

INSURANCE LAW

BY NORMAN H. DACHS AND JONATHAN A. DACHS

On Significant Recent No-Fault Decisions and the "Top 10"

LAST YEAR PRODUCED several cases dealing with No-Fault claims. First and foremost, the Court of Appeals upheld the authority of the superintendent of insurance to promulgate certain new regulations respecting No-Fault automobile insurance benefits, primarily reducing the time frames for claiming and proving entitlement to such benefits in an effort to combat perceived widespread abuse of the system. *Medical Society of New York v. Serio*, 100 NY2d 854 (2003).

Next, in *National Grange Mut. Ins. Co. v. Vitebskaya*, — Misc2d —, 766 NYS2d 320 (Sup. Ct. Kings Co., Rivera, J.), the court denied No-Fault benefits to a passenger in a vehicle injured as a result of "an intentional collision staged for the purpose of insurance fraud." In so holding, the court cited *Progressive Northwestern Ins. Co. v. Van Dina*, 282 AD2d 680 (2d Dept. 2001), for the proposition that an intentional act may void coverage even if not committed by the claimant, and *State Farm v. Laguerre*, 305 AD2d 490 (2d Dept. 2003), for the proposition that even innocent victims may not recover No-Fault benefits when a collision is the result of an intentional act. Although the "30-day rule" enunciated in *Presbyterian Hosp. v. Maryland Cas. Co.*, 90 NY2d 274 (1997) (see also 11 NYCRR §65-3.8) was not involved — or at least not discussed — in *Vitebskaya*, the failure timely to disclaim or deny such claim would not implicate the rule inasmuch as such defense pertains to a matter of coverage. See *Matter of Metro Med. Diagnostics v. Eagle Ins. Co.*, 293 AD2d 751, 752 (2d Dept. 2002). The defense of noncoverage is not precluded by the failure to adhere to the 30-day rule. *Central Gen. Hosp. v. Chubb Group of Ins. Cos.*, 90 NY2d 195 (1997).

30-Day Rule Cases

The year ended with a spate of decisions by the appellate term, Second and Eleventh judicial districts and one by the Civil Court, Richmond County, which provide the bar with those courts' clear and scholarly analyses of the procedural consequences resulting from an insurer's failure strictly to adhere to the requirements of the "30-day rule." While we strongly recommend that each of these cases — *Amaze Medical Supply Inc. v. Eagle Ins. Co.*, The New York Law Journal, Dec. 29, 2003, p. 27, col. 7; *A.B. Medical Services v. Eagle Ins. Co.*, NYLJ, Dec. 29, 2003, p. 28, col. 1; *Damadian MRI in Elmhurst v. Liberty Mut. Ins. Co.*, NYLJ, Dec. 29, 2003, p. 28, col. 2; *A.B. Medical Services v. GEICO*, NYLJ, Dec. 24, 2003, p. 31, col. 4 — be carefully read, the crux of these decisions is that where the insurer fails to issue a proper denial within 30 days after submission by claimant of its proof of claim, i.e., the completed statutory forms (11 NYCRR 65-3.3[d]; 65-3.5[a]), the plaintiff satisfies his or her burden of proof on a motion for summary judgment or a trial merely by submission of "proof of a properly completed claim." The claimant need not demonstrate as part of his or her prima facie case that the services were necessary. Explaining,



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the courts in both *Amaze* and *Damadian*, stated: "Where, as here, the insurer is precluded from raising the defense of lack of medical necessity, the logic of the result reached in *St. Luke's-Roosevelt Hosp. v. American Tr. Ins. Co.*, — AD2d —, [767 NYS2d 252] (2d Dept., Nov. 17, 2003) is even more compelling. A contrary rule would require a claimant to prove the health benefits' medical necessity by evidence additional to the proof necessary to establish a proper claim, even when the insurer has waived the defense, thereby rewarding an insurer's dilatory response to the claim in the first instance by imposing a greater burden of proof after the action is commenced than was necessary at the claim stage to require that the insurer act on the claim or be precluded from most defenses. Moreover, the situation may be analogized to an account stated where, upon the insurer's failure to timely and properly deny the bill as embodied in the claim form, the insurer is presumed to have acquiesced to its correctness, thereby rendering the insurer liable thereon. Thus when an action is commenced, the prima facie case is

