

A05-2020
A06-58
A06-59

In Court of Appeals

IN RE THE CLAIMS FOR NO-FAULT BENEFITS
AGAINST PROGRESSIVE INSURANCE COMPANY,

PROGRESSIVE INSURANCE COMPANY,

Appellant,

vs.

PEDRO SANCHEZ, ANETH GALINDO, FRANCISCO MARTINEZ,
ELIZUR GARCIA, ELMER MINERO, BLANCA BONAVIDES,
PEDRO FERNANDEZ, MARIA CASTREJON, LUIS PALLARES,

Respondent.

APPELLANT'S BRIEF AND APPENDIX VOLUME I

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STATEMENT OF LEGAL ISSUES

- I. Whether the district court violated Appellant's due process rights by converting a motion to stay into a Order denying Appellant's motion to vacate.

Trial Court's Ruling: The Trial Court held that it had no legal basis to stay an arbitration award and then denied Appellants remaining issues regarding the motion to vacate the arbitration award.

Apposite Cases:

- 1) Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1975)

Apposite Statutes:

None

- II. Whether the Trial Court judicially created "constructive denial" conflicts with existing law and rules.

Trial Court Ruling: The Trial Court created a "constructive denial" for procedural purposes to attach jurisdiction to the arbitrators.

Apposite Cases:

- 1) Weaver v. State Farm Insurance Companies, 609 N.W.2d 878, 885 (Minn. 2000)

Apposite Statutes:

- 1) Minn.Stat, §60A.951
- 2) Minn.Stat. §60A.954
- 3) Minn.Stat. §65B.525, subd. 1
- 4) Minn.Stat. §72A.201
- 5) Minn.No-FaultArb.R., Rule 5

- III. Whether the Trial Court erred in determining it had no authority to stay further proceedings pending a federal court action.

Trial Court Ruling: The Trial Court adopted Judge Burkes ruling which is on appeal A05-2020.

Apposite Cases:

- 1) Green Tree Acceptance, Inc. v. Midwest Federal Savings and Loan Assoc. of Minneapolis, 433 N.W.2d 140 (Minn.App. 1988)

Apposite Statutes:

None

- IV. Whether the trial court can vacate a no-fault arbitration award procured by corruption and fraud by a medical provider for the claimant despite no allegation of fraud or corruption by the arbitrator or claimant.

Trial Court Ruling: The Trial Court held that an award can only be vacated if there was corruption or fraud on the part of the claimant.

Apposite Cases:

None

Apposite Statutes:

- 1) Minn.Stat. §572.19, subd. 1(1).

- V. Whether the trial court violated Appellant's due process rights when it issued an Order sanctioning Appellant

Trial Court Ruling: The Trial Court did not have any findings to support an award of sanctions.

Apposite Cases:

- 1) Leonard v. Northwest Airlines, Inc., 605 N.W.2d 425, 432, 433 (Minn.App. 2000) review denied (Minn.App. 18, 2000)

Apposite Statutes:

1) Minn.Stat. §549.211

STATEMENT OF THE CASE

This appeal arises out of nine no-fault arbitration awards that were pending in the Second, Fourth and Tenth Judicial Districts on Appellants motions to vacate the arbitration awards or stay the proceedings until a related case in federal court is concluded. On September 12, 2005, the Minnesota Supreme Court consolidated the cases before the Honorable Charles A. Porter, Hennepin County District Court Judge. The Honorable Charles A. Porter by letter dated September 15, 2005 set the matter for hearing for October 16, 2006 on the motion to stay the proceedings until a related case in federal court is concluded and any motions to confirm the arbitration awards.

Appellant submitted its memorandum of law in support of a stay due to the pending federal civil RICO action and also requested the arbitration awards be vacated because the arbitrators lacked subject matter jurisdiction. Respondents brought numerous motions to confirm the awards and motions for sanctions.

The Trial Court conducted a hearing on October 6, 2005 and then entered an Order confirming the arbitration awards and denying Appellant's motion to vacate or stay the arbitration awards. The Trial Court also ordered that sanctions be paid to each Respondent and incorporated its memorandum into the Order. Appellant filed the Notice of Appeal on January 10, 2006 and moved to consolidate the appeals with two other appeals arising from similar issues. The Court of Appeals consolidated this appeal with appeals A05-2020 and A06-58 on January 27, 2006.

STATEMENT OF FACTS

This matter arises out of a consolidation by the Minnesota Supreme Court of Appellants' motions to vacate the no-fault arbitration awards of nine claimants that were pending in the Second, Fourth and Tenth Judicial Districts.¹ Appellant had moved to vacate the arbitration awards based on the provisions of Minn.Stat. §572.19, subd. 1 for:

- (1) fraud and corruption;
- (2) that the arbitrator's exceeded their authority;
- (3) that the American Arbitration Association lacked subject matter jurisdiction because there was no denial that triggered jurisdiction; and
- (4) Appellants requested a stay of further proceedings based on a federal civil RICO action started in federal court.

FN²

All of the claimants in this case sought treatment with Dr. Josh Anderson at Alivio Chiropractic Clinic (Alivio) and massage therapy with Andrea Bongart (Bongart). All of the outstanding medical bills claimed at the arbitrations were for alleged treatment at Alivio and Bongart.³ Appellant had not denied no-fault coverage to any of the above claimants but did delayed payment of medical bills to Alivio and Bongart pending further investigations. All other medical bills were paid.

The following are the claimant's and the medical claims at the arbitrations at issue in this appeal:

<u>Claimant Name</u>	<u>Amount Awarded</u>	<u>Clinic</u>	<u>Arb. Award Date</u>
1) Blanca Bonavides	\$4,285.00	Alivio	3-9-05
2) Pedro Fernandez	\$5,715.00	Alivio & Bongart	2-22-05

¹ Notice of Motion and Motion. (A-1 to A-24).

