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Expert Analysis
No-fault Insurance **Wrap**-up

ERRONEOUS CLAIM FORM, EBT, DISCOVERY, AFFIDAVIT OF NON-RECEIPT

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In a prior **wrap**-up[FN1] we discussed Davydov v Progressive Ins. Co.,[FN2] a case where the assignment of benefits was written in favor of 'Dr. Davydov,' but the lawsuit was initiated on behalf of 'Dr. Davydov, P.C.' In that case, the Appellate Term permitted the plaintiff to recover as the defendant insurer did not request verification as to the assignment, nor did it issue a denial on the basis that the assignment was defective.

In Bedford Park Neurology, P.C. v. New York Cent. Mut. Fire Ins. Co.[FN3] —rendered less than six months after Davydov and having similar facts—the Appellate Term came to the opposite result. In Bedford, the physician was listed as the provider on the bill, but handwritten next to the physician's name on the bill was 'Bedford Park' and not 'Bedford Park Neurology, P.C.,' the plaintiff that brought the action. The assignment of benefits, however, was written in favor of the plaintiff. In dismissing plaintiff's complaint, the Appellate Term held, 'Plaintiff failed to submit a claim form which entitled it to payment, and may not correct the allegedly erroneous claim form once litigation has commenced,'[FN4] citing Davydov.

In Davydov, the defendant did not request verification or issue a denial as to the assignment. Likewise, in Bedford Park, it appears as if defendant did not request verification as to the discrepancy in the bills, nor deny the claim on that basis. In both cases, the defendant argued that the plaintiff did not have standing to recover benefits. The Davydov court cited to Hospital for Joint Diseases v Travelers Prop. Cas. Ins. Co.,[FN5] while the Bedford Park court did not. The Bedford Park court appears to have created an exception to the 30-day rule,[FN6] where one did not exist before. However, Bedford Park can probably be limited to its facts.

Early Verification Requests

In Infinity Health Prods., Ltd. v. Eveready Ins. Co.,[FN7] the Appellate Division was asked to determine what effect, if any, an early follow-up verification request has. In that case, as explained in the Appellate Term's opinion, the defendant insurer issued a follow-up verification request three days earlier than the 10 days required by 11 NYCRR §65-3.6(b). The Appellate Term held that the insurer's premature follow-up had no tolling effect and affirmed the lower court's grant of summary judgment to Infinity.

Upon granting leave, the Appellate Division reversed the Appellate Term, and held that despite the insurer's premature

follow-up, its time to pay or deny remained tolled. The court based its decision upon its finding that '[Infinity] is estopped from claiming that the defendant is precluded from asserting any defense to the claim,' because it ignored both the original and the second verification request which was a 'mere 3 days' early.

Before Infinity, courts strictly construed the deadlines set forth by the regulations.[FN8] The Appellate Division infused equity into **no-fault** jurisprudence which, up until this decision, had not been done:

[I]n light of the particular factual circumstances herein, it would be incongruous to conclude that the Insurance regulation regarding follow-up verification, or any other statute or rule, warrants a result which would, in effect, penalize an insurer who diligently attempts to obtain the information necessary to make a determination of a claim, and concomitantly, rewards a plaintiff who makes no attempt to even comply with the insurer's requests. Such a result is not contemplated by the ' **no-fault** law' or its regulations, which should be interpreted to promote the expeditious handling of verification requests and prompt claim resolution.

The decision can be limited to its facts—where a plaintiff does not respond to either the initial or follow-up verification requests and where the follow-up's untimeliness is de minimus. But it can also be expanded, interjecting equity in other circumstances, e.g., where a plaintiff submits its bill on the 48th day (instead of 45th), or where the insurer receives late notice of the underlying accident. Only time will tell whether equity considerations will further creep into **no-fault**, a traditionally black and white area of the law.

EBTs of Assignors

In Mia Acupuncture, P.C. v Mercury Ins. Co.,[FN9] the Appellate Term, Second Department, held that an assignor is not a party in a **no-fault** case. There, Mercury issued several discovery demands, including an EBT notice for plaintiff's assignor. The assignor did not appear, and defendant moved to dismiss the action pursuant to CPLR R.3126(3).

The lower court denied Mercury's motion, and the Appellate Term affirmed. The Appellate Term explained that assignors 'divest' themselves of any interest in **no-fault** benefits by assigning their rights and that the assignor is not under the provider's control. It follows, according to The Appellate Term, that the lower court could not have granted defendant's motion because, '[b] y its terms, the CPLR §3126(3) dismissal sanction is applicable only to the disclosure violations of parties, not nonparties.'

Foundation

When a party offers an affiant to testify as to its practices and procedures, it is incumbent upon that affiant to explain how he or she has personal knowledge of those practices and procedures. Part of that explanation must include testimony as to the duration of the affiant's employment. Points of Health Acupuncture, P.C. v GEICO Ins. Co.,[FN10] provides some context.