the unchallenged claim form. Indeed, the Court of Appeals has expressed its impatience with insurers "Who sit on their many procedural rights and requirements and then belatedly deny claims they should have acted upon earlier (*Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co.*, 90 NY2d at 285)."

Open Question?

A sentence in both cases may cause some confusion as to the ultimate effect of the failure to comply with the 30-day rule. Does it simply provide the claimant with a shortcut in his or her attempt to establish a prima facie case, or does it also preclude the insurer from rebutting claimant's showing? The overall discussion in both cases suggests the latter. Yet, both courts stated: "Thus, we reaffirm our holding that a provider's proof of a properly completed claim makes out a prima facie case upon its motion for summary judgment (citations omitted) thereby shifting the burden to the insurer who, if not precluded, may rebut the inference by proof in admissible form establishing that the health benefits were not medically necessary (emphasis added)."

Citing *Das v. Allstate Ins. Co.*, 297 AD2d 321 (2d Dept. 2002) and *Bonetti v. Integon Nat. Ins. Co.*, 269 AD2d 413 (2d Dept. 2000), the Court in *Matter of Park Radiology v. Allstate*, NYLJ, Dec. 30, 2003, p. 21, col. 4 (Civ. Ct. Richmond Co., Vitaliano, J.) held that "an insurer is precluded from denying a No-Fault claim if it fails to timely deny it" and that "an insurer is precluded from challenging the adequacy of a claimant's proof of 'medical necessity' if it fails to timely deny the claim of No-Fault benefits." Parenthetically, the court, in a well-reasoned opinion, took issue with those arbitrators who persist in following a contrary advisory opinion issued by the superintendent of insurance in 2000.

• **The "Top 10."** It is once again that time of year when we have the privilege of reporting upon Insurance Department's "Annual Ranking of Automobile Insurance Complaints." The Annual Ranking for 2002,

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the latest year for which such data is available, ranks 50 automobile insurance companies or groups of companies by the number of private passenger automobile insurance complaints upheld against them and closed by the Insurance Department in 2002, divided by their average 2001-2002 average private passenger automobile premium volume in New York State.

Thousands of complaints are handled by the Insurance Department's Consumer Services Bureau each year. In 2002, the department upheld 4,614 private passenger auto complaints, a substantial increase from the prior year, when only 2,478 complaints were upheld. An upheld complaint occurs when the department agrees with a consumer that an auto insurer made an inappropriate decision. Typical complaints are those involving monetary disputes, such as the value of a total loss. Complaints about policy terminations and failures to pay claims are also common.

The 2002 ranking also includes complaints regarding late payment of No-Fault arbitration awards. The number of upheld No-Fault arbitration late payment complaints was 188, a 22 percent reduction from the 2001 total. Most auto insurers posted two or fewer upheld No-Fault arbitration late payment complaints in 2002. However, four insurers — Allstate, GEICO, Interboro and Countrywide — each posted more than fifteen such complaints, accounting for half of all the upheld No-Fault late payment complaints.

The 2002 average complaint ratio for all companies or groups, including those with less than \$10 million in premiums, was 0.49 per \$1 million in premiums, up from 0.29 in 2001. This average ratio was derived by dividing the number of complaints upheld against all those companies in 2001 (4,614) by the average premium for 2001-2002 for all companies (\$9.46 million).

Two relatively small insurers — Atlantic Companies and Electric Mutual — each writing less than \$20 million in average annual premiums for 2001-2002 — posted no upheld complaints. This is the second consecutive year that Atlantic posted no upheld complaints. Amica Mutual Ins. Co., a perennial "top 10" finisher, ranked third in the 2002 ranking, with just one upheld complaint, the same number it had in the prior year.