² *Id.* at (A-1 to A-3, A-13 to A-14, and A-21 to A-22)

³ *Id.* at (A-4 to A-11, A-15 to A-19, and A-23)(There was one medical bill that had not been submitted to Appellant prior to the arbitration and is not at issue)

3)	Aneth Galindo	\$6,135.00	Alivio & Bongart	5-11-05
4)	Elizur Garcia	\$2,315.70	Alivio & Bongart	4-23-05
5)	Elmer Minero	\$6,010.68	Alivio & Bongart	4-08-05
6)	Francisco Martinez	\$4,790.00	Alivio	4-29-05
7)	Luis Pallares	\$864.00	Alivio	11-20-03
8)	Maria Casterjon	\$3,131.82	Alivio & Bongart	2-11-05
9)	Pedro Sanchez	\$6,695.35	Alivio	7-13-05

FN.⁴

On May 18, 2005 Appellant filed a federal civil RICO case against Alivio, Dr. Josh Anderson, Alex Alarcon Aguilar, Bongart and Mark Anthony Karney.⁵ The federal action arises out of a systematic scheme to exploit illegal aliens within the State of Minnesota in order to defraud insurance companies and its policy holders for medical expense benefits under Minnesota's No-Fault Automobile Insurance Act for direct financial gain and to systematically inflate the nature and value of the claims to meet the required tort thresholds for purposes of obtaining higher personal injury settlements for automobile accidents occurring within the State of Minnesota.⁶

Appellant alleged as causes of action in the federal case violations of 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1512 (relating to tampering with a witness, victim, or an informant) and 8 U.S.C. § 1324 (formerly § 274) (relating to bringing in and harboring certain aliens); 18 U.S.C. § 1962(d) (RICO

⁴ MemoLawSupportMotionStay. (A-154 to A-155).

⁵ Federal RICO Complaint. (A-183 to A-353).

⁶ Id.

conspiracy), unjust enrichment, intentional and negligent misrepresentations, constructive trust, 18 U.S.C. § 1035 (health care fraud), Minn.Stat. §65B.54, subd. 4 (No-Fault fraud) and violation of the corporate practice of medicine doctrine.⁷

In support of its allegations, Appellant detailed the factual basis for the causes of action and addressed each of the above claimants involved in this motion as Claimants 1-55.⁸ Appellant detailed some of the known fraudulent activities that occurred including those activities at the arbitration hearing.⁹ In Dr. Josh Anderson and Alivios' Answer to the federal complaint, they counterclaimed against Appellant for the outstanding medical expenses that are at issue in this appeal and alleged that the claimants had assigned their right to those benefits to Dr. Anderson and Alivio.¹⁰

The Minnesota Supreme Court consolidated the motions to vacate or stay before the Honorable Charles A. Porter, Hennepin County District Court Judge on September 12, 2005.¹¹ On September 15, 2005 Judge Porter sent a letter establishing a hearing date of October 26, 2005 to address the motion to stay the proceedings and any motion to confirm the arbitration awards.¹² Appellant submitted a brief on the issue of whether a stay of proceedings is needed until a related case in federal court is concluded and moved to have the arbitrations dismissed for lack of subject matter jurisdiction.¹³ Respondents submitted numerous motions to confirm the award and to resist the motion to vacate

⁷ Id. at (A-235 to A-244)

⁸ Id. at (A-204 to A-227)

⁹ Id.

¹⁰ Anderson, Alivio and Aguilar Answer. (A-364)

¹¹ Order (A05-1635) dated September 12, 2005 (A-91 to A-93)

¹² Letter dated September 15, 2005. (A-100)

¹³ MemoLawSupportMotionStay. (A-154 to A-165).

along with motions for sanctions against Appellant.¹⁴ Respondents also provided briefs in opposition to Appellant's request for a stay.¹⁵

At the hearing on October 26, 2005, it was clear that Judge Porter had "no intention of staying these proceedings based on the written submissions."¹⁶ The hearing then turned to the issue of vacating the arbitration awards.¹⁷ The discussion at the hearing turned to what Judge Porter unilaterally deemed a "tactical decision" not to litigate the fraud issues at arbitration when Appellant was investigating the claim.¹⁸ Appellant maintained at the hearing that such investigatory information is protected from disclosure as a matter of law.¹⁹ Given the nature of the questions and statements made by Judge Porter, Appellant requested that it be allowed to brief the issue on investigation of fraud as it relates to disclosure. Appellant was informed that the investigation of fraud and disclosure was not an issue before the Court.²⁰

On November 18, 2005, Judge Porter entered an Order confirming the arbitration awards and denying all of Appellant's motions to vacate the arbitration awards or stay the proceedings.²¹ Judge Porter also ordered that Appellant shall pay sanctions to each Respondent in the amount of \$1,500.00 and attached a memorandum as part of his Order.²² Judge Porter in his memorandum determined that an arbitration award cannot be

¹⁴ RespondentMotions. (A-25 to A-27; A-33 to A-34; A-39 to A-40; A-47 to A-48; A-53 to A-58; A-59 to A-61; A-75 to A-77; A-94 to A-98; A-101 to A-105; A-110 to A-112; and A-137 to A-139).

¹⁵ RespondentMemoLawOppStay. (A-367 to A-377; A-510 to A-522; and A-523 to A-535).

¹⁶ Transcript, dated 26 October, 2005, at p 6, ¶¶5-8

¹⁷ *Id.* at ¶¶16-19

¹⁸ *Id.* at pp. 7-12.

