# Legal News in Brief

## News in a flash for Subrogation and Defense Adjusters

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### Subrogee Who Fails to Read Insurance Contract Before Electing Arbitration of its Claim Risks Forfeiting Appeal of Decision

Riverside Chiropractic v. Mercury Ins.
New Jersey Appellate Division
Docket No. A-3034-07T2
(December 17, 2008)

Plaintiff, as subrogee of Megan Machado, appealed from an arbitration award in favor of Mercury Insurance Company. Ms. Machado, injured in the underlying automobile accident, assigned Riverside Chiropractic all of her rights to insurance coverage under her policy with Mercury, thereafter receiving treatments for her injuries. Plaintiff sent a series of pre-certification requests to Defendant for payment of the treatments it had provided to the insured. Defendant, upon review by a chiropractor, contended that Plaintiff's services exceeded the usual and customary care required for the diagnosis. Although Plaintiff had not yet obtained a copy of the applicable insurance contract, it filed a demand for arbitration on the presumption that said contract mandated arbitration for personal injury protection (PIP) disputes. The arbitrator awarded Plaintiff only the cost of medical supplies, less than seven percent of its entire claim, in addition to attorney's fees and costs. Plaintiff thereupon filed a verified complaint and an order to show cause seeking to vacate the decision. The Appellate Division reviewed the language of the insurance contract, which actually stipulated that "[a] PIP dispute...**may** be submitted to dispute resolution...." (emphasis added). As Plaintiff elected to resolve its PIP claim through Alternate Dispute Resolution, precedent required compliance with the Alternative Procedure for Dispute Resolution Act (APDRA), which in turn forbids any further appeal or review of the arbitration decision. Contrary to Plaintiff's insistence otherwise, APDRA's restriction is constitutionally valid because Plaintiff in electing arbitration thereby rendered a knowing and voluntary waiver of appeal. Moreover, no public policy concerns exist in this matter so as to warrant review of the lower court's decision upholding the arbitration award.

### Existence of a Permanent Injury is a Question of Fact for Jury

Ames v. Gopal
New Jersey Appellate Division
Docket No. A-2522-07T1
(December 9, 2008)

Defendant appealed as to the amount of damages in a personal injury lawsuit which resulted from an automobile accident. Plaintiff claimed to have sustained a herniated disc from the accident. Specifically, the defendant argued that the judge in his instructions to the jury erroneously stated that

were the jury to find that there was a herniation caused by the accident, then the jury should determine that a permanent injury thereby existed. N.J.S.A. 39:6A-8 provides that an injury "shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." Such requirement, among other alternatives, is necessary to meet the verbal tort threshold, whereby the injured party may bring suit for non-economic damages. Here, the Appellate Division on review found that the defendant's expert witness only conceded on cross-examination that the Plaintiff's herniated disc was a permanent condition, but not a permanent injury. The expert's testimony presented a question of fact as to the existence of a permanent injury, which should have been left for the jury to determine. The Court therefore reversed and remanded the award of damages.

**Insurance Carrier Must Prove That the Adverse Vehicle is Used Principally for Commercial Purposes in Order to Recover Benefits Otherwise Covered by the No-Fault Law**

In re Progressive Northeastern v. N.Y. State Ins. Fund
New York Appellate Division
2008 NY Slip Op 09334
(November 26, 2008)

The underlying accident occurred between Respondent's insured, who sustained personal injury, and Petitioner's insured's employee, who was operating her employer's vehicle, a passenger vehicle that bore livery license plates belonging to a commercial vehicle. Respondent successfully sought reimbursement of workers' compensation benefits paid to its insured, notwithstanding Petitioner's assertion that its insured's passenger vehicle was her personal vehicle and not used primarily for the transportation of persons or property. Petitioner appealed the Supreme Court's denial of its proceeding to vacate the arbitration award. In vacating the award, the Appellate Division cited Insurance Law § 5105(a), which provides that a workers' compensation carrier that pays benefits in lieu of first-party benefits, which another insurer would be obligated to pay but for the No-Fault Law, has a right to recover "only if at least one of the motor vehicles involved [weighs] more than [6,500 pounds] unloaded or is...used principally for the transportation of persons or property for hire." Respondent bore the burden of proving that it was entitled to recover the benefits paid; this factor is a condition precedent, not an affirmative defense. Because Respondent failed to conduct discovery for evidence that would support its claim that the vehicle was principally used as a commercial vehicle, Respondent could not prevail.

**Tree Well Does Not Constitute Part of a "Sidewalk" Per New York Administrative Code Section 7-210**

Vucetovic v. Epsom Downs
New York Court of Appeals
2008 NY Slip Op 04901
(June 3, 2008)

Plaintiff brought suit for personal injuries sustained when he stepped into a tree well between Second and Third Avenues and tripped on one of the cobblestones surrounding the dirt area containing a tree stump. The tree well was located in front of a building owned by Defendant, but the tree well had been installed before Defendant acquired the building. The City had cut down the tree about four months before the accident.

In 2003, the pertinent Administrative Code of the City of New York, as amended, provided that "[i]t shall be the duty of the owner of real property abutting any sidewalk...to maintain such sidewalk in a reasonably safe condition." Further, such owner "shall be liable for any injury to property or personal injury...proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk." The Code added that the City would not be liable for any such failure of the owner to maintain sidewalks in a reasonably safe condition. In determining whether such provisions include tree wells within the definition of "sidewalk," the Court of Appeals applied the common-law principle of strict statutory construction; as tree wells were not mentioned within the code or its legislative history, the Court found that such were not included.