

# CALENDAR CALL

Volume 2, Issue 2

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## BG&S - KEEPING UP TO DATE

On Wednesday, August 18, 2004, the firm held its second “in-house” seminar that was approved by the Suffolk Academy of Law for Continuing Legal Education (CLE) credits.

The presenters were Vincent F. Gerbino, Jeffrey S. Siegel and James K. Hogan.

Mr. Gerbino spoke about EMG and NCV testing. He gave an in-depth explanation of what each test was,

why it would be prescribed, and how the test was performed. He even provided insight as to the environment in which the test was to be administered.

Mr. Gerbino also provided a chart that delineated the various muscles that are usually tested. This chart will be of great assistance when an attorney inquires about this test during a deposition or examination under oath, and compares the wit-

ness’ testimony to the EMG and/or NCV report.

Mr. Siegel is in court every day and he routinely takes cases to trial. His lecture focused on the various types of objections that he usually makes or encounters at trial. He delineated several common objections, for plaintiff and defendants and how to respond to same, including the relevant case law to support his position.

*Continued on page 2*

## DISCLAIMERS MUST BE TIMELY AND PRECISE

In two recent cases, the Appellate Division found against the carrier in both instances. In the automobile case, the court reversed the lower court that had granted summary judgment dismissing the declaratory judgment action. The basis of the reversal was the insurer’s failure to explain “its un-

reasonable 15-month delay” in disclaiming coverage. The court found that if there is an existing policy and an accident, then the insured has established their case. The insurer did not adequately explain its delay in disclaiming coverage, and therefore the court awarded judgment in favor of the insured.

In the labor law case, the insurer disclaimed on the grounds of failure to notify whereas the proper ground was failure to provide the complaint. The court held that since the denial was on a specific ground it would preclude a denial on a different, albeit similar ground.

## TEMPORARY INJURIES GET FUTURE DAMAGES

The Appellate Division modified the ruling of the trial court for instructing the jury that they could only consider future damages if they find that the injuries caused by the accident were permanent.

The jury found that the plaintiff suffered a “serious injury” but found that those injuries were not per-

manent in nature. The trial court charged the jury that under those circumstances they were not to consider future damages.

What makes this ruling most troublesome is the fact that the Appellate Division modified, despite the fact that trial counsel did not object to the charge or verdict sheet. The court found that

the ruling was a fundamental error and therefore modified the trial court’s ruling and sent the case back for a trial on the issue of future damages.

The claims department and all trial counsel should be aware of this case, Gallagher v. Samples (6 AD 3d 659) as well as a similar holding in Rizzo v. DeSimone (6 AD 3d 600).

## KEEPING UP TO DATE

*Continued from page 1*

Mr. Hogan spoke about the validity of Assignments and the need for verification of same. He provided copies of recent cases on this topic. He also spoke about Independent Contractors and the position of the State Insurance Department and relevant cases with regard to the billing

for services provided by such Independent Contractors.

The information was very well received by all in attendance, and this was reflected in the course evaluations that were forwarded to the Suffolk Academy of Law.

This seminar, sanctioned by the Suffolk

Academy of Law, the educational arm of the Suffolk County Bar Association, is part of the ongoing effort by the firm to maintain the highest level of competency in its attorneys. In addition to these major seminars, partners routinely engage in discussions about topics of interest at the weekly calendar meeting.

## STUPID HUMAN TRICKS

A British cyclist who was arrested for slashing no less than 2,000 automobile tires was sentenced to 16 months in prison.

Mr. Carpenter, an avid bike rider, used a sharpened screwdriver to puncture the tires of

over 500 parked cars, trucks and vans in a ten day period in response to the “inconsiderate manner” of some motorists.

He told the arresting officer that he started slashing the tires after one car nearly

knocked him down and another drove through a puddle and splashed him with water.

It may not be wise to bring a “subrogation” action against this guy. Especially if you park your car on the street.

