Defense Association of New York
Seminar, November 9, 2010

Avoiding Mistakes When Appearing in Court

Martin Schoenfeld
Associate Justice, Appellate Term
First Judicial District

Introduction

"You've got to change your evil ways, baby"
(Santana, Evil Ways)

Powell v. Metropolitan Entertainment Company
195 Misc.2d 847 (John Fogerty)

Subjective Rules

N.Y. County Supreme Court, Civil Branch Rules of the Justices
http://www.nycourts.gov/supctmanh/UNIFRL-Sept%203-2010.pdf

N.Y. County Lawyers' Association, Guide to Civil Practice in the New York County Supreme Court

"I heard it through the grapevine" (Marvin Gaye)
The Robing Room, Where Judges are Judged
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Colleagues

Objective Conduct (Not objectionable conduct)

Be prepared
Be respectful
Don't be tardy
Dress code

Credibility

"Honesty is...mostly what I need from you"
(Billy Joel, Honesty)

Kayatt v. Dinkins
148 Misc.2d 510

Trials

As an officer of the court, counsel should support the authority of the court and the dignity of the trial courtroom by manifesting a professional attitude toward the judge, opposing counsel, witnesses, jurors and others in the courtroom.
See, Standard 4.71(a) – Courtroom Professionalism, ABA Standards: Criminal Justice Section (Feb. 1991)

See also, Rule 3.3(f) – N.Y. Rules of Professional Conduct (April 2009)
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Preserving your record

Avoid too many sidebar conferences

Be clear to court reporters

Use the words "question" and "answer" when reading from an E.B.T. transcript

Motions

"Something in the way she moves"
(George Harrison, Something)

Memorandum of law shall not exceed 30 pages each, and affidavits shall not exceed 25 pages each

Dannasch v. Bifulco
184 AD2d 415
New arguments cannot be introduced in reply papers

The CPLR does not provide for sur-reply papers

Conclusion

"Why can't we be friends"
(War, Why Can't We Be Friends)

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Rule #1 : The judge is always right
Rule #2: If the judge is wrong, refer to Rule #1

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WHAT JUDGES EXPECT FROM ATTORNEYS AND EMERGING ISSUES IN CLAIMS RESOLUTION

DANY- Continuing Legal Education - November 9, 2010

Speaker: George J. Silver, Acting Supreme Court Justice, New York County

I. THE MEDICARE SET-ASIDE AND ITS EFFECT ON THE RESOLUTION OF CASES-THE JUDICIAL PROSPECTIVE

A. Brief Overview of the Medicare Set-Aside Statute

B. The Impact of the Medicare Set-Aside
   1. Discovery Phase
   2. Settlement Phase

C. The Future is Now

II. THE EMERGING IMPACT OF BIO-MECHANICAL ISSUES IN THE TRIAL OR SETTLEMENT OF CASES

A. Brief Overview

B. The Judicial Prospective

III. WHAT JUDGES EXPECT FROM ATTORNEYS

A. Discovery Phase

B. Pre-Trial Phase

C. Trial Phase

The Medicare Secondary Payer Act (MSP)

42 CRF 411.24 (h) allows the United States the right to be repaid on amounts paid by Medicare for medical treatment upon settlement of the personal injury action.

Tips for Practicioners:

The process may be lengthy so you should start to gather information about Medicare's claim as soon as possible.

Discovery

Never ruin a settlement because of a Medicare Set-Aside

Don't do it yourself.

No-Fault First-Party Benefits:
Recent Appellate Cases:
January 1, 2010 to September 30, 2010.
Peter P. Sweeney
Supervising Judge, Civil Court, Kings County

THE 45 DAY RULE - BURDEN OF PROOF - WRITTEN JUSTIFICATION WHERE DEFENDANT ISSUES A TIMELY DENIAL OF CLAIM BASED ON THE 45 DAY RULE WHICH INFORMS PLAINTIFF THAT THE DELAY COULD BE EXCUSED IF PLAINTIFF PROVIDED WRITTEN JUSTIFICATION FOR THE DELAY, WHO HAS THE BURDEN OF PROOF AS TO WHETHER WRITTEN JUSTIFICATION WAS PROVIDED?

***AR Medical Rehabilitation, P.C. v. MVAIC*, 27 Misc.3d 135(A), 2010 N.Y. Slip Op. 50828(U) [App Term, 2nd, 11th & 13th Jud Dists].**

It is undisputed that plaintiff was required to submit its claim form to MVAIC within 45 days after the services at issue were rendered and that plaintiff did not do so (*see* Insurance Department Regulations [11 NYCRR] § 65-1.1; *Nir v. MVAIC,* 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U] [App Term, 2d & 11th Jud Dists 2007]; *NY Arthroscopy & Sports Medicine PLLC v. Motor Veh. Acc. Indem. Corp.,* 15 Misc.3d 89 [App Term, 1st Dept 2007]). MVAIC's denial of plaintiff's claim for $3,903.92, based upon its untimely submission, also informed plaintiff that it could excuse the delay if plaintiff provided "written justification" for the delay (*see* Insurance Department Regulations [11 NYCRR] § 65-3.3[e]; *see also Matter of Medical Socy. of State of N.Y. v. Serio,* 100 N.Y.2d 854, 862-863 [2003]; *Nir,* 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U]). In opposition to MVAIC's motion for summary judgment, plaintiff did not establish that it had provided MVAIC with a written justification for its untimely submission of the claim form seeking the sum of $3,903.92. As plaintiff's remaining contentions lack merit, the order, insofar as appealed from, is affirmed.