None of the three largest New York State auto insurers — Allstate, State Farm or GEICO — registered complaint ratios higher than the overall average. State Farm, Travelers and Progressive all finished among the top 25 insurers in the ranking, while GEICO and Allstate were ranked in the bottom half of the 50 ranked insurers included in the report.

Of the five largest auto insurers in New York State, only Progressive showed a year-to-year decrease in the number of upheld complaints, dropping from 139 in 2001 to 110 in 2002. Since most insurers posted year-to-year increases in complaints in 2002, Progressive rose from 34th to 22nd place. Allstate, the state's largest insurer, improved its ranking only slightly, from 40th in 2001 to 39th in 2002.

After four consecutive years of improvement in the rankings, New York's second-largest writer, State Farm, slipped from 11th to 19th place in 2002, finishing just behind Travelers. Travelers had finished 18th in 2000, improved to 13th in 2001, and slipped back to 18th in the 2002 ranking. It should be noted that Citigroup began to spin-off Travelers property/casualty companies early in 2002.

GEICO, the third-largest New York insurer, ranked 28th among all insurers, below its 22nd place finish in 2001.

Charts

The first chart below lists the "Top 10," i.e., the 10 companies with the fewest complaints against them, or, the 10-best performers of 2002. It should be noted that this list contains four repeat performers from last year — Atlantic, Amica, Erie and USAA. For purposes of comparison, these companies' rankings in 2001 and 2000 are also shown. Companies listed in boldface finished among the top 25 auto insurers in each of the past three years. New York Central Mutual Fire Ins. Co. was the largest company among the top-10 finishers, and USAA was the second-largest. (USAA markets private passenger automobile insurance to retired military personnel.)

The second chart reveals the opposite side of the spectrum; it lists the 10 auto insurers with the worst performance record for the calendar year 2002. In this chart, the company with the highest ratio

is ranked first; the company with the lowest ratio is ranked last. Thus, those ranked near the top of this list had the worst performance. These companies' rankings in 2001 and 2000 are also shown. Companies listed in boldface are the only two companies to be ranked among the 10 lowest in each of the past three years.

Half of the insurers with the highest complaint ratios were carryovers from the previous year's "bottom ten." Most of the insurers on the current list are relatively small. However, three insurers — Eagle, Clarendon and Great American — each posted over \$100 million in average premiums. The lowest ranked insurer — Merchants & Business Men's Mutual — is a Liberty Mutual company. In this report, however, Merchants & Business Men's was ranked separately from Liberty Mutual because the firm that had been handling Merchants automobile claims filed for bankruptcy.

For those interested in the performance records of the 10-largest auto insurers in New York State, we offer the third chart, which indicates those companies' 2002 rankings, complaints ratios and 2001-2002 premiums. As can be seen, 73.5 percent of auto insurance consumers purchase their insurance from one of these 10 companies.

The insurance department notes that its rankings should not be the only factor considered when selecting an auto insurer. Price is also a major factor, as are recommendations from family and friends. The department's annual Consumers Guide to Automobile Insurance contains representative price information for 25 New York auto insurers in addition to the Assigned Risk Plan. Copies of the guide and the ranking may be obtained free of charge by calling the department's toll-free telephone number (800) 342-3736. In addition, both publications are accessible on the Internet at the department's Web site address: www.ins.state.ny.us.

(1) See Dachs, N. and Dachs, J., "On the 'Top 10,' No-Fault Update, Insolvency and SUM Coverage," *The New York Law Journal*, March 11, 2003, p. 3, col. 1; "The 'New' No-Fault 'Regulation 68'," *NYLJ*, Sept. 11, 2001, p. 3, col. 1; "Court 86s Regulation 68 ...," *NYLJ*, May 8, 2001, p. 3, col. 1; "No-Fault Regulations Update," *NYLJ*, Sept. 12, 2000, p. 3, col. 1; "More on No-Fault," *NYLJ*, July 11, 2000, p. 3, col. 1; and "Proposed New No-Fault Regulations," *NYLJ*, July 13, 1999, p. 3, col. 1.

