

# CALENDAR CALL

Volume 5, Issue 2

MG&S  
MG&S  
MG&S  
MG&S  
MG&S

## STRICT RULES OF CONTRACT FOR UM/SUM COVERAGE

The case of Omar Williams v Progressive Northeastern Insurance Co. in the Appellate Division, Fourth Department involved a passenger who was injured when the car he was riding in was forced off the road by an unidentified vehicle.

The passenger, Mr. Williams brought an action in the Supreme Court seeking damages under the supplementary uninsured/underinsured motorist (SUM) benefits of the insurance policy relating to the car in which he was a passenger.

The trial court held that Mr. Williams was not entitled to seek damages under the SUM coverage because he had not sought to first recover from the other vehicle. However, he would be entitled to seek the uninsured motorist (UM) coverage under the same policy.

More importantly, both the trial court and the Appellate Court held that, in either event, such claims require mandatory arbitration under the terms of the policy.

The Appellate Court ruled that the parties to a contract may agree to waive a jury trial and consent to mandatory arbitration.

Furthermore, a third party beneficiary, such as this passenger, is only entitled to the rights to which the parties to contract agreed.

The complaint was therefore dismissed since the dispute did not belong in a trial court but rather in an arbitration hearing.

## NO PROOF ~ NO CASE

Plaintiff Anthony Woods was involved in a multi-car collision which was allegedly caused by a driver who left the scene of the accident. Mr. Woods did not get the license plate number, and could only describe the car by its make, model and color.

Some two years later Mr. Woods brought an action against these de-

fendants, Essence Craig and Antwoin Craig.

The Craigs then moved for summary judgment to dismiss the complaint upon their affidavits that neither they nor their car were involved in this accident.

The trial court judge denied the motion and the Craigs appealed.

The Appellate

Division, Fourth Department reversed and dismissed as to both Craigs.

The Appellate Court found that the affidavits from each of these defendants were sufficient to meet their burden of proof on the motion, and the failure of the plaintiff to rebut the defendant's assertions required that the motion be granted and the complaint be dismissed.

## JURY VERDICT NOT ENOUGH ~ LET'S TRY AGAIN

In the case of Glenda Hughes v Kenneth Webb, the Appellate Division, Second Department set aside a jury verdict which only awarded plaintiff the sum of \$22,500 for pain and suffering up to the date of trial and ordered a new trial on the issue of damages for both past and future pain and suffering.

The Appellate

Court found that the trial court committed error by not allowing the plaintiff's doctor to testify as to permanency of the injury based on a recent examination even though it was not previously disclosed to the defendant.

The Appellate Court found that the plaintiff's Bill of Particulars "clearly included allegations that the ankle fracture resulted in permanent injuries... Con-

sequently, no [new] medical report was required to be served..."

In addition the Appellate Court found that it was an "improvident exercise of discretion" for the trial court to deny the plaintiff a continuance of the trial in order to compel the defendant's doctor to appear as a fact witness.

Let's see if the next jury gets it right.

## STUPID HUMAN TRICKS

**At least it's not under No-Fault.**

In New Zealand, a prostitute who was injured when the car which was being driven by her "john" rode off the road and plunged down a hillside, may be eligible for worker's compensation payments. Although it is undisputed that she was being driven to the site they had chosen for their encounter, the question remains open as to whether or not the car accident constituted a "workplace" injury.

**And they say that cell phones are a distraction.**

Merv Bontrager crashed his 18-wheeler in Minot, N.D., during a moment of distraction

when he was searching around on the floor to find the doughnuts he had tossed aside for later.

Whereas Kristopher Lind lost control of his car in Vancouver, British Columbia, while he was struggling with trying to open a tightly wrapped "sex toy" that he had just purchased. The news report did not reveal the exact nature of the object.

And poor Andrew Workman of Shepley, England got into an accident with another car when a bee flew through the window and stung him in a private area.

**I can't be expected to see everything.**

In Hilton Head, S.C., Alexander Ocampo

was arrested and charged with driving under the influence after his car spun out of control and he continued to drive on, without realizing that his passenger had been ejected out of the open window. The passenger survived, but with very serious injuries.

**Waste not, want not.**

The police in Orlando, Fl., were in pursuit of a suspected drunk driver, when the car stopped and the driver jumped out and fled on foot. When he was overtaken by the police he was found clutching a "Corona" beer presumably from the 12 pack that was recovered from the front seat of his car.

## NO-FAULT CASES TURN ON MAILING RECEIPTS

Two recent cases from the Appellate Division, Second Department accentuate the vital importance that mailing receipts and the notations written on them have in No-Fault cases.