45 DAY RULE - REASONABLE JUSTIFICATION WHERE PLAINTIFF WAITS MORE THAN 45 DAYS AFTER LEARNING OF AN INSURER'S THE DISCLAIMER OF COVERAGE BEFORE SUBMITTING A CLAIM TO MVAIC AND DOES NOT JUSTIFY WHY, MVAIC DOES NOT HAVE TO HONOR THE CLAIM.

***Alba Medical Supply, Inc. v. Motor Vehicle Accident Indemnification Corp.*, 26 Misc.3d 141(A), 2010 N.Y. Slip Op. 50372(U) [App Term, 2nd, 11th & 13th Jud Dists].**

It is undisputed that plaintiff was required to submit its claim form to MVAIC within 45 days after the supplies at issue were furnished (*see* Insurance Department Regulations [11 NYCRR] § 65-1.1; *Nir v. MVAIC,* 17 Misc.3d 134 [A], 2007 N.Y. Slip Op 52124[U] [App Term, 2d & 11th Jud Dists 2007]; *NY Arthroscopy & Sports*

Medicine PLLC v. Motor Veh. Acc. Indem. Corp., 15 Misc.3d 89 [App Term, 1st Dept 2007]) and that plaintiff did not do so. MVAIC's denial of plaintiff's claim based upon the untimely submission also informed plaintiff that it could excuse the delay if plaintiff provided "reasonable justification" for the delay (*see* Insurance Department Regulations [11 NYCRR] § 65-3.3[e]; *see also Matter of Medical Socy. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 862-863 [2003]; *Nir*, 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U]). Plaintiff asserts that it sent the claim form to MVAIC more than 45 days after the supplies were furnished because it had first sent the claim to an insurer which had disclaimed coverage. However, plaintiff does not explain why plaintiff's counsel, who submitted the claim form on plaintiff's behalf, waited more than 45 days after learning of the disclaimer before submitting the claim form to MVAIC. Consequently, plaintiff failed to proffer a reasonable justification for its untimely submission of the claim form to MVAIC. As plaintiff's remaining contentions lack merit (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins .*, 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]; *see also Dawson v. Raimon Realty Corp.*, 303 A.D.2d 708 [2003]; *Splawn v. Lextaj Corp.*, 197 A.D.2d 479 [1993]), the order granting MVAIC's motion for summary judgment dismissing the complaint is affirmed.

45 DAY RULE - REASONABLE JUSTIFICATION

WHERE A PLAINTIFF PROMPTLY SUBMITS A LATE CLAIM TO DEFENDANT AFTER ITS INITIAL CLAIM WAS DENIED BY ANOTHER INSURANCE CARRIER, PLAINTIFF MUST STILL PROFFER AN EXPLANATION AS TO WHY IT FIRST SUBMITTED THE CLAIM TO THE OTHER INSURANCE CARRIER .

***Prestige Medical & Surgical Supply, Inc. v. Chubb Indem. Ins. Co.*, 26 Misc.3d 145(A), 2010 N.Y. Slip Op. 50449(U) [App Term, 2nd, 11th & 13th Jud Dists].**

The affidavit of defendant's claims adjuster sufficiently established the timely mailing of the denial of claim form, since the affidavit described in detail defendant's standard office practices or procedures used to ensure that the denial was properly addressed and mailed (*see Residential Holding Corp. v. Scottsdale Ins. Co.*, 286 A.D.2d 679 [2001]; *Delta Diagnostic Radiology, P.C. v. Chubb Group of Ins.*, 17 Misc.3d 16 [App Term, 2d & 11th Jud Dists 2007]). Defendant denied the claim on the ground that plaintiff's submission of the claim was untimely. The denial of claim form adequately advised plaintiff, pursuant to Insurance Department Regulations (11 NYCRR) § 65-3.3(e), that late submission of the claim would be excused if plaintiff provided a reasonable justification for the failure to timely submit the claim. Although the record reveals that plaintiff promptly submitted its claim to defendant after its initial claim was denied by another insurance carrier, plaintiff failed to proffer any explanation as to why it first submitted the claim to the other insurance carrier. As a result, plaintiff failed to provide defendant with a reasonable justification for plaintiff's untimely submission of the claim to defendant (*see St. Vincent's Hosp. & Med. Ctr. v. Country Wide Ins. Co.*, 24 AD3d 748 [2005]; *Nir v. MVAIC*, 17 Misc.3d 134[A], 2007 N.Y. Slip Op 52124[U] [App Term, 2d & 11th Jud Dists 2007]; *NY Arthroscopy & Sports Medicine PLLC v. Motor Veh. Acc. Indem. Corp.*, 15 Misc.3d 89 [App Term, 1st Dept 2007]). Accordingly, the order, insofar as appealed from, is affirmed.

