

CALENDAR CALL

Volume 2, Issue 1

BG&S
BG&S
BG&S
BG&S
BG&S
BG&S

BROKER LIABLE FOR MATERIAL MISREPRESENTATION

An insurer brought a declaratory judgment action against both its insured and the insured's broker based on a material misrepresentation in the application for the insurance. The insured then filed a cross-claim against the broker grounded upon the same claim.

The broker was able to successfully dismiss the claim on the grounds that there was no contractual relationship between the carrier

and the broker.

The court then converted the insured's cross-claim against the broker into a third party action, and denied the broker's motion to dismiss that claim as well.

The broker appealed that decision and the Appellate Division of the Second Department agreed with the lower court.

The appellate court found that the insured appeared to have

a viable cause of action against the broker for violating its duty to obtain an effective insurance policy. It allegedly violated this duty by misrepresenting a material fact in the insurance application and thereby exposing the insured to having his carrier disclaim.

It is important to remember that the case deals with an insurance *broker* who was acting as an agent of the insured.

JEFF SIEGEL STRIKES AGAIN

BG&S partner Jeff Siegel who was facing three consolidated no-fault cases, successfully argued that Horizon Psychological Services could not consolidate three unrelated claims under a single index number. Therefore, they were required to pay for two additional

index numbers and file two additional notices for trial.

Furthermore, in defending the remaining action, Jeff Siegel produced the defendant's peer review doctor who testified that the patient had seen a different psychologist a mere four days prior to allegedly

being treated by the plaintiff. That doctor noted that the failure of the plaintiff to include such information in his report was not only inappropriate but unethical.

It was at this juncture that the plaintiff discontinued this action with prejudice.

PLAINTIFF'S MISTAKE IS FATAL FLAW

The plaintiff was involved in a two car accident and had three years to commence a personal injury action for negligence. The plaintiff did not commence the action until one month short of the three years. Unfortunately, the plaintiff only served and named the passenger as a party defendant and did not either serve or name the driver/owner in the action.

The passenger was neither the driver nor the owner and was therefore

not liable.

Two months thereafter the plaintiff served and filed an amended summons and complaint against the driver/owner who immediately moved to dismiss the action as being too late. That motion was granted and the case was dismissed.

The Appellate Division of the Second Department affirmed the dismissal upon a finding that the driver/owner was not united in interest with the

passenger and therefore the action was commenced beyond the applicable statute of limitations.

Had the "new" defendant been united in interest, then the late service of process would have been found to relate back in time to the earlier service of the other party. However, this plaintiff waited until the last minute, sued the wrong party and then had no time to correct that mistake.

DOCTOR'S CONCLUSIONS ARE INSUFFICIENT

The Appellate Division affirmed an Order of the Bronx Supreme Court which granted defendant's motion to dismiss on threshold.

The court found that the defendant who submitted deposition testimony and medical reports had met its initial burden of demonstrating that the plaintiff did not sustain a

serious injury.

In opposition, the plaintiffs submitted affidavits from a doctor who asserted that he reviewed their medical history and had personally conducted an examination of each plaintiff. His affidavit went on to say that each of the plaintiffs suffered from a bulging or herniated disc which resulted in perma-

nent problems in standing, sitting, bending and lifting.

The court found that such affidavit was insufficient to establish a serious injury since the examination took place 2½ years after their last treatment without any explanation or reason for the gap in time.

STUPID HUMAN TRICKS

After having had a little too much to drink, a 28 year old man was leaving a bar and decided to steal a vehicle for a joyride.

Not finding a Mercedes or an Audi to his liking, he chose a 17 ton bulldozer which he drove around the streets

of Berlin in the early hours of Sunday morning.

It was not until he drove through a red light at 20 m.p.h. that the police took an interest in him and ordered him to stop.

When he refused to do so, they had to jump

on the bulldozer, smash the window and spray mace in his face. He was thereupon detained for drunk driving.

At least his insurer can deny any no-fault benefits on the grounds that he was driving while intoxicated.

UMBRELLA POLICY ESCAPES STORM

A driver who caused the death of a husband and seriously injured the man's wife while engaged in a drag race, had an auto liability umbrella policy which was purchased by his parents.

