

6/10/2010 N.Y.L.J. 3, (col. 1)

New York Law Journal
Volume 243
Copyright 2010 ALM Media Properties, LLC

Thursday, June 10, 2010

Expert Analysis
No-Fault Insurance Wrap-Up

'SHADY GROVE,' STAMPED SIGNATURES, COLLATERAL ESTOPPEL, DISCOVERY

David M. **Barshay** and David M. Gottlieb

The U.S. Supreme Court issued its decision in [Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.](#),^[FN1] a case discussed in an earlier edition of the **Wrap-Up**.^[FN2]

By way of background, Shady Grove initiated a class action against Allstate, in the Eastern District of New York, to recover overdue interest on **no-fault** claims. The plaintiff's argument was that Allstate paid the principal, but not the interest on overdue claims. The Eastern District dismissed the action because it did not have jurisdiction to hear the case pursuant to [CPLR §901\(b\)](#).^[FN3] The U.S. Court of Appeals for the Second Circuit affirmed,^[FN4] and the Supreme Court granted certiorari.^[FN5]

The issue before the Supreme Court was whether [CPLR §901\(b\)](#), which precludes class actions in New York courts to recover a penalty, was a procedural rule or a substantive rule. If substantive, the Eastern District would have to apply New York's rule, and the Eastern District's dismissal would stand. If procedural, the federal rule, [FRCP 23](#) (the federal equivalent of [CPLR §901](#)), which has no similar restriction as to class actions to recover a penalty, would apply, and the lawsuit could proceed in federal court.

In a 5-4 decision, with Justice Antonin Scalia writing for the majority, the Supreme Court reversed. The Court held that contrary to Allstate's argument, [FRCP 23](#) specifically allows federal courts to certify a class when the rule's requirements are met and that [CPLR §901\(b\)](#) is a procedural rule: 'the substantive nature [of [CPLR §901\(b\)](#)] or its substantive purpose, makes no difference.' Rather, according to the Court, what matters is whether the federal rule 'regulates procedure.' As [FRCP 23](#) does indeed regulate procedure, the class action could proceed in federal court.

While Shady Grove surely will affect New York litigation,^[FN6] the case will have ramifications well beyond New York.

MVAIC

As most practitioners are aware, actions for the recovery of **no-fault** benefits usually turn on whether the defense asserted is a non-precludable 'coverage defense,' or a precludable 'non-coverage' defense. The latter defenses are precluded by the failure of an insurer to deny the claim within 30 days.^[FN7] In [Matter of MVAIC v. Interboro Med. Care & Diagnostic PC](#),^[FN8] the Appellate Division, First Department, added a wrinkle to this rule in actions against

the Motor Vehicle Accident Indemnification Corporation.

In this case, MVAIC defended an arbitration on the ground that the police accident report showed that the offending vehicle was registered out-of-state and was insured. The arbitrator refused to consider MVAIC's defense on the ground that MVAIC failed to deny the claim within 30 days of its submission, and such decision was affirmed by a master arbitrator. MVAIC subsequently filed a petition in Supreme Court seeking an order from the court vacating the award of the master arbitrator.[FN9] The Supreme Court denied the petition, holding that the arbitrator's and master arbitrator's decisions were not 'arbitrary, capricious, irrational or without plausible basis,' relying on [New York Hosp. Medical Center of Queens v. MVAIC](#),[FN10] which held:

The defendant neither denied the claim within 30 days after receiving it nor sought to extend that time by requesting verification (see 11 NYCRR 65.15[g][3]; [d][1]; [e]). We reject the defendant's contention that the 30-day time requirement contained in 11 NYCRR 65.15(g)(3) does not apply to it until after it has 'qualified' an injured party.

MVAIC subsequent appealed to the Appellate Division, First Department. That court unanimously reversed the Supreme Court, holding that MVAIC's defense was a nonprecludable coverage defense. This is squarely at odds with prior decisions that considered MVAIC 'qualified person' defenses as 'condition precedent,' defenses,[FN11] which are clearly precludable.[FN12]

It should be noted that the Appellate Division added a reminder that: '[T]he burden is on MVAIC to prove its lack-of-coverage defense.' Therefore, MVAIC must prove that there is no coverage rather than that the plaintiff did not prove there is coverage.

Stamped Signatures

Determining whether a signature is a stamp, facsimile, or the doctor's actual signature by hand, can be a difficult task. The Appellate Term has told us that, in a summary judgment motion, if it is unclear whether a doctor's signature is the doctor's or something else, then a triable issue of fact exists.[FN13] If it is clear that the signature is not the doctor's, the affirmation is inadmissible.[FN14] In two recent decisions, the Appellate Term has added another option and clarified what constitutes a 'properly asserted' objection to the signature.

