

HEALTH PROVIDER ASSIGNMENTS / DERIVATIVE CLAIMS

No-Fault Assignments

On March 14, 2000, New York City Civil Court Judge Duane Hart, in *Rehab Medical Care of New York, P.C. v. Travelers*, 184 Misc.2d 140, 706 NYS2d 614, held that an assignment by a no-fault patient to a health service provider which contained a provision that “if the sum is not collected, I will remain personally liable therefore (sic)” was “not a complete transfer of all rights possessed by the assignor to the recovery of benefits from the defendant/insurer.” Concluding that because she will be required to reimburse the assignee should the insurer prevail in the action brought against it, the assignor had a “continued interest in the outcome of the action,” Judge Hart held that “the attempted assignment is voided” (emphasis in original). In support of this conclusion, the court cited to *Central General Hospital v. American Arbitration Ass’n*, 91 Misc.2d 516, 398 NYS2d 198 (Sup. Nassau, 1977, McCaffrey, J.). That case, however, dealt not with the right of the assignee to pursue the claim but with the right of the assignor to bring the action notwithstanding the assignment.

The assignment in *Central General* included a provision that “I am financially responsible to the hospital for the charges not covered by my Group Insurance Plan.” Because the assignment “did not to the exclusion of [the assignor] operate to establish Central General Hospital as the sole proper party to pursue the arbitration of this claim,” the court held that the assignor could pursue his portion of the claim. *Central General*, however, did not deal with the corollary issue – the issue involved in *Rehab Medical Care* -- as to whether the assignee may pursue the claim assigned to it.

New Insurance Department Form

Expressing concurrence with the holding in *Rehab Medical* and concerned that “objectionable assignment language [which] would include language that may be used to convey the right for the health care provider to pursue payment directly from the injured person in cases where the provider has overcharged or in instances where treatment has been determined to be unnecessary or unreasonable,” the Insurance Department has developed a new form to be used to modify the assignment previously executed by the assignor and which, in the Insurance Department’s opinion, “will provide some measure of assurance that the injured person has been advised of the modification of the assignment and that the assignee has not, and will not in the future, attempt to collect from the injured person, except under the specified circumstances.” The Department has informed the AAA No-Fault Conciliation Center that it should require the completion of this form where arbitration is requested by an assignee that has submitted an “improper assignment form” and has suggested that AAA provide a copy of the form to those attorneys that submit a significant number of arbitration requests on behalf of health care providers. The form reads as follows:

“MODIFICATION OF ASSIGNMENT

With respect to the assignment of Personal Injury Protection benefits by (injured person) to (name of provider) I, (provider) do hereby certify that I have not received any payment from or on behalf of the above named injured person, nor do I intend to pursue payment directly from such person in the future, for the services provided on behalf of said named person for the period (period of treatment) for injuries sustained due to a motor vehicle accident which occurred on (date of accident), notwithstanding any prior written agreement

to the contrary. This agreement shall become null and void if at any time it is determined that benefits are not payable due to the following circumstances: lack of coverage, violation of a policy condition, or determination that the treatments/services rendered are not related to said motor vehicle accident. I further certify that a copy of this affidavit has been forwarded to (injured person) at his/her last known address.

cc: Patient's name and address

(Date)

Signature of Provider

Notary:"

Contrary Holdings

Following on the heels of the Insurance Department's advisory came Nassau County District Court Judge Susan T. Kluewer's Decision in Rombom v. Interboro Mutual Indemnity Ins. Co., NYLJ, October 19, 2000, p. 32, col. 3, disagreeing "with the proposition, advanced by defendant [and the holding in Rehab Medical] that an assignment of a cause of action against an insurer must also simultaneously wipe out a debt owed by the assignor to the assignee in order for the assignment of the cause of action to be complete." Of note also is Judge Kluewer's alternate ground for allowing the action to go forward, that "by failing to set forth in its denial of claim form . . . that a deficient assignment was among the reasons for the denial of the claim, defendant has waived lack of standing as a basis for refusing to make payment."

Civil Court Judge Ferne J. Goldstein reached the same result as did Judge Kluewer in Pain Resource Center v. Travelers Ins. Co., ___ Misc.2d ___, 713 NYS2d 258 (Civil Ct.