The policy which covered all family members had a deductible of \$500,000 and "kicked-in" after the primary insurance policy's limits were reached.

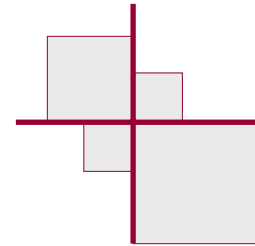
The insurer dis-

claimed on the grounds that the driver did not have the required primary insurance. The driver commenced this action for a judgment declaring that the umbrella policy carrier was obligated to indemnify the defendant driver in the personal injury action.

In this action the insurer acknowledged that the policy was in effect and that the policy would cover the son of the

named insured as a family member. However, the explicit terms of the policy required that an insured must have primary insurance in an amount not less than the deductible of \$500,000.

Inasmuch as the driver-son did not have primary insurance in that amount the court found that he was not covered under the clear terms of the policy.



UNINSURED MOTORIST COVERAGE NOT AVAILABLE

On April 2, 1999 plaintiffs and defendants were involved in a collision in which several people were allegedly injured. Nearly three years later, these plaintiffs commenced an action for personal injury against the defendant.

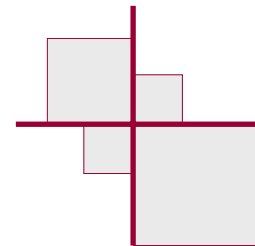
These plaintiffs were then informed by the defendant's carrier, that prior to the commencement

of their action, the full \$50,000 per accident policy limit had already been completely paid out to other claimants.

The plaintiffs then filed a demand for uninsured motorist arbitration against their own carrier upon the claim that the defendant's vehicle was, in effect, uninsured. The court, however, rejected

that argument and permanently stayed the arbitration.

Both the Supreme Court and the Appellate Division held that where an insurer has paid the full monetary limits of its policy, its duties under the contract ceases. The exhaustion of its policy limits does not render the vehicle "uninsured".



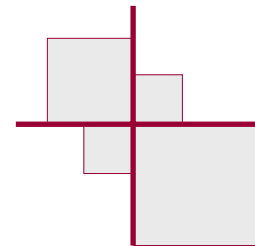
SORRY— JUST TRYING TO KILL MYSELF

The Appellate Division of the Fourth Department found that neither the plaintiff nor the defendant were entitled to Summary Judgment where a defendant's son decided to kill himself by setting his father's car on fire thereby burning down the building where the car was parked.

The ultimate question faced by the court was whether the defendant intentionally set fire to the building where plaintiffs lived or if he inadvertently caused the fire through his negligence while committing suicide.

It was established that the building initially

caught fire because of its proximity to the car that the defendant's son was in. However, there was also evidence that after the fire started, the defendant's son drove the burning car directly into the building thereby establishing his intent to cause the building to burn.



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

Website: www.bgslaw-ny.com

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

**B
G
&
S
S**

JURY RIGHT ~ JUDGE WRONG

In an action to recover damages for personal injury as the result of an automobile accident a jury found that the plaintiff did not sustain a fracture as the result of the accident.

The plaintiff testifying on her own behalf stated that she went to a hospital immediately after the accident, but failed to submit any records of that visit. She further testified that she went to a doctor the following day for treatment to her back, but failed to produce either that doctor or any of his medical re-

ords. She then claimed that she saw another doctor a month later who prescribed that she submit to an MRI, but she did not offer that doctor's testimony nor any record or report concerning the prescribed MRI.

She did, however, present a doctor who testified that he examined the plaintiff for the first time more than two years after the accident and that he also examined an MRI taken several months after the accident which revealed a fracture. He further testified that such fracture was the result of the

accident based upon the plaintiff's own rendition of her medical history.

Although the jury found for the defendant, the trial judge relying solely on this evidence set aside the jury's findings, found for the plaintiff and set the matter down for a trial on the issue of damages.

Upon the defendant's appeal, the Appellate Division of the Second Department reversed the order of the trial court, reinstated the jury verdict and dismissed the complaint.