¹⁹ *Id.* at pp. 13-15.

²⁰ *Id.* at p. 8, ¶¶16-19 and p. 27, ¶¶18-22.

²¹ Order, dated November 18, 2005. (A-536 to A-543).

²² *Id.* at (A-537).

vacated if there is no fraud by the Respondents.²³ Judge Porter then adopted the concept of a “constructive denial” for procedural purposes based on his characterization of Appellant’s “indefinite suspense due to fraud” to allow jurisdiction for no-fault arbitrations.²⁴ Judge Porter also adopted Judge Burkes ruling from a related case (Appeal A05-2020) on the stay of proceedings.²⁵

ARGUMENT

I. The district court violated Appellant’s due process rights when it converted a court established motion to stay into a motion to vacate the arbitration awards and rendered an Order denying Appellant’s motion to vacate.

The United States Supreme Court has consistently held that due process requires some form of hearing--the opportunity to be heard at a meaningful time, and in a meaningful manner.²⁶ On a motion to vacate an arbitration award based on an allegation of corruption, fraud and undue means, due process should require that the trial court conduct an evidentiary hearing and enter findings of fact and conclusions of law upon any issue presented in the motion to vacate the award.²⁷

In the present case, the trial court in a letter dated September 17, 2005 set the hearing for October 26, 2005 to determine Appellant’s motion to stay the proceedings and to hear Respondent’s motions to confirm.²⁸ Appellant brought its motions to vacate based on corruption and fraud and alleged that the arbitrators lacked subject matter

²³ *Id.* at (A-540).

²⁴ *Id.* at (A-540 to A-541)

²⁵ *Id.* at (A-541 to A-542).

²⁶ *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1975)

²⁷ See *Medina v. Foundation Reserve Ins. Co.*, 123 N.M. 380, 940 P.2d 1175 (1997)

²⁸ Letter, dated September 15, 2005. (A-100)

jurisdiction because there had not been a denial of benefits as required by Minnesota's No-Fault Arbitration Rule.²⁹ Appellant in response to Judge Porter's request submitted its memorandum of law in support of a stay and also briefed the issue regarding the lack of subject matter jurisdiction.³⁰ "A party may raise an objection based on lack of subject matter jurisdiction at any stage of a proceeding."³¹

In the present case, Appellant asserts that Judge Porter violated its due process rights by scheduling a hearing and defining the issues to be heard only to render an Order denying all of Appellant's grounds for vacating the arbitration award along with the issue on staying the proceedings.³² This determination was based on an incorrect legal determination that an arbitration award could not be vacated for fraud or other undue means unless the allegation was against the claimant. Judge Porter ignored that the allegations of fraud and undue means were also alleged against the claimants' attorney, Mark Karney.

Judge Porter then went on to make unsupported factual allegations that Appellant's never informed the arbitrators that it challenged their jurisdiction and alleged that Appellant made a "tactical" decision not to inform the arbitrators about the ongoing investigation.³³ However, the Trial Court record contains documentation that Appellant

²⁹ Notice of Motion and Motion. (A-1 to A-24)

³⁰ MemoLawSupportMotionStay. (A-154 to A-165).

³¹ Minn.R.Civ.P. 12.08(c); Mangos v. Mangos, 117 N.W.2d 916, 918 (1962).

³² Order, dated November 18, 2005. (A-536 to A-543)

³³ Id. at (A-540).

did in fact raise the issue of a lack of subject matter jurisdiction to the arbitrators who actually ruled on the issue.³⁴

Appellant at the hearing had requested permission on numerous occasions to brief some of the issues in this appeal. Judge Porter informed Appellant that the issues were “tactical” decisions and did not give Appellant an opportunity to brief this issue stating that “it’s not an issue that’s before me.”³⁵ Notwithstanding this statement, Judge Porter’s Order relied upon the issue of whether an insurer can investigate insurance fraud without disclosure and without being subject to no-fault arbitrations without a denial of claim and created the “constructive denial” standard. If in fact due process requires a “meaningful” hearing on the issues, Appellant did not receive one even after requesting to brief an issue that the Trial Court relied upon in denying Appellant’s motion.

Appellant requests that the Appellate Court reverse those portions of the Order that have violated Appellant’s due process rights.

II. The district court’s judicially created “constructive denial” to trigger jurisdiction for No-Fault Arbitration contradicts and conflicts with existing laws and rules.

Judge Porter in his Order dated November 18, 2005 created a new form of denial which he labeled “constructive denial” in order to attach subject matter jurisdiction for the arbitrations at issue. Judge Porter held that Appellant’s suspension of payment “pending further investigation” amounted to an indefinite suspension and was a constructive denial for procedural purposes and the

³⁴ Notice of Motion and Motion (A-11, and A-18 to A-19 to A-24).

³⁵ Transcript, dated 26 October, 2005, at pp.27-28, ¶¶16-19.

arbitrators had authority for purposes of Minn.Stat. §572.19 to adjudicate the claims.³⁶ Judge Porter further held that Appellant refused to attend certain arbitrations and “never articulated to any of the arbitrators that it challenged their jurisdiction because of the ongoing investigation of Alivio and Bongart.”³⁷ Finally, Judge Porter, being consistent with Judge Burke’s prior decision in a similar case appeal A05-2020, ruled that Appellant made a “tactical” decision to not inform the arbitrators of its ongoing fraud investigation.³⁸

Appellant asserts that Judge Porter’s judicially created rule on “constructive denial” is in direct contradiction to the statutes that were enacted to regulate Appellant’s conduct when investigation claims and the procedural rules promulgated by the Minnesota Supreme Court in conferring jurisdiction for mandatory no-fault arbitrations. These statutes and rules recognize and work in sync with each other to insure the fairest system and to promote both public policy concerns (prevention of insurance fraud and prompt payment of medically appropriate treatment) within the State of Minnesota.

