

CALENDAR CALL

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IF AT FIRST YOU DON'T SUCCEED ...

Proving fraud can be an arduous task. Even showing sufficient indicia of fraud when opposing a no-fault plaintiff's motion for summary judgment can be tricky. Some lower court judges do not pay sufficient attention to factual circumstances uncovered by insurance carriers. But appellate courts, armed with the ability to review both facts and law, can be persuaded to focus on fraud allegations and use them to deny a medical provider's motion for

summary judgment.

In Ocean Diagnostic/Matveyev v. Utica Mutual Insurance Company, 6 Misc. 3d 131A (Appellate Term 2nd Dept. 2005), a case handled by BG&S, the Appellate Term reversed a lower court order which granted the plaintiff's motion for summary judgment even though the NF-10 denials were not timely sent. The lower court's decision essentially ignored the indicia of fraud offered by Utica in opposi-

tion to plaintiff's summary judgment motion.

Two passengers in the car insured by Utica refused medical treatment at the scene of the alleged accident, but then proceeded to treat in an excessive manner with various medical services providers. Utica's SIU unit determined that the parked car allegedly hit by Utica's insured vehicle was involved in a prior accident in which the parked car was totaled.

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A FUNNY THING HAPPENED SHOPPING FOR A FORUM

In a clear rejection of the plaintiff's attempt to shop for a more favorable forum, Judge Eileen N. Nadelson (Civil Court, Kings County) dismissed an action for first party no-fault benefits which had been previously submitted to arbitration.

The Judge, citing

an Appellate Division case, found that "flitting between forums" should be discouraged, if not condemned. She was entirely unmoved by the plaintiff's argument that the circumstances of this case were different than the case relied on by the defendant.

The Court held

that "once a No-Fault claim is submitted to arbitration, regardless of the result of that submission, that claim and all subsequent No-Fault claims arising out of the same accident are bound by that submission and the parties may not then resort to the courts to adjudicate their rights."

NO HELP FROM THE COURTS

In a recent decision from the Appellate Division (4th Dept.), the court held that the vicarious liability statute that made a long term lessor liable for the negligence of the person who leased the vehicle did not violate due process of law under the U.S. Constitution.

A long term lessee, with a limited liability policy and even

more limited assets, ran over his daughter with his truck while she was sunbathing in the driveway of the family home.

The trial court granted summary judgment on the issue of liability against the father (driver) and against the long term lessor who had no involvement other than the business relation-

ship of leasing the vehicle. The jury awarded the plaintiff \$800,000 which the court found reasonable, and for which the lessor was jointly and individually responsible for payment.

If the Legislature continues in its refusal to act on this problem, there will soon be no more long term leases in this state.

BG&S PARTNER LECTURES ON NO-FAULT

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denial of claim form into evidence.

Judge Siegal who presided over the mock trial noted that it was "always a pleasure to

have this witness in her Courtroom", an obvious nod to Alison's frequent appearances before Judge Siegal as a trial attorney.

Jeff also partici-

pated in a question and answer session at the conclusion of the evening. He responded to questions from the audience dealing with changes in case law and evidentiary issues.

STUPID HUMAN TRICKS

~PLAYING POSSUM

In Vancouver, British Columbia the police responded to a report of a dead man's body lying alongside the Trans Canada Highway.

Upon arrival, they discovered that the man was very much alive. He had run out of gas and decided to lay on the highway in order to attract someone's attention.

~PSYCHO DRIVERS

A university study in Lima, Peru found that approximately 40% of all taxi and bus drivers in Peru have psychopathic tendencies. These tendencies included aggression, anxiety, and antisocial behavior.

The drivers showed that they would not feel any guilt in injuring or running over pedestrians. They do not

obey traffic rules or bother to stop at red lights.

As a result, hundreds of people die in bus and taxi crashes each year. Maybe we should commission a similar study here in the United States.

~CONCLUSION

Perhaps the time has come for the underwriters to add a psychiatric exclusion.

