

IN BRIEF

The Nassau Lawyer welcomes submissions to the IN BRIEF column announcing news, events and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

Forchelli Deegan Terrana LLP proudly announces that the firm has been awarded a 2018 Top Workplaces honor by Newsday. The *Long Island Business News* featured **Lisa M. Casa** as Ones to Watch: Law and honored **Andrea Tsoukalas Curto** as one of Long Island's Top 50 Influential Women Class of 2018. **Erik Snipas** was a panelist at the Real Estate Young Alumni Roundtable lunch at St. John's University School of Law sponsored by St. John's Mattone Institute for Real Estate Law.

The Law Offices of Alan J. Schwarz, P.C. of Garden City is pleased to announce that **Alan J. Schwartz** has been honored with the Super Lawyers designation as a Top Rated Criminal Defense Attorney in the New York Metro Area.

Joan Lensky Robert of Kassoff, Robert & Lerner received the 2018 Outstanding Service Award from the Community Living Corporation for her years of support and advocacy on behalf of individuals challenged by age and

disability-related issues, and over 25 years of dedication to elder and disability law.

Karen Tenenbaum of Tenenbaum Law, P.C. spoke with other firm attorneys at the 2018 NYS Society of CPAs, Nassau All Day Tax Conference on NYS Residency Audits, presented at the Tax Practitioner's Institute, discussing the Nuts & Bolts of NYS Tax Residency Audits and NYS Tax Collection issues, and spoke about IRS and NYS Tax Collection at the NYS Society of CPAs, Suffolk Annual Tax Conference. Ms. Tenenbaum is a finalist for the KPMG's ATHENA Leadership Award and has also been nominated by Best of Long Island for "Best Lawyer" and Tenenbaum Law, P.C. for "Best Law Firm."

Capell Barnett Matalon & Schoenfeld LLP partners **Robert Barnett**, of the firm's Tax, Estate Planning and Estate Administration areas, and **Stuart Schoenfeld**, of the firm's Elder Law, Medicaid and Estate Planning practice areas, recently presented at the Nassau/Suffolk Chapter of the National Conference of CPA Practitioners. The program was titled "TCJA AND IRA Yesterday & Today". Partner **Yvonne Cort** recently participated on a panel at Long Island University Civil and Criminal Tax Controversy Forum. Five of the firm's attor-



Marian C. Rice

neys were featured presenters at the Long Island Tax Professionals Symposium 2018 in Woodbury, New York. Partner **Gregory Matalon** presented on Estate Planning updates, partner **Stuart Schoenfeld** and associate **Monica Ruela** presented on navigating the Medicaid application process and partner **Yvonne Cort** presented on IRS collection updates. Partner **Robert Barnett** presented a total of seven programs on topics concerning Tax and Estate Planning and TCJA updates, throughout this three-day event.

Bernard Kennedy and **Craig L. Olivo** announced that the Bond, Schoenck & King Garden City office has been recognized by the 2019 *U.S. News-Best Lawyers*® "Best Law Firms" in four categories, including Education Law; Employment Law – Management; Labor Law – Management; and Litigation – Labor & Employment.

It is with pride that Pegalis & Erickson, LLC announces its founding partner and one of the nation's foremost medical malpractice trial lawyers for patients, **Steven E. Pegalis**, was recognized as "Lawyer of the Year" by Best Lawyers® for 2019, for Long Island Medical Malpractice Law — Plaintiffs. Mr. Pegalis was previously named the "Lawyer of the Year" for Plaintiffs' Personal Injury

Litigation in 2017. Pegalis & Erickson, LLC has also been recognized for the eighth consecutive year by U.S. News "Best Law Firms," as a TIER ONE Long Island law firm for Medical Malpractice Law – Plaintiffs and Personal Injury Litigation – Plaintiffs.

Brian Andrew Tully of Tully Law, PC and founder of ElderCare Resource Center, Inc., has announced that he has earned his Elder Law Attorney Recertification from the National Academy of Elder Law Attorneys, Inc. (NAELA). Mr. Tully's most recent certification will run through November 2023.

Ronald Fatoullah & Associates is pleased to announce that four of the firm's attorneys have been selected as Super Lawyers for 2018 including **Ronald Fatoullah**, for his tenth consecutive year (Elder Law), Managing Attorney, **Elizabeth Forspan** as a Super Lawyers Rising Star (Estate Planning & Probate), and **James A. E. Asquith** as a Super Lawyers Rising Star (Elder Law).

PLEASE EMAIL YOUR SUBMISSIONS TO: nassaulawyer@nassaubar.org with subject line: IN BRIEF

The In Brief column is compiled by **Marian C. Rice**, a partner at the Garden City law firm **L'Abbate Balkan Colavita & Contini, LLP** where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

REIMBURSEMENT ...

Continued From Page 12

Huntington Hospital v. Abrandt,⁷ a hospital had sued a former patient on an account stated. The patient defended by arguing that she had been charged more than the "fair market value" for the services rendered to her, based on the fact that the hospital typically charged lower rates to other patients – such as patients covered by Medicaid and Medicare. The patients' argument was thus implicitly the same as the carriers' argument in *Paracha*: that a medical provider's rate should be deemed unreasonable and unenforceable simply because it is higher – even substantially higher – than "governmental" or other types of "high volume" rates charged for the same service in other settings.

The Appellate Term rejected the argument, just as the Commercial Division did in *Paracha*, reasoning that, "[t]he fact that lesser amounts for the same services may be accepted from commercial insurers or government programs as payment in full does not indicate that the amounts charged to [these] [patients] were not reasonable."⁸ The Appellate Term also rejected the argument that the provider's rates were unreasonably high based on a comparison with other contractual cost structures – which the plaintiff in *Huntington Hospital* cited as "evidence" of the "fair market value" of the services in question – precisely as United argued in *Paracha*.⁹ The court went on to dismiss the claim regarding "unreasonable charges" and awarded summary judgment to the provider hospital.