A. Statutory Framework

Under Minnesota law an insurance company has a statutory duty to “institute, implement, and maintain” an antifraud plan that it designed, in part, to diminish “claims fraud.”³⁹ This plan is then reviewed by the Commissioner of

³⁶ Order, dated November 18, 2005. (A-536 to A-543). (No-Fault Arbitrators derive authority pursuant to Minn.Stat. §65B.525 and the No-Fault Act)

³⁷ Id.

³⁸ Id.

³⁹ Metropolitan Prop. & Cas. Ins. Co., 2003 WL 21008323 (Minn App. 2003); citing Minn Stat. §60A.954, subd. 1(1), attached at (A-544 to A-546)

Commerce.⁴⁰ The commissioner must withhold from public inspection any part of an insurance company's antifraud plan as long as the withholding is deemed to be in the public interest.⁴¹ The purpose behind non-disclosure of the plan is to prohibit those who commit insurance fraud from gaining an advantage in how an insurance company looks for and investigates insurance fraud.

Under Minnesota law, "insurance fraud" is defined as follows:

Subd. 4. **Insurance fraud.** "Insurance fraud" occurs when a **person** presents or causes to be presented to any insurer, or prepares with knowledge or belief that it will be so presented, a written or oral statement, including a computer-generated document, an electronic claim filing, or other electronic transmission, that contains materially false or misleading information, or a material and misleading omission, concerning:

- (1) an application for the issuance of an insurance policy;
- (2) the rating of an insurance policy;
- (3) a claim for payment, reimbursement, or benefits payable under an insurance policy to an insured, a beneficiary, or a third party;
- (4) premiums on an insurance policy; or
- (5) payments made in accordance with the terms of an insurance policy.

FN⁴²

A person for purposes of insurance fraud is defined as a "natural person, company, corporation, unincorporated association, partnership, professional corporation, and any other entity."⁴³ Therefore, Judge Porter's contention that fraud investigations must only involve the "insured" or claimant in order for an

⁴⁰ Minn. Stat. §60A.954, subd. 2

⁴¹ Id.

⁴² Minn. Stat. §60A.951, subd. 4

⁴³ Minn. Stat. §60A.951, subd. 5a

insurance carrier to investigate fraud or suspend payment pending a fraud investigation is contrary to the specific and unambiguous language contained within the above statute.

The legislature went on to define what an “insurance transaction” is for purposes of insurance fraud:

Insurance transaction. "Insurance transaction" means a transaction by, between, or among:

- (1) an insurer or a person who acts on behalf of an insurer; and
- (2) an insured, claimant, applicant for insurance, public adjuster, insurance professional, practitioner who performs professional services as defined by section 319B.02, subdivision 19, attorney, or any person who acts on behalf of any of the foregoing for the purpose of obtaining insurance or reinsurance, calculating insurance premiums, submitting a claim, negotiating or adjusting a claim, or otherwise obtaining insurance, self-insurance, or reinsurance, or obtaining the benefits or annuities thereof or therefrom.

FN⁴⁴ It is clear that the Minnesota legislature specifically identified those “insurance transactions” that occur between an insurance company and a practitioner who performs professional services as defined by the Minnesota Professional Firms Act, section 319B.02 (Chiropractors, Medical Doctors) would be subject to investigation for insurance fraud and part of the antifraud plan.⁴⁵ Minnesota’s No-Fault Act and certain provisions of Minnesota’s Health Care Containment Act also allow medical providers to make a legal attachment on benefits, including an assignment, and submit the claim for re-imburement

⁴⁴ Minn.Stat, §60A.951, subd. 4c.

⁴⁵ Id.

directly to the insurance company.⁴⁶ Alivio has claimed such an assignment to those benefits in its Answer to the federal Complaint that the Respondents are now seeking.

B. No-Fault and the Unfair Claims Practices Act

Minnesota's No-Fault Act provides for mandatory submission to binding arbitration all cases at issue where the claim at commencement of arbitration is in an amount of \$10,000 or less.⁴⁷ The Minnesota legislature tasked the Supreme Court and the several courts of general trial jurisdiction to adopt rules of court or other constitutionally allowable device for such submissions.⁴⁸ In accordance with that mandate the Minnesota Supreme Court promulgated Minnesota's No-Fault Arbitration Rules, which provides the rules for initiating arbitration including when a claim can be filed.⁴⁹

Minnesota's No-Fault Arbitration Rules provides that "[a]t such time as the respondent denies a claim, the respondent shall advise the claimant of claimant's right to demand arbitration."⁵⁰ A "denial of claim" occurs "[i]f a respondent fails to respond in writing within 30 days after reasonable proof of the fact and the amount of loss is presented to the respondent, the claim shall be deemed denied for the purposes of activating these rules."⁵¹

⁴⁶ Minn. Stat. §65B.57 and Minn.Stat. §62J.53 and 62J.535.

⁴⁷ Minn. Stat. §65B.525, subd. 1.

⁴⁸ Id.

⁴⁹ Minn.No-FaultArb.R., Rule 5.

⁵⁰ Minn.No-FaultArb R., Rule 5a.

⁵¹ Minn.No-FaultArb R., Rule 5d.