Queens Co. 2000). Most recently, Queens County Civil Court Judge Peter J. Kelly came to the same conclusion in *Health Value Medical, P.C. v. GEICO*, NYLJ, November 9, 2000, p. 24. col. 5.

Questions

Will the AAA refuse to process arbitration requests by providers armed with the “improper assignment” who refuse to execute the proposed “modification of assignment”? If such claims pass muster administratively and are assigned to an AAA arbitrator for determination, will the arbitrator feel constrained to follow the Insurance Department advisory? Will such providers simply bypass AAA and seek arbitration before an alternative arbitration forum currently in operation (see Dachs, N. and Dachs, J., “More on No-Fault,” NYLJ, July 11, 2000, p. 3, col. 1)? Or will they abandon arbitration altogether and seek to litigate the issue in the courts? Stay tuned for further developments.

UM/SUM Coverage for Derivative Claims

In a column entitled “UM and SUM coverage for Derivative Claims,” March 9, 1999, we argued strongly that the decision of the Appellate Division, First Department in *Travelers Ins. Co. v. Lianides*, 246 AD2d 490 (1st Dept. 1998), which held that an uninjured spouse, who was not involved in an accident, was not entitled to benefits under an uninsured motorist endorsement, was incorrectly decided. Indeed, we argued that based upon the specific language of the UM and SUM endorsements there is no prohibition against awarding damages for loss of services or other derivative-type claims in a UM or SUM case, provided, of course, that the derivative claimant makes a separate claim, demands arbitration on that separate claim and proves the particular derivative damages claimed, and that the total award (for the injured party and the derivative party together) is within the “per person” limit of the coverage. Still, we noted, those intending to make and

pursue a derivative claim “will have to deal somehow with the precedent of the Lianides case.”

Although prior to the publication of that column, many, if not most, of the SUM arbitrators felt constrained to and did follow the Lianides decision and denied derivative benefits (see, e.g., New York State No-Fault/SUM Arbitration Reporter, SUM 213, Vol. 24, No. 1 (March 1999) [Arbitrator Horenstein]), thereafter it appeared that the tide began to turn. In a case reported in the September 1999 edition of the No-Fault/SUM Arbitration Reporter, Matter of Sohm v. Travelers Property Casualty, SUM 238 (September 1999), Arbitrator Seymour Lesser wrote as follows: “Claimant Benedict’s claim is derivative for loss of consortium of his wife, claimant Donna. In considering this claim, the Arbitrator is well aware of Matter of Travelers Insurance Company v. Lianides, 246 AD2d 490 (1st Dept. 1998), wherein it was held that such cause of action does not lie under an uninsured motorist endorsement of a covering policy of insurance. This determination, however, relates to a pre-Regulation 35-D endorsement. The Arbitrator is also well aware of the controversy as to whether Lianides is applicable under the Regulation 35-D uninsured motorist endorsement (see “UM and SUM Coverage for Derivative Claims,” Norman H. Dachs and Jonathan A. Dachs, N.Y.L.J., March 3 [sic], 1999, at p. 3, col. 1). The Arbitrator has held, and continues to hold, that this unresolved question . . . ‘is a coverage issue reserved for court resolution,’ since ‘the SUM Arbitrator’s jurisdiction is limited to adjudication of liability and damage issues.’ (See Ribaudo v. CNA Insurance Company, February 25, 1999, American Arbitration Association, case #17S200 02056-98; ‘Letters To The Editor,’ Seymour S. Lesser, N.Y.L.J., March 22, 1999, at p. 2, col. 5). Respondent

failed to seek court determination of Claimant Benedict's derivative entitlement under Regulation 35-D. Its objection thereto is deemed waived. To be perfected, however, the claim must be stated separately and identified clearly in the 'Demand for Arbitration' so as to distinguish it from injury claims and to alert Respondent of its assertion." Because, in that case, the Claimant failed to separately assert a derivative claim, that claim was dismissed.

In a subsequent case, reported in the December 1999 issue of the No-Fault/SUM Arbitration Reporter, Arbitrator Lesser made the same pronouncement. Although the claimant in that case did, in fact, separately and distinctly assert a derivative claim, and, thus, the Arbitrator held that the derivative claim was in issue in the proceeding, he nevertheless denied the claim in its entirety because he found that "the amount claimant lost of her husband's services is so negligible as not to be compensable." See Matter of Lombardi v. Allstate Ins. Co., SUM 252 (December 1999).

