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Expert Analysis
No-Fault Insurance **Wrap**-up

CLASS ACTIONS, DEFECTIVE ASSIGNMENTS, STAGED ACCIDENTS

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The U.S. Supreme Court recently granted certiorari in Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.[FN1] from the U.S. Court of Appeals for the Second Circuit.[FN2]

Shady Grove Orthopedic Associates (a Maryland corporation) and Sonia E. Galvez[FN3] brought a class action against Allstate (an Illinois corporation) in the Eastern District of New York[FN4] for unpaid interest on **no-fault** claims pursuant to a New York insurance policy.[FN5] Those claims were paid, but for the interest. Shady Grove argued that it could get into federal court through 28 U.S.C. §1332(d)(2)(A), which gives the federal courts original jurisdiction in a class action where the amount in controversy is more than $5 million and diversity exists, and FRCP 23 allows class certification for the relief requested.

CPLR §901(b) stands at the center of this case. It bears quoting in full, so that readers can appreciate the issues that will be discussed:

Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.[FN6]

In the Eastern District, Allstate moved to dismiss the action, arguing that CPLR §901(b) is a substantive rule and, as such, the federal court must use that rule, rather than FRCP 23. Allstate further argued that as interest is a 'penalty,' the application of CPLR §901(b) requires dismissal. Shady Grove, conversely, argued that (1) CPLR §901(b) is a procedural rule and it is in conflict with FRCP 23 (the federal equivalent of CPLR §901), which contains no identical or similar restriction; (2) because it is a procedural rule, the Eastern District must apply the federal rule; and (3) the 'unless clause' of CPLR §901(b) permits the lawsuit, even if the court finds it to be a substantive rule.

The Eastern District agreed with Allstate and dismissed the action. It found that CPLR §901(b) is substantive and therefore does not invoke the Supremacy Clause[FN7] and that '[i]t would be patently unfair to allow a plaintiff an attempt at recovery in federal court for a state law claim that would be barred in state court.' Without class certification, Shady Grove was unable to maintain diversity jurisdiction, because the underlying claim was for far less than the statutory limit.

At the Second Circuit, Shady Grove added an argument in its reply brief—that the court should certify the following question to the New York Court of Appeals: whether the interest provision is a 'penalty within the meaning of CPLR §901(b).'[FN8] The Second Circuit, upon Allstate's motion, struck that portion of the brief, because that issue should have been addressed in its initial brief.

The Second Circuit discussed each of Shady Grove's arguments.

First, the court addressed the Erie[FN9] issue. Under Erie, when a federal court sits in diversity jurisdiction, it must apply a state's substantive law and the federal procedural law. It found that FRCP 23 does not conflict with CPLR §901(b); that there is no 'direct collision' with §901. It reasoned that, because FRCP 23 does not determine which actions can or cannot be brought, 'it leaves room for the operation of §901(b), ' finding it to be a substantive rule.

But would the application of CPLR §901(b) 'serve the twin aims[FN10] of Erie?' The court answered in the affirmative. Not applying the rule would, according to the court, encourage plaintiffs to file in the federal courts, rather than in New York, and it would allow them to recover in federal court, when they could not in New York.

Second, the court then discussed (and ultimately dismissed) Shady Grove's argument that under N.Y. Ins. Law §5106(a) the lawsuit can be maintained via class action because 11 NYCRR §65-3.9(c)[FN11] contemplates class actions in this context, and therefore satisfies the exception clause of CPLR §901(b). In rejecting this argument, the court found that N.Y. Ins. Law §5106(a) contains no authorization for class actions to recover a penalty and that 11 NYCRR §65-3.9(c) did not specifically authorize[FN12] class actions to recover a penalty. The Second Circuit interpreted the language of CPLR §901(b) 'provides that where a statute creates a penalty, the 'statute' itself must 'specifically authorize'' the class action. 'At most, [the] regulation contemplates the recovery of a penalty in a class action,' and contemplation is not enough. The Eastern District's decision was affirmed.

Oral argument before the Supreme Court is scheduled for Nov. 2, 2009.[FN13] The questions presented[FN14] are:

1. Can a state legislature properly prohibit the federal courts from using the class action device for state law claims?

2. Can state legislatures dictate procedure in the federal courts?

3. Could state-law class actions eventually disappear altogether, as more state legislatures declare them off limits to the federal courts?

Wrong Assignment

In Davydov v. Progressive Ins. Co.[FN15] the trial court held that plaintiff (Dr. Albert Davydov, DDS) established its prima facie case, notwithstanding that it presented an assignment for 'Dr. Albert Davydov, DDS, P.C.,' rather than 'Dr. Albert Davydov, DDS.' Defendant attempted to cross-examine plaintiff's witness as to the medical necessity of the services provided, however, the trial court did not permit it. Judgment was granted in favor of plaintiff and defendant appealed.