In other words, for purposes of triggering jurisdiction for no-fault arbitration when an insurance carrier denies a claim they are required to advise the claimant of the right to mandatory arbitration. If a claim is submitted and the insurer fails to respond to the claim in writing then the claim is deemed denied. However, nowhere in the arbitration rules does it state that if an insurer fails to pay a claim within 30 days or delay payment pending an investigation that the claim is deemed denied.

The triggering event for attaching jurisdiction is a non-written response within 30 days of the claim being submitted and nothing more. This provision conforms to the provisions of the Unfair Claims Practices Act which allows an insurer to investigate claims and provides very specific regulations as to how they must respond to a claim if acceptance or denial cannot be made within the time lines required.⁵²

The Minnesota Supreme Court has noted that under the statutory scheme of the No-Fault Act, which clearly requires that medical expense be paid promptly, that the “statutory scheme also recognizes that insurers will at times need more than 30 days to investigate a claim (including arranging for an IME), and may ultimately deny some claims.”⁵³ Under the Unfair Claims Practices Act, an insurer is required to complete its investigation and inform the insured or “claimant” of acceptance or denial of a claim within 30 business days after

⁵² Minn.Stat. §72A.201

⁵³ See Weaver v. State Farm Insurance Companies, 609 N.W.2d 878, 885 (Minn. 2000); citing Minn. Stat. §§ 65B.54, subd. 5 (1998); 72A.201, subd. 4(3) (1998).

notification of the claim.⁵⁴ If the investigation cannot be completed in that time the insurance company is required to notify the insured or “claimant” within that time period of the reasons why the investigation is not complete and the expected date the investigation will be complete.⁵⁵

There is an exception to this notification requirement. That exception is when evidence of suspected fraud is present, the requirement to disclose the reasons as required above need not be specific.⁵⁶ However, the insurer must make the evidence of suspected fraud available to the Department of Commerce if requested.⁵⁷ The purpose of this provision is the same as the requirement that an insurance company’s anti-fraud plan not be disclosed. The legislature did not want the individuals committing the fraud to find out of an ongoing fraud investigation or what exactly the insurance company was investigating so they could conceal or correct the activity.

The Unfair Claims Practices Act specifically makes such fraud investigation unavailable to the insured or claimant who has submitted a no-fault claim pursuant to Minnesota’s No-Fault Act, Minn.Stat. §65B.44.⁵⁸ Therefore, it is clear that in enacting the various provisions dealing with insurance fraud in the State of Minnesota, the legislature intended for information concerning an insurance company’s plans on investigating fraud, how it handles fraud

⁵⁴ Minn.Stat. §72A.201, subd. 4(3)(i).

⁵⁵ Id.

⁵⁶ Minn.Stat. §72A.201, subd. 4(4)

⁵⁷ Id.

⁵⁸ Minn.Stat. §72A.201, subd. 6(13)(An insurer is not required to provide an insured “materials that relate to any insurance fraud investigation.”)

investigations and the material obtained during a fraud investigation remain confidential and not subject to disclosure to the public or other persons with the exception of those agencies tasked with regulating the insurance industry.

The Minnesota No-Fault Act, including Minnesota's No-Fault Arbitration Rules was enacted and adopted to co-exist with the provisions of the Unfair Claims Practices Act. The No-Fault Arbitration Rules only allow for initiation of arbitration if an insurer fails to provide a written response to a claim within 30 days of the submission of the claim. This is consistent with the requirement that an insurer within 30 days of having a claim submitted notify the insured of its decision in writing, either accepting or denying the claim (which would trigger arbitration); or notify the insured that the investigation is not complete for certain reasons (which may include obtaining an IME, additional medical records, etc.); or a written response that is not specific that there is "pending further investigation" when conducting a fraud investigation.

Judge Porter's new "constructive denial" to trigger jurisdiction for no-fault arbitration ignores this statutory framework and the specific unambiguous rules adopted by the Minnesota Supreme Court which do in fact take into consideration these other statutory provisions. The question Appellant and other insurance companies are faced with is whose rules do they follow? Those rules and regulations adopted by constitutional authority or a those rules created by a single judge from the bench.

Appellant strongly urges the Appellate Court to overturn Judge Porter's adoption of a "constructive denial" to trigger no-fault arbitration jurisdiction as there are already statutes and rules adopted that provide for initiation of arbitration.

III. The district court erred when it determined that it had no authority to stay further proceedings pending the outcome of the related Federal Civil RICO court action.

Judge Porter relied exclusively on Judge Burkes Order on this issue which has been previously briefed in appeal A05-2020. However, Judge Porter had the benefit of being fully briefed on this issue and given the applicable law but still failed to address the legal and factual issues involved in determining whether a stay should be granted in this case. The legal issue of whether to stay a state court proceeding pending the outcome of a related federal court action has been litigated throughout the United States, including Minnesota and the courts have broken down and commingled two distinct legal terms of "abatement" and a "stay" when deciding this issue.⁵⁹ However, "abatement" is a matter of right and a "stay" of further proceedings is a matter of discretion.⁶⁰

On the issue of whether a pending suit in federal court between the same or similar parties and concerning the same subject matter is grounds for abatement, a number of states have held in the negative on that issue.⁶¹ In Minnesota, earlier cases applied a

⁵⁹ Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State, § 1, 56 A.L.R. 2d 335 (1957-2005).

⁶⁰ Id. citing Evans v. Evans, 186 S.W.2d 277 (Tex. Civ. App. 1945)

⁶¹ Id., §2.

