

CALENDAR CALL

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MEDICAL MILLS MUST PROVIDE DISCOVERY

In a typical no-fault lawsuit scenario, upon receiving the complaint we send out discovery demands relating to the plaintiff medical provider's causes of action. The medical provider many times simply fails to answer those demands. At that point we usually move to preclude for failure to respond to the discovery demands, and the provider frequently moves at the same time for summary judgment.

Lower courts have been granting the medical provider's mo-

tion for summary judgment, while ignoring the protestations of the insurance company that it needs answers to its discovery demands in order to fully oppose the summary judgment motion. However, a recent case that BG&S argued in the Appellate Term, Second Department, that court came down forcefully on the side of insurance companies seeking pertinent discovery to defend a no-fault lawsuit.

The insurance company had sought discovery in this case under the authority of State

Farm Mut. Auto Ins. Co. v. Mallela, a New York Court of Appeals case holding that insurers may withhold payment for first-party no-fault benefits provided by fraudulently licensed medical corporations to which patients have assigned their claims. The Appellate Term held that a medical provider's summary judgment motion should be denied under CPLR 3212(f) for its failure to respond to discovery demands seeking information regarding non-precluded defenses.

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BG&S EXPANDS ITS SERVICES

In order to provide additional services to our clients on a personal basis, we have brought in Mr. David H. Kaplan, Esq. "of counsel" to our firm.

Mr. Kaplan's primary practice is in the areas of Trusts and Estates, Sophisticated

Estate Planning, Elder Law, Tax Planning and Tax Litigation.

He is not only an experienced attorney in his field, he also holds a Masters Degree in Taxation.

He is very adept at designing complex and sophisticated trusts

for asset protection and family oriented estate planning.

We are very pleased to be able to add someone of Mr. David H. Kaplan's caliber as counsel to our firm.

MEDICAL MILLS MUST PROVIDE DISCOVERY

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On behalf of the insurance carrier, we had sought specific information regarding relevant corporate licensor information under Mallela which was not palpably improper or privileged. The medical provider did not challenge the propriety of the discovery nor did they produce the information sought. They simply ignored the demand and moved for summary judgment. The lower court also chose to ignore the issue, and granted summary judgment.

Because such information should have been provided, the Appellate Term, Second

Department held that the medical provider's motion for partial summary judgment should have been denied by the lower court due to its failure to respond to the discovery demands. In addition, the court found that our cross-motion regarding the production of evidence should have been granted to the extent of requiring the medical provider to respond to the relevant discovery demands.

This case stands strongly for the proposition that a no-fault medical provider should not be able to "rush to judgment", i.e., should not be able to successfully move for summary judgment where discovery

demands relevant to non-precluded no-fault defenses are outstanding. The application of this case in the lower courts could result in a marked decrease in granting medical providers' summary judgment motions in no-fault cases where outstanding relevant discovery requests by an insurer have not been addressed. This case restores a good deal of balance to no-fault lawsuits in that it evens the playing field between medical providers and insurance companies by demanding that medical providers play by the same CPLR-based rules as any other New York litigant.

STUPID HUMAN TRICKS

Stupidity coupled with a scheme to defraud, a deadly combination.

A Bronx man, Wilfred Elize, died while trapped in a car that the police believe he intentionally set on fire. The car, a Nissan Altima, was about to come off-lease and Mr. Elize would have been assessed additional charges.

Mr. Elize, apparently, decided that instead of his being responsible for those additional assessments, he would claim that the car was destroyed by an arsonist. His insurance carrier would step in and he would walk away from his problem.

As usual, the easy way out is rarely the best way, or the safest.

Would 160 mph constitute speeding?

A London judge found that an off-duty traffic officer who was recorded driving 159 mph in a 70 mph zone was not speeding and not driving dangerously. He claimed that he was taking the car for a test run.

It seems that it's not what you do, it's who you know.

