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## Advocate's VIEW

### First Party insurance issues in personal injury cases

The impact of insurance coverage on personal injury claims cannot be overstated.

First Party insurances providing immediate payments to injured persons – such as No-Fault and Workers' Compensation insurances – can impact a plaintiff's ability to later pursue certain damages in a personal injury action. This article briefly explores how No-Fault and Workers' Compensation claims may impact a plaintiff's personal injury lawsuit.

Under New York's No-Fault Law an injured claimant can promptly receive compensation from a No-Fault carrier for first party benefits to cover their basic economic loss (medical bills, lost wages and other necessary expenses) irrespective of the claimant's relative fault. However, the loss must arise out of the "use and operation" of a motor vehicle. NY Ins. Law §5103(a)(1). The mandatory Personal Injury Protection ("PIP") endorsement states that "use or operation" of a motor vehicle or motorcycle includes the loading or unloading of such vehicle." 11 NYCRR §65.12.

Notably, if No-Fault coverage is potentially available, that is the injured party's only way to recover those damages up to the amount of basic economic loss. In other words, under NY Ins. Law §5104 (a), the injured person cannot recover what it should have sought from the No-Fault carrier in her or his subsequent lawsuit – even if the No-Fault coverage is not applied for or the expenses are denied to the injured person. *See, e.g., Hughes v. Ryder Truck Rental, Inc.*, 125 AD2d 177 (1st Dept 1986). Further, if the benefits are denied

and the injured person litigates the dispute with the No-Fault insurer and loses on the issue of causation of the injury – that may have preclusive effect in the personal injury action. *See generally Allstate Ins.*



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*Co. v. Toussaint*, 163 A.D.2d 444 (2d Dept. 1990)(recognizing collateral estoppel principles are applicable to arbitration awards). There are many things to consider determining when and how an injured party should contest a denial of No-Fault benefits, including at a minimum the forum, the possibilities of discovery, trials

*de novo* and waiting to commence any proceeding until after the personal injury action is over – but before the expiration of the statute of limitations.

Further, while in most circumstances a No-Fault carrier may not assert a lien in a personal injury action, the carrier will have lien rights if the action is against a "non-covered" person or entity. NY Ins. Law §5104 (b). Loosely defined, a "covered person" is defined as a person with New York No-Fault coverage. A "non-covered person" may include a municipality, out-of-state defendants, motorcyclists, products liability manufacturers and physicians who aggravate in injury with malpractice. Additionally, the statute requires written consent of the insurer or approval of the court to settle an action involving a non-covered defendant. *See* NY Ins. Law §5104 (b). The insurer may also assert its claim separately under certain conditions. *See* NY Ins. Law §5104 (b).

The rights of the carrier are different when the benefits involved are outside basic economic loss. For example, additional personal injury protection payments will not provide lien rights but the carrier may assert subrogation rights for its payments. *See*

*Walker v. Stein*, 305 AD2d 972, 973, (4th Dept. 2003). Furthermore, under certain circumstances, the settlement of a lawsuit by an APIP insured will extinguish and prejudice the claim of the APIP carrier. *Weinberg v. Trans America Ins. Co.*, 62 NY2d 379 (1984) *Davies v. Nationwide Mut. Ins. Co.*, 99 Misc2d 899 (Sup Ct Broome Co 1979). Any settlement with the tortfeasor which prejudices the APIP carrier's rights should abrogate the carrier of any further responsibility to pay APIP benefits since it violates a policy condition. *Weinberg, supra*.

Arguably, if the APIP insured does not sue for APIP (i.e., claimant sues for pain and suffering only), the settlement should not apply to a claim for APIP. To make a determination, one should examine the complaint, bill of particulars and any jury instructions or proposed findings of fact in a non-jury case. Furthermore, if the tortfeasor's carrier has notice of the APIP carrier's claim, it may be precluded from relying on a general release to defeat the APIP carrier's recovery right. *Government Emp. Ins. Co. v. Halfpenney*, 103 Misc2d 128 (Sup Ct NY Co 1980); and *Aetna Cas. & Sur. Co. v. Schulman*, 70 AD2d 792 (1st Dept. 1979), *appeal denied*, 48 NY2d 608 (1979); *see also Aetna Cas. & Sur. Co. v. Siskand & Sons, Inc.*, 209 AD2d 215 (1st Dept. 1994)(release by insured did not prohibit claim already started by insurer and tortfeasor could seek reimbursement from injured party for part of settlement representing economic loss).

Word of caution, if the APIP insured settles and prejudices the APIP carrier's recovery rights, the APIP carrier can seek the recovery of its benefits from the

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APIP insured. Under such circumstances, a hearing would be needed to determine what portion of the recover should be allocated to APIP. *See Government Emp. Ins. Co. v. Jacobson*, 98 AD2d 811 (2d Dept. 1983); *Aetna Cas. & Sur. Co. v. Jackowe*, 96 AD2d 37 (2d Dept. 1983); and *Kozlowski v. Briggs Leasing Corp.*, 96 Misc2d 337 (Kings Co Sup 1978).

With respect to Workers' Compensation payments, many of the same issues arise in a personal injury action. For example, a negative finding may have preclusive effect in the personal injury action. *See*

*Baker v. Matthews*, 8 A.D.2d 585 (4th Dept. 1959)(estopped by conduct to be decided by jury on issue of employer's failure to object to course of employment in Workers' Compensation proceeding). Further, the carrier often has lien rights against any recovery in the personal injury for payments it has made and for future payments. *See* NY WCL §29 (1). However, the Workers' Compensation Board does not have a lien for any benefits paid in lieu of No-Fault. NY Ins. Law §5104(a) (McKinney's 2000) and NY WCL §29 (1-a). Similarly, no lien exists for New York disability benefits paid in lieu of No-Fault.

In sum, an attorney should keep informed

of the injured party's claims for No-Fault and Workers' Compensation benefits and collaborate with an attorney focusing her practice in such insurance coverages when dealing with complex coverage issues.

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