“priority over action” analysis in determining whether to abate a state court proceeding.⁶²

However, a “stay” of proceedings is not a matter of right, but a matter of comity and discretion.⁶³ Irrespective of whether an “abatement” should apply in such a case at issue here, most courts, including Minnesota, recognize the power to stay a proceeding until determination of a pending federal action.⁶⁴

The general rule in Minnesota is that where two courts have concurrent jurisdiction, the first to obtain jurisdiction has priority to decide the case, but this general rule has exceptions.⁶⁵ In the present case, Alivio and Dr. Anderson have counterclaimed for the outstanding medical expense benefits at issue in the nine arbitration awards and have claimed they have an assignment of those benefits. Therefore, it is clear that two courts have concurrent jurisdiction over this action.

When deciding to defer to another court, the trial court “**must** determine which action will best serve the parties need for a comprehensive solution, consider judicial economy, cost and convenience to the litigants, and assess the possibility of overlapping multiple determination of the same dispute.”⁶⁶ The court should also consider the desirability of avoiding piecemeal litigation in making a decision on whether to defer to

⁶² See McCormick v. Robinson, 139 Minn. 483, 167 N.W. 271 (Minn. 1918)(If an action in state court is commenced prior to the federal court action then such action has priority over action in federal court); See also Eways v. Governor’s Island, 326 N.C. 552, 391 S.E.2d 182 (N.C. 1990).

⁶³ Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State, § 2, 56 A.L.R. 2d 335 (1957-2005).

⁶⁴ See Green Tree Acceptance, Inc. v. Midwest Federal Savings and Loan Assoc. of Minneapolis, 433 N.W.2d 140 (Minn. App. 1988); Werlein v. Federal Cartridge Corp., 401 N.W.2d 398 (Minn. App. 1987) Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State, § 1, 56 A.L.R. 2d 335 (1957-2005)

⁶⁵ Green Tree Acceptance, Inc. v. Midwest Federal Savings and Loan Assoc. of Minneapolis, 433 N.W.2d 140, 141-142 (Minn. App. 1988); citing Minnesota Mutual Life Insurance v. Anderson, 410 N.W.2d 80, 82 (Minn. App. 1987).

⁶⁶ Id. (Emphasis Added)

another court.⁶⁷ In the present case, Judge Porter did not make any such determination as is required by case law and simply adopted another Judge's ruling on this issue.

Other jurisdictions have applied the following factors in making such a determination on staying further proceedings:

- 1) Prior commencement of action;
- 2) Requirement that federal adjudication affect the outcome of the state court proceeding;
- 3) Identity of parties;
- 4) Identity of causes of action and issues; and
- 5) Matter is subject to counterclaim in federal court.

FN⁶⁸

A. Prior Commencement of Action.

In this particular case, the federal court action against Alivio, Dr. Anderson, Bongart, Alexis Aguilar and Mark Karney was started prior to bringing the motions to vacate the arbitration awards based on corruption and fraud as alleged in the federal court action. Appellant's causes of action for fraud, including mail and wire fraud, conspiracy, witness tampering, no-fault fraud, common law fraud, unjust enrichment, etc. did not accrue until such action could be brought without being subject to dismissal for failure to state a claim upon which relief could be granted.⁶⁹

Therefore, this case should be subject to the exception to the general rule in Minnesota as set forth in Green Tree Acceptance because deferring to the federal court action is in the best interests of judicial economy, will provide a comprehensive solution

⁶⁷ Id.; citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 818, 96 S Ct. 1236, 1246, 47 L.Ed.2d 483 (1976).

⁶⁸ Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State, § 5, 56 A L.R. 2d 335 (1957-2005)

⁶⁹ Minn.Stat. §541 05 Subd. 1(6)(2000); See also Herrmann v. McMenemy and Severson, 590 N W 2d 641, 643 (Minn. 1999).

to the issue of the procurement of the arbitration award by fraud and corruption and will avoid the possibility of overlapping and/or inconsistent determinations of the same dispute. It will also avoid piecemeal litigation by providing one venue for adjudication of the issues especially given the assignment of benefits and counterclaim made by the treating practitioners in the federal case.

B. The Federal Adjudication will Affect Outcome of the Motion to Vacate.

The core issue in dispute is whether the arbitration award was procured by fraud, corruption and undue means by the activities of the Respondent's treating chiropractor. The federal Complaint details the scheme involving the chiropractor and others including specific breakdowns of fraudulent activities that occurred during the arbitration process. If Appellant is successful in its case in federal court, the issue of fraud and corruption as it relates to the motion to vacate will be settled. If Appellant is not successful, the issue of fraud and corruption will be settled to its detriment including payment of 15% penalty interest for such stay of proceedings.

C. Identity of Parties.

While the identity of the parties in the federal court case and the Respondent in this proceeding are different in terms of name, the identity of the medical providers who claim medical expense benefits under the No-Fault Act are identical to the federal court action. The medical provider is claiming an assignment of those benefits and has asserted a counterclaim in the federal court action for the outstanding medical benefits. As such the identity of parties are the same in both cases.

D. Identity of Causes of Actions and Issues.

As stated previously, the one issue involved is the corruption and fraud of the treating chiropractic provider, Alivio and Dr. Anderson, and a scheme by these individuals to exploit a class of individuals and defraud Appellant and others for no-fault benefits for their own financial gain. Appellant started its action in federal court based upon federal civil RICO violations, allegations of fraud and other causes of action. The motion to vacate the arbitration award was initiated on the basis it was procured by corruption and fraud on the part of the treating chiropractic clinic; therefore, the causes of action and issues are identical.

E. Matter Subject to Counterclaim in Federal Court.

Alivio and Dr. Anderson have affirmatively alleged in their counterclaim to the federal Complaint that ten of the twelve claimants referenced in it have attended arbitration and that each claimant had assigned no-fault medical expense benefits to Defendants Dr. Anderson and Alivio. The Defendants then requested judgment against Appellant on their counterclaim for all sums due and owing for services rendered to the claimants referenced in the Complaint.

