uncharted territory in the realm of **no-fault** litigation and its application, if any, remains to be seen.

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FN1. [2008 N.Y. Slip Op. 67834\(U\) \(3rd Dept. 2008\)](#).

FN2. **No-Fault Insurance Wrap-Up**, Jan. 31, 2008 NYLJ, at p. 3.

FN3. [LMK Psychological Servs., PC v. State Farm Mut. Auto. Ins. Co.](#), 46 AD3d 1290 (3rd Dept. 2007).

FN4. [2007 N.Y. Slip Op. 76465\(U\) \(2nd Dept. 2007\)](#).

FN5. [East Acupuncture PC v. Allstate Ins. Co.](#), 15 Misc.3d 104 (App. Term 2nd and 11th Jud. Dists., 2007).

FN6. [42 AD3d 277 \(2nd Dept. 2007\)](#).

FN7. 18 Misc3d 136(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN8. 18 Misc3d 140(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN9. 18 Misc3d 138(A) (App. Term, 1st Dept. 2008).

FN10. 18 Misc3d 139(A) (App. Term 2nd and 11th Jud. Dists. 2008); See also, Boston Post Road Medical Imaging, PC v. Progressive Ins. Co., 15 Misc3d 145 (App. Term 9th and 10th Jud. Dists. 2007).

FN11. 18 Misc3d 139(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN12. 18 Misc3d 139(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN13. 19 Misc3d 130(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN14. [CPT Medical Services v. New York Central Mutual Fire Insurance Co.](#), 18 Misc3d 87 (App. Term 1st Dept. 2007).

FN15. [2008 NY Slip Op 03199 \(2nd Dept. 2008\)](#).

FN16. 18 Misc3d 140(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN17. 19 Misc3d 127(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN18. 19 Misc3d 128(A) (App. Term 2nd and 11th Jud. Dists. 2008).

FN19. 19 Misc3d 1104(A) (N.Y. Sup. Ct. 2008).

FN20. **No-Fault Insurance Wrap-Up**, Nov. 9, 2007 NYLJ, at p. 3.

FN21. [46 AD3d 174 \(2nd Dept. 2007\)](#).

FN22. [2008 N.Y. Slip Op. 50638\(U\) \(N.Y. Sup. Ct. 2008\)](#).

FN23. 18 Misc3d 1139(A) (N.Y. Civ. Ct. Kings Co. 2008).

FN24. [2008 NY Slip Op. 01418 \(2008\)](#).

FN25. In this case the insured was suing for consequential damages.

FN26. New York Civil Law, ‘New York Court of Appeals Holds Consequential Damages May Be Covered in First-Party Action Against Insurer,’ [http://nylaw.typepad.com/new\\_york\\_civil\\_law/2008/02/new-york-court.html](http://nylaw.typepad.com/new_york_civil_law/2008/02/new-york-court.html) (Last visited April 25, 2008.)

FN27. <http://www.ins.state.ny.us/ogco2008/rg080204.htm>. (Last visited April 25, 2008.)  
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