

Is Fee Schedule Application Really a Defense to a No-Fault Claim?

Jason Tenenbaum

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Perhaps one of the most vexatious and unjust situations in no-fault practice involves the insurance carrier who is compelled to pay a medical provider or injured person an amount for a service or supply that is in excess of the maximum allowable rate under the fee schedule, due to the insurance carrier's failure to issue a timely or otherwise valid denial. While the courts adjudicating this issue have held that the fee schedule defense—as it is labeled—is precludable, the question this article asks is whether application of the proper fee schedule really is a defense. The fee schedule defense—to the extent it really is a defense—is nothing more than an element of a medical provider's damages. Since damages are an element of any party's prima facie case, it thus follows that the fee schedule "defense" is an element of a provider's prima facie case and is therefore not subject to the preclusion sanction.

For those unfamiliar with the realm of no-fault litigation or arbitration,¹ a medical provider or injured person generally establishes its prima facie case "[b]y submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received, and that payment of no-fault benefits was overdue."² All non-coverage defenses that are not raised in a timely disclaimer are precluded.³

The Appellate Division, Second Department, squarely held that an insurance carrier will be "[p]recluded from raising th[e] [fee schedule] statutory exclusion defense based upon its failure to issue a denial of claim form within 30 days of its receipt of the claim...."⁴ The Appellate Term, Second Department, best stated the above rule, when it observed that an insurance carrier "[m]ay not avoid the preclusion sanction by casting billing code issues as matters of coverage, whether as exceeding the compensation allowed for a given treatment or the maximum allowable compensation per diem."⁵

But, is the issue of application of the proper fee schedule really a defense? This author does not disagree with the principle that matters of fee scheduling do not implicate matters of coverage, and would be precludable if properly cast as a bona-fide defense. Should the fee schedule issue, however, only implicate the quantum of damages that an insurance carrier, who is otherwise liable, would be responsible to pay, then it would follow that fee schedule issues would be part of a provider's prima facie case and not properly cast as a defense.

Initially, it cannot be denied at this point of our jurisprudence that a no-fault dispute is considered a breach of contract action.⁶

Liability and Damages

New York Jurisprudence observed that "a plaintiff seeking damages against defendant for breach of contract has the burden of proof to establish the elements *and measure of damage sustained from the breach*."⁷ In other words, liability and damages are two separate components of any breach of contract action. This would include a no-fault action, which is contractual.⁸

Even in cases where the adverse party defaults, courts have declined to enter judgments where the damages are not supported through appropriate documentary evidence. For instance, in [*PDQ Aluminum Products Corp. v. Smith*](#),⁹ the Appellate Term reversed a clerk's judgment entered on default in a breach of contract action because the evidence in the record failed to demonstrate that a portion of the contract was actually performed.¹⁰

The Appellate Division, Third Department, in the recent no-fault lost wage action entitled [*Proper v. State Farm Mut. Auto. Ins. Co.*](#) dismissed a complaint based upon a plaintiff's failure to prove his damages at trial.¹¹ The Appellate Division held as follows:

Because plaintiffs failed to support their claim with admissible evidence that they suffered damages, Supreme Court properly dismissed the complaint. *Failure to prove the essential element of damages is fatal to a cause of action for breach of contract.*¹²

As plaintiffs bear the burden of proving damages, and cannot meet that burden with pure speculation or bare assertions, the court correctly granted defendant's motion for summary judgment dismissing the complaint.¹³

It has been argued, contrariwise to *Proper*, that the issues of liability and damages are uniquely intertwined in a no-fault action. In the landmark decision of [*Amaze Medical Supply Inc. v. Eagle Ins. Co.*](#),¹⁴ the Appellate Term observed that "the [recovery of no-fault benefits]...may be analogized to an account stated where, upon the insurer's failure timely and properly to deny the bill...the insurer is presumed to have acquiesced to its correctness...."

This author agrees with the above statement only in that the failure to timely and properly object to a claim—with the exception of certain coverage issues—creates a liability against the insurance carrier.¹⁵ Through being found liable, the insurance carrier, among other things, is

estopped from contesting: (a) the claimant's failure to abide by a condition precedent; (b) the existence of a violation of a policy exclusion; (c) the medical reasonableness of a service or supply; and (d) the allegation that a service was not rendered, the supply was not provided or the transportation never occurred.

Yet, even under an account stated theory, a party's damages should be considered separate and apart from the issue of liability. "An essential element of an account stated is an agreement with respect to the amount of the balance due."¹⁶ By law, the only agreement as to the amounts due and owing is that established in the appropriate fee schedule. The Appellate Division, twenty years ago, held in pertinent part, that: "[a] person of average intelligence would understand [Insurance Law §5108(c)] to constitute a prohibition against accepting any payments in excess of the fee schedule, including payments voluntarily made by patients."¹⁷

Therefore, any damage assessment against an insurance carrier is limited to the amounts found in the applicable fee schedules, since: "No provider of health services specified in paragraph one of subsection (a) of section five thousand one hundred two of this article may demand or request any payment in addition to the charges authorized pursuant to this section."¹⁸

Application of Principles

In applying the above principles, consider this hypothetical. Assume that a medical provider submits a bill to an insurance carrier for a follow-up chiropractor visit in the amount of \$10,000. The visit never occurred, and is only reimbursable at the per diem rate of \$33.70.¹⁹

The above bill, although received, was neither paid nor denied. Under established Appellate Division, Second Department precedent, the insurance carrier would be precluded from contesting liability—precluded from contesting the amount of the damages that flowed from the breach of contract—and would be indebted to the medical provider in the amount of \$10,000 since the fee schedule "defense" would be precluded.

