

CALENDAR CALL

Volume 1, Issue 4

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NO CAR – NO LOSS

Plaintiff sued her insurance carrier claiming that a car which was given to her by her father was stolen from a department store parking lot and her insurance carrier refused to pay. She claimed that her father who owned an auto body shop had purchased a damaged car, repaired it and gave it to her as a surprise present.

The defendant-insurer claimed that the vehicle was a “paper car” that had never actually been purchased, restored nor given to the plaintiff.

At the conclusion of the testimony, the trial judge directed a verdict in favor of the plaintiff and issued a judgment against the insurance company.

BG&S’ associate Charles “Chip” Benton, who heads the appeals division, obtained a reversal in the appellate court and the case was sent back for a new trial.

At the second trial, the plaintiff’s father testified that he bought the vehicle in a damaged condition, repaired it over the next six months and gave it

to his daughter as a present. She testified that she did not know that the car existed until it was given to her as a present. The plaintiff also testified that at the time when it was stolen there was approximately 48,000 miles on the odometer.

Under cross examination by BG&S’ associate Jon Kessel, neither the plaintiff nor her father could explain all the inconsistencies between their story and the documentary evidence.

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SPECIFIED DAMAGES NO LONGER ALLOWED

Section 3017 and rule 4016 of the Civil Practice Law and Rules (CPLR) have been amended.

The new law prohibits a plaintiff from making a demand for a specific dollar amount to be recovered in any personal injury action.

This brings all personal injury actions in

conformity with medical and dental malpractice actions. Defendants are given the right to request a “supplemental demand” which shall set forth the total damages sought. The plaintiff shall provide that “supplemental demand” within 15 days of the request.

In addition, rule

4016 of the CPLR was amended to permit an attorney to state a specific dollar amount as appropriate compensation during opening and/or closing statements. In that event, the court would then instruct the jury that such statement by the attorney should not be considered as evidence.

SCHOOL ATTENDANCE TAKEN SERIOUSLY

Plaintiff, a student, brought an action in Supreme Court, Queens County for personal injury as the result of a two-vehicle accident with defendant. The jury found in favor of the plaintiff on the issue of liability and the case proceeded to damages.

At the conclusion of the damage portion, the jury returned a verdict in favor of plaintiff finding a “serious injury” (90/180

days) and awarding a judgment for the plaintiff in the amount of \$100,000.

The Appellate Division (Loperna v Buona 309 AD 2d 592) set aside the jury verdict and dismissed the complaint.

The Appellate Division court specifically found that the plaintiff did not miss any days from school and thus he “failed to establish...that he sus-

tained a medically determined injury which prevented him from performing...the material acts which constitute his usual and customary activities.”

This case very clearly indicates the proposition that showing up for your job or school during the first 90 out of 180 days precludes a finding of serious injury threshold under that section.

NO-FAULT FRAUD A FEDERAL CRIME

In the case of U.S. v Lucien (78 Fed App 141) the United States Court of Appeals for the Second Circuit affirmed the conviction of three defendants who participated as passengers in staged accidents. The purpose of their actions was to fraudulently cause payments to be made under New York’s No-Fault laws.

The defendants claimed that defrauding an insurance company into paying for non-existent treatments under the no-fault regime was not a violation of the health care fraud laws. Neither the Federal District Court which conducted the trial nor the Federal Court of Appeals were moved by that argument. The Fed-

eral Court of Appeals specifically found that fraud against the no-fault plan is “clearly covered and proscribed by the plain and unambiguous language of the health care fraud statute.”

Hopefully, the federal government will now be taking auto insurance fraud more seriously.

PEER REVIEW DENIAL UPHOLD IN COURT

A medical provider brought an action in court (not arbitration) as the assignee of two patients for whom he performed MRI’s.

The bills for such MRI’s were denied by the no-fault carrier upon a finding by a peer review doctor who determined that they were not medically necessary. BG&S’ associate

Diane Petillo argued that the findings of the peer review doctors was sufficient for denial of the claim.

One doctor testified that the documents provided by the plaintiff did not contain any neurological examination findings and concluded that “if it wasn’t written, it wasn’t done”. The Court agreed

and found no support for plaintiff’s assertion that a peer review doctor is obligated to search out and request additional information. The Court found that there is “no obligation for the insurer to make the applicant’s case for it.”

Both claims were denied.