APPELLATE PRACTICE - CROSS-MOTIONS

A DEFENDANT CANNOT ARGUE ON APPEAL THAT THE COURT IMPROPERLY DENIED ITS CROSS-MOTION UNLESS IT APPEALS FROM THE ORDER WHICH DENIED THE CROSS-MOTION.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant also argues that the Civil Court improperly denied its cross motion for summary judgment as to plaintiff's tenth cause of action because plaintiff failed to rebut defendant's prima facie showing of lack of medical necessity as to this cause of action. However, since defendant did not appeal from the underlying order and the appeal from the judgment does not bring up for review so much of the order as denied the branch of defendant's cross motion seeking summary judgment dismissing plaintiff's tenth cause of action, said part of the order is not before us on appeal

ARBITRATION - VACATING ARBITRATION AWARDS

A DOCUMENT PURPORTING TO BE AN AFFIRMATION THAT IS SIGNED BY AN ATTORNEY WHO DID NOT AFFIRM THE STATEMENTS CONTAINED THEREIN "TO BE TRUE UNDER THE PENALTIES OF PERJURY" IS INSUFFICIENT TO SUPPORT AN APPLICATION TO VACATE AN ARBITRATION AWARD.

***RJ Professional Acupuncturist, P.C. v. Country Wide Ins. Co.*, 27 Misc.3d 127(A), 2010 N.Y. Slip Op. 50579(U) [App Term, 2nd, 11th & 13th Jud Dists].**

RJ Professional Acupuncturist, P.C. commenced this proceeding pursuant to CPLR 7511 to vacate a master arbitrator's award which upheld an arbitrator's award denying petitioner's claim for assigned first-party no-fault benefits. The Civil Court granted the petition, vacated the master arbitrator's award and directed the entry of judgment in favor of petitioner in the principal sum of $6,498.52.

The papers submitted by petitioner to the Civil Court were insufficient on their face to warrant the granting of any relief (*see SP Med., P.C. v. Country-Wide Ins. Co.*, 20 Misc.3d 126[A], 2008 N.Y. Slip Op 51230[U] [App Term, 2d & 11th Jud Dists 2008]). The only document submitted by petitioner in support of the petition was one denominated an "Affirmation in Support." The attorney who purportedly signed the document did not affirm the statements contained therein "to be true under the penalties of perjury" (CPLR 2106) but merely indicated that he "states as follows" (*cf. Puntino v. Chin*, 288 A.D.2d 202 [2001]; *Jones v. Schmitt*, 7 Misc.3d 47, 794 N.Y.S.2d 568 [App Term, 2d & 11th Jud Dists 2005]; *see also A.B. Med. Servs. PLLC v. Prudential Prop. & Cas. Ins. Co.*, 11 Misc.3d 137[A], 2006 N.Y. Slip Op 50504 [U] [App Term, 2d & 11th Jud Dists 2006]). Consequently, the document is insufficient as an affirmation (*SP Med., P.C.*, 20 Misc.3d 126[A], 2008 N.Y. Slip Op 51230[U]). In view of the foregoing, the order is reversed and the petition to vacate the master arbitrator's award is denied without prejudice to renewal upon proper papers (*see Matter of Sadler Textiles [Winston Uniform Corp.]*, 39 A.D.2d 845 [1972]).

ASSIGNMENTS - BY MINORS

THE DEFENSE THAT AN ASSIGNMENT IS INEFFECTIVE BECAUSE IT WAS SIGNED BY A MINOR IS WAIVED UNLESS THE CARRIER SEEKS VERIFICATION OF THE ASSIGNMENT.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 146(A), 2010 N.Y. Slip Op. [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant further argues that plaintiff had no standing to bring the instant action since the assignment of benefits form was defective in that it was signed by a minor. However, since defendant did not timely object to the form or seek verification of the assignment, it waived any defenses based thereon (*see Hospital for Joint Diseases v. Allstate Ins. Co.*, 21 A.D.3d 348 [2005]; *see also New York Hosp. Med. Ctr. of Queens v. New York Cent. Mut. Fire Ins. Co.*, 8 A.D.3d 640 [2004]; *A.B. Med. Servs. PLLC v. Nationwide Mut. Ins. Co.*, 6 Misc.3d 70, 792 N.Y.S.2d 289 [App Term, 2d & 11th Jud Dists 2004]).

ATTORNEYS FEES - MULTIPLE CLAIMS

ATTORNEY'S FEES ARE TO BE CALCULATED BASED "ON THE AGGREGATE OF ALL BILLS FOR EACH INSURED" TO A MAXIMUM OF $850.

***A.M. Medical Services, P.C. v. New York Central Mut. Ins.*, 26 Misc.3d 140(A),2010 N.Y. Slip Op. 50264(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff alleged five unpaid claims as its cause of action. The Civil Court granted plaintiff's motion for summary judgment as to four of the claims. Following this court's affirmance of the order (*A.M. Med. Servs., P.C. v. New York Cent. Mut. Ins.*, 13 Misc.3d 126[A], 2006 N.Y. Slip Op 51662 [U] [App Term, 2d & 11th Jud Dists 2006]), defendant moved to modify plaintiff's proposed judgment to limit the award of attorney's fees to the sum of $850, rather than the proposed total of $1,745.47 sought therein, which fee had been calculated on a per claim basis. The Civil Court granted defendant's motion. Thereafter, in light of the opinion of the Appellate Division, Third Department, in *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 46 AD3d 1290 [2007]), the Civil Court granted plaintiff's motion for leave to renew defendant's motion and, upon renewal, allowed the fees as previously proposed by plaintiff. Defendant appeals from that order. Plaintiff subsequently entered a judgment which included the award of $1,745.47 as attorney's fees, from which judgment this appeal is deemed taken (CPLR 5512 [a]).