In [Park Slope Med. & Surgical Supply Inc. v. GEICO Ins. Co.](#),[FN15] the defendant, in support of its cross-motion for summary judgment and in opposition to plaintiff's motion, argued that the plaintiff's doctor's affirmation was inadmissible because it was not an original. While acknowledging that a 'properly asserted' objection would normally create an issue of fact, the court determined that:

[T]he better practice would be for the Civil Court to hold a hearing pursuant to [CPLR 2218](#) on the limited issue of the validity of the signature upon plaintiff's doctor's 'affirmation,' which will determine whether the 'affirmation' was in admissible form (see also Uniform Rules for Civ Ct [[22 NYCRR §208.11](#)][b][4]) and, thus, whether defendant's prima facie showing upon its cross motion was rebutted.

If the defendant's prima facie showing is rebutted, then it appears as if plaintiff's summary judgment motion should be granted.

In [Ortho-Med Surgical Supply Inc. v. Mercury Cas. Co.](#),[FN16] the plaintiff, in opposing defendant's motion for summary judgment, alleged that defendant's peer review contained a stamped signature and that the peer review was therefore inadmissible. Again, the court recognized that 'properly asserted,' the objection would create an issue of fact. But in this case, it was not 'properly asserted' because the 'plaintiff's mere conclusory assertion that the peer review report contained a stamped or facsimile signature, without any indication as to why plaintiff held such belief, was insufficient to raise an issue of fact.'[FN17]

Under the present state of law, a stamped signature objection can have many outcomes: (1) If it is a conclusory assertion, with no explanation, then the objection will have no effect; (2) If it is 'properly asserted' then either a triable issue of fact will exist or the court can order a hearing pursuant to [CPLR §2218](#); or (3) If 'properly asserted' and it is clear that it is a stamped signature, then the affirmation is inadmissible.

Collateral Estoppel

Generally, a default judgment cannot be given collateral estoppel effect in subsequent litigation.[FN18] One recent case cemented this rule, as it relates to **no-fault** litigation. In [Magic Recovery Med. & Surgical Supply Inc. v. State Farm Mut. Auto. Ins. Co.](#),[FN19] State Farm received two declaratory judgments, finding that the accident was 'staged.' The judgments were issued on default, two years before the submission of plaintiff's claims. In the Civil Court, State Farm moved for summary judgment based on those declaratory judgments, arguing that collateral estoppel bars plaintiff from recovering under those claims. The motion was granted. Plaintiff appealed, and the Appellate Term reversed.[FN20]

As the plaintiff was never served in the declaratory judgment actions, and wasn't in privity[FN21] with one of the parties in the declaratory judgment actions, collateral estoppel could not successfully be invoked.[FN22] As a separate rationale, the court concluded that 'as the declaratory judgments were obtained on default, there was no actual litigation of the issues and, therefore, no identity of issues.'

Justice Joseph Golia provided a spirited dissent, which appeared to argue that the courts should carve out a special exception to the collateral estoppel doctrine, just for **no-fault** cases. He took pains to distinguish his concurring opinion in *Mid Atl. Med., P.C. v. Victoria Select Ins. Co.*[FN23]

Discovery and Arbitration

[CPLR §3102\(c\)](#) allows a party to seek disclosure in New York courts in relation to pending arbitrations. In [Matter of Travelers Indem. Co. v. United Diagnostic Imaging, P.C.](#),[FN24] Travelers moved under that section in the Supreme Court. The Supreme Court granted Travelers' motion and denied United's motion for leave to reargue. The Appellate Division reversed.

The Appellate Division found that Travelers did not show 'extraordinary circumstances' existed and that the discovery was not 'absolutely necessary for the protection' of Travelers' rights, among other things. To receive discovery in aid of arbitration, the burden on the party requesting disclosure is far beyond what is required in everyday litigation. That much is clear.

Coming Soon

The Appellate Division granted leave to appeal in [Andrew Carothers, M.D., P.C. v. GEICO Indem. Co.](#)[FN25] A reply brief was due on June 2, 2010. Oral argument will not be far off.

The issue in Carothers is whether the plaintiff's witness provided sufficient testimony to introduce the plaintiff's bills into evidence as business records under CPLR R.4518. Andrew Carothers' witness at trial was a third-party biller. The Appellate Term found that the witness' testimony was insufficient, and in doing so, distinguished its decision in *Pine Hollow Med., P.C. v. Progressive Cas. Ins. Co.*,[FN26] finding that it misapplied the law to the facts in that case.

The Appellate Division's decision has the potential to affect cases far outside the penumbra of **no-fault**.

DAVID M. **BARSHAY** is a partner at Baker, Sanders, **Barshay**, Grossman, Fass, Muhlstock and Neuwirth, in Mineola, and vice-president of New Yorkers for Fair Automobile Insurance Reform. DAVID M. GOTTSLIEB is an associate with the firm. JOSEPH A. D'AGOSTINO assisted with the preparation of this article.