The Appellate Term affirmed the lower court's ruling on both issues. That the assignment is on behalf of the P.C., rather than the plaintiff is of no consequence, according to the Appellate Term, because 'A copy of the assignment accompanied plaintiff's claim form, and the discrepancy was apparent on its face.' Defendant did not seek verification with respect to the assignment, and its denial of claim form did not deny the claim on the ground that the assignment was defective. Consequently, defendant was precluded from contesting the assignment.[FN16] Moreover, the Appellate Term held the cross-examination was properly curtailed because defendant did not show that it preserved either

a fee-schedule or a medical necessity defense.

Justice Joseph G. Golia disagreed and dissented. In his dissent he distinguished this case from Hospital for Joint Diseases,[FN17] because in Hospital, the assignment was for the correct entity.

Compare this decision with Westchester Neurodiagnostic, P.C. v. Allstate Ins. Co.[FN18] where the Appellate Term, Second Department, 9th and 10th Judicial Districts, held that 'We note that, contrary to defendant's contention, proof of the assignment of benefits form is not an element of plaintiff's prima facie case' (internal citations omitted).

Benefits Previously Assigned

Another peculiar decision involving an assignment was Lopes v. Liberty Mut. Ins. Co.[FN19] In Lopes, plaintiff was not a medical provider; rather plaintiff was suing in her individual capacity. The lower court granted defendant's motion to dismiss the complaint pursuant to CPLR R. 3211(a)(7) and awarded defendant attorney's fees and costs finding that plaintiff had previously 'assigned her rights to collect **no-fault** benefits, and that, in any event, she did not plead or prove that she had paid her providers for the bills upon which she was suing,[FN20] and did not demonstrate that payment was overdue.' Plaintiff's cross-motion to strike defendant's answer was denied as moot.

The Appellate Term affirmed—against another Judge Golia dissent—the dismissal for services rendered by three providers because plaintiff 'clearly' assigned her claims to those providers. But it reversed as to the services rendered by the remaining provider, because the assignment was not 'clear.'

As a preliminary hurdle, the court found that by attaching defendant's denials, plaintiff's submission '[establishes] prima facie that the insurer received the claims referenced therein as having been submitted by the provider and that the insurer did not pay the claim.'[FN21] This, according to the Appellate Term, is sufficient to defeat a defendant's motion to dismiss, pursuant to CPLR R. 3211(a)(7) where a defendant argues that plaintiff 'failed to allege that a claim was submitted and not paid within 30 days. '[FN22] In this case, no payment had been issued to either the provider or the assignor.

The services rendered by the remaining provider were not 'clearly' assigned because it did not show an intention by plaintiff to transfer all of her rights. As a result, the 'assignment' is not a valid assignment.

Because the language of the 'assignment' is not sufficient to create a valid assignment, and plaintiff provided sufficient evidence to overcome defendant's motion to dismiss as to those claims, the Appellate Term held that plaintiff's claim should not have been dismissed, that attorney's fees should not have been awarded, and that the lower court must address plaintiff's cross-motion to strike.

Staged Accidents

In proving that an accident was intentional, defendant does not have to prove fraud. Such is the rule according to the Appellate Term, 2nd, 11th, and 13th Judicial Districts. In V.S. Med. Servs., P.C. v. Allstate Ins. Co.[FN23] defendant must only show that 'at least one driver intended to make contact, ' because, '[a] deliberate collision caused in furtherance of an insurance fraud scheme is not a covered accident.'[FN24] And defendant must show that the accident was intentional by a preponderance of the evidence, not by clear and convincing evidence.

The court did not cite or address State Farm Mut. Auto. Ins. Co. v. Langan,[FN25] an Appellate Division case decided well after State Farm Mut. Auto. Ins. Co. v. Laguerre.[FN26] Langan, readers might recall,[FN27] held that in **no-fault**, even if an accident is intentional, if the injured person was not complicit in 'misconduct, provocation, or assault' and if the accident 'was unexpected, unusual, and unforeseen' by the injured person, **nofault** coverage exists. V.S. Med does not tell us whether plaintiff's assignor was somehow complicit in the manufactured accident.

Procedural Issues

Prior to Sept. 8, 2005 a lawsuit could be initiated by service of a summons and complaint. It need not have been filed with the court prior to service; however, filing with proof of service within 14 days[FN28] was required to complete service. In J.R. Dugo, D.C., P.C. v. New York Cent. Mut. Ins. Co.[FN29] defendant moved to dismiss the complaint due to plaintiff's failure to file, in violation of former NY City Civ. Ct. Act §409, or in the alternative for summary judgment because defendant alleged that it never received the claims in dispute. Plaintiff cross-moved for nunc pro tunc relief pursuant to former NY City Civ. Ct. Act §411. The lower court denied defendant's motion. From a review of the decision, it does not appear that plaintiff's cross-motion was granted.