In the case of Westchester Medical Center v Liberty Mutual Insurance Co. the Appellate Division reversed the lower court's finding of summary judgment in favor of the defendant insurance company and granted summary judgment to the plaintiff.

The Appellate Court found that the plaintiff had initially demonstrated entitlement to judgment as a matter of law by simply showing that billing documents were mailed and received and asserting that payment was overdue. Although the defendant responded that verification requests were sent and the plaintiff failed to respond, the Appellate Court discounted the defendant's affidavits and found that the plaintiff did respond.

In the case of Mary Immaculate Hospital v Allstate Insurance Co. decided just three months later, the same Appellate Division re-

versed a lower court's finding of summary judgment in favor of the plaintiff and sent the matter back to the Supreme Court for trial.

In this case, the Appellate Court found that the plaintiff failed to submit sufficient evidence in admissible form to establish that the billing forms relating to this case were sent to the carrier. The Appellate Court discounted the affidavit of the plaintiff's billing representative and the certified mail receipts.

Inasmuch as both of these cases turn entirely on certified mail receipts can both cases be reconciled, and more importantly is the question of what a carrier should do to protect itself.

The answer can be found in the way this Appellate Court interprets its own earlier decision of New York and Presbyterian Hospital v Progressive Insurance Co.

In that case this Appellate Court found that the plaintiff's evidence was inadequate to establish that the proper billing material was sent to the carrier.

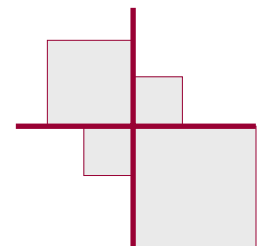
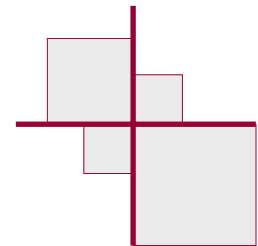
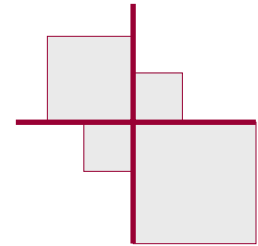
Quite specifically they found that the plaintiff's submission of a certified mail receipt coupled with a "Track & Confirm" printout merely establishes that *something* was sent and received, but cannot establish that it was the billing for any particular case.

However, in the Westchester Medical Center case the plaintiff supplied a cover letter stating what claim the enclosed documents related to and also put a handwritten notation on the mailing receipt.

It was these additional notations that this Court found made the difference between sufficient and insufficient proof.

It has now become incumbent on an insurance carrier, who receives more than a few items of certified return receipt mail, to check the return receipt form for any notations and to make sure that the items noted on the form are contained within the envelope.

Just another example of a court that simply does not understand what is going on in the world.



---

**BRUNO GERBINO & SORIANO, LLP**

445 Broad Hollow Road, Ste 220  
Melville, NY 11747

Phone: (631) 390-0010  
Fax: (631) 393-5497  
Email: [BGS@BGSLAW-NY.COM](mailto:BGS@BGSLAW-NY.COM)  
Website: [www.bgslaw-ny.com](http://www.bgslaw-ny.com)

**BRUNO GERBINO & SORIANO, LLP**  
**Insurance Defense at its best !**

**B  
&  
G  
&  
S**

## **SOMETIMES IT ALL WORKS OUT IN THE END**

The Appellate Division, Third Department affirmed the determination of the jury in the case of Sandra Holbrook v Brit-tany Pruiksma, which found the defendant negligent in the hap-pening of the accident, but did not find that the plaintiff sustained a serious injury within the meaning of section 5102 (d) of the Insur-ance Law.

The plaintiff based her appeal on the fact that the defendant did not call any wit-nesses at all, and there-

fore her own proof was uncontroverted.

The plaintiff testified that she began suffering from numer-ous ailments within a few days of the acci-dent and that these problems continued up to the date of trial. Specifically, she suf-fered from back pain, neck pain, stiffness, frequent headaches, dizziness, confusion, loss of concentration, loss of memory, loss of coordination, and fa-tigue.

In spite of

these subjective com-plaints, all of her ob-jective medical tests showed normal results.

In addition, it was established during cross-examination that the plaintiff had a prior accident which re-sulted in many of the same complaints.

Accordingly, under all the circum-stances the Appellate Court found that the jury did not need any opposing evidence to conclude that this plaintiff did not suffer from a serious injury.