FN1. [130 S.Ct. 1431 \(2010\)](#).

FN2. David M. **Barshay** and David M. Gottlieb, **No Fault Insurance Wrap-Up: 'Class Actions, Defective Assignments, Staged Accidents,'** Sept. 30, 2009 NYLJ 3, (col. 1).

An excellent discussion of the case, including a recap of the oral argument and the procedural history, can be found at the SCOTUS blog. ([http:// www.scotusblog.com/2009/11/analysis-shady-groveon-edge-of-slippery-slopes/](http://www.scotusblog.com/2009/11/analysis-shady-groveon-edge-of-slippery-slopes/)) (<http://www.scotusblog.com/2010/03/analysis-sorting-out-anerie-sequel/>) (Last visited June 3, 2010).

FN3. [466 F.Supp.2d 467 \(EDNY 2006\)](#).

FN4. [549 F.3d 137 \(2d Cir. 2008\)](#).

FN5. [129 S.Ct. 2160 \(2009\)](#).

FN6. Justice Thomas A. Dickerson, 'State Class Actions: Game Changer,' April 6, 2010 NYLJ 6, (col. 4); Barbara J. Hart and Kesav M. Wable, 'Donnelly Act Class Claimants Given New Lease on Life,' May 17, 2010 NYLJ S8, (col. 1).

FN7. See generally, [Fair Price Med. Supply Corp. v. Travelers Indem. Co., 10 N.Y.3d 556 \(2008\)](#). To be clear, there are a few defenses, which aren't coverage defenses as the Court of Appeals defines 'coverage,' which the Appellate Terms have found to be non-precludable. (e.g., Mallela defenses, independent contractor defenses.)

FN8. [2010 N.Y. Slip Op. 04522 \(1st Dept. 2010\)](#).

FN9. [2009 N.Y. Slip Op. 30536\(U\)\(Sup. Ct. N.Y. County 2009\)](#).

FN10. [12 A.D.3d 429 \(2nd Dept. 2004\)](#).

FN11. Five Boro Psychological Servs., P.C. v. MVAIC, 27 Misc.3d 131(A) (App. Term, App. Term, 2nd, 11th & 13th Jud. Dists., 2010) and Meridian Health Acupuncture, P.C. v. MVAIC, 22 Misc.3d 141(A) (App. Term, App. Term, 2nd, 11th & 13th Jud. Dists., 2009).

FN12. [Stephen Fogel Psychological, P.C. v. Progressive Cas. Ins. Co., 35 AD3d 720 \(2d Dept. 2006\)](#).

FN13. Mani Med., P.C. v. Eveready Ins. Co., 25 Misc.3d 132(A) (App. Term, 2nd, 11th & 13th Jud. Dists., 2008).

FN14. [Vista Surgical Supplies Inc. v. Travelers Ins. Co., 50 A.D.3d 778 \(2d Dept. 2010\)](#).

FN15. 27 Misc.3d. 131(A) (App. Term, 2d, 11th and 13th Jud. Dists., 2010).

FN16. [2010 N.Y. Slip Op. 50587\(U\)](#)(App. Term, 2d, 11th and 13th Jud. Dists, 2010).

FN17. Id.

FN18. [Matter of AutoOne Ins. Co. v. Valentine, 2010 NY Slip Op 03319, \(2d Dept. 2010\).](#)

FN19. [2010 N.Y. Slip Op. 20130](#) (App. Term, 2nd, 11th and 13th Jud. Dists., 2010).

FN20. In its motion for summary judgment, State Farm argued, in the alternative, that it proved that the accident was staged, independent of the declaratory judgment action. The matter was sent back to Civil Court for a determination as to the alternative argument.

FN21. Compare with [Bath Med. Supply Inc. v. Allstate Indem. Co., 2010 NY Slip Op 20059 \(App. Term, 9th & 10th Jud. Dists., 2010\)](#) and [Mia Acupuncture, P.C. v. Mercury Ins. Co., 2009 NY Slip Op 29509](#) (App. Term, 2nd, 11th & 13th Jud. Dists., 2009).

FN22. The court cited [Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481 \(1979\).](#)

FN23. 20 Misc.3d 143(A) (App. Term, 2nd & 11th Jud. Dists., 2008).

FN24. [2010 N.Y. Slip Op. 03944 \(App. Div., 2nd, 2010\).](#)

FN25. [24 Misc.3d 19](#) (App. Term, 2nd, 11th and 13th, Jud. Dists., 2009).

FN26. 13 Misc.3d 131(A)(App. Term, 2nd & 11th Jud. Dists., 2006).
6/10/2010 NYLJ 3, (col. 1)

END OF DOCUMENT