IF AT FIRST YOU DON'T SUCCEED ...

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Utica's SIU unit compared photos taken of the car immediately after the prior accident with photos that Utica had taken of the vehicle after the alleged accident under investigation and determined that the alleged damage to the vehicle was the same damage suffered in the prior accident. Utica's SIU unit also determined that the mileage on the vehicle at the time of the alleged second accident was only one mile more than the odometer reading when title to the totaled vehicle was transferred prior to that alleged accident. Such a nominal mileage increase is consistent with a situation where a salvaged vehicle is purchased for the purpose of facilitating additional physical damage and personal injury complaints.

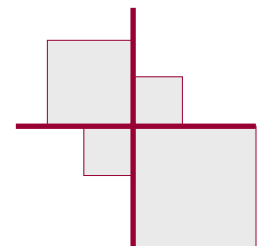
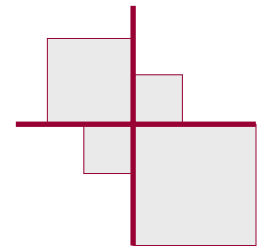
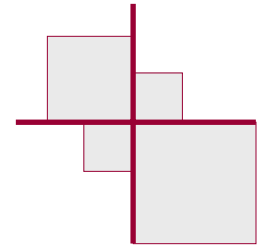
The passengers in Utica's vehicle who sought treatment from the medical providers failed to show for their requested Examinations Under Oath (EUO). Also, further investigation revealed that Utica's insured went to

college with the son of the passenger in the parked vehicle which was allegedly hit by Utica's insured. During his EUO, Utica's insured stated that the parked vehicle which he allegedly hit contained a male passenger whom he did not know and with whom he did not speak at the accident scene. He then testified that, after the accident occurred, the son of the struck vehicle's occupant, to whom he also did not speak, appeared at the accident scene. When asked how he knew that the individual appearing at the accident scene was the son of the parked vehicle's occupant when he had not spoken to anyone at the accident scene, after a lengthy pause, Utica's insured stated that he assumed that they were father and son. There was no way that Utica's insured would have known that these two people were father and son if he had not known these people before the accident, because he stated during his EUO that he did not speak with either individual at the scene of the accident. Further casting

doubt on Utica's insured's EUO testimony was his statement that he had purchased the insured vehicle a few weeks before the alleged loss from a man he could not identify with funds he could not prove had been paid to this unknown individual.

In reversing the trial court's order granting the plaintiff summary judgment, the Appellate Term determined that Utica established that its denial of the no-fault claims in question was based upon a founded belief that the alleged injuries did not arise out of an insured accident. Thus, Utica demonstrated the existence of triable issues of fact as to whether there was a lack of coverage based upon fraud.

This case shows that appellate courts can be persuaded not to rubber-stamp decisions regarding issues of fraud and, given sufficient indicia, will overturn lower court rulings where clear-cut evidence of fraud is presented.



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BG&S PARTNER LECTURES ON NO-FAULT

On May 11, 2005, more than 100 lawyers came to listen to Jeff Siegel, a partner with BG&S when he appeared as a guest lecturer at the request of the Queens County Bar Association. The topic for this continuing legal education (CLE) seminar was "*Trial of a No-Fault Case*".

Jeff was asked to provide the defense attorney's perspective. After being introduced as a "regular" in the Civil

Queens Courthouse, Jeff outlined the basic aspects of the typical No-Fault Trial and addressed the sweeping changes occurring in the various jurisdictions as new decisions are reported daily with different views of various issues in the No-Fault arena.

Among the other lecturers speaking that evening were Howard Wieder, Judge Markey's Law Secretary and Judge

Bernice Siegal. The evening concluded with a Mock trial of a No-Fault case. Guest expert witness for the defense was Dr. Jay Weiss who provided great detail on the necessity of EMG/NCV testing. Alison Goldstein, an associate of Bruno Gerbino & Soriano, also appeared as "Katie Claims" playing the role of a claims representative testifying with regard to the admission of the...

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