SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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August 28, 2009

(VIA E-FILED)
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Submitted: August 19, 2009
Decided: August 28, 2009

RE: *Janie L. Kennedy v. Allstate Property Casualty Ins. Co.*
07C-08-026 FSS

Upon Defendant's Motion for Summary Judgment – *Denied*

Dear Counsel:

Plaintiff, among many others who have been injured in New York City taxis, fell victim to New York's infamous 30-day time limit for accident-related claims.[1] On May 22, 2004, Plaintiff, a Delaware resident, was a passenger in a New

[1] *See generally, Medical Society of State of New York v. Levin*, 712 N.Y.S.2d 745, 753 (N.Y. Sup. Ct. 2000) (holding the "new regulation" null and void, on finding that "in promulgating the new regulations[,] [the State of New York Insurance Department has] placed an

York City taxi that was involved in a collision. Plaintiff failed to timely file her claim, thereby barring her recovery from the taxi's insurer, American Transit Insurance ("ATI"). Plaintiff then sought benefits from Defendant, her no-fault insurer. This decides Defendant's summary judgment motion based, mainly, on the fact Plaintiff failed to submit a timely claim to ATI. The facts are undisputed.

Following the collision, Plaintiff timely submitted a claim to Defendant. On June 8, 2004, Defendant's claim representative issued a "Denial of Claim Form," stating "[p]rimary no-fault benefits are the responsibility of the involved vehicle." The denial did not mention that under New York law, Plaintiff had only 30 days in which to notify ATI.

On August 9, 2004, Plaintiff requested a claim form from ATI. ATI notified Plaintiff on September 10, 2004 that, except for a "clear and reasonable justification" for her late notice, she was time-barred from benefits. Plaintiff failed to offer ATI any justification.

Plaintiff filed this breach of contract action on August 3, 2007. Defendant filed its motion for summary judgment on January 14, 2009. Plaintiff's response was received on April 15, 2009. On July 22, 2009, the court requested information about the claims representative's location and a copy of the insurance policy.

On July 31, 2009, Defendant submitted a copy of Plaintiff's insurance policy and told the court that the claims adjuster who issued the denial was located

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enormous new burden on accident victims and small health providers, ostensibly in an effort to prevent fraud"), *aff'd*, 280 A.2d 309 (N.Y. App. Div. 2001); *see also*, Matt Brady, *Tort Reform Suffers Body Blows in New York and Florida*, Insurance Accountant, Feb. 19, 2001; Editorial, *A Bad Idea Revisited*, Buffalo News, Aug. 15, 2001; Marco Leavitt, *State, NYPIRG Clash on New Regulation*, The Business Review (Albany), Sept. 5, 2001; *but see*, *Medical Society of New York v. Serio*, 800 N.E.2d 728, 731 (N.Y. 2003) (holding the "new regulation" lawful and "fully consistent with the insurance law").

in New York at the time. On August 19, 2009, after a filing extension, Plaintiff resubmitted the same information submitted by Defendant.

Defendant argues that, based upon this case's facts and Plaintiff's policy,[2] it is an "excess" carrier and the "excess" coverage was not triggered because Plaintiff failed to "avail herself of [ATI's] benefits." Defendant does not offer any law supporting that position, rather, relies solely on the facts.

Plaintiff argues that Defendant's excess clause's "exclusionary" language is unenforceable because it negates no-fault minimum coverage requirements. Additionally, Plaintiff claims that Defendant's position is against the "strong public policy underlying Delaware's no-fault insurance law." For the most part, Plaintiff fails to support her argument.

At this point, the court does not know what to make of the fact that Defendant's New York-based employee denied benefits without cautioning Plaintiff, Defendant's customer, that only days remained in which to file a claim. The court is not saying that Defendant's actions were wrong, but it cannot say that Defendant's failure to inform Plaintiff was necessarily right. Therefore, Defendant's

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[2] Plaintiff's policy reads, in pertinent part:

> **PART 2 [PIP] COVERAGE**
> . . . Allstate will pay to or on behalf of the injured person the following benefits .
>
> "Injured Person[s]" means:
> b. Outside the State of Delaware
> i. You . . . while in . . . an accident with any motor vehicle.
>
> **Limits of Liability**
> If There is Other Insurance: This coverage is excess to any medical payments or no-fault coverages for accidents occurring outside [Delaware]. This coverage also excess to any medical payments insurance for you . . . while occupying . . . any vehicle not insured for Delaware no-fault benefits.

motion for summary judgment, at this juncture, is **DENIED**. Defendant shall have leave to renew the motion upon discovery's conclusion.

Very Truly Yours,

/s/ Fred S. Silverman

cc: Prothonotary (Civil)