

## New York No-Fault Law: A Comparative Analysis

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In the world of the recovery of contested no-fault benefits, rarely does the practitioner ever have pause to consider, from a comparative approach, how New York's no-fault reimbursement scheme compares to those of the other so-called "no-fault" states.<sup>1</sup> New York's approach as it deals with the allocations of the burdens of proof and use of the preclusion remedy (among other facets of our no-fault law) shares nothing in common with that of the other PIP state.

This article examines how New York's approach differs from other no-fault states, primarily as it relates to "the prima facie case" and the "preclusion of evidence rule" due to an insurance carrier's issuance of an untimely or defective denial of claim form. This article does not attempt to expound upon the policy choices that either New York courts or the New York State Legislature have embarked upon in crafting and interpreting New York's no-fault statute. The reader is left to draw his or her own conclusions about the propriety of the path we have taken in the world of no-fault reimbursement.

### The Prima Facie Case

• *The prima facie case in New York.* In New York, a prima facie case involves the submission of a claim form and proof that

30 days have elapsed from the date of the claim's submission.<sup>2</sup> The Appellate Term, beginning in 2003, held it would be improper to "impos[e] on the provider the unwarranted burden to obtain the necessary affidavits or other proof extrinsic to the forms to establish medical necessity. 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."<sup>3</sup>

In terms of the "properly completed" claim form that the *Amaze* court discussed, it was held as recently as 2001 that defects in the claim form are fatal to establishing a provider's prima facie case, even without the carrier addressing the defects in the bill during the claims stage.<sup>4</sup> This no longer appears to be good law anymore since the Court of Appeals in *Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.* has recently held that "[a] carrier's failure to seek verification or object to the adequacy of claim forms pursuant to 11 NYCRR 65-3.5 precludes it from interposing any defenses based on such deficiencies."<sup>5</sup>

An insurance carrier may also not challenge a medical provider's "standing to sue" absent a timely objection in the claims stage to an assignment of benefits.<sup>6</sup> So harsh is this rule that the Appellate

Division held that the failure to object to an assignment of benefits in the claims stage is fatal to a challenge of a medical provider's standing, despite extrinsic proof which demonstrated that a purported assignor's "signature on file" could not actually be "on file" since the assignor was comatose upon admission to the hospital, never gained consciousness and later died.<sup>7</sup> One commentator in evaluating *Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.* noted that

*the dissent rejected the majority's position because it improperly shifted the burden to the carrier to establish standing by estoppel in contravention of the regulatory scheme . . . . [T]he dissent [also] said that the majority opinion runs the risk of encouraging further litigation by eliminating the essential element of standing.<sup>8</sup>*

It should be noted that the burden of production on the plaintiff medical provider is so minimal, that the current debate in New York no-fault circles is: whether a medical provider must set forth a sufficient evidentiary basis for the admission of the claim form into evidence as a business record as well as demonstrating that the claim form was mailed,<sup>9</sup> or whether submission of the claim form, not offered into evidence as a business record, is sufficient to meet a

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prima facie burden.<sup>10</sup> An entire law journal article was based upon this subtle evidentiary issue.<sup>11</sup>

Parenthetically, we are having the above debate regarding whether a bill needs to be placed into evidence to satisfy a prima facie burden because the medical provider does not need to demonstrate, in the first instance, that the services were medically necessary,<sup>12</sup> causally related to the loss<sup>13</sup> and billed in accordance within the applicable fee schedule.<sup>14</sup>

• **The prima facie case outside of New York.** In every no-fault jurisdiction outside New York, a policy choice has been made which imposes upon the injured party or his or her assignee the burden to demonstrate, in the first instance, that a service was medically necessary, causally related to the motor vehicle accident and properly billed. Certain jurisdictions, to the extent they have ruled on the issue, have held that an assignee medical provider must affirmatively demonstrate standing.