In *LMK Psychological Servs., P.C. v. State Farm Mut. Aut. Ins. Co.* (12 NY3d 217, 222-223 [2009]), the Court of Appeals reversed the Appellate Division and accepted the opinion of the Superintendent of Insurance (Ops Gen Counsel N.Y. Ins Dept No. 03-10-04 [Oct.2003]), which "interpreted a claim to be the total medical expenses claimed in a cause of action pertaining to a single insured, and not ... each separate medical bill submitted by the provider." As a result, the Court of Appeals held that attorney's fees are to be calculated based "on the aggregate of all bills for each insured," to a maximum of $850 (*LMK Psychological Servs., P.C.*, 12 NY3d at 223).

Accordingly, as there is but one insured involved herein, the award of attorney's fees to plaintiff is reduced to the sum of $850.

COLLATERAL ESTOPPEL - PRIOR DECLARATORY JUDGMENT ACTION

A PLAINTIFF IS NOT COLLATERALLY ESTOPPED FROM A DECLARATORY JUDGMENT IF HE OR SHE WAS NEVER NAMED NOR SERVED IN THE DECLARATORY JUDGMENT ACTION, WAS NOT IN PRIVITY WITH SOMEONE WHO WAS, AND WHO OTHERWISE HAD NO FULL AND FAIR OPPORTUNITY TO APPEAR AND DEFEND ITS INTERESTS IN THE ACTION.

***Magic Recovery Medical & Surgical Supply Inc. v. State Farm Mut. Auto. Ins. Co.*, 27 Misc.3d 67, 901 N.Y.S.2d 774, 2010 N.Y. Slip Op. 20130 [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff herein was neither named nor served in the declaratory judgment actions nor, at the time, was it in privity with someone who was, and plaintiff otherwise had no full and fair opportunity to appear and defend its interests in those proceedings. Accordingly, the judgments do not collaterally estop plaintiff from recovering in this action (*Gramatan Home Invs. Corp. v. Lopez,* 46 N.Y.2d 481, 414 N.Y.S.2d 308, 386 N.E.2d 1328 [1979]; *Mid Atl. Med., P.C. v. Victoria Select Ins. Co.,* 20 Misc.3d 143(A), 2008 N.Y. Slip Op. 51758(U), 2008 WL 3865849 [App. Term, 2d & 11th Jud. Dists. 2008]; *see also Green v. Santa Fe Indus.,* 70 N.Y.2d 244, 253, 519 N.Y.S.2d 793, 514 N.E.2d 105 [1987]). Moreover, as the declaratory judgments were obtained on default, there was no actual litigation of the issues and, therefore, no identity of issues (*Kaufman v. Eli Lilly & Co.,* 65 N.Y.2d 449, 456-457, 492 N.Y.S.2d 584, 482 N.E.2d 63 [1985]; *Zimmerman v. Tower Ins. Co. of NY,* 13 A.D.3d 137, 139-140, 788 N.Y.S.2d 309 [2004]; *Chambers v. City of New York,* 309 A.D.2d 81, 85-86, 764 N.Y.S.2d 708 [2003]; *Holt v. Holt,* 262 A.D.2d 530, 530, 692 N.Y.S.2d 451 [1999]). As the Civil Court did not address the alternative ground asserted by defendant in its motion for summary judgment, the matter must be remitted to the Civil Court for a determination of that ground (*e.g. McElroy v. Sivasubramaniam,* 305 A.D.2d 944, 761 N.Y.S.2d 688 [2003]).

COVERAGE DEFENSE - FRAUDULENT INCORPORATION - DOCTORS PERFORMING ACUPUNCTURE

A PROFESSIONAL CORPORATION WHICH IS OWNED BY A DOCTOR WHO IS NOT LICENSED TO PRACTICE ACUPUNCTURE IS NOT ENTITLED TO RECOVER ASSIGNED NO-FAULT BENEFITS FOR ACUPUNCTURE SERVICES.

***Quality Medical Care, P.C. v. New York Central Mut. Fire Ins. Co.*, 26 Misc.3d 139(A), 2010 N.Y. Slip Op. 50262(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Insurance Department Regulations (11 NYCRR) § 65-3.16(a)(12) states that "[a] provider of health care services is not eligible for reimbursement [of no-fault benefits] if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service[s]" (*see e.g. Allstate Ins. Co. v. Belt Parkway Imaging, P.C.,* 33 AD3d 407 [2006]; *Multiquest, P .L.L.C. v. Allstate Ins. Co.,* 17 Misc.3d 37, 38-39 [App Term, 2d & 11th Jud Dists 2007]).