Recent Decisions

Most recently, another of the SUM Arbitrators found a different way to deal with the precedent of the Lianides case. The March 2000 edition of the No-Fault/SUM Arbitration Reporter contains an interesting decision by Arbitrator Thomas P. Bogan in Matter of Beyer and Burne v. Allstate Ins. Co., SUM 255 (March 2000). Therein, Arbitrator Bogan, one of the upstate SUM Arbitrators, addressing the specific question of "Whether Applicant is entitled to compensation under a SUM endorsement issued by Respondent for loss of services," stated as follows:

“Respondent argued that the SUM endorsement did not provide coverage for a loss of services claim, citing *In re Travelers Ins. Co. v. Lianides*, 668 N.Y.S.2d 200 (1st Dept. 198). That case involved interpretation of an uninsured motorist endorsement admittedly similar, although not identical to the current SUM endorsement mandated by the Insurance Department. This case arose and the claim was brought in the Third Department, and I do not believe that I am as obligated to follow a First Department holding as I would be to follow a Third Department case. I conclude that if the Appellate Division Third Department was to consider the question, it would hold that a claim for loss of services is covered by the policy.

“I do not reach this conclusion based upon the rule of construction that provides that ambiguities in a contract should be construed against the party that drafted the contract, and was in the best position to avoid ambiguities in the first place. The public policy behind such a rule of construction does not apply here, since the Insurance Department, not Respondent, provided the policy language. 11 NYCRR §60-2.

“I conclude that the policy provides coverage for a loss of services claim because the plain language of the endorsement seems to require such a conclusion. The definition of 'insured' includes:

(1) you, as the named insured and, while residents of the same household, your spouse and the relatives of either you or your spouse;

(2) any other person while occupying;

(i) a motor vehicle insured for SUM under this policy; or

(ii) any other motor vehicle while being operated by you or your spouse; and

(3) *any person with respect to damages such person is entitled to recover, because of bodily injury to which this coverage applies sustained by an insured under paragraph (1) or (2) above.* (emphasis added) 11 NYCRR §60-2,3.'

"I can think of no reason for definition number 3, other than to provide coverage for a loss of services claim. Furthermore, if there is no coverage for a loss of services claim, why exclude it under certain circumstances? The first numbered exclusion in the endorsement states that 'SUM coverage does not apply: (1) to bodily injury to an insured, including care or *loss of services recoverable by an insured*, if such insured ... without our written consent, settles any lawsuit...." (emphasis added) 11 NYCRR §60-2,3.

"Finally, the stated purpose of the legislation giving rise to Regulation 35-D was to provide coverage to protect people 'in the event of loss sustained by themselves caused by an uninsured or underinsured driver.' L. 1994, ch. 425, §1, eff. Oct. 18, 1994. if the legislature wanted to provide protection for people who sustained losses caused by underinsured drivers, but for some reason wanted to carve out from such protection the spouse's common-law claim for loss of services, it could have done so more clearly. Thus, Applicant is entitled to compensation for loss of services."

In addition to the foregoing, a recent decision of the Supreme Court, New York County has been brought to our attention, in which the court (Justice Bruce Allen) rejected the insurer's reliance upon Lianides and allowed a derivative claim to proceed under an SUM policy. As stated by Justice Allen:

"If Lianides were taken to mean that uninjured respondents could not be granted derivative damages, it would be a departure from previous law. In numerous instances,

uninjured respondents have been granted derivative damages, even in uninsured motorist cases. See Wiremen v. Suffolk Bus Co., 220 AD2d 582 (2d Dept. 1995); Redcross v. Aetna, 146 AD2d 125 (3d Dep. 1989).

“A denial of derivative damages to uninjured respondents based on Lianides would conflict even with the language of Travelers' Automobile Accident Indemnification Coverage's 'Limits of Liability' section: 'The limit of liability of the company for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident is \$10,000

“I do not believe the language of the Lianides decision was intended to change existing law regarding derivative damages. According to an article by Norman H. Dachs and Jonathan A. Dachs, NYLJ 3/9/99 p. 3, c. 1, the respondents in Lianides did not actually argue the issue of derivative damages before the 1st Department.”

Attorneys representing and/or defending against derivative claims should be guided accordingly.