1. *Plaintiff must demonstrate that a service is necessary, causally related and properly billed.* The following was noted in New Jersey: “[t]he other issue to be resolved here was whether such continued palliative treatment also was medically reasonable and necessary. It was plaintiff’s burden to establish such by a preponderance of the evidence.”<sup>15</sup> “In addition to proving that the treatment/services rendered were ‘medically necessary,’ plaintiff has the burden of proving by a preponderance of the evidence that the treatment/services were proximately caused by the particular accident.”<sup>16</sup> “We also conclude that the trial court inappropriately put the burden of justifying reasonableness of fees on defendants rather than [Plaintiff].”<sup>17</sup>

In Michigan, “a provider of medical services to a person injured in an automobile accident that submits a no-fault claim bears the burden of proving that its charges were both reasonable and

reasonably necessary for the injured person’s care, recovery, or rehabilitation.”<sup>18</sup> It was also noted that “[a] no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident.”<sup>19</sup>

In Pennsylvania, the appellate court observed that: “[t]he decision of whether . . . any . . . treatment . . . is reasonable and necessary is one which must be viewed under an objective and reasonable standard. In other words, an insured must demonstrate that the treatment was warranted by the circumstances. In addition, the value of the treatment must be verified by credible and reliable evidence.”<sup>20</sup>

The Florida appellate courts have held that “the burden to prove that charges are reasonable, related, and necessary lies with the insured or the insured’s assignee.”<sup>21</sup>

Prior to Colorado’s abrogation of its no-fault law in 2003, the appellate court in Colorado held that: “The court [correctly] instructed the jury, inter alia, that in order for the plaintiff to recover from the defendant for breach of contract, it must find, by a preponderance of the evidence, that the treatment not paid for by the defendant and received by the plaintiff was reasonable and necessary as a result of the accident.”<sup>22</sup>

In Kansas, the appellate court noted that “the trial court [correctly] stated in its ruling that the jury’s finding that the medical expenses incurred by Moore in their entirety were reasonable and necessary”<sup>23</sup> According to the Kentucky Appellate Court, “[W]e hold that as long as proposed medical services to be rendered an insured are needed in order to treat the injuries the insured sustains in a covered accident, and the fees to be charged for the services are within reasonable limits of the applicable profession, a reparations obligor is not entitled to refuse to pay a claim for

PIP benefits . . . .”<sup>24</sup>

The Massachusetts appellate court observed that, “To recover on a claim for PIP reimbursement for medical expenses, the burden of proof is on the plaintiff to establish by a preponderance of the evidence that the medical services he received were necessary and that the bills or charges for such services were reasonable”<sup>25</sup>

The Minnesota Appellate Court likewise noted that: “In order to award VanLangen reimbursement for Pavelka’s bills, the arbitrator had to conclude that the cost of the massage therapy was reasonable and necessary as well as causally related to the auto accident. The district court specifically left these conclusions in tact.”<sup>26</sup>

The Utah Supreme Court observed that: “Under both the plain language of the relevant statute and the relevant policy provisions, Bear River was required to pay PIP benefits to cover only expenses incurred for necessary medical treatments.”<sup>27</sup>

Finally, the Hawaii Appellate Court explicitly rejected a lower court’s analysis that a “presumption exists that medical treatments following a motor vehicle accident are appropriate, reasonable, and related to the accident at issue.”<sup>28</sup> Rather, a no-fault claimant bears the initial burden of production that the services were medically necessary.<sup>29</sup>

As can be gleaned from the above, the established case law in New York is completely anomalous to the weight of authority set forth in almost every other no-fault jurisdiction.<sup>30</sup>

2. *Plaintiff medical provider must affirmatively demonstrate standing to prosecute an action.* Three jurisdictions, outside of New York, have confronted this issue. These jurisdictions have ruled that a medical provider must demonstrate

standing as part of its prima facie case. A court confronting this issue in New Jersey observed that: “Although the hospital has asserted 23 affirmative defenses [in this declaratory judgment action against 23 assignors], it has not alleged an assignment of any injured parties’ rights . . . .

