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Clients&Friends Alert

Important Court Decision For No-Fault Insurers
New York Appellate Court Rejects Limitation On *State Farm v. Mallela*

December 1, 2010

We are very pleased to inform you that on November 30, 2010 our firm, together with our co-counsel Bob Stern of Stern & Montana, obtained a very favorable and significant decision for no-fault insurers from the Appellate Division, First Department, on an issue of first impression before the New York State appellate courts. This marks the second time in this same case that the Appellate Division has ruled in favor of no-fault insurers on an issue of first impression. In the first instance, the Court confirmed the right of insurers to defend any unpaid claim under *State Farm v. Mallela* irrespective of whether the services were alleged to be rendered prior to the April 2002 effective date of the new no-fault regulations.

You will recall that in *State Farm v. Mallela*, the New York Court of Appeals ruled that, as of April 5, 2002, fraudulently-incorporated providers, or providers that were violating core licensing requirements, were not entitled to reimbursement under New York's no-fault system. Since that time, many providers have sought, in the context of litigating actions against insurers or defending against affirmative recovery actions brought by insurers, to limit the scope and effect of *Mallela*. In *Allstate Insurance Co. v. Belt Parkway Imaging, P.C.*, the defendant radiological providers made a summary judgment motion seeking dismissal of affirmative claims by Allstate and GEICO and the insurers' affirmative defenses to counterclaims. Such defendants argued that the New York State Legislature's enactment of Insurance Law Section 5109 (relating to the de-certification of providers) overruled *Mallela* and prevented insurers from raising *Mallela*-type defenses or seeking affirmative recoveries from providers without a determination from the Department of Insurance that such providers were de-certified from receiving no-fault benefits as the result of fraudulent or other improper activities. The trial court denied the providers' motion.

On appeal, the First Department specifically addressed the Legislature's enactment of Insurance Law Section 5109 and rejected the argument that such enactment overruled *Mallela*, calling "absurd" the result that would obtain if the defendants' argument were to be accepted. A copy of the decision is attached. This decision constitutes the first New York State appellate ruling on this issue and represents a significant victory that protects and re-affirms the validity of insurers' anti-fraud efforts, including the independent ability to bring affirmative recovery actions and assert affirmative defenses relating to providers' fraudulent activities.

If you have any questions concerning the decision, or require assistance in no-fault issues generally, please do not hesitate to contact us.

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Gonzalez, P.J., Mazzarelli, Nardelli, Renwick, DeGrasse, JJ.

3718 Allstate Insurance Company et al., Index 600509/03
Plaintiffs-Respondents,

-against-

Belt Parkway Imaging, P.C., et al.,
Defendants-Appellants,

Parkway Magnetic Resonance Imaging, Inc., et al.,
Defendants.

Hession Bekoff Cooper & LoPiccolo, LLP, Garden City (Jonathan M. Cader of counsel), and Baker, Sanders, Barshay, Grossman, Fass Muhlstock & Neuwirth, Mineola (Todd Fass of counsel), for appellants.

Cadwalader, Wickersham & Taft LLP, New York (William J. Natbony of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 26, 2009, which denied the motion by defendants Belt Parkway Imaging, P.C., Diagnostic Imaging, P.C., Metroscan Imaging, P.C., Parkway MRI, P.C. (the PC defendants) and Herbert Rabiner, M.D., for partial summary judgment, unanimously affirmed, without costs.

"A provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement" (11 NYCRR 65-3.16[a][12]). Pursuant to this regulation, the Court of Appeals held that "insurance

carriers may withhold payment for medical services provided by fraudulently incorporated enterprises" (*see State Farm Mut. Auto Ins. Co. v Mallela*, 4 NY3d 313, 319, 321 [2005]). *Mallela* was decided on March 29, 2005. The Legislature subsequently enacted Insurance Law § 5109, which became effective on August 2, 2005.

There is no indication in § 5109 that the statute overrules *Mallela*. Nor is there any such indication in its legislative history, which "must be reviewed in light of the existing decisional law which the Legislature is presumed to be familiar with" (*Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 157 [1987]).

Section 5109(a) states, "The superintendent, in consultation with the commissioner of health and the commissioner of education, shall by regulation, promulgate standards and procedures for investigating and suspending or removing the authorization for providers of health services to demand or request payment for health services as specified in" Insurance Law § 5102(a)(1). However, the Superintendent of Insurance has issued no regulations pursuant to § 5109(a). Thus, if - as defendants contend - only the Superintendent can take action against fraudulently incorporated health care providers, then no one can take such action. In light of the fact that "[t]he purpose of the regulations of which [11 NYCRR] 65-3.16(a)(12) is

a part was to combat fraud" (*Allstate Ins. Co. v Belt Parkway Imaging, P.C.*, 33 AD3d 407, 409 [2006]), this would be an absurd result, and we reject it (Statutes § 145).

Defendants' contention that plaintiffs fail to state a cause of action for unjust enrichment because they have not alleged that the services rendered by the PC defendants were medically unnecessary is without merit. Paragraph 1 of the second amended complaint alleges that "numerous unnecessary referrals were made subjecting many patients to unnecessary testing and/or radiation."

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 30, 2010

CLERK