## CLAIMS DEPARTMENT ~ BEST LINE OF DEFENSE

A Claims Manager of a major insurance carrier became suspicious about the billing activity of a Nassau County physician and requested that **BG&S** investigate to determine if there was any improprieties or illegalities.

After discussions with the claims department, we requested Examinations Under Oath of some of the claimants who were treated by this doctor. This proved to be very interesting.

In some cases, the services provided by this doctor seemed reasonable and in accordance with the post accident complaints of the claimants. However, we also found many instances in which the claimant went to one chiropractor in particular.

At that chiropractor's office, the

claimant was invariably treated by other people who administered physical therapy modalities. The referring physician only saw the claimant in consultation, and recommended continued physical therapy.

When we reviewed the billing we discovered that the physician's billing always reflected physical therapy modalities being provided by the chiropractor at his office. We know that those bills were not accurate, since the claimant testified that the physical therapy modalities were administered by other people. We then discovered that this chiropractor simultaneously billed for his chiropractic adjustments.

The physician's billing was false and misleading in that it designated the chiropractor as the individual who ad-

ministered physical therapy but did not identify him as a chiropractor. The names of the people who actually administered the physical therapy were nowhere to be found. We therefore do not know the identity of these people or if they hold the requisite license to administer physical therapy.

As per an opinion from the Education Department, issued in April, 2002, any services that are provided by a chiropractor are to be billed as chiropractic services. Therefore, the chiropractor and the physician had developed a plan to bill for both the physical therapy and chiropractic services in violation of the Education Law directive. We reported our findings to the carrier and are awaiting a determination as to how to proceed.

## TRIAL COURT JUDGE ALMOST GOT IT RIGHT

The Appellate Division modified the order of a trial court judge who had reversed his own order that had granted dismissal on the grounds that plaintiff did not suffer a "serious" injury.

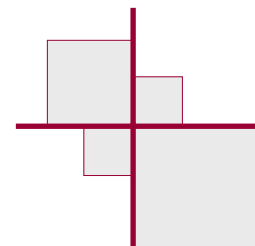
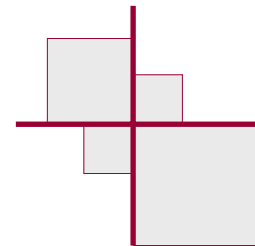
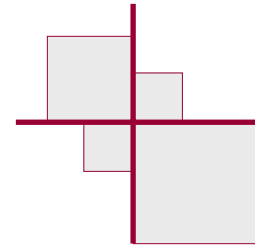
Plaintiff commenced two separate actions, one for an accident

in January and the current action for an accident of August of the same year.

The trial court originally granted defendant's motion to dismiss on threshold and then reversed itself on plaintiff's motion to renew.

The Appellate

Division found the judge was in error in granting the motion on procedural grounds and then found the judge was in error on the merits as well. The appellate court stated that the plaintiff failed to establish that his alleged injuries resulted from the August accident and not from the January one.



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## **LEGISLATIVE UPDATES**

**No dollar amount can be mentioned during opening statements...** The Governor signed Senate Bill 6651 which effectively provides that in any action to recover damages for personal injury or wrongful death the attorney for either party may not make reference to a specific dollar amount during their opening statement. This law is effective immediately.

**Statute of Limitation for Fraud Extended...** Assembly Bill 10800 was signed

into law on August 17, 2004. This law extends the statute of limitations for commencing an action based upon fraud to “the greater of six years from the date the cause of action accrued or two years from the time the plaintiff...discovered the fraud”.

**Electronic filing is on the way...**The Legislature just passed and the Governor just signed an extension to the “pilot program” which permits commencing an action by electronic means. The

program now includes tort actions which are commenced in Nassau, Suffolk, New York, Bronx, Kings, Queens, Richmond, Westchester, Monroe and Albany.

At this juncture it is strictly voluntary. However, when you couple electronic filing with the existing rules in the Supreme Court of commencement by filing, then we suggest careful monitoring on Statute of Limitation issues.