Only someone properly licensed or certified may practice acupuncture in New York State (Education Law § 8212; *Great Wall Acupuncture v. GEICO Ins. Co.,* Misc.3d, 2009 N.Y. Slip Op 29467 [App Term, 2d, 11th & 13th Jud Dists 2009]; *Lexington Acupuncture, P.C. v. State Farm Ins. Co.,* 12 Misc.3d 90, 92 [App Term, 2d & 11th Jud Dists 2006]). Physicians are not authorized to practice acupuncture by virtue of

their medical licenses; rather, they must satisfy the certification requirements if they are to practice acupuncture (Education Law §§ 8212, 8216[3]; Education Department Regulations [8 NYCRR] § 60.9). Thus, the certificate of incorporation for a professional service corporation that seeks to obtain reimbursement of no-fault benefits for acupuncture services rendered "shall have attached thereto a certificate or certificates issued by the [Education Department] certifying that each of the proposed shareholders, directors and officers is authorized by law to practice a profession which the corporation is being organized to practice and, if applicable, that one or more of such individuals is authorized to practice [acupuncture]" (Business Corporation Law § 1503[b]; *see e.g. Midborough Acupuncture P.C. v. State Farm Ins. Co.,* 13 Misc.3d 58, 60 [App Term, 2d & 11th Jud Dists 2006]; *Lexington Acupuncture, P.C.,* 12 Misc.3d at 92).

Where, as here, a professional service corporation is owned solely by a doctor who is not a certified acupuncturist at the time the acupuncture services at issue were rendered, such professional service corporation is not entitled to reimbursement of assigned no-fault benefits for such services notwithstanding the fact that the acupuncture services were rendered by a licensed acupuncturist employed by the corporation and that the corporation's owner subsequently became a certified acupuncturist (Business Corporation Law § 1503[b]; § 1507; Insurance Department Regulations [11 NYCRR] § 65-3.12 [a]; *cf. Healthmakers Med. Group, P.C. v. Travelers Indem. Co.,* 13 Misc.3d 136[A], 2006 N.Y. Slip Op 52118[U] [App Term, 1st Dept 2006]). Accordingly, the judgment is reversed and the complaint dismissed.

COVERAGE DEFENSES - FRAUD IN THE PROCUREMENT

THE DEFENSE OF FRAUDULENT PROCUREMENT IS A COVERAGE DEFENSE AND IS NOT WAIVED BY AN UNTIMELY DENIAL OF A CLAIM.

***Total Family Chiropractic/Dr. Brian Ross v. Mercury Cas. Co.*, 28 Misc.3d 138(A), 2010 N.Y. Slip Op. 51470(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant argues that plaintiff failed to establish that it was entitled to summary judgment upon the claim form dated March 22, 2007 for services rendered to assignor Karoy Brown on February 7 and 9, 2007, as it was duplicative of the claim form plaintiff submitted to defendant dated February 17, 2007, which sought payment for the same services. Upon a review of the record, we agree with defendant's contention, and defendant is awarded summary judgment dismissing the complaint insofar as it sought to recover upon the claim form dated March 22, 2007 (*see e.g. First Aid Occupational Therapy PLLC v. Country-Wide Ins. Co.,* 27 Misc.3d 128[A], 2010 N.Y. Slip Op 50594[U] [App Term, 2d, 11th & 13th Jud Dists 2010]). In an attempt to establish that the time period in which it had to pay or deny the claims was tolled due to outstanding verification requests, defendant relied upon spreadsheets annexed to the affidavit of its claim representative. However, because the claim representative did not establish that the spreadsheets constituted evidence in admissible form (*see* CPLR 4518[a]; *People v. Kennedy,* 68 N.Y.2d 569, 579-580 [1986]; *Palisades Collection, LLC v. Kedik,* 67 AD3d 1329, 1330-1331 [2009]; *Speirs v. Not Fade Away Tie Dye Co.,* 236 A.D.2d 531 [1997]), defendant has not shown that it made timely verification requests.

While defendant has failed to demonstrate that it is not precluded from raising most defenses (*see Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co.,* 90 N.Y.2d 274, 282 [1997]), in any event, defendant is not precluded from raising the defense of fraudulent procurement of the insurance policy (*see Matter of Insurance Co. of N. Am. v. Kaplun,* 274 A.D.2d 293 [2000]; *A.B. Med. Servs. PLLC v. Commercial Mut. Ins. Co.,* 12 Misc.3d 8 [App Term, 2d & 11th Jud Dists 2006]). The certified transcripts of plaintiff's assignors' examinations under oath, annexed to defendant's motion papers, support defendant's assertion that the assignors' testimony at an examination before trial would be material and necessary to the defense of fraudulent procurement of an insurance policy (*see* CPLR 3101[a]). Since plaintiff served the notice of trial two weeks after defendant served its answer and it is uncontroverted that defendant timely moved to vacate the notice of trial within 20 days of its receipt of same (*see* Uniform Rules for Civ Ct [22 NYCRR] § 208.17[c]), the branch of defendant's motion seeking to strike the notice of trial is granted. However, as plaintiff's assignors are not directors, members or employees of plaintiff, defendant must subpoena them to compel their appearance at examinations before trial (*see* CPLR 3016[b]; *see also A.M. Med. Servs., P.C. v. Allstate Inso Co.,* 14 Misc.3d 143[A], 2007 N.Y. Slip Op 50384[U] [App Term, 2d & 11th Jud Dists 2007]). Accordingly, the judgment is reversed, the order entered February 13, 2009 is vacated, the branch of defendant's motion seeking summary judgment dismissing the complaint is granted to the extent of dismissing the complaint insofar as it sought to recover upon the claim form dated March 22, 2007, the branch of defendant's motion seeking to strike the notice of trial and to compel plaintiff's assignors to attend examinations before trial is granted to the extent of striking the notice of trial, plaintiff's cross motion for summary judgment is denied, and the matter is remitted to the Civil Court for all further proceedings.

