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OUTSIDE COUNSEL

Expert Analysis

No-Fault Practice: Getting A Fair Shake From 'Fair Price'

By **Dominick Gullo**

And **Anthony DeGuerre**

The Court of Appeals in *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, recently held that an insurer was required to pay no-fault benefits to a medical provider for services that were never provided. The court's conclusion certainly shocks the conscience, yet the court determined that no other result could be reached pursuant to the no-fault regulations. The purpose of this article is to provide the insurer with a way to defend itself. This article outlines counter-claims that can be interposed at the time of pleadings, and suggests a litigation strategy for counsel representing insurance carriers who find themselves liable for overdue no-fault payments to medical providers who submit fraudulent no-fault claims.

New York's no-fault automobile insurance system is designed to ensure prompt compensation for losses incurred by accident victims without regard to fault or negligence, to reduce the burden on the courts and to provide substantial premium savings to New York motorists.[1] To achieve this end, insurance companies issuing automobile insurance policies within the state of New York must pay or deny claims for no-fault benefits within 30 days of receiving the claims for goods or services provided to an injured party covered under the no-fault policy of insurance.[2]

By statute, failure of an insurance company to pay or deny these claims within 30 days will result in the overdue payments accruing interest at a rate of two percent a month and entitled the claimant to reasonable attorney's fees and costs in securing the overdue payment, subject to limitations by the superintendant of insurance.[3] Moreover, where a claim for no-fault benefits is not paid or denied within 30 days of the carrier receiving the claim, the insurance carrier is precluded from raising affirmative defenses for not paying the claim.[4]

It is this latter penalty that was addressed by the Court of Appeals in *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, where the Court held that when an insurance carrier tenders a late denial, the carrier may not raise the affirmative defense that the goods and services were not provided to the injured party, even where the injured party denies receiving the alleged goods and services.[5] While the current state of the law provides that these carriers will not be able to raise affirmative defenses, there is nothing to preclude a defrauded insurance carrier from interposing counterclaims in their Answer to recover the monies that are due the unscrupulous no-fault medical provider, and to recover damages and the costs of litigation.[6]

> Insurance fraud is a major cause of increased premiums for drivers in New York State, and insurance companies require tools to combat fraudulent claims.

The proposed counter-claims are not an exhaustive litany of causes of action available to insurance carriers in a *Fair Price* situation. They should provide a viable way for insurance carriers to combat insurance fraud given the current state of New York's no-fault law.

RICO

Most attorneys are familiar with Federal RICO statutes as a way of combating organized crime. In the context of no-fault, this cause of action can be a valuable way for insurance companies to affirmatively fight insurance fraud that is perpetrated by unscrupulous no-fault enterprises, including management companies who exploit medical professionals for their own profit.

RICO claims are usually brought in federal District Court, however, both federal and state courts have jurisdiction to entertain RICO claims.[7] Whether the RICO claims are to be brought in the civil court where the cause of action was originally brought, or removed to federal District Court is a decision best left to the counsel handling the claim.

A cause of action for a RICO claim accrues four years after the injured party discovers, or should reasonably have discovered, the injuries that resulted from the pattern of racketeering activity.[8] New York courts have held that the elements that must be pleaded to state a civil RICO claim are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.[9]

The federal RICO statute defines "pattern of racketeering activity" as:

> (5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.[10]

The Federal RICO statute defines "racketeering activity" as:

> (1) 'racketeering activity' means…(B) any act which is indictable under any of the following provisions of title 18, United States Code: …section 1341 [18 USC §1341] (relating to mail fraud)…[11]

An insurance carrier who has received two or more bills from a medical provider in which the services or supplies were not provided, like the provider in *Fair Price*, can assert a RICO cause of action against the provider as a counterclaim. By submitting NF-3 forms for services or supplies that were not provided to the assignor, the

DOMINICK GULLO *is a partner at Gullo & Associates in Brooklyn.* ANTHONY DeGUERRE *is the founding shareholder of the DeGuerre Law Firm on Staten Island.*

medical provider is in violation of 18 USC §1341, which sets forth:

> Whoever, having devised or intending to devise any scheme or artifice…for obtaining money or property by means of false or fraudulent pretenses, representations, or promises…for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service…shall be fined under this title or imprisoned not more than 20 years, or both.[12]

An insurance carrier who succeeds in proving RICO liability against a medical provider is entitled to treble damages, reasonable attorney fees and the costs of the suit.[13] In calculating damages for a RICO claim, New York courts have found the measure of damages is a sum equal to the settlements paid on the fraudulent claims submitted.[14] As applied to no-fault litigation, an insurance carrier's damages would be the principal, interest and attorney's fees claimed in the medical provider's summons and complaint, trebled.