It is clear that the issue of the outstanding medical expense benefits awarded at this arbitration hearing is now firmly before the federal court on counterclaim of Defendants Dr. Anderson and Alivio. Secondly, this counterclaim was the first time that Appellant was made aware that the claimants had assigned those benefits to Alivio and Dr. Anderson. Therefore, because Alivio and Dr. Anderson have taken it upon themselves to bring a counterclaim for those outstanding bills that were awarded by the

arbitrators, the claimants no longer face an economic detriment and lack standing to pursue this matter further.

Appellant requests that the Appellate Court overrule Judge Porter's Order regarding the stay and remand the issue back to the Trial Court directing that the matter be stayed pending the outcome of the federal court action.

IV. The district court can vacate a no-fault arbitration award procured by corruption and fraud by a medical provider and attorney for the claimant despite no allegation of fraud or corruption by the arbitrator or claimant.

Appellant sought to vacate the arbitration award at issue in this case based on the provisions of Minn.Stat. §572.19, subd. 1(1) which states:

Subdivision 1. **Application.** Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means.

FN⁷⁰ Appellant alleges that the corruption and fraud occurred in the submission at the arbitration hearing of fraudulent medical records, billings statements and verification of injury forms signed by Dr. Anderson and Alivio, including specific allegations against attorney Mark Karney. The arbitrators entered an award for Alivio based on the fraudulent documents submitted at the arbitration; therefore it was procured by fraud, undue means and corruption.

The Trial Court denied sue sponte Appellant's motion to vacate based on the fact that an arbitration award could only be vacated for corruption, fraud and undue means of the party or the arbitrator although the issue was not briefed or requested to be briefed

⁷⁰ Minn. Stat. §572.19, subd. 1(1)

when Judge Porter set this matter for hearing on October 26, 2005. However, a number of cases have set aside arbitration awards due to witness perjury or submission of fraudulent documents since such submission constitutes fraud.⁷¹

Minnesota's No-Fault Act also recognizes that an insurance company has a private cause of action against a medical provider who intentionally misrepresents the services provided:

Recovery of benefits paid due to intentional misrepresentation. A reparation obligor may bring an action to recover benefits which are not payable, but are in fact paid, because of an intentional misrepresentation of a material fact, upon which the reparation obligor relies, by the claimant or by a person providing products or services for which basic economic loss benefits are payable. The action may be brought only against the person providing the products or services, unless the claimant has intentionally misrepresented the facts or knew of the misrepresentation. A reparation obligor may offset amounts the reparation obligor is entitled to recover from the claimant under this subdivision against any basic economic loss benefits otherwise due the claimant.

FN⁷² In the present case, Appellant has started that action in federal court and this provision of the No-Fault Act is one of the state law claims made within the federal Complaint. The above statute is evidence that the Legislature understood that provider fraud may be an issue and gave the insurance carrier the right to seek those benefits back from the provider directly. The statutory scheme also evidences that such "actions" be maintained in District Court and not in no-fault arbitrations which involve informal hearings with limited discovery.

⁷¹ See Bonar v. Dean Witter Reynolds, Inc. 835 F.2d 1378, 1383 (9th Cir. 1988); citing Dogherra v. Safeway Stores, Inc. 679 F.2d 1293, 1297 (9th Cir.), cert. denied, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982); cf Harre v. A.H. Robins, 750 F.2d 1501, 1503 (11th Cir. 1985); Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004).

⁷² Minn. Stat. §65B.54, subd. 4

In the present case, under Minnesota law, there is a six year statutory limitations period for fraud. A claim for fraud is not deemed to have accrued until discovery of the facts constituting the fraud.⁷³ Generally, a cause of action for fraud accrues when the action can be brought without being subject to dismissal for failure to state a claim.⁷⁴ This concept is recognized in a large majority of states, which by statute or case law have established that the claim of fraud does not accrue until it is or should have been discovered by exercise of reasonable diligence or some similar standard.⁷⁵ Appellant's cause of action for fraud against Alivio and others accrued when it could bring an action against Alivio, et al, without being subject to dismissal for failure to state a claim.

Therefore, it is clear that an arbitration award can be vacated based on the fraudulent submission of evidence by a medical provider at a no-fault arbitration and that an insurer has a private cause of action under the No-Fault Act to pursue such fraudulent activity by the medical provider. Such activity is akin to fraud upon the court. It is also

⁷³ Minn.Stat. §541.05 Subd. 1(6)(2000).

⁷⁴ See Herrmann v. McMenemy and Severson, 590 N.W.2d 641, 643 (Minn. 1999).