COVERAGE DEFENSES - INJURIES UNRELATED TO THE ACCIDENT
AN "INDEPENDENT RADIOLOGY REPORT" OF MRI IMAGES OF A BODY PART THAT WAS ALLEGEDLY INJURED WHICH STATES THAT THE INJURY WAS NOT CAUSALLY RELATED TO THE ACCIDENT IS SUFFICIENT TO CREATE A TRIABLE ISSUE OF FACT AS TO WHETHER THE BODY PART WAS INJURED IN THE ACCIDENT.

***Stephen Fealy, M.D., P.C. v. State Farm Mut. Auto Ins. Co.*, 28 Misc.3d 136(A), 2010 N.Y. Slip Op. 51442(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover the sum of $25,000 in assigned first-party no-fault benefits, defendant insurance company moved for summary judgment dismissing the complaint on the ground that plaintiff's assignor's injuries were preexisting, chronic or progressive degenerative conditions which did not result from the subject accident. The occurrence which forms the subject matter of this action took place on March 20, 2007. On June 12, 2007, plaintiff, an orthopedic surgeon, performed "anterior cruciate ligament reconstruction with suprapateller pouch and tendon left knee partial debridement, medial meniscectomy [and] left medial arthroscopic patellofemoral condoplasty" on plaintiff's assignor at the Hospital for Special Surgery, for which he submitted a claim for $25,900. The claim was denied

based upon an independent peer review on July 11, 2007 advising that the left knee injury was unrelated to the accident.

In support of its motion for summary judgment, defendant submitted, among other things, affirmed peer review reports and an "independent radiology report" of the MRI images of the affected area, which identified degenerative processes accounting for the conditions treated by plaintiff. In opposition, plaintiff submitted an affidavit from plaintiff's president, a "board-certified" surgeon, who had performed the procedure. After defendant served reply papers in further support of the motion, plaintiff served a sur-reply, which contained a more detailed affidavit executed by the doctor. The Civil Court denied defendant's motion, finding that plaintiff had raised issues of fact. This appeal by defendant ensued. . . .

Although defendant's papers established, prima facie, based on objective medical evidence, that the assignor's injuries did not arise from the accident, we find that the affirmation in opposition, written by Dr. Fealy, the surgeon who actually performed the procedure on the assignor, read in conjunction with the other medical and hospital reports indicating that the assignor had complained of left knee pain within days of the accident, is sufficient to raise an issue of fact that must be resolved at trial.

DEFAULTS - ON STIPULATIONS

THE COURT NEED NOT CONSIDER OPPOSITION PAPERS FILED PAST A DEADLINES SET FORTH IN A BRIEFING STIPULATION AND MAY GRANT THE MOTION OF THE MOVING PARTY ON DEFAULT. TO VACATE AN ORDER GRANTING SUCH A MOTION, THE MOVING PARTY MUST DEMONSTRATE A REASONABLE EXCUSE FOR THE LATE SUBMISSION AND A MERITORIOUS DEFENSE.

***Manhattan Medical Imaging, P.C. v. Nationwide Ins. Co.*, 27 Misc.3d 127(A), 2010 N.Y. Slip Op. 50584(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff commenced four actions against defendant to recover assigned first-party no-fault benefits and, thereafter, moved for summary judgment in each action. In June 2007, the parties stipulated to adjourn the motions until November 30, 2007, and defendant agreed to serve its opposition papers by September 30, 2007. In July 2007, the parties stipulated to consolidate the four actions into one. Defendant served its opposition papers in November 2007, but the Civil Court would not consider them on the ground that they were untimely. By four separate orders dated November 30, 2007, the court granted plaintiff's motions for summary judgment on default, finding that plaintiff had established its prima facie entitlement to summary judgment with respect to each motion. In December 2007, defendant moved to, among other things, vacate its default and/or for leave to renew/reargue the prior motions. Defendant's motion was denied by order entered June 19, 2008, and the instant appeal by defendant ensued.

A defendant seeking to vacate a default pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a meritorious defense to the

action (*see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141 [1986]; *Mora v. Scarpitta*, 52 A.D.3d 663 [2008]). In the exercise of its discretion, a court can accept a claim of law office failure as an excuse (*see* CPLR 2005) if the facts submitted in support thereof are in evidentiary form and sufficient to justify the default (*see Incorporated Vil. of Hempstead v. Jablonsky*, 283 A.D.2d 553, 554 [2001]). By its June 19, 2008 order, the Civil Court correctly found defendant's law office failure excuse to be disingenuous and insufficient to justify the default. Consequently, so much of the order as denied the branch of defendant's motion seeking to vacate its default is affirmed.

DEFAULT JUDGMENTS - PLAINTIFF'S BURDEN

TO OBTAIN A DEFAULT JUDGMENT, PLAINTIFF'S MOTION PAPERS MUST DEMONSTRATE A PRIMA FACIE ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW.

***Balance Chiropractic, P.C. v. Property and Casualty Ins. Co. of Hartford*, 27 Misc.3d 138(A), 2010 N.Y. Slip Op. 50889(U) [App Term, 2nd, 11th & 13th Jud Dists].**

ORDERED that the order is modified by providing that plaintiff's motion is denied with leave to renew upon proper papers; as so modified, the order is affirmed without costs.

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff moved for leave to enter a default judgment based upon defendant's failure to appear or answer the complaint or, in the alternative, for an order finding for all purposes in the action that plaintiff had established a prima facie case. The motion was unopposed. The Civil Court denied the motion, and this appeal by plaintiff ensued.