FEDERAL CASES TO HELP FIGHT NO-FAULT FRAUD

As the result of two recent federal court cases, in the 2nd Circuit Court of Appeals, there appears to be reason to celebrate.

The Court of Appeals case deals with an appeal taken by a group of defendants who were found guilty of violating the federal “Health Care Fraud” statute. That law states that it is a crime for anyone who “...knowingly and willfully executes...a scheme or artifice... to defraud any health care benefit program; or...to obtain, by means of false or fraudulent pretenses, representations...any of the money...under the control of, any health care benefit program...”

These defendants had participated in a number of staged accidents. They then feigned injuries and completed assignment of benefit forms in order for medical providers to obtain payments for medical services that were never performed from the no-fault insurance provider.

The central issue on appeal was whether

or not the “Health Care Fraud” law protected private no-fault insurance carriers. The Circuit Court of Appeals held, in no uncertain terms, that “all forms of health care fraud would be proscribed, regardless of the kind of specific schemes unscrupulous persons may concoct.”

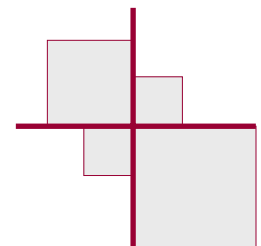
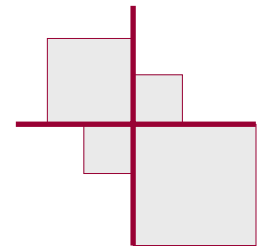
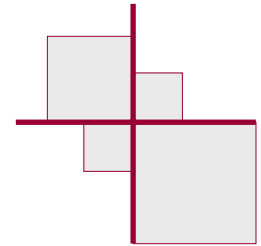
The court closed the issue by stating “In sum, the federal health care fraud statute applies to defendants’ participation as passengers in staged automobile accidents designed to profit from New York’s no-fault automobile insurance regime.” The court could not be any clearer, and we could not be any more pleased.

In addition to holding that no-fault insurance fraud constituted the federal crime of “Health Care Fraud”, the same court ruled in another case that “The Mandatory Victims Restitution Act” requires a court to order full restitution to all identifiable victims of the fraud without regard to the defen-

dants economic circumstances. The importance of this case is that once an individual is convicted of fraud, a judge cannot give a break to a defendant who claims that he doesn’t have the ability to pay the restitution in full. This case also provides that there shall be no offset for any monies paid by an insurance company. It simply requires that the restitution goes, in part, to the insurer.

When taken together, these two cases create what may prove to be a valuable tool in fighting no-fault fraud in particular and insurance fraud generally.

It is unrealistic to hope that the U.S. Attorney’s office will prosecute all instances of no-fault fraud. However, the SIU division working together with defense counsel who have conducted EUO’s and depositions can garner enough information to initiate a federal prosecution against the organized fraudulent medical providers and staged accident rings.



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PERSEVERANCE PAYS OFF

In two separate New York County, Civil Court no-fault cases, perseverance by BG&S paid off.

In the first case, the plaintiff failed to voluntarily submit to an EBT, requiring BG&S to obtain a court order. When we were told the witness was not available, we refused to reschedule and moved to preclude the testimony and to dismiss the complaint. This scenario repeated itself three times.

On the first two occasions the court de-

nied the dismissal, and set another date for the plaintiff to appear. Finally, on the third failure to appear, the court granted the motion and dismissed the complaint.

In another case, the plaintiff moved for summary judgment on the argument that a claim was filed and not paid or “properly” denied within 30 days. In the first instance, the Civil Court Judge agreed and found the NF-10 denial for failure to submit to an EUO was invalid be-

cause it was under the old regulations.

In spite of these circumstances, BG&S argued that this was a fraudulent claim. We submitted an affidavit by the claim’s representative showing two other recent losses by this claimant as well as the suspicious nature of the alleged accident.

The court found this argument compelling, and denied the motion.

Don’t ever give in with no-fault cases, perseverance is the key.
