

# CALENDAR CALL

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## MALLELA UPDATE ~ THE GOOD & THE BAD

In a recent decision by the Appellate Division, First Department, concerning a fraudulently incorporated provider, that court held that a carrier is permitted (after April 4, 2002) to withhold payment of any claim filed by such a fraudulently incorporated enterprise regardless of when the claim was filed.

The Appellate Division stated in no uncertain terms that the Court of Appeal's holding in *Mallela* applies to

any and all claims that were not paid prior to the effective date of the "new" regulation, which is April 4, 2002.

Therefore all carriers should be vigilant in determining if any claimant was fraudulently incorporated regardless of when the claim was filed.

On the bad side, the court also ruled that an insurance carrier cannot maintain an action for fraud and unjust enrichment for any claims that were paid before the

regulation became effective.

Although the court did not specifically address the issue, it appears that a carrier would be able to seek reimbursement for any claims that were paid after April 4, 2002 regardless of when the actual claim was filed. The court stated that "...the clear import ... is that as of April 4, 2002, defendants were no longer eligible to be paid, even if they had already performed services."

## DOCTOR'S REPORT MUST BE PERFECT TO DISMISS

Justice Baisley, Jr. of Supreme Court, Suffolk County granted defendant's motion to dismiss on the grounds that the plaintiff did not suffer a serious injury as defined by section 5102(d) of the Insurance Law.

The plaintiff appealed the ruling and the Appellate Division, Second Department reversed

and directed that the motion to dismiss be denied.

The defendant's doctor examined the plaintiff within three months of the accident and submitted a properly affirmed report which found that the plaintiff had full flexion as well as full extension and lateral extension of the cervical spine. The doctor also found that there was "60

degrees of rotation bilaterally".

The Court held that the doctor's failure to compare that finding to what constitutes a normal rotation, necessitates a denial of the motion to dismiss.

Always make sure your IME reports are perfect before they go to the court.

## ONCE AGAIN ~ FORM OVER SUBSTANCE

The Supreme Court, Nassau County issued an order that permanently stayed an arbitration for an uninsured motorist claim on the grounds that the court had previously been presented with their identical facts concerning the same parties and found that the offending vehicle was insured. Therefore, uninsured motorist coverage was unavailable.

Despite the fact that there was no reversal

of that prior order and that it was therefore the law of the case, the claimant filed another notice of her intent to arbitrate on her claim for uninsured motorist benefits. The carrier moved to stay the arbitration and the court, once again granted the stay. The claimant filed an appeal as to this order which did no more than follow the prior order.

The Appellate Division, Second Department reversed the Su-

preme Court upon a finding that the carrier failed to apply for the permanent stay of arbitration within 20 days of service of the notice of intent to arbitrate and therefore the application for the stay was dismissed. The court found it “unnecessary” to consider the fact that there was a previous and undisturbed court finding that the other car was insured which would seem to preclude uninsured motorist coverage.

## STUPID HUMAN TRICKS

**You just can't trust the accuracy of news reports.**

Richard Ramos had heard a news report that the Houston Texas police had instituted a new “no-chase” policy for minor traffic violations. Therefore, when a squad car signaled for him to pull over, he hit the gas and sped away.

Unfortunately for him, the squad car was from the Harris County Sheriff's department which did not have such a policy. They gave chase and arrested him for a variety of charges above and beyond the initial traffic violation.

**Too smart for his own good.**

Michael Kubosh

also of Houston Texas decided that he was going to mount a court challenge to traffic tickets which are based solely on a traffic-light mounted camera. He therefore deliberately ran a red light at an intersection at which a camera was mounted.

Unfortunately for him, the intersection was also being patrolled by two Houston police officers who observed the violation and wrote him a ticket based solely on their own observations.

Not only was he unable to challenge a “camera” ticket, but the fine was \$200 rather than \$75.

**Watch out for flying objects.**

Two men were

injured when their van rolled over on Interstate 75 outside of Toledo, Ohio after the driver lost control when a red bra blew over from the radio antenna of another car.

The Highway Patrol tracked down the owner of the bra who explained that she hung it from the antenna when she realized it had broken from being chewed on by her dog. She was given a summons for littering, but the police are investigating whether there had been any car-to-car socializing before the accident.

If anyone in the claims department were to accept this story on face value, then it might be wise to send them for some additional training.