Therefore, it has no standing to oppose Allstate’s claims.”<sup>31</sup>

In Florida, the Appellate Court observed that: “[t]he assignment of PIP benefits is not merely a condition precedent to maintain an action on a claim held by the person or entity who filed the lawsuit. Rather, it is the basis of the claimant’s standing to invoke the processes of the court in the first place. If the insured has assigned benefits to the medical provider, the insured has no standing to bring an action against the insurer.”<sup>32</sup> The Kansas Appellate court has likewise held that a medical provider must demonstrate standing to prosecute an assigned claim.<sup>33</sup>

## Preclusion as a Sanction

• ***Due to the Failure to Timely and Properly Deny a Claim.*** In New York the failure to timely and properly deny a claim precludes the insurance carrier from raising any noncoverage defenses to the underlying no-fault claim.<sup>34</sup> The Appellate Term, First Department succinctly set forth the rule in New York: “Inasmuch as it is undisputed that defendant did not timely deny the subject claims within 30 days of receipt thereof it is precluded from asserting any statutory defenses, defenses predicated upon breach of conditions precedent or policy exclusion, or a defense of provider fraud based on fraudulent billing practices.”<sup>35</sup>

Since every no-fault state that has published opinions on this topic, except New York, requires that the plaintiff produce through competent proof that a service is reasonable, necessary, causally related to the loss and properly billed, the issue of “claim preclusion” has not been

addressed in many jurisdictions. The issue was actually briefed in two no-fault states<sup>36</sup> and, not surprisingly, the courts of those states declined the invitation to follow New York’s preclusion rule.

The Appellate Division in New Jersey made the following observation: “The issue in this case is whether, when benefits become ‘overdue,’ the insurer loses its right to contest the payments and must pay the same plus the interest provided . . . or whether the payment of interest is the sole ‘penalty’ incurred by the insurer by failing to follow the statutory procedure requiring prompt payment or denial of the claim . . . . Nowhere has the Legislature expressed an intention that the failure to accept or deny the claim, rendering it ‘overdue,’ would preclude a later good faith contest of the claim. To hold otherwise would lead to anomalous results.”<sup>37</sup>

The Supreme Court in Florida, faced with this issue came to the same conclusion when it made the following observation: “[T]he insurer is not barred from contesting the claim just because a payment becomes overdue. If the insurer is ultimately found liable for a contested claim, then the statutory penalties of interest and attorney’s fees would be applicable.”<sup>38</sup>

Again, the established case law in New York regarding *Presbyterian* preclusion is contrary to the law in every other no-fault state.

## Conclusion

In analyzing how New York addresses the prima facie burden that an injured party or assignee bears to recover no-fault benefits when compared to the burden placed upon the same entity in every other no-fault jurisdiction, one cannot help but observe that New York’s approach bears no resemblance to how these issues are resolved everywhere else in the country.

Furthermore, New York’s no-fault law, similar to that of the other no-fault states, has obtained its meaning through judicial interpretation of the operative statute. Yet, while every other state court has chartered a course that requires the no-fault plaintiff to prove medical necessity, causal relation and reasonableness of the charges, New York has taken a different position. It also appears that, where relevant, every other state has rejected our unique defense preclusion rule when a denial is late, defective or not issued.

But, there may be some changes on the horizon. In *Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.*, the sole issue briefed was whether the hospital had standing to prosecute the no-fault action. The issue as to whether the hospital needed to demonstrate that the service was medically necessary, reasonable, causally related or properly billed was not properly before the court. Noteworthy is the last sentence of the opinion:

*Since Travelers does not otherwise contest the hospital’s entitlement to no-fault payments, the courts below appropriately awarded summary judgment to the hospital.*<sup>39</sup>

It therefore stands to reason that if properly preserved, the Court of Appeals may follow the majority approach regarding placing the burden of proving medical necessity, causal connection to the loss and reasonableness of the charges, prima facie, to the plaintiff medical providers. Or, the Court of Appeals may demur at this invitation and finally cement New York’s unique interpretation of our no-fault law.

Only time will tell.