In that case, the denials were issued before the affiant was employed by GEICO. Missing from the affidavit was any explanation as to how the affiant obtained knowledge of GEICO's practices and procedures prior to her start date. Having failed to provide an explanation, GEICO was unable to show that it mailed anything according to a standard practice or procedure. As a result, it could not show that it preserved a medical necessity defense, and plaintiff's motion was granted.

Material Misrepresentations

In a short but important decision,[FN11] the Appellate Term in Excel Radiology Servs., P.C. v Clarendon Natl. Ins. Co. held that an 'assignor's alleged misrepresentation of the presence of her daughter in the car is irrelevant to the question of whether the assignor's injuries arose from an insured incident.' The court did note, however, that Cla-

rendon limited itself to the argument that the accident was either staged or no accident at all. Different facts or different defenses might have brought about an altogether different result for Clarendon.

Compare this with A.B. Med. Servs., PLLC v Clarendon Natl. Ins. Co.[FN12] where defendant offered the same defense. While the Appellate Term provided almost no facts, it did provide an important distinction. Plaintiff moved for summary judgment, and defendant cross-moved for the same relief. In an amended order, the lower court denied plaintiff's motion and granted defendant's.

The Appellate Term modified the order, finding that while the defendant provided a founded belief sufficient to create a triable issue of fact as to whether the injuries arose out ‘of an insured incident,‘ it did not provide ‘sufficient evidence in admissible form‘ to show, as a matter of law, that the injuries did not ‘arise out of an insured incident.‘ Therefore, Clarendon's cross-motion could not be granted.

Bad Faith Cause of Action

Prior **wrap**-ups discussed whether a bad faith cause of action is viable in **no**-**fault** litigation.[FN13] After Devonshire Surgical Facility & Carnegie Hill Orthopedic Servs., P.C. v National Cont. Ins. Co.,[FN14] we now know, at the very least, that if properly plead, it should survive a motion to dismiss for failure to state a cause of action. Indeed, it already has in other contexts.[FN15] The court's decision, while short, bears quoting in full:

Plaintiffs' proposed amended complaint does not specify any damages sustained by plaintiffs other than unpaid first-party **no**-**fault** benefits. Because plaintiff did not specify any consequential damages (see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of NY, 10 NY3d 187 [2008]) caused by defendant's failure to pay plaintiffs' claims for such benefits, the proposed amendment is palpably insufficient as a matter of law (see Peach Parking Corp. v 346 W. 40th St., LLC, 42 AD3d 82, 86 [2007]; Davis & Davis, P.C. v Morson, 286 AD2d 584, 585 [2001]), and Civil Court providently exercised its discretion in denying plaintiffs' motion to amend.

The sole reason plaintiff's motion was denied was its failure to specify consequential damages. While the court did not provide much explanation as to what would be sufficient, its decision allows that a bad faith cause of action, pled properly, is viable.

CPLR R.3212(f) Per Se

CPLR R.3212(f) allows the opponent of a summary judgment motion to create a triable issue of fact if it can ‘offer an evidentiary basis to suggest that discovery may lead to relevant evidence and that facts essential to justify opposition were exclusively within the knowledge or control of the [moving party].‘[FN16] Relief under 3212(f) isn't given as a matter of course, as two recent decisions out of the Appellate Term indicate. In RLC Med., P.C. v Allstate Prop. & Cas. Ins. Co.,[FN17] and Delta Diagnostic Radiology, P.C. v Interboro Ins. Co.,[FN18] the defendants argued that discovery was required to oppose plaintiff's motion. Each defendant received a different result. It appears as if the Appellate Term has set two standards when reviewing 3212(f) arguments, one for Malella cases, and one for every-thing else.

In RLC,[FN19] Allstate alleged that it was unable to oppose plaintiff's summary judgment motion because RLC did not answer defendant's discovery demands with respect to the issue of RLC's incorporation. In affirming the denial of plaintiff's motion, the Appellate Term held that ‘while facts may exist that are essential to justify denial of the branch of the summary judgment motion seeking to recover upon claims submitted by RLC, defendant was unable to set forth sufficient facts to establish the defense of fraudulent incorporation.‘ The RLC court also reiterated the general rule that, in order for an EUO transcript to be considered by the court, it must be in admissible form.

In Delta Diagnostic, the defendant opposed plaintiff's motion for summary judgment utilizing CPLR R.3212(f), inter

alia. Plaintiff's motion was granted, and the Appellate Term affirmed, holding that ‘defendant failed to demonstrate that discovery was needed in order to show the existence of a triable issue of fact.‘

Whether the Appellate Term, Second Department, will allow such a defense does not necessarily depend on what discovery was provided, if any. Instead, it appears that its decision will be an amalgamation of the defense presented, the discovery provided, the evidence submitted, and most importantly, whether discovery is actually needed to oppose the motion. It may be the case that a defendant relying on a Mallela defense will receive automatic relief under CPLR R. 3212(f); however, such a rule cannot be inferred from these two cases alone.