The Appellate Term modified and affirmed. The court found that dismissal for failure to file was inappropriate where plaintiff requests nunc pro tunc relief. And such relief should have been granted here. The court also addressed defendant's motion for summary judgment, finding

while defendant asserts that the action is premature since it never received the claims which are at issue, the affidavit of defendant's claims examiner was insufficient to establish such assertion as a matter of law

Defendant's affidavit is two paragraphs long. The second paragraph is the only one that addresses defendant's argument that it did not receive the bills. In relevant part, that affidavit reads:

In the present matter, the Plaintiff is seeking payment from the Defendant in the amount of $1,044.70 for allegedly overdue **no-fault** benefits for services rendered between 03/16/04 through 07/29/04. After reviewing the claims file in the above mentioned matter, I have personal knowledge that Defendant has not received the bills from the Plaintiff in that amount for medical services pertaining to this assignor on those dates of service.

Justice Joseph Golia dissented, preferring to dismiss the action without prejudice. He reasoned that plaintiffs failure to file the proof of service nearly two and a half years after service was effected is not a ‘mere oversight‘ by the plaintiff, and that it should have been corrected when defendant served plaintiff with a demand to purchase an index number. Further, he found that plaintiff never requested nunc pro tunc relief. Instead plaintiff stated that it would request the relief if the lower court found it to be necessary.

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FN1. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 129 S.Ct. 2160 (2009).

FN2. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 549 F.3d 137 (2d. Cir. 2008).

FN3. Sonia E. Galvez is plaintiff's assignor. The Eastern District found that, because she ‘made a complete assignment‘ of her rights to recover for the underlying claims, she did not have standing to pursue the lawsuit. This issue was not appealed.

FN4. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 466 F.Supp.2d 467 (EDNY 2006).

FN5. Shady Grove asked for other relief, however the bar on class actions deprived the court of subject matter jurisdiction and the other relief was not completely addressed.

FN6. Emphasis added.

FN7. U.S. Const. art. VI, Cl. 2
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

FN8. Shady Grove cited to Sperry v. Crompton Corp., 8 N.Y.3d 204 (2007) in support of its request for certification. This decision was issued before Shady Grove's initial brief was submitted.

FN9. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

FN10. (1) to discourage forum shopping and (2) avoid inequitable administration of the laws. Gasperini v. Center for Humanities Inc., 518 U.S. 415 (1996).

FN11. 11 NYCRR §65-3.9(c) provides:
(c) If an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken. If any applicant is a member of a class in a class action brought for payment of benefits, but is not a named party, interest shall not accumulate on the disputed claim or element of claim until a class which includes such applicant is certified by court order, or such benefits are authorized in that action by Appellate Court decision, whichever is earlier.

FN12. The court is referring to this portion of CPLR §901(b) 'Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action.' (emphasis added).

FN13. http://origin.www.supremecourtus.gov/oral_arguments/argument_ calendars/MonthlyArgumentCalNovember2009.html. (last visited 9/21/09).

FN14. http://origin.www.supremecourtus.gov/qp/08-01008qp.pdf. (last visited 9/21/09).

FN15. 2009 N.Y. Slip Op. 29299 (App. Term, 2nd, 11th, and 13th Jud. Dists. 2009).

FN16. The Court cited to Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 N.Y.3d 312 (2009).

FN17. Supra.

FN18. 24 Misc.3d 133(A)(App. Term. 9th and 10th Jud. Dists. 2009).

FN19. 24 Misc.3d 127(A)(App. Term, 2nd, 11th, and 13th Jud. Dists 2009).

FN20. The Appellate term noted that plaintiff need not 'prove that she issued payment for treatment.'

FN21. Internal citations omitted.

FN22. The court qualified this by stating that, while it shows that defendant received and did not pay the claims, it is not sufficient to make out a plaintiff's prima facie case. Compare, Tenenbaum and Scahill, 'What Constitutes a 'Prima Facie' Case in **No-Fault** Practice?' Aug. 4, 2009, NYLJ 4 (col. 1.)

FN23. 2009 N.Y. Slip Op. 29310, (App. Term 2nd, 11th and 13th Jud. Dists, 2009).

FN24. For this the Court quotes State Farm Mut. Auto. Ins. Co. v. Laguerre, 305 A.D.2d 490 (2d Dept. 2003).

FN25. State Farm Mut. Auto. Ins. Co. v. Langan, 55 A.D.3d 281 (2d Dept. 2008), app. dismissed 12 N.Y.3d 883 (2009).

FN26. 305 A.D.2d 490 (2d Dept. 2003).

FN27. Langan was discussed in two prior **wrap**-ups. **Barshay** and Schatz, 'Intentional Accidents Are Covered Under **No-Fault**,' NYLJ Sept. 30, 2008, p. 3, col. 1; **Barshay** and Gottlieb, 'On Class Actions, Endorsements and Expert Reports,' NYLJ Jan. 23, 2009, p. 3, col. 1.

FN28. Withsomeexceptionsnotrelevanthere.

FN29. 24 Misc.3d 68 (App. Term 2nd, 11th and 13th Jud. Dists. 2009).
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