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## Endnotes:

1. The other no-fault states are: Florida, Michigan, New Jersey, Pennsylvania, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, North Dakota and Utah.
2. *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 AD3d 742 (2d Dept. 2004).
3. *Amaze Medical Supply Inc. v. Eagle Ins. Co.*, 2 Misc.3d 128(A)(App. Term 2d and 11th Jud. Dis. 2003); See, *Damadian MRI In Elmhurst, PC v. Liberty Mut. Ins. Co.*, 2 Misc.3d 128(A)(App. Term 9th and 10th Jud. Dis. 2003).
4. *New York, Presbyterian Hosp. v. New York Central Mut. Ins. Co.*, 279 AD2d 616, 617 (2d Dept. 2001) (“the defendant presented sufficient evidence to raise triable issues of fact as to the completeness of the hospital facility forms submitted by the plaintiffs in support of their no-fault insurance claims”).
5. *Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.*, 9 NY3d 312, 318 (2007), citing, *Westchester Med. Ctr. v. Safeco Ins. Co. of Am.*, 40 AD3d 984 (2d Dept 2007); *LMK Psychological Servs., PC v Liberty Mut. Ins. Co.*, 30 AD3d 727, 728-729 (3d Dept 2006).
6. Id. at 320 (“Upon receipt of a no-fault claim, the regulations shift the burden to the carrier to obtain further verification or deny or pay the claim. When, as here, an insurer does neither, but instead waits to be sued for nonpayment, the carrier should bear the consequences of its nonaction. To allow an insurance company to later challenge a hospital’s standing as an assignee merely encourages the carrier to ignore the prescribed statutory scheme”).
7. *Nyack Hosp. v. Encompass Ins. Co.*, [http://decisions.courts.state.ny.us/10jd/nassau/decisions/index/index\\_new/mccarty/2005apr/010244-04.pdf](http://decisions.courts.state.ny.us/10jd/nassau/decisions/index/index_new/mccarty/2005apr/010244-04.pdf) (Sup. Ct. Nassau Co. 2005), rev’d by, 23 AD3d 535, (2d Dept. 2005), appeal dismissed 8 NY3d 895 (2007). It should be noted that the same defense firm obtained leave in this case and *Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.* Yet, the latter matter, with the less compelling fact pattern, was perfected. The former matter was dismissed for failure to timely perfect the appeal. One has to wonder if the Court of Appeals would have held the way it did if the former matter was perfected and argued.
8. Shlomo S. Hagler, “A No-Fault Holiday Gift: ‘Hospital for Joint Diseases,’” NYLJ Dec. 14, 2007, at 4 col. 3.
9. *Dan Medical, PC v. New York Cent. Mut. Fire Ins. Co.*, 14 Misc.3d 44, 46 (App. Term 2d and 11th Jud. Dis. 2006); *Delta Diagnostic Radiology, PC v. Mercury Cas. Co.*, 14 Misc.3d 138(A)(App. Term 2d and 11th Jud. Dis. 2007). See, *Bajaj v. General Ass.*, 18 Misc.3d 25 (App. Term 2d and 11th Jud. Dis. 2007); *Empire State Psychological Servs., PC v Travelers Ins. Co.*, 13 Misc.3d 131(A)(App. Term 2d and 11th Jud. Dis. 2006).
10. *Fair Price Medical Supply Inc. v. St. Paul Travelers Ins. Co.*, 16 Misc.3d 8 (App. Term 1st Dept. 2007). See, *Devonshire Surgical Facility v. GEICO*, 16 Misc.3d 130(A)(App. Term 1st Dept. 2007).