Intwoothercaseswithremarkablysimilar overtones, *UnitedHealthcare Servs., Inc. v. Tesser*,¹⁰ and *UnitedHealthcare Servs., Inc. v. Davenport*,¹¹ United sued non-participating physicians (surgeons), again to limit those physicians' reimbursements to amounts consistent with FAIR Health billing guidelines. Justice Bucaria of The Commercial Division of the Nassau County Supreme Court initially either dismissed outright or expressed significant concerns regarding the viability of United's core claims.

In *Tesser*, the court dismissed United's tortious interference, fraud, negligent misrepresentation, and GBL § 349 claims, consistent with the outcome in *Paracha*, while leaving intact United's claim based on unjust enrichment.¹² The court in *Tesser* reasoned that although United's ability to recoup alleged overpayments may be limited in light of the New York Insurance Law, "a doctor may not charge a fee which is excessive or unreasonable."¹³ The general principle of freedom to contract is not discussed in the *Tesser* decision. In *Davenport*, the court similarly dismissed each of United's claims based on excessive billing rates, and left intact only United's conceptually distinct claim (unique to that case, apparently) regarding allegedly "duplicate payments."¹⁴

In another case, discontinued by stipulation of the parties, *UnitedHealthCare Servs., Inc. v. Asprinio*,¹⁶ United again had sought to prevent a non-participating physician from billing at rates deemed by United to be "excessive" and "unreasonable."¹⁷ Justice Scheinkman of The Commercial Division of the Westchester County Supreme Court denied United's initial motion for injunctive relief, which was aimed at preventing the non-participating provider from billing his patients for the unpaid balance due based on

his standard-rate invoices, after applying United's remittance.¹⁸ Just as in *Paracha* and *Tesser*, United claimed that the physician's standard charges were "unlawful, excessive and unenforceable,"¹⁹ and that billing patients at that level tortiously interfered with United's contractual relations with its insureds, and violated General Business Law § 349.

The court found it unlikely that United would succeed on the merits of its claims and denied injunctive relief, observing that, "while the predicate of the action against Defendants is the contention that their charges are excessive, United has not offered any evidence that such is in fact the case."²⁰ The court rejected United's suggestion that the FAIR Health guidelines constituted a binding measure: "[T]he FAIR Health database . . . has not been shown to be the sole authoritative standard."²¹ Following the filing of counterclaims by the involved provider, on December 11, 2015, the parties stipulated to discontinuance of the case, with prejudice.

Conclusion

These cases commenced by United are notable in that each involved a carrier in the role of plaintiff, seeking offensively to limit reimbursements. More commonly, the non-participating provider initiates suit in an effort to win reimbursement from a defendant carrier.²² In that setting, the physician plaintiffs frequently assert claims under the Employee Retirement Income Security Act of 1974.²³ ERISA's civil enforcement provisions provide avenues for non-participating providers to seek reimbursement at their standard rates, provided that the requisite circumstances are presented.²⁴

For the foreseeable future, non-participating providers will continue to fight for their right to standard-rate reimbursements, both in federal and state court. The series of negative decisions suffered recently in this area by United constitute important developments in a complex field.

Mark S. Mulholland is a Senior Litigation Partner and former Managing Partner of **Ruskin Moscou Faltischek, PC in Uniondale**. Mr. Mulholland represented defendants in *Paracha*.

1. Ins. Law §§ 3216(i)(9), 3221(k)(4) and 4303(a)(2).
2. See www.fairhealth.org/About-FH.
3. No. 070033/2014, Short Form Order at 1-2 (Sup. Ct., Suffolk Co. Sept. 16, 2015), available at <https://goo.gl/axRdo6>.
4. 526 U.S. 286, 291 (1999).
5. See, e.g., *Village Taxi Corp. v. Beltre*, 91 A.D.3d 92, 99 (2d Dept. 2011); *Matter of Riese*, 100 A.D.3d 516, 516 (1st Dept. 2012).
6. *Paracha*, supra n.3, at 3.
7. 4 Misc.3d 1 (App. Term 2d Dept. 2004).
8. *Id.* at *3 (emphasis added).
9. *Id.*
10. No. 606619/2014 (Sup. Ct., Nassau Co. Dec. 11, 2015).
11. No. 603617/2015 (Sup. Ct., Nassau Co. Nov. 2, 2015).
12. *Tesser*, supra n.10, at 3.
13. *Id.* at 4 (citing Ins. Law § 3224-b[b]).
14. *Davenport*, supra n. 11, at 2-4.
15. *Id.*
16. No. 58353/2015, Short Form Order at 1-2 (Sup. Ct., Westchester Co. Aug. 27, 2015).
17. *Id.*
18. *Id.* at 4-6.
19. *Id.* at 6.
20. *Id.* at 10.
21. *Id.*
22. See, e.g., *Star Multi Care Servs., Inc. v. Empire Blue Cross Blue Shield*, 6 F. Supp.3d 275 (E.D.N.Y. 2014); *The Plastic Surgery Group, P.C. v. United Healthcare Ins. Co. of New York, Inc.*, 64 F.Supp.3d 459 (E.D.N.Y. 2014).
23. 29 U.S.C. § 1001 et seq.
24. See *Neuroaxis Neurosurgical Assoc., P.C. v. Costco Wholesale Co.*, 919 F.Supp.2d 345, 351 (S.D.N.Y. 2013); *The Plastic Surgery Group, P.C.*, 64 F.Supp.3d at 459.