

LEGAL NEWS IN BRIEF

News in a flash for Subrogation
and Defense Adjusters

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Judicial Notice of Medical Conditions Per Diagnosis Codes Does Not Determine Issue of Causation

Kingsbrook Jewish Med. Ctr.v.
Allstate Ins.
New York Appellate Division
2009 NY Slip Op 00351
(January 20, 2009)

Allstate Insurance Company's insured assigned Plaintiff his right of reimbursement for medical services. Plaintiff demanded that Allstate pay the sum of said services, sending, inter alia, the UB-92 form which contained code numbers to identify the diagnoses that had been made of the insured's conditions and the treatments provided to him in

furtherance of the diagnoses. Upon Allstate's failure to pay or deny the claim, Plaintiff filed suit and moved for summary judgment, causation being presumed in its favor as a party seeking recovery of first-party no-fault payments. Allstate cross-moved for summary judgment on the grounds that the treatment rendered to the insured was unrelated to the motor vehicle accident in which he allegedly sustained injuries. Proffering diagnosis and procedure codes from the official website of the United States Department of Health and Human Services, Allstate requested that the Supreme Court take judicial notice of the codes and their definitions as public documents. The Appellate Division upheld the Supreme Court's findings in granting Plaintiff summary judgment. As the Supreme Court held, judicial notice applies to the codes and their definitions because they are of sufficient authenticity and reliability, such that the codes key is reliably sourced and its accuracy not contested by Plaintiff. Nonetheless, such codes merely identify the insured's diagnoses and treatments. Allstate's counsel, relying on his

affirmation alone, failed to include any affidavit by a medical expert, and thus could not disprove causation between the diagnoses and the underlying accident.

Tortfeasor Informed of Insurer's Right of Subrogation While Settling with the Insured Cannot Waive That Right

Gr. Health, Inc. v. Mid-Hudson
Cablevision, Inc.
New York Appellate Division
2009 NY Slip Op 00273
(January 22, 2009)

Plaintiff as subrogee of Stephanie Weaver filed a subrogation action against the other party and his insurer in the underlying automobile accident. Weaver had previously settled her personal injury action against Defendants, with a general release of all claims that she had or could have against Defendants, and further agreed to "indemnify and save harmless" Defendants "against any and all further claims for damages, costs, expenses and liens, including but not limited to...health insurance liens." Defendants knew prior to settlement that Plaintiff

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claimed a lien and subrogation rights. Weaver's counsel, however, had promised Defendants that Weaver would satisfy the lien herself, which she did not do. After Weaver settled her action for pain and suffering only, Plaintiff brought suit for reimbursement of medical expenses. The Court held over Defendants' objections that where the tortfeasor settles after it already knows of the insurance company's subrogation rights, but settles without the insurer's consent, the settlement will not bar the insurer's right to subrogation as against the tortfeasor. Conversely, in the instance where the insured conceals the existence of its insurer's subrogation rights, thereby prejudicing said rights, the insurer has an action against the insured.

Subrogation Waiver in Condominium Unit Owner's Insurance Policy Bars Suit Against an Uninsured Owner

Skulskie v. Ceponis

New Jersey Appellate Division

Docket No. A-2397-07T1

(January 15, 2009)

The Appellate Division upheld summary judgment for defendants, a condominium association and uninsured owners of the unit situated directly above Plaintiff's unit, which had sustained water damage. A condominium's master policy, here containing a subrogation waiver, is intended to not only protect the overall needs of the project but also guard against

gaps in individual insurance contracts caused by lapsed policies or limited coverage; such is necessary because of the risk that one unit owner's negligence will impact many other owners due to their spatial proximity to one another. The subrogation waiver, however, would not apply to other negligent parties, such as a contractor working within the condominium.

Medical Provider Contesting Reviewer's Impartiality Should File Action to Vacate the Arbitration Award

Orthopaedic As. v. Dept., Banking & Ins.

New Jersey Appellate Division

Docket No. A-5591-06T2

(January 20, 2009)

Progressive Insurance Company's insured sustained injuries in two separate automobile accidents. Because Progressive insured against the first accident only, it refused to provide Personal Injury Protection (PIP) payments for a particular surgery, on the grounds that the underlying injury did not arise from that accident. The medical provider for the surgery filed for arbitration with the National Arbitration Forum Association (NAF). Progressive successfully requested that the matter be submitted for review by a medical review organization (MRO) and that arbitration be adjourned pending receipt of the MRO physician's report. NAF later provided the

applicant with a copy of the MRO report and identified the MRO physician, who concluded that the insured's underlying injury was unrelated to the first accident. Applicant contested the report, alleging the physician's supposed conflict of interest, as said physician performed independent medical examinations and peer reviews for insurance companies. NAF eventually dismissed such allegations and held in favor of Progressive. Applicant then filed a complaint, seeking to collaterally attack the arbitration decision, arguing that the error was procedural rather than substantive, thereby challenging the validity of PIP dispute resolution procedures within N.J.A.C. 11:3-5.1 to -5.12, which governs MROs and the physicians they use. The Appellate Division upheld the lower court's dismissal of the complaint, finding that the applicant had neglected the statutory option, provided in N.J.S.A. 2A:23A-13, of "[commencing] a summary application in the Superior Court for [the award's] vacation, modification or correction within 45 days after the award is delivered to the applicant, or within 30 days after receipt of an award modified....unless the parties shall extend the time in writing." Here, whereas N.J.S.A. 2A:23A-13(c)(2) would enable vacation of an award upon the showing of "[p]artiality of an umpire appointed as a neutral," the procedures which the applicant instead impugned were inherently valid.