11. Purdy and Barshay, “No-Fault: Requirements for Prima Facie Case Modified,” NYLJ Jan. 10, 2008, at 4 col. 4.
12. *Benson Medical, PC v. Progressive Northeastern Ins. Co.*, 12 Misc.3d 144(A)(App. Term 2d and 11th Jud. Dis. 2006).
13. *Bronx Radiology, PC v. New York Cent. Mut. Fire Ins. Co.*, 17 Misc.3d 97, 99 (App. Term 1st Dept. 2007).
14. See generally, *Westchester Medical Center v. American Transit Ins. Co.*, 17 AD3d 581 (2d Dept. 2005); *New York Hosp. Medical Center of Queens v. Country-Wide Ins. Co.*, 295 AD2d 583 (2d Dept. 2002); *Rigid Medical of Flatbush, PC v. New York Cent. Mut. Fire Ins. Co.*, 11 Misc.3d 139(A)(App. Term 2d and 11th Jud. Dis. 2006).
15. *Elkins v. New Jersey Mfrs. Ins. Co.*, 244 N.J.Super. 695, 583 A2d 409 (N.J.Super.A.D.1990).
16. *Smith v. Encompass Ins. Co.*, 2006 WL 473793 (N.J.Super.A.D.2006).
17. *Cobo by Hudson Physical Therapy Services v. Market Transition Facility by Material Damage Adjustment Corp.*, 293 N.J.Super. 374, 680 A.2d 1103 (N.J.Super.A.D.1996).
18. *Borgess Med. Ctr. v. Resto*, 273 Mich. App. 558, 730 N.W.2d 738 (Mich. Ct. Appeals 2006).
19. *Anthony v. Citizens Ins. Co.* 2006 Mich. App. LEXIS 3078 (Mich. Ct. Appeals 2006), citing, *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich. 521, 531, 697 N.W.2d 895 (2005).
20. *Tagliati v. Nationwide Ins. Co.*, 720 A.2d 105 (Pa. Super. 1998).
21. *Progressive Exp. Ins. Co. v. Francisco M. Gomez, M.D., PA*, 2006 WL 2616376 (Fla.Cir.Ct. 2006). See, *Auto Owners Ins. Co. v. Marzulli*, 788 So.2d 1031 (Fla.App. 2 Dist. 2001); *Derius v. Allstate Indem. Co.*, 723 So.2d 271 (Fla.App. 4 Dist. 1998).
22. *Klein v. State Farm Mut. Auto. Ins. Co.*, 948 P.2d 43 (Colo.App. 1997).
23. *Moore v. Dudley*, 31 Kan.App.2d 184, 64 P.3d 429 (Kan.App. 2002).
24. *Shelter Mut. Ins. Co. v. Askew*, 701 SW2d 139 (Ky.App. 1986).
25. *Sanabia v. Travelers Ins. Co.*, 1999 Mass.App.Div. 46, 1999 WL 66915 (Mass.App.Div.1999).
26. *VanLangen v. Western Nat. Ins. Group*, 2002 WL 1611126 (Minn.App.2002).
27. *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524 (Utah 2002).
28. *Iaea v. TIG Ins. Co.*, 104 Hawai’i 375, 90 P.3d 267 (Hawai’i App. 2004).
29. Id.
30. We were unable to locate any published decisions from North Dakota on this issue.
31. *Allstate Ins. Co. v. Lopez*, 325 N.J.Super. 268, 738 A.2d 987 (N.J.Super.Law Div.1999).
32. *Progressive Exp. Ins. Co. v. McGrath Community Chiropractic*, 913 So.2d 1281 (Fla.App. 2 Dist. 2005).
33. *Chamberlain v. Farm Bureau Mut. Ins. Co.*, 36 Kan.App.2d 163; 137 P.3d 1081 (Kan.App.2006).
34. *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274, 282 (1997).
35. *Inwood Hill Medical PC v. Utica Mut. Ins. Co.*, 16 Misc.3d 130(A)(App. Term 1st Dept. 2007) (internal citations omitted).
36. See infra, footnotes: 37 & 38.
37. *Kowaleski v. Allstate Insurance Co.*, 238 N.J. Super 210, 216-218 (App. Div. 1990).
38. *Allstate Ins. Co. v. Kaklamanos*, 843 So.2d 885 (Fla. Sup. Ct. 2003).
39. *Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.*, 9 NY3d at 320.



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