

# CALENDAR CALL

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## PSYCHOLOGIST HEAL THYSELF

Diane Petillo, of BG&S, represented the defendant insurance carrier in a no-fault action brought in Civil Court, Bronx County to recover for psychological evaluations, testing and record review of five assignors, all of whom claimed injuries in five unrelated automobile accidents

The defendant insurance company issued a timely denial based on a doctors Peer Review which found that the treating psychologist failed to properly docu-

ment his file, for each assignor, with respect to the type of accident, severity of the accident and the injuries sustained. Specifically, whether the individuals sustained any head trauma. The doctor also testified that the treating psychologist had billed seven hours for review of the test results in violation of accepted psychological guidelines which allowed only two hours for this procedure. Additionally, the doctor testified that in the State of New York, only licensed

psychologists were permitted to perform the tests billed for by the plaintiff.

The plaintiff's attorney took approximately one and a half hours to cross examine the doctor in an attempt to discredit his opinion as an expert. This must have impressed the judge, because at the conclusion of plaintiff's cross-examination, the court on its own motion severed the remaining causes of action. *Continued on page 3*

## WHAT CONSTITUTES AN UNINSURED MOTORIST

The Appellate Division in the Second Department addressed the issue of who is a covered insured in two distinct cases concerning UIM coverage.

In the first case the Court found that the insured's daughter is not covered for uninsured motorist purposes even though she has keys to

the house, gets her mail there, and has numerous personal belongings at the house.

The fact that she spends the night at a variety of other locations negates a finding of residency at her father's home.

On the other hand the Court found that an owner was in-

sured when he loaned the car to a friend who left it unattended on the road with the keys in plain sight. The car was stolen and involved in an accident.

Since the permissive user violated a statute, the owner was found responsible and the carrier was required to defend and indemnify.

## NO-FAULT DENIALS MUST BE BETTER THAN PERFECT

Insurers denial of no-fault benefits was found insufficient by New York County Civil Court because the Examination Under Oath (EUO) was not signed and notarized. The same court also granted summary judgment to the plaintiff even though the insured failed to appear at an EUO because the insurer failed to send a

second notice to the insured.

In another case, the Kings County Civil Court granted summary judgment to a medical equipment provider despite the fact that the defendant raised the issue of medical necessity and despite the fact that the covered party did not seek any medical services for an extended period after the

accident. The court completely disregarded defendants claims and asserted that the plaintiff has no burden to prove anything more than that they filed the claim and that they have no record of a timely denial or a timely request for additional verification. In the absence of such denial the court simply grants judgment.

## POLICE BLOTTER

A Russian native was recently arrested for insurance fraud at Kennedy airport as he was about to flee from this country. He is also suspected of being involved in a number of staged

accidents as part of a no-fault ring operating on Long Island.

Another individual was also arrested in February for falsely claiming that the inju-

ries he sustained were caused by an auto accident when they were not. When confronted with the results of an investigation, he confessed to falsifying records.

## STUPID HUMAN TRICKS

Mr. Brian Calen, a Dobbs Ferry man who apparently is blessed with four (4) right eyes, pled guilty to insurance fraud on February 1, 2005.

In a scheme that dated back to 1985, Mr. Calen filed a claim that he suffered the loss of sight in his right eye when the sun filter slipped off a telescope he was using on vacation. In 1992 he filed a

claim for the loss of sight in his right eye as the result of a solar burn.

In 1997 he once again filed for the loss of sight in his right eye when a bottle of champagne exploded while he was on a cruise ship and he was struck in the right eye. Then in 2002 he filed another claim that he was blinded in his right eye by an errant Frisbee

while onboard a cruise ship. This last claim finally led to an investigation and his ultimate arrest and conviction for insurance fraud.

Pardon the pun, but this should open your eyes to the importance of running a full claims history. Mr. Calen collected well over a million dollars on his multiple right eyes.