Where carriers in a *Fair Price* situation assert a RICO counter-claim, the medical provider will likely seek to dismiss the RICO counter-claim, arguing that a New York supreme court found that exaggerated and fraudulent insurance claims cannot give rise to a RICO cause of action because there was no allegation of pattern activity marked by two prior RICO convictions.[15] However, the second circuit cases which this New York case were based on were reversed by the U.S. Supreme Court which found that there was nothing in the RICO statutes' history, language or policy considerations which required two prior RICO convictions as a prerequisite to a civil RICO action.[16]

Fraud

American courts have defined fraud as the "deception practiced in order to induce another to part with property or to surrender some legal right."[17] A cause of action for fraud accrues the greater of six years from the date of the fraudulent act, or two years from when the injured party discovered, or should have discovered the fraud.[18]

To plead a cause of action for fraud in New York, a party must allege the elements of representation of a material existing fact, falsity, scienter, justifiable reliance and damages.[19] To plead a cause of action for constructive fraud, the elements are the same as actual fraud, but the scienter element is replaced by an allegation that the parties have a fiduciary or confidential relationship warranting the trusting party to repose his confidence in the other party and therefore to relax the care and vigilance he would ordinarily exercise in the circumstances.[20]

Each of the elements for fraud and constructive fraud must be supported by factual allegations sufficient to satisfy the requirement of CPLR 3016(b) that the circumstances surrounding the fraud be pleaded in detail.[21] For a cause of action premised on actual fraud, proof of the defendant's knowledge of the deceit, and the plaintiff's justifiable reliance on the false representation, can be adduced from the circumstances attending the transaction.[22] Damages in a fraud cause of action are indemnity for the actual loss sustained as the direct result of the fraud.[23]

By submitting a fabricated NF-3 claim, and subsequently sending letters of medical necessity to the insurance carrier, it is clear that the medical provider in *Fair Price* intended to induce the no-fault insurance carrier to issue payments on the claim within 30 days of receipt of the claim, or face the penalties imposed by the no-fault regulations. A carrier seeking to pursue a claim for actual fraud against a medical provider, however, should consider the strength of its proof of the deceit of the medical provider, and whether there have been other acts. Medical providers being sued for fraud may seek to defend this claim on grounds that the billing was an error, and not a calculated plan by the medical provider to induce the insurance carrier to make no-fault payments.

As to a cause of action for constructive fraud, the insurance carrier can allege that the no-fault policy of insurance, under which the medical provider is making a claim for no-fault benefits, puts both parties in a confidential relationship. It should be pled by the carrier in their counter-claim that the insurance carrier relies on the medical provider's statutory NF-3 claim forms to be truthful, so that the carrier and medical provider can meet the goals of the no-fault system. The acknowledgement by the courts that no-fault medical providers have an obligation to submit truthful and accurate NF-3s is consistent with the overall aims of the no-fault system.

Conclusion

Insurance fraud is a major cause of increased premiums for drivers in New York State, and insurance companies require tools to combat fraudulent claims. For defense counsel representing no-fault insurance carriers, an affirmative tact needs to be taken at the pleading stage enabling no-fault carriers to put pressure on unscrupulous medical providers seeking no-fault benefits on non-existent services and supplies.