STUPID HUMAN TRICKS

Three exhibitors who had won in the livestock exhibition at the Ohio State Fair have been disqualified and their winnings are being withheld for allegedly placing hairpieces on their Holstein cows to enhance their appearance.

State Fair inspectors found that the three had glued hair from another part of the animal or from other animals to make their cows more attractive in the show ring. It was not reported what other part of the body

the hair came from.

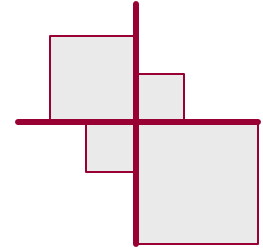
It only goes to prove that fraud exists in all aspects of human endeavor. If there are people gluing hair on cows, it should not surprise you that there are people creating false no-fault claims and staging accidents.

One accident that was not staged was a Texas woman who was sentenced to 10 years in prison for running over the manager of a McDonald's restaurant with her car because she was not

served mayonnaise on her cheeseburger.

"I gave her everything she asked for." When the manager went outside to write down the license plate number, the woman drove her car right into the manager, breaking her pelvis. "I was just putting ketchup on my burger" when the car accidentally took off.

How many of us find comfort in the fact that intentional acts are not covered by auto insurance.



LESSONS WELL LEARNT

BG&S' partner Stewart Fink who has negotiating experience and skills from years of insurance defense and the knowledge of precious objects garnered from being a diamond and jewelry salesman, put all his talents to good use in a case in Supreme Court, Nassau County.

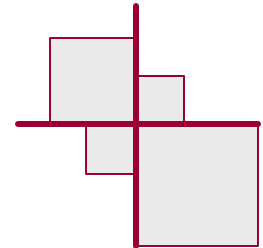
A substantial issue of bad faith had arisen and

the insurance carrier was in serious jeopardy of being hit for a significant judgment on a case in which it could have disclaimed coverage.

However, Stew Fink knowing that the defendant was a rug merchant, was able to broker a settlement that cost the insurance carrier only a small fraction of their exposure and provided the plaintiff with sev-

eral valuable Persian rugs that cost the defendant only a small percentage of their value.

The carrier was protected, the plaintiff was satisfied, and the defendant only suffered a small loss for his actions and the judge was impressed by Mr. Fink's unique resolution.



NO CAR - NO LOSS

Continued from page 1

In the first instance he produced records that showed that the vehicle had 90,000 miles on the odometer at the time it was taken as "salvage" by another insurance company. In addition, there was some \$33,000 worth of damage.

The father was unable to adequately explain

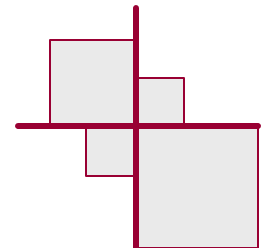
why he could only produce \$2,000 worth of receipt for parts to repair this "totaled" vehicle. He did offer that he had all the other parts just lying around his shop.

Also unexplained was how the plaintiff was able to file an application for insurance two months before she knew she was getting this vehicle from her father. The

fact that the vehicle was transferred with 90,000 miles and then later stolen with 45,000 was another unexplained mystery.

It apparently was not a mystery to the jury who returned a verdict in favor of the defendant.

Perseverance and attention to details is an insurer's best weapon.



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BG&S ASSOCIATE APPOINTED TO SURROGATE PANEL

The New York State Commission on Quality Care for the Mentally Disabled recently appointed BG&S' Associate Charles "Chip" Benton as a member of the Surrogate Decision Making Committee (SDMC).

The SDMC is an innovative program which serves mentally disabled individuals in a residential facility or any other program that is operated, funded or licensed by New York State who do not have the capacity to make their own decisions.

It serves as an alternative to resorting to the courts when it is necessary to obtain informed consent for non-emergency major medical treatment.

A problem exists because these individuals are not capable of giving informed consent and many do not have a legally authorized surrogate that is willing and/or able to make those decisions on their behalf.

Mr. Benton, who heads our appeals division, serves the SDMC as a public offi-

cer and sits as a member of a four person panel who determines these matters.

They review the declaration concerning the patient's capacity; they determine the availability of a surrogate; and they consider the need for the proposed medical treatment. Then after careful consideration they render a decision that is in the best interest of the disabled individual.

We all applaud Chip for the service he is providing to our community.