## PSYCHOLOGIST HEAL THYSELF

*Continued from page 1*

The court held that since the five assignors were injured in five different accidents, there was no common question of law to justify trying the causes together.

The defendant rested and argued that as the defendant witness satisfied defendant burden of proof with respect to medical necessity and that the burden then shifted to the plaintiff to prove that the treatment provided was medically necessary and the billing in the matter was proper. The plaintiff attempted to have their client, a licensed social worker with a Masters Degree in Psychology certified as an expert with respect to the care, treatment, and testing

rendered to each assignor. The defense objected, arguing that under New York State Law, only a licensed psychologist is permitted to conduct the testing performed on the assignors and as a result, plaintiff's witness was not qualified to testify. The defense also argued that as the severity of the injuries was at issue to justify the treatment provided, and testing performed. The records were deficient with respect to these issues and therefore the only person who could testify was the treating psychologist.

The court held that the defendant had satisfied their burden regarding medical necessity, thus shifting it to the plaintiff to prove

the medical necessity of the treatment and testing. The Court then ruled that as defendant's expert witness testified that only a licensed psychologist could perform the testing and that plaintiff's witness was not qualified to testify as an expert. The court also ruled that the severity of the injuries and the length of time necessary to review the testing results were issues, the only person who could testify to these items was the treating psychologist. As the treating psychologist did not appear to testify, the defense made a motion to dismiss the matter as plaintiff could not prove the medical necessity of the treatment and testing. The motion was granted and plaintiff's case was dismissed.

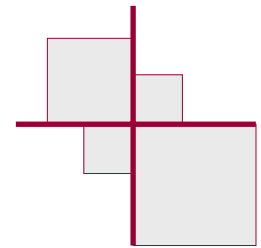
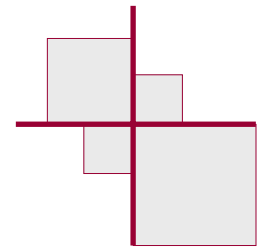
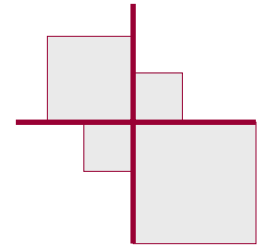
## "SERIOUS INJURY" — STILL ALIVE AND KICKING

The Appellate Division of the Second Department recently reaffirmed, by their rulings in two separate cases, that a plaintiff still must establish a "serious injury" as defined in section 5102(d) of the Insurance Law in order to proceed with their case.

In the first case, the court found that the affirmation by the plaintiff's doctor was conclusory and was tailored to meet the statutory requirements.

The second case addresses the court's finding that a five year gap between the end of

treatment and the recent examination was not adequately explained. The court also notes that the chiropractor did not account for the serious neck, shoulder, and back injuries sustained by the plaintiff as claimed in his three prior motor vehicle accidents.



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## **ONLY UNDER THE UNINSURED MOTORIST LAW**

A claimant who was injured as a pedestrian in a motor vehicle accident, erroneously believed that the driver was not insured. He therefore notified his own carrier that he was going to file an uninsured motorist claim.

After filing the claim, he later learned that the offending driver was insured and commenced an action against the driver to recover for his injuries. The driver's carrier thereupon success-

fully disclaimed coverage on the grounds that they did not receive timely notice of the accident.

Claimant then returned to actively pursue his supplementary uninsured motorist coverage on the grounds that the offending driver was now "truly" uninsured due to the disclaimer.

Claimant's insurer moved to dismiss the claim because at the time the claim was filed the driver was not uninsured.

Nevertheless, the trial court, as affirmed by the Appellate Division, found that inasmuch as the driver was held to be uninsured at the end of the day, it did not matter that he was not uninsured at the time the claim was filed. Indeed the appellate court was not even persuaded by the fact that the claimant's own lack of due diligence caused the driver to become uninsured in the first place.