## APPELLATE TERM FINALLY REQUIRES PROOF

Several years ago the Appellate Term, Second Department rendered a decision in which they held that in order to succeed on a motion for summary judgment, a plaintiff medical provider should not be required to present any greater proof to the court than they would be required to provide to a carrier in a submitted no-fault claim form.

As a result of this decision, plaintiffs were able to obtain money judgments on no more proof than the statement that “a claim was submitted and it has not been paid within 30 days”. It had gotten to the point where they did not even have to prove mailing as long as the carrier sent a denial or a demand for verification which constituted proof that the claim was sent.

It did not even matter if the claim form was incomplete, or incorrect, or if the assignment was improper, or was not even signed. So long as the defendant was not able to establish a timely denial or verification request for those items, then it was deemed sufficient.

Thanks to a re-

cent appeal handled by **BG&S**, that may all be changing.

In the case of *Midborough Acupuncture, PC a/a/o Rodriguez v. New York Central Mutual Fire Ins. Co.*, 2006 NY Slip Op 51879(U), the Appellate Term, Second Department reversed an order by a judge of the Civil Court, Kings County which had granted plaintiff’s motion for summary judgment due to plaintiff’s failure to establish a *prima facie* case.

Plaintiff’s motion consisted only of an attorney’s affirmation and unsworn exhibits, which included the insurer’s denial of claim forms.

BG&S argued on the appeal that the CPLR requires a motion for summary judgment be supported by an affidavit of a person with personal knowledge of the relevant facts supporting the motion. Therefore, the attorney’s affirmation was clearly insufficient unless the attorney himself has personal knowledge of the material facts asserted.

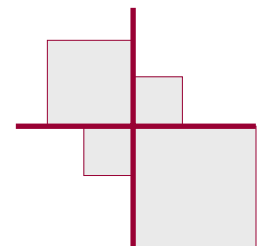
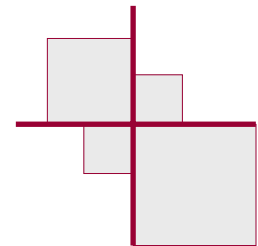
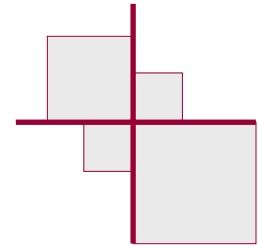
The Appellate Term, Second Department agreed, and stated in their decision that “[p]

laintiff’s counsel did not lay a sufficient foundation to establish that what counsel represented to be plaintiff’s claim forms were admissible under the business records exception to the hearsay rule.”

More importantly, the Appellate Term held that “[t]o the extent defendant may have issued claim denial forms, said claim denials merely established that defendant received claim forms submitted by, or on behalf of plaintiff, but they did not concede the admissibility of the purported claim forms or the facts set forth therein.”

This holding is very significant as the lower courts have frequently granted summary judgment to plaintiffs despite the absence of supporting affidavits that sufficiently establish the timely submission of the bills in question, due to the plaintiffs’ submission of the insurers’ NF-10s as exhibits.

Thanks to this Appellate Term holding, plaintiffs should no longer be able to skirt the requirements of the CPLR and hang insurers with their own rope.



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**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)

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**~HAPPY HOLIDAYS~**

As the year comes to a close we, at **BG&S**, wish you and yours a very happy holiday season as well as a joyous and prosperous New Year and we would like to take a moment to acknowledge some of the charitable endeavors that we have been involved in.

This past year we expanded on the concept of "National Denim Day". Instead of merely participating in a national one day event, **BG&S** started a new tradition of "Jeans Fridays". This program allows anyone in the firm to wear jeans to work on any Friday that they submit a donation of \$5. The firm then for-

warded the money raised to the following organizations: the **U.S.O., American Heart Association, Jewish Community Relations Council, Autism Speaks, Breast Cancer Prevention Project, Leukemia Society, Lymphoma Society, Contractors For Kids, March of Dimes and the Muscular Dystrophy Association.**

The program proved to be a great success. In addition to the funds that we were able to raise for the charity, several members of our staff volunteered for additional aid to select charities.

We have also continued our ongoing support to **Habitat For Humanity** and our participation in the **Avon Walk for Breast Cancer.**

In addition, **Vince Gerbino** ran in a triathlon to raise money for the **Leukemia and Lymphoma Society.**

We thank everyone for their continued support of the groups mentioned and urge all of you to take some time this holiday season and lend a hand to those who could use it.

Happy holidays, from all of us at **Bruno, Gerbino & Soriano.**

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