The "Top 10": The 10 Best Performers of 2002

| Company or Group | 2002 Complaint Ratio | 2002 Ranking | 2001 Ranking | 2000 Ranking |
|---------------------|----------------------|--------------|--------------|--------------|
| 1. Atlantic | 0 | 1/50 | 4/51 | 20/54 |
| 2. Electric | 0 | 2/50 | 25/51 | 45/54 |
| 3. Amica | 0.01 | 3/50 | 6/51 | 6/54 |
| 4. USAA | 0.06 | 4/50 | 9/51 | 7/54 |
| 5. Erie | 0.08 | 5/50 | 1/51 | 1/54 |
| 6. New York Central | 0.09 | 6/50 | 12/51 | 9/54 |
| 7. Preferred Mutual | 0.11 | 7/50 | 21/51 | 10/54 |
| 8. Merchants Mutual | 0.11 | 8/50 | 20/51 | 40/54 |
| 9. Response | 0.14 | 9/50 | 26/51 | 17/54 |
| 10. State-Wide | 0.14 | 10/50 | 14/51 | 16/54 |

The "Bottom 10": The 10 Worst Performers of 2000

| Company or Group | 2002 Complaint Ratio | 2002 Ranking | 2001 Ranking | 2000 Ranking |
|-------------------------------------|----------------------|--------------|--------------|--------------|
| 1. Merchants & Bus. Men's Mutual | 30.01 | 50/50 | 51/51 | 54/54 |
| 2. Clarendon | 7.72 | 49/50 | 49/51 | 26/54 |
| 3. Leucadia | 6.47 | 48/50 | 50/51 | 52/54 |
| 4. Eagle | 3.49 | 47/50 | 36/51 | 23/54 |
| 5. Interboro | 2.4 | 46/50 | 10/51 | 4/54 |
| 6. Great American | 1.98 | 45/50 | 48/51 | 37/54 |
| 7. St. Paul | 1.66 | 44/50 | 41/51 | 30/54 |
| 8. Sentry | 1.3 | 43/50 | 37/51 | 15/54 |
| 9. Eveready | 0.75 | 42/50 | 3/51 | 38/54 |
| 10. Credit Suisse Group | 0.7 | 41/50 | 45/51 | 41/54 |

The "Big 10": The Largest Auto Insurers in New York

| Company or Group | 2002 Ranking | 2002 Complaint Ratio | 2001-2002 Average Premium (In Millions) | Market Share |
|-------------------------------|--------------|----------------------|---|--------------|
| 1. Allstate | 39/50 | 0.49 | \$1,592.60 | 16.8% |
| 2. State Farm | 19/50 | 0.19 | \$1,229.50 | 13.0% |
| 3. Berkshire-Hathaway (GEICO) | 28/50 | 0.27 | \$1,194.50 | 12.6% |
| 4. Travelers | 18/50 | 0.18 | \$598.10 | 6.3% |
| 5. Progressive | 22/50 | 0.2 | \$551.00 | 5.8% |
| 6. Liberty Mutual | 30/50 | 0.31 | \$409.80 | 4.3% |
| 7. Nationwide | 23/50 | 0.2 | \$364.00 | 3.8% |
| 8. AIG | 40/50 | 0.66 | \$355.90 | 3.8% |
| 9. White Mountains | 15/50 | 0.18 | \$331.00 | 3.5% |
| 10. New York Central | 6/50 | 0.09 | \$326.60 | 3.5% |

The "Big Ten"

Total (all companies, including those with less than \$10 million premiums)

\$6,953.00

\$9,464.50

73.5%

100.0%

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