⁷⁵ Ala.Code §6-2-3 (1993); Ariz.Rev.Stat. Ann. § 12-543 (West 1992); Cal.Civ.Proc.Code § 338(d) (West 1982 & Supp.2002); Colo.Rev.Stat. § 13-80-108 (2001); Fla.Stat.ch. 95.031(2)(a) (2001); Ga.Code Ann. § 9-3-96 (1982); Idaho Code § 5-218 (Michie 1998); Iowa Code § 614.4 (2001); Kan. Stat. Ann. §60-513(a)(3) (1994 & Supp.2001); Ky.Rev.Stat. Ann. § 413.130(3) (Michie 1992 & Supp.2001); Me.Rev.Stat. Ann. tit. 14, § 859 (West 1980 & Supp.2001); Miss.Code. Ann. § 15-1-49 (1995); Mo.Rev.Stat. §516.120 (5) (2000); Mont.Code. Ann. § 27-2-203 (2001); Neb.Rev.Stat. § 25-207(4) (1995); Nev.Rev.Stat. § 11.190(3)(d) (2001); N.H.Rev. Stat. Ann. § 508:4 (1997); N.M.Stat. Ann. § 37-1-7 (Michie 1990); N.Y.C.P.L.R. Law § 213 (McKinney 1990); N.C. Gen.Stat. § 1-52(9) (1999); N.D. Cent. Code Ann. § 28-01-16 (Michie 1991); Ohio Rev.Code. Ann. § 2305.09 (Anderson 2001); Okla. Stat. tit. 12 § 95(3) (1991 & Supp. 1997); Or.Rev.Stat. § 12.110(1) (1999); S.C.Code Ann. § 15-3-530(7) (Law, Coop. 1977 & Supp.2000); S.D. Codified Laws § 15-2-3 (Michie 1984); Utah Code Ann. § 78-12-26(3) (1996); Va.Code. Ann. § 8.01-249 (Michie 2000); Wash. Rev.Code Ann. § 4.16.080(4) (West 1988 & Supp.2002); Wis. Stat. Ann. § 893.93(1)(b) (West 1997); Wyo. Stat. Ann. § 1-3-106 (Michie2001); Knox College v. Celotex Corp., 88 Ill.2d 407, 58 Ill.Dec. 725, 430 N.E.2d 976, 980-81 (1981); Barnes v. A.H. Robins Co., 476 N.E.2d 84, 87-88 (Ind. 1985); Lumsden v. Design Tech Builders, Inc., 358 Md. 435, 749 A.2d 796, 800 (2000); Bowen v. Eli Lilly & Co., Inc., 408 Mass. 204, 557 N.E.2d 739, 741 (1990); Garden City Osteopathic Hosp. v. HBE Corp., 55F.3d 1126, 1135 (6th Cir.1995)(applying Michigan law); SASCO 1997 NI, LLC v. Zudkewich, 166 N.J. 579, 767 A.2d 469,475 (2001); Connaught Laboratories, Inc. v. Lewis by Lewis, 124 Pa.Cmwlt. 568, 557 A2d 40, 43 (1989); Murphy V. Campbell, 964 S.W.2d 265, 270 (Tex 1997); Union School Dist. No. 20 v. Lench, 134 Vt. 424, 365 A.2d 508, 511 (1976).

clear that such allegations of fraud cannot be made until such time as a party can assert the claim without a dismissal for failure to state a claim upon which relief can be granted.

Appellant requests that the Appeals Court make a ruling that an arbitration award can be vacated if procured by corruption, fraud and undue means of a witness or medical provider who submits fraudulent documents at an arbitration hearing in support of the claim for no-fault medical expense benefits pursuant to Minn.Stat. §572.19.

V. The district court violated Appellant's due process rights and abused its discretion in awarding sanctions.

The Appellate Courts review a district court's decision to award sanctions for violations of Rule 11 or Minn.Stat. §549.211 under an abuse of discretion standard.⁷⁶ In the present case, while Appellant received numerous notices of motions for sanctions pursuant to Minn.Stat. §549.211 the issues were not presented to the trial court at the October 26, 2005 hearing which was scheduled to determine the issue of staying the proceedings or confirming the award. At the hearing, even Respondents counsels had requested a separate hearing on the issue of sanctions.⁷⁷

However, Judge Porter without a hearing on the issue or a finding of fact awarded sanctions against Appellant in the amount of \$1,500.00 per each claimant. There is no finding as to what conduct or legal issue was made that was in bad faith or frivolous that would constitute sanctionable conduct on the part of Appellant. Appellant was never given a meaningful opportunity to respond to any alleged or purported violation that the

⁷⁶ Leonard v. Northwest Airlines, Inc., 605 N W 2d 425, 432, 433 (Minn.App 2000) review denied (Minn.App 18, 2000).

⁷⁷ Transcript, dated October 26, 2005 at p. 8, ¶¶16-19 and p. 27, ¶¶18-22

award was based on. In fact, Appellant is at a loss as to why it was sanctioned as the Order is completely silent on that issue. Judge Porter's award of sanctions, which again mirrors Judge Burke's subsequent sanction of \$1,500 in the separate proceedings, given the circumstances is a clear abuse of discretion and should be overturned.

CONCLUSION

Appellant requests that the Trial Court's Order confirming the arbitration award, denying Appellant's request for a stay and denying Appellant's motion to vacate the arbitration award by reversed and remanded to the Trial Court with instructions to stay the proceedings pending the outcome of the federal lawsuit.

Dated: 22 Feb. 06

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STATE OF MINNESOTA
IN COURT OF APPEALS
CASE NO. A06-59

IN RE THE CLAIMS FOR NO-FAULT BENEFITS
AGAINST PROGRESSIVE INSURANCE COMPANY,

PROGRESSIVE INSURANCE COMPANY,

APPELLANT,

VS.

**CERTIFICATE OF
BRIEF LENGTH**

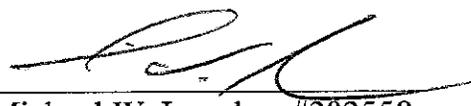
PEDRO SANCHEZ, ANETH GALINDO,
FRANCISCO MARTINEZ, ELIZUR GARCIA,
ELMER MINERO, BLANCA BONAVIDES,
PEDRO FERNANDEZ, MARIA CASTREJON,
LUIS PALLARES,

Respondents.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a Times New Roman font. The length of this brief is 6,740 words. I certify that the word processing program has been applied specifically to include all text, including headings, footnotes, and quotations. This brief was prepared using Microsoft Office Word 2003.

DATED: 22 Feb 06

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).