

Rolling the Dice: Does ‘Alleviation’ Alleviate Insurance Carrier Fears?

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New York Law Journal

April 21, 2021

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On Feb. 24, 2021, the Appellate Division, Second Department issued a long-awaited decision in *Alleviation Med. Svcs. v. Allstate Ins. Co.*, 2021 N.Y. Slip Op. 08159 (2d Dept. Feb. 24, 2021). Carriers, providers, and legal practitioners, alike, hoped the court would provide clarity on a carrier’s obligations once a policy becomes exhausted, but the recent decision did not squarely address that issue. Instead, the court focused on the lack of carrier documentation in its underlying motion papers, and stated “there are issues of fact remaining as to when the claim was denied, and the basis and efficacy of the denial,” despite confirming the carrier had proved policy exhaustion. See *id.*

Thus, albeit not articulated, the Second Department makes clear that proof of policy exhaustion, alone, is insufficient to dismiss a personal injury protection (PIP) lawsuit. That is, it is still necessary to scrutinize the timeliness and propriety of a denial. The logical conclusion is that a claim will be awarded if the denial or defense is not sustained regardless of policy exhaustion.

Pursuant to New York state no-fault law, an automobile insurance policy has a statutory

mandatory minimum to include \$50,000 in PIP. New York insurance law provides “first party benefits” coverage for “basic economic loss,” which includes all necessary expenses incurred for medical treatment and loss of earnings from work. See N.Y. Ins. Law §5102(a)-(b). Insurance carriers are required to process each bill upon receipt. Therefore, the benefits are to be paid as the loss is incurred, prior to the exhaustion of the policy. See N.Y. Ins. Law §5106(a); see also *Matter of Medical Socy. of State of N.Y. v. Serio*, 100 N.Y.2d 854, 860 (2003). Absent additional PIP coverage purchased by the insured, a policy will exhaust at \$50,000.

In *Nyack Hosp. v. General Motors Acceptance*, the New York Court of Appeals held that fully verified claims are payable in the order they are received. See *Nyack Hosp. v. General Motors Acceptance*, 8 N.Y.3d 294 (2007). Four years after *Nyack*, *Alleviation Med. Svcs. v. Allstate Ins. Co.* commenced in the Civil Court of New York, Queens County. See *Alleviation Med. Svcs.*, 2021 N.Y. Slip Op. 08159. In *Alleviation*, the plaintiff-provider alleged that the defendant-carrier “failed to properly deny the claim or request additional verification in compliance with no-fault regulation” for

treatment rendered. See *id.* Thereafter, the defendant moved for summary judgment due to policy exhaustion. See *id.* The motion was denied on the basis that the defendant's evidence, while proving exhaustion of the policy, did not speak to the basis of the denial of the subject claim. See *id.* Subsequent appeals ensued.

Under *Alleviation's* "priority of payment" analysis, which cites *Nyack*, the availability of funds from the policy must be considered on a disputed bill from the vantage point of how much coverage existed when said bill was received or fully verified. See *Alleviation Med. Svcs.*, 2021 N.Y. Slip Op. 08159. If there were funds available under the policy on the date that a claim was received or fully verified, then the carrier runs the risk of exceeding the applicable coverage limits, if the carrier paid subsequent bills ahead of the disputed claim or "out of line." See *id.* To that end, *Alleviation* scrutinizes the handling of the claim and the basis of the denial. See *id.*

While *Alleviation* was making its way through the New York Second Department appellate courts, the First Department decided another case involving policy exhaustion, *Harmonic Phys. Therapy, P.C. v. Praetorian Ins. Company*, 15 N.Y.S. 3d 711 (N.Y. App. Term. 2015). *Harmonic* created a very limited safe harbor provision to the priority of payment regulation in holding that an insurer was not precluded from paying other providers' legitimate claims

subsequent to the denial of the plaintiff-provider's claim. Adopting the plaintiff-provider's position, which would require insurers to delay payment on uncontested claims or binding arbitration awards pending resolution of a plaintiff-provider's disputed claim, "runs counter to the no-fault regulatory scheme, which is designed to promote prompt payment of legitimate claims." See *Nyack Hosp.*, 8 N.Y.3d at 300.

Therefore, the decision in *Harmonic* may be extrapolated to stand for the premise that, like what *Alleviation* seems to infer, a policy exhaustion defense will not be sustained where a carrier had issued a defective or, otherwise, precludable denial. To that end, carriers are potentially exposed to paying in excess of policy limits in such circumstances. This, of course, will require carriers to focus on proper claims handling.

While *Alleviation* did not supply the answers the PIP world was waiting for, it does seem the court stands for the premise that policy reaching exhaustion will not circumvent potential claim mishandlings.



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