In support of its motion, plaintiff proffered neither an affidavit nor a verified complaint by a party with personal knowledge setting forth the factual basis for the claim, as is required by CPLR 3215(f). Rather, plaintiff submitted a complaint verified by counsel, who did not demonstrate personal knowledge of the facts, and an affidavit of the president of a third-party billing company, which affidavit did not establish that the documents annexed to plaintiff's motion were admissible pursuant to CPLR 4518 (*see Art of Healing Medicine, P.C. v. Travelers Home & Mar. Ins. Co.*, 55 AD3d 644 [2008]; *Andrew Carothers, M.D., P.C. v. Geico Indem. Co.*, 24 Misc.3d 19 [App Term, 2d, 11th & 13th Jud Dists 2009]; *Dan Med., P.C. v. New York Cent. Mut. Fire Ins. Co.*, 14 Misc.3d 44 [App Term, 2d & 11th Jud Dists 2006]).

Since plaintiff's motion papers did not demonstrate a prima facie entitlement to judgment as a matter of law, the Civil Court properly denied the motion (*see All Mental Care Medicine, P.C. v. Allstate Ins. Co.*, 15 Misc.3d 129 [A], 2007 N.Y. Slip Op 50612[U] [App Term, 2d & 11th Jud Dists 2007]). Furthermore, plaintiff is not entitled to the alternative relief it sought, a finding for all purposes in the action that it had established its prima facie case (*see e.g. B.Y., M.D., P.C. v. Government Empls. Ins. Co.*, 26 Misc.3d 95 [App Term, 9th & 10th Jud Dists 2010]). However, in the circumstances presented, we modify the order to provide that plaintiff's motion is denied with

leave to renew upon proper papers.

DENIALS - ADMISSIBILITY

WHEN A DENIAL OF CLAIM FORM IS NOT OFFERED FOR A HEARSAY PURPOSE, IT DOES NOT HAVE TO BE QUALIFIED AS A BUSINESS RECORD.

***Five Boro Psychological Services, P.C. v. Progressive Northeastern Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50991(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Plaintiff also argues that defendant's motion should have been denied because defendant failed to establish that its denial of claim forms constituted evidence in admissible form pursuant to the business records exception to the rule against hearsay as set forth in CPLR 4518. This argument is unavailing. Defendant did not offer the denial of claim forms to establish the truth of the matters asserted therein, such as plaintiff's assignor's failure to appear for scheduled examinations under oath (EUOs), but rather to show that such denials were sent and that, therefore, the claims were denied. As the denial of claim forms were not offered for a hearsay purpose, they did not need to qualify as business records (*see e.g. Dawson v. Raimon Realty Corp.*, 303 A.D.2d 708 [2003]; *Splawn v. Lextaj Corp.*, 197 A.D.2d 479 [1993]).

DENIALS - ADMISSIBILITY

AS A DENIAL OF CLAIM FORM IS NOT GENERALLY OFFERED FOR A HEARSAY PURPOSE. HENCE, THEY DO NOT NEED TO QUALIFY AS BUSINESS RECORDS.

***Quality Health Products, Inc. v. N.Y. Cent. Mut. Fire Ins. Co.*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50990(U) [App Term, 2nd, 11th & 13th Jud Dists].** Plaintiff argues, among other things, that defendant's motion should have been denied because defendant failed to establish that its denial of claim forms constituted evidence in admissible form pursuant to the business records exception to the rule against hearsay as set forth in CPLR 4518. This argument is unavailing. Defendant did not offer the denial of claim forms to establish the truth of the matters asserted therein, such as the lack of medical necessity of the services rendered, but rather to show that such denials were sent, and that, therefore, the claims were denied. As the denial of claim forms were not offered for a hearsay purpose, they did not need to qualify as business records (*see e.g. Dawson v. Raimon Realty Corp.*, 303 A.D.2d 708 [2003]; *Splawn v. Lextaj Corp.*, 197 A.D.2d 479 [1993]).

Plaintiff raises the same argument regarding the notice of cancellation offered by defendant with respect to the insurance policy issued to Manuel Espinal which defendant had canceled. Again, since this document was not being offered for a hearsay purpose, it did not need to qualify as a business record. As plaintiff's remaining contentions are meritless, the order is affirmed.

DENIALS - FORM

DENIALS MUST BE ISSUED IN DUPLICATE AND ON A FORM APPROVED BY THE DEPARTMENT OF INSURANCE.

***Excel Imaging, P.C. v. MVAIC*, 27 Misc.3d 141(A), 2010 N.Y. Slip Op. 50998(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Upon a review of the record, we agree with the Civil Court's determination that MVAIC is not entitled to summary judgment. In *New York Univ. Hosp. Rusk Inst. v. Hartford Acc. & Indem. Co.* (32 AD3d 458, 460 [2006]), the Appellate Division, Second Department, held, in relevant part:

"Here, the defendants' September 28, 2004, letter adequately conveyed the information mandated by the prescribed form including, but not limited to, the precise ground on which the partial denial was predicated. *However, the defendants failed to establish that the letter had been issued in duplicate* and approved by the Department of Insurance (*see* 11 NYCRR 65-3.8[c][1], *supra*). *Accordingly, having failed to pay or properly deny that portion of the hospital's claim within the statutory time frame, the defendants were precluded from interposing a defense* (*Presbyterian Hosp. in City of N.Y. v. Maryland Cas. Co.,* 90 N.Y.2d 274, 286 [1997]; *Nyack Hosp. v. State Farm Mut. Auto. Ins. Co., supra*), and the Supreme Court should have granted the plaintiff's motion for summary judgment on the second cause of action" (emphasis added).