Non-Receipt

In a previous **wrap**-up,[FN20] we discussed a case where the defendant's affidavit as to non-receipt was insufficient as a matter of law.[FN21]The Appellate Division, Second Department, recently addressed a similar matter. A defense of non-receipt must be supported by a detailed affidavit from someone with personal knowledge of the practices and procedures for receiving mail.[FN22] Personal knowledge, however, of one facility's practices and procedures cannot necessarily be inferred as to another facility's, even where both facilities are the same insurance companies.

Such were the facts in Westchester Med. Ctr. v Philadelphia Indem. Ins. Co.[FN23] There, the Appellate Division, Second Department, instructed that if an insurer wants to rely on a claim of non-receipt, a conclusory affidavit will not be sufficient. In Westchester, Philadelphia Indemnity failed to interpose an answer, and a default judgment was entered. It attempted to vacate the default, arguing that it did not receive the summons and complaint and that it did not receive plaintiff's bills. Both arguments were rejected.

Philadelphia Indemnity's motion contained one affidavit from a senior claims examiner from Philadelphia Indemnity's Texas office who essentially said, in sum and substance, that he checked the computer system and there was no record of the office receiving the bills—without much explanation. However, Philadelphia Indemnity was served through the Insurance Department and notified at the Philadelphia office. An employee of defendant signed for the bills when they were received.

The Appellate Division found the affidavit to be insufficient, because the affiant ‘failed to demonstrate any knowledge of the office procedures employed in the handling of a summons and complaint received at the defendant's Philadelphia office.‘ For the same reason, the court rejected Philadelphia Indemnity's argument that it did not receive the bill. It is clear, however, that it would not have been sufficient to attach an affidavit from a Philadelphia claims examiner, unless that affiant had knowledge of the office procedures in the handling of a summons and complaint in that office and the procedures in handling billing forms received in that office.

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FN1. **No**-**Fault** Insurance **Wrap**-Up, Sept. 30, 2009, NYLJ at p. 3.

FN2. 25 Misc 3d 19 (App. Term 2nd, 11th and 13th Jud. Dists. 2009), lv denied 2009 NY Slip Op 86389(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN3. 26 Misc.3d 128(A) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN4. Compare with Bath Med. Supply, Inc. v Country Wide Ins. Co., 23 Misc 3d 147(A) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN5. 9 NY3d 312 (2007).

FN6. See, Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co., 90 NY2d 274, 282 (1997), rearg denied 90 NY2d 937 (1997).

FN7. 67 A.D.3d 862 (App. Div., 2nd, 2009).

FN8. e.g., Presbyterian Hosp. in the City of New York v. Maryland Cas., 90 N.Y.2d 274 (1997).

FN9. 2009 NY Slip Op 29509 (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN10. 25 Misc 3d 140(A) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN11. Excel Radiology Servs., P.C. v Clarendon Natl. Ins. Co., 25 Misc.3d 140(A) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN12. 25 Misc.3d 139(A) (App. Term 2nd, 9th and 10th Jud. Dists. 2009).

FN13. **No-Fault** Insurance **Wrap**-Up, April 30, 2008, NYLJ at p. 3.; **No-Fault** Insurance **Wrap**-Up, April 29, 2009, NYLJ at p. 3. Bi-Economy Market Inc. v. Harleysville Ins. Co. of N.Y., 10 N.Y.3d 187 (2008), rearg denied 2008 NY Slip Op 73698 (2008),

FN14. 26 Misc.3d 131(A) (U)(App. Term, 1st, 2009)

FN15. Hoffman v Unionmutual Stock Life Ins. Co. of N.Y., 51 A.D.3d 633 (App. Div., 2nd 2008); Savino v Hartford, 23 Misc.3d 1116(A) (Sup Ct, Suffolk County); Grinshpun v Travelers Cas. Co. of Conn., 23 Misc.3d 1111(A) (Sup Ct, Kings County); Panasia Estates, Inc. v Hudson Ins. Co., 2009 NY Slip Op 09284 (App. Div., 1st, 2009),

FN16. See generally, Davila v New York City Tr. Auth., 66 A.D.3d 952 (App. Div., 2nd, 2009)

FN17. 26 Misc.3d 129(A) (App. Term 2nd, 9th and 10th Jud. Dists. 2009).

FN18. 25 Misc.3d 134(A) (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN19. RLC had three plaintiffs: RLC Medical, P.C., Gentle Care Acupuncture, P.C.., and Craig Total Health Family Chiropractic Care, P.C.

FN20. **No-Fault** Insurance **Wrap**-Up, Sept. 30, 2009, NYLJ at p. 3.

FN21. J.R. Dugo, D.C., P.C. v. New York Cent. Mut. Ins. Co., 24 Misc.3d 68 (App. Term 2nd, 11th and 13th Jud. Dists. 2009).

FN22. Here we are only discussing a situation where the defendant or plaintiff does not have an affidavit of the person actually served denying receipt.

FN23. 2010 NY Slip Op 00138 (App. Div., 2nd, 2009).
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