1. *Hosp. for Joint Diseases v. Travelers Prop. Cas. Ins. Co.*, 2007 N.Y. Slip Op. 9067, 9 N.Y.3d 312, 879 N.E.2d 1291, 849 N.Y.S.2d 473 (N.Y. Ct. of App., 2007) (internal citations omitted).
2. NY Ins. Law §5106(a) (Lexis 2008); and 11 NYCRR 65-3.8 (Lexis 2008).
3. NY Ins. Law §5106(a) (Lexis 2008).
4. *Presbyterian Hosp. v. Md. Cas. Co.*, 90 N.Y.2d 274, 683 N.E.2d 1, 660 N.Y.S.2d 536 (N.Y. Ct. of App., 1997).
5. *Fair Price Med. Supply Corp. v. Travelers Indem. Co.*, 2008 N.Y. Slip Op. 4946, 10 N.Y.3d 556, 890 N.E.2d 233, 860 N.Y.S.2d 471 (N.Y. Ct. of App., 2008).
6. *Merritt v. Gouley*, 12 N.Y.S. 132, 58 Hun 372 (N.Y. Sup. Ct., Gen. Term, 2nd Dept., 1890) ("A counter-claim must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff…: (1) A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of this action. (2) In an action on contract, any other cause of action on contract existing at the commencement of the action." citing Code Civil Proc. N. Y. §501).
7. *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L. Ed. 887, 894 (U.S. Sup. Ct. 1990).
8. *Podraza v. Carriero*, 212 A.D.2d 331, 339, 630 N.Y.S. 163, 16 (N.Y.A.D., 4th Dept., 1995).
9. *Podraza v. Carriero*, 212 A.D.2d 331, 335, 630 N.Y.S. 163, 166 (4th Dept., 1995).
10. 18 USCS 1961(5) (Lexis 2008).
11. 18 USCS §1961(1)(B) (Lexis 2008).
12. 18 USCS §1341 (Lexis 2008).
13. 18 USCA 1964(c)(Lexis 2008).
14. *Chubb & Sons Inc. v. Kelleher*, 2006 U.S. Dist. Lexis 46200 (N.Y. U.S.D.C., E.D., 2006), citing *Aetna Cas. Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1568-1569 (U.S. Ct. of App., 1st Cir., 1994).
15. *Ebnan Atnique Rugs & Tapestries Inc. v. New York Marine Managers Inc., et al.*, 128 Misc.2d 84, 86, 488 N.Y.S.2d 534, 536 (N.Y. Supreme Court, New York County, 1984), citing *Sedima S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (U.S. Ct. of App., 2nd Cir., 1984) [reversed and remanded, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed. 346 (U.S. Sup. Ct., 1985)]; *Bankers Trust Co. v. Rhodes*, 741 F.2d 511 (U.S. Ct. of App., 2nd Cir., 1984) [vacated and remanded, 473 U.S. 922, 105 S.Ct. 3550, 87 L.Ed. 673 (U.S. Sup. Ct., 1985)]; and *Furman v. Cirrito*, 741 F.2d 524 (U.S. Ct. of App., 2nd Cir., 1984) [vacated without opp, 779 F.2d 36 (U.S. Ct. of App., 2nd Cir., 1985)].
16. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed. 346 (U.S. Sup. Ct., 1985).
17. *Fottler v. Moseley*, 179 Mass. 295, 60 N.E. 788 (Sup. Jud. Ct. of Mass. 1901).
18. NY CPLR 213(8) (Lexis 2008); see also *Del Vecchio v. Nassau County*, 118 A.D.2d 615, 499 N.Y.S.2d 765 (N.Y.A.D., 2nd Dept., 1986).
19. *Lanzi v. Brooks*, 54 A.D.2d 1057, 388 N.Y.S.2d 946 (N.Y.A.D., 3rd Dept., 1976) [affirmed, 43 N.Y.2d 778, 373 N.E.2d 278, 402 N.Y.S.2d 384 (N.Y. Ct. of App. 1977)].
20. *Brown v. Lockwood*, 76 A.D.2d 721, 432 N.Y.S.2d 186 (N.Y.A.D., 2nd Dept., 1980).
21. *Lanzi v. Brooks*, 54 A.D.2d 1057, 388 N.Y.S.2d 946 (N.Y.A.D., 3rd Dept., 1976) [affirmed, 43 N.Y.2d 778, 373 N.E.2d 278, 402 N.Y.S.2d 384 (N.Y. Ct. of App. 1977)].
22. *Ochs v. Woods*, 221 N.Y. 335, 117 N.E. 305 (N.Y. Ct. of App. 1917) ("If there was evidence that the plaintiff was influenced by the misrepresentation, the jury could have found that there was deception. It is incumbent upon a plaintiff in an action for deceit through false representations to show that he was influenced by them. It does not require very strong proof to establish it. In most cases, it may be inferred from the circumstances attending the transaction.").
23 Id.; see also *Kuelling v. Roderick Lean Mfg. Co.*, 183 N.Y. 78, 75 N.E. 1098 (N.Y. Ct. of App. 1905).