In view of the foregoing, the order, insofar as appealed from, is affirmed, as issues of fact exist (*see* Insurance Department Regulations [11 NYCRR] § 65-3.8[c][1]; *New York Univ. Hosp. Rusk Inst.* (32 AD3d at 460).

DENIALS - SERVICES THAT ARE PART OF ANOTHER SERVICES

IS PROOF OF A TIMELY DENIAL, WHICH ASSERTS THAT THE SERVICES FOR WHICH PAYMENT IS SOUGHT WERE PART OF ANOTHER SERVICE AND THUS NOT SEPARATELY REIMBURSABLE, SUFFICIENT TO DEFEAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

***St. Vincent Medical Care, P.C. v. Country Wide Ins. Co.*, 26 Misc.3d 144(A), 2010 N.Y. Slip Op. 50444(U) [App Term, 2nd, 11th & 13th Jud Dists].**

Defendant also established that it had timely denied the two $365 .68 claims (plaintiff's fourth and seventh causes of action) on the ground that the services for which payment was sought were part of another service and, thus, were not separately reimbursable. Consequently, defendant raised a triable issue of fact with respect to the fourth and seventh causes of action (*see St. Vincent's Med. Care, P.C. v. Country-Wide Ins. Co.*, --- Misc.3d ----, 2009 N.Y. Slip Op 29508 [App Term, 2d, 11th & 13th Jud Dists 2009]).

Accordingly, the judgment is reversed, the portions of the order entered June 20, 2008 which

granted plaintiff's motion for summary judgment and which denied the branches of defendant's cross motion seeking summary judgment dismissing the first, second, third, fifth, sixth, eighth and ninth causes of action are vacated, plaintiff's motion for summary judgment is denied, the branches of defendant's cross motion seeking summary judgment dismissing the first, second, third, fifth, sixth, eighth and ninth causes of action are granted, and the matter is remitted to the Civil Court for all further proceedings on the fourth and seventh causes of action.

DISCOVERY - CONDITIONAL ORDERS OF PRECLUSION

IN ORDER TO AVOID THE ADVERSE IMPACT OF A CONDITIONAL ORDER OF PRECLUSION, A PARTY IS REQUIRED TO DEMONSTRATE AN EXCUSABLE DEFAULT AND A MERITORIOUS CAUSE OF ACTION.

***Kimball Medical, P.C. v. Travelers Ins. Co.*, 27 Misc.3d 130(A), 2010 N.Y. Slip Op. 50639(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff failed to serve complete responses to defendant's discovery demands within 45 days, as required by a so-ordered stipulation which, among other things, provided that if plaintiff failed to do so, plaintiff would be precluded from offering any evidence in any subsequent motion or at trial. As a result, the so-ordered stipulation was a conditional order of preclusion, which became absolute upon plaintiff's failure to comply (*see Panagiotou v. Samaritan Vil., Inc.*, 66 AD3d 979 [2009]; *Calder v. Cofta*, 49 AD3d 484 [2008]; *Callaghan v. Curtis*, 48 AD3d 501 [2008]; *Michaud v. City of New York*, 242 A.D.2d 369 [1997]; *Saavedra v. Aiken*, 25 Misc.3d 133[A], 2009 N.Y. Slip Op 52207[U] [App Term, 2d, 11th & 13th Jud Dists 2009]). In order to avoid the adverse impact of the conditional order of preclusion, plaintiff was required to demonstrate an excusable default and a meritorious cause of action (*see Panagiotou*, 66 AD3d 979; *Calder*, 49 AD3d 484; *Callaghan*, 48 AD3d 501; *Michaud* at 370). Since plaintiff failed to do so, plaintiff is precluded from establishing a prima facie case. Accordingly, the Civil Court should have granted defendant's motion for summary judgment dismissing the complaint (*see Panagiotou*, 66 AD3d 979; *Calder*, 49 AD3d 484; *Callaghan*, 48 AD3d 501; Michaud, 242 A.D.2d 369; *Saavedra*, 25 Misc.3d 133[A], 2009 N.Y. Slip Op 52207[U]).

DISCOVERY - CONDITIONAL ORDERS OF PRECLUSION

IN ORDER TO AVOID THE ADVERSE IMPACT OF THE CONDITIONAL ORDER OF PRECLUSION, A PARTY IS REQUIRED TO DEMONSTRATE AN EXCUSABLE DEFAULT AND A MERITORIOUS CAUSE OF ACTION.

***Nordique Medical Services, P.C. v. Travelers Ins. Co.*, 27 Misc.3d 131(A), 2010 N.Y. Slip Op. 50648(U) [App Term, 2nd, 11th & 13th Jud Dists].**

In this action by a provider to recover assigned first-party no-fault benefits, plaintiff failed to serve complete responses to defendant's discovery demands within 45 days as required by a conditional order of preclusion which, among other things, provided that if plaintiff failed to do so, plaintiff would be precluded from offering any evidence