It is respectfully submitted that the Appellate Division, Second Department case law has completely confounded this issue. Mandating that damages, far in excess of the allowed amount, due solely to a finding of liability against an insurance carrier is inimical to logic, fair play and common sense. Whether the above example is considered under a breach of contract theory or an account stated theory, the insurance carrier never agreed or acquiesced to a \$10,000 charge for a chiropractor visit. If forced to prove its actual damages, in accordance with Third Department precedent, then the medical provider would be entitled to the principle sum of \$33.70. It is submitted that the Third Department precedent is correct, and the damages in the above-hypothetical example should be limited to \$33.70.

Conclusion

The reader should be mindful that there is no doctrinal support for the Appellate Division, Second Department's position that damage issues are uncontestable due to a finding of liability, adverse to the insurance carrier. Conversely, there is a significant amount of doctrinal support for the Appellate Division, Third Department's position that it is incumbent upon the medical

provider or injured person to prove his or her damages, regardless of the insurance carrier's liability. As such, the fee scheduling of no-fault billing is properly considered a part of a medical provider or injured person's prima facie case, as opposed to being cast as a defense. Accordingly, the failure to timely deny a claim based upon the failure to bill in accordance with the appropriate fee schedule should not be subject to the penalty of preclusion.

Jason Tenenbaum is the managing partner at *The Law Office of Jason Tenenbaum, P.C.*
Rosemarie McMahon, a paralegal, assisted in the preparation of this article.

Endnotes:

1. A medical provider or injured person have the unilaterally option to either litigate or arbitrate a dispute regarding overdue no-fault benefits. Ins. Law §5106(b).
2. [*Mary Immaculate Hosp. v. Allstate Ins. Co.*](#), 5 AD3d 742 (2d Dept. 2004). But see, [*Dan Med., P.C. v. New York Cent. Mut. Fire Ins. Co.*](#), 14 Misc.3d 44 (App. Term 2d Dept. 2006).
3. [*Fair Price Medical Supply Corp. v. Travelers Indem. Co.*](#), 10 NY3d 556 (2008); [*Hospital for Joint Diseases v. Travelers Property Cas. Ins. Co.*](#), 9 NY3d 312 (2007); [*Presbyterian Hosp. in the City of New York v. Maryland Cas. Co.*](#), 90 NY2d 274 (1997).
4. [*Westchester Medical Center v. American Transit Ins. Co.*](#), 17 AD3d 581 (2d Dept. 2005) (internal grammar omitted).
5. [*Benson Medical, P.C. v. Progressive Northeastern Ins. Co.*](#), 2006 N.Y. Slip Op. 51427(U), (App. Term 2d Dept. 2006) (internal grammar omitted).
6. [*Mandarino v. Travelers Property Cas. Ins. Co.*](#), 37 AD3d 775 (2d Dept. 2007) ("Here, the plaintiff's action is premised on the terms of a contract for automobile liability insurance[, and] we find that the six-year statute of limitations provided in CPLR 213 (2) applies..."). See [*Travelers Indem. Co. of Connecticut v. Glenwood Medical, P.C.*](#), 48 AD3d 319 (1st Dept. 2008).
7. 36 NY Jur. 2d Damages §198 (emphasis added).
8. See e.g. [*Wyckoff Heights Medical Center v. Country-Wide Ins. Co.*](#), 71 AD3d 1009 (2d Dept. 2010) ("In an action to recover no-fault medical payments under two insurance contracts..."). See [*ELRAC Inc. v. Suero*](#), 38 AD3d 544 (2d Dept. 2007) (finding that no-fault benefits is deemed contractual even in the absence of a contract between a self-insured entity and the ultimate beneficiary).
9. 20 Misc.3d 94 (App. Term 2d Dept. 2008).
10. Id. at 95.
11. 63 AD3d 1486, 1487 (3d Dept. 2009)

12. Id. (emphasis added).

13. Id. at 1487.

14. 2003 N.Y. Slip Op. 51701(U)(App. Term 2d Dept. 2003).

15. Another way of looking at the above situation is to consider the failure to timely deny a claim as a substantive default, which would lend itself to an inquest or hearing on damages.

16. [*Cameron Engineering & Associates, LLP v. JMS Architect & Planner, P.C.*](#), 2010 NY Slip Op 05983 (2d Dept. 2010).

17. [*Goldberg v. Corcoran*](#), 153 AD2d 113, 119 (2d Dept. 1989) (internal grammar omitted).

18. Ins Law §5108(c).

19. This is the reimbursable amount found for a follow-up chiropractic visit, in the downstate New York area, when properly billed with CPT Code 99213.