Against Whom May the Defense of Lack of Medical Necessity be Made?

Second Department Reverses Trial Court's Holding that Defense May Not be Asserted Against Diagnostic Testing Centers

Under the No-Fault Law in New York, an insured is entitled to compensation for "basic economic loss" resulting from injuries caused by the operation of a motor vehicle. (*See*, New York Insurance Law § 5101 *et seq*.). Insurance Law § 5102(a)(1) defines "basic economic loss", in part, as "all necessary expenses" for medical services. (*See also*, 11 NYCRR § 65-1.1).

Accordingly, a claimant or his/her assignee may only be reimbursed for those medical expenses which are medically necessary. No-fault insurers often deny claims for reimbursement based upon lack of medical necessity. Recently, diagnostic testing centers have challenged the defense of lack of medical necessity as used against them.

***West Tremont Medical Diagnostics, P.C. v. GEICO* (N.Y. City Civ. Ct. 2005)**

On February 23, 2005, Judge Judith R. McMahon decided a case in Richmond County, holding that the defense of medical necessity may not be raised against an assignee of no-fault benefits who performed an MRI at the request of the insured's treating physician. *West Tremont Medical Diagnostics, P.C. v. GEICO*, 8 Misc.3d 423, 795 N.Y.S.2d 840 (N.Y. City Civ. Ct. 2005). Specifically, Judge McMahon stated, "to deny the First Party benefits, on the basis of lack of medical necessity, to the diagnostic center that does not come to a diagnosis based upon a physical examination of the patient [is] in derogation of the purpose and intent of the Insurance Law No-Fault Benefits statute which is expedient payment of benefits to automobile victims." *Id.* at 427, 795 N.Y.S.2d at 843. By this logic, No-Fault insurers would not be permitted to raise the defense of lack of medical necessity against any diagnostic testing centers because, in Judge McMahon's words, doing so would "impute knowledge to the diagnostic center as if it were a treating physician." *Id.*

Judge McMahon held that because these diagnostic testing centers were not affiliated with the treating physician, the No-Fault carrier could not deny benefits based upon lack of medical necessity. Notably, the Court so held, notwithstanding the fact that there was undisputed testimony from the No-Fault insurer's expert that the MRI was not medically necessary.

Second Department Reverses : *West Tremont Medical Diagnostic P.C. v. GEICO*

On September 29, 2006, the Second Department reversed Judge McMahon's decision. *West Tremont Medical Diagnostic P.C. v. GEICO*, 13 Mis.3d 131(A), 2006 WL 2829826. The Court first noted that West Tremont Medical Diagnostic Center was an assignee of the claimant, Janette Lamb-McCleod. The Court stated :

> While it may be argued that a diagnostic center is in no position to establish the medical necessity of a prescribed MRI, it is well settled that the assignee stands in no better position than its assignor, and has no more right or claim than the assignor. If a claim is not assigned, and is submitted to the insurer directly by the eligible injured person, the insurer may assert a defense of lack of medical necessity which, if established, will shift the burden to the eligible injured person to provide his or her own evidence of medical necessity. *If the defense may be asserted against the eligible injured person, it follows that it may be asserted against the provider as well.*

West Tremont Medical Diagnostic P.C. v. GEICO, 13 Mis.3d 131(A), 2006 WL 2829826 (*emphasis added).*

Accordingly, the Court held that the defense of medical necessity could be asserted against a diagnostic testing center, notwithstanding the fact that the testing center did not order the MRI (or other diagnostic test) and was not affiliated with the examining physician who did.

***Long Island Radiology v. Allstate Ins. Co.* 12 Misc. 3d 1167A (Sup. Ct. Nassau Cty. 2006)**

On June 7, 2006, Supreme Court Justice Thomas P. Phelan decided *Long Island Radiology v. Allstate Ins. Co.* 12 Misc. 3d 1167A (Sup. Ct. Nassau Cty. 2006). Long Island Radiology is a diagnostic imaging center which had performed an MRI on the claimant. When Long Island Radiology sought reimbursement from claimant's No-Fault insurer as an assignee of benefits, the No-Fault insurer denied the claim due to lack of medical necessity. Long Island Radiology argued that the defense of lack of medical necessity should not be asserted against an imaging center because they do not assess the medical necessity.

The Court decided *Long Island Radiology v. Allstate Ins. Co.* before the Second Department reversed Judge McMahon's decision in *West Tremont Medical Diagnostic P.C. v. GEICO*, 13 Mis.3d 131(A), 2006 WL 2829826.

Citing to Judge McMahon's decision in *West Tremont Medical Diagnostic P.C. v. GEICO*, Judge Phelan held that the defense of lack of medical necessity may not be asserted against a diagnostic testing center. The Court stated :

> [I]t makes no sense to argue 'lack of medical necessity' against radiologists, because they do not assess medical necessity. Radiologists neither examine the no-fault patient, nor render a pre-test diagnosis. Any diagnostic opinion is based on the radiological test. To require radiologists to render a pre-test diagnosis would cause significant delay in treating the injured.
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> *Long Island Radiology v. Allstate Ins. Co.* 12 Misc. 3d 1167A at 5.

The Court bases its holding on the Judge McMahon's decision in *West Tremont Medical*

Diagnostic P.C. v. GEICO as well as another Civil Court decision arising in Kings County, *Omega Diagnostic Imaging, P.C. v. State Farm Mutual Auto Ins.*, 8 Misc.

In holding that the defense of lack of medical necessity is not available against radiologists, the Court stated that "[t]he prescription establishes medical necessity for purposes of the radiologist." *Id.* at 5. The Court further stated, "[t]he insurer's recourse should lie against the treating physician or medical provider. An insurer who can prove that a radiology test is unnecessary or duplicative, should be able to challenge through subrogation the treating physician or medical provider who prescribed the test." *Id.* at 5.

***Long Island Radiology v. Allstate Ins. Co.* : A Certified Class Action ?**

Interestingly, the Plaintiffs sued on behalf of themselves (Long Island Radiology) and all other entities that are assignees of claims for the payment of radiology no-fault benefits similarly situated. Plaintiffs moved for class certification pursuant to CPLR 901 and 902 identifying the proposed class as "all radiologists and radiology practices that have been denied no-fault benefits in the last six years for MRI's performed where said denial is based on the lack of medical necessity [...]". *Id.* At 5.

The Court denied the petition for class certification, without prejudice, holding that more discovery is needed before certification could be resolved.

In light of the Second Department's holding in *West Tremont Medical Diagnostic P.C. v. GEICO*, the outcome of this litigation may change course. The Court in *Long Island Radiology v. Allstate Ins. Co.* recognized that the appeal in *West Tremont* was still pending when it rendered its decision. We are still waiting to see the impact that *West Tremont* will have.