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## **New York’s Highest Court Rules No-Fault Insurers are Not Required to Pay a Facility Fee to Doctors’ Offices**

In a recent decision, New York’s Court of Appeals, its highest court, has ruled that no-fault automobile insurers do not have to pay a facility fee for procedures performed in private physician offices. This *GT Alert* analyzes the decision and its implications.

### Background

When a person is injured in an automobile accident and is treated in a licensed hospital or ambulatory surgery center (ASC), New York’s No-Fault Law allows the treating physician to bill and collect a “professional” fee for the physician’s services, and allows these licensed facilities to bill their “technical” or “facility” fee for providing the premises, equipment, and support personnel needed to facilitate the performance of the procedure.

Private physician office-based surgery (OBS) practices, which are not licensed by the State Department of Health (DOH), have been attempting to charge No-Fault carriers both a physician professional fee and a facility fee. These OBS practices have argued that they are entitled to collect both a professional and a facility fee because many of them are required to be “accredited” by private accreditation agencies approved by the DOH, and because the professional fee does not cover all of the OBS’s expenses.

### *Government Employees Insurance Co. et al v. Avanguard Medical Group PLLC*

In an attempt to stop what it argued was “double-dipping” by OBS practices, GEICO filed suit against an OBS practice known as Avanguard Medical Group LLC (Avanguard). GEICO sought a declaratory judgment from the Supreme Court that GEICO was not obligated to pay Avanguard a facility fee. The Supreme Court denied GEICO’s motion for summary

judgment.<sup>1</sup> Upon appeal, the Appellate Division unanimously reversed the Supreme Court and granted GEICO's motion for summary judgment, declaring GEICO is not required to pay a facility fee to Avanguard.<sup>2</sup>

Avanguard appealed, and the Court of Appeals affirmed the Appellate Division's decision.<sup>3</sup> In its opinion, the court found that the no-fault fee schedule promulgated by the New York State Department of Financial Services (DFS) provides reimbursement for physician services delivered in an OBS setting, but limits the payment of facility fees to licensed hospitals and ASCs. Moreover, the court found that under the No-Fault Regulations, reimbursement for medical services should be provided in a manner that assures consistency, and that the inclusion of an additional facility fee for services performed in an OBS would produce inconsistent results in total payment amounts within service categories.

The court rejected Avanguard's argument that OBS facilities should be treated similarly to licensed hospitals and ASCs. It distinguished hospitals and ASCs from OBS practices. The court noted that hospitals and ASCs are: (i) licensed and regulated under the Public Health Law, (ii) are subject to strict standards, and (iii) that their facility fee reimbursements are based on calculations implemented in the no-fault fee schedules, including the surcharges required by New York's Health Care Reform Act (HCRA). It found that OBS practices are not licensed or regulated by the DOH, and in fact are prohibited by DOH regulations from using the terms "facility," "center," or "clinic" as part of their business names.

Finally, the court noted that in the No-Fault Law, the Legislature capped total payment for basic economic loss and delegated the determination of fee rates to DFS. The DFS, in turn, has not chosen to include OBS facility fees in the no-fault fee schedules. Accordingly, the court found that it is up to the Legislature and not to the court to determine whether it would be better for patients to have OBS practices reimbursed a facility fee in addition to a professional fee.

### Analysis

For years, health insurers and OBS practices have been at odds over whether OBS practices should be able to collect a facility fee on top of the professional fees billed by the physicians. Some insurers uniformly reject bills for facility fees from OBS practices while others pay all or part of the facility fee.

While the Court of Appeals' decision in *Avanguard* is limited to no-fault insurers, the court did identify the clear distinction between licensed hospitals and ASCs on the one hand and unlicensed and unregulated OBS practices on the other. It thereby clearly rejected Avanguard's attempts to blur that distinction. As such, the court's decision may prompt health insurers to re-visit their policies regarding payment of facility fees to OBS practices.

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Greenberg Traurig, LLP attorneys, Carmen Beauchamp Ciparick, Francis J. Serbaroli and Anne C. Reddy, submitted an amicus curiae brief in the *Avanguard* case on behalf of the New York State Association of Ambulatory Surgery Centers and in support of GEICO's position in both the Appellate Division and the Court of Appeals.

This *GT Alert* was prepared by **Francis J. Serbaroli** and **Anne C. Reddy**. Questions about this information can be directed to:

- > [Francis J. Serbaroli](mailto:serbarolif@gtlaw.com) | +1 212.801.2212 | [serbarolif@gtlaw.com](mailto:serbarolif@gtlaw.com)
- > [Anne C. Reddy](mailto:redhya@gtlaw.com) | +1 212.801.9211 | [redhya@gtlaw.com](mailto:redhya@gtlaw.com)
- > Or your [Greenberg Traurig](#) attorney

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<sup>1</sup> *Government Employees Insurance Co. et al v. Avanguard Medical Group PLLC*, 2012 WL 1899872 (Sup. Ct. Nassau Co. 2013).

<sup>2</sup> *Government Employees Insurance Co. et al v. Avanguard Medical Group PLLC*, 127 A.D. 3d 60 (2d Dept. 2015).

<sup>3</sup> *Government Employees Insurance Co. et al v. Avanguard Medical Group PLLC*, No. 27, New York Court of Appeals, Mar. 31, 2016.

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