

CASE NO. A05-2020, A06-58, A06-59

**State of Minnesota
In Court of Appeals**

PROGRESSIVE INSURANCE COMPANY,

Appellant,

vs.

EDGAR VILLAFANA PALLARES,

Respondent.

APPELLANT'S BRIEF AND APPENDIX VOLUME 1

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STATEMENT OF LEGAL ISSUES

- I. Whether 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.

Trial Court's Ruling: The Trial Court held that it had no legal basis to stay an arbitration award simply because Appellant filed a civil action against Respondent's treating chiropractic clinic.

Apposite Cases:

- 1) McCormick v. Robinson, 139 Minn. 483, 167 N.W. 271 (Minn. 1918).
- 2) Green Tree Acceptance, Inc. v. Midwest Federal Savings and Loan Assoc. Minneapolis, 433 N.W.2d 140 (Minn.App. 1988).

Apposite Statutes:

None

- II. Whether the trial court can vacate a portion of an arbitration award based on corruption and fraud while confirming the remainder of the award

Trial Court Ruling: The Trial Court did not rule on this issue. Appellant did raise the issue, but the Trial Court did not address it in the Order.

Apposite Cases:

None

Apposite Statutes:

- 1) Minn.Stat. §572.20, subd. 3.
- 2) Minn.Stat. §572.19, subd. 1(1).

- III. 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 did not rule on this issue. Appellant and the Trial Court did raise the issue at the hearing, but the Trial Court did not address it in the Order.

Apposite Cases:

None

Apposite Statutes:

- 1) Minn.Stat. §572.19, subd. 1(1).
- 2) Minn.Stat, §65B.54, subd. 4.

- IV. Whether the trial court violated Appellant's due process rights when it issued an Order denying Appellant's motion without an evidentiary hearing on the issue of corruption and fraud.

Trial Court Ruling: The Trial Court did not rule on this issue.

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

STATEMENT OF THE CASE

This case was heard in Hennepin County District Court before the Honorable Kevin S. Burke on July 8, 2005 on a motion to vacate an arbitration award and to confirm the arbitration award for Respondent Edgar Villafana. This case involves an arbitration award rendered on December 21, 2004 and a federal court Complaint against the Respondent's treating chiropractor and clinic filed on May 18, 2005.

Appellant moved to vacate the arbitration award based on corruption, fraud and undue means and Respondent moved to dismiss the application to vacate and confirm the award. The case was stayed pending the unsealing of the federal court case on June 7, 2005 against Respondent's treating chiropractor and clinic. Appellant moved to stay proceedings in order to consolidate additional arbitration awards on motions to vacate. Appellant also moved to vacate that portion of the arbitration award involving Alivio Chiropractic Clinic and to confirm the remainder of the award based on the allegations against Alivio Chiropractic Clinic in the federal RICO action or in the alternative to stay further action on the issue of corruption and fraud pending the outcome of the federal RICO action.

The Trial Court conducted a hearing on July 8, 2005 in which an offer was made to resolve the dispute and the Trial Court gave Respondent a week to make his determination. Respondent rejected the offer and the Trial Court then entered an Order denying the request to stay the proceedings finding that there was no legal basis for such a stay and denying the motion to vacate the award without any findings of fact or law.

STATEMENT OF FACTS

This action arises out of a no-fault arbitration award that was issued on December 21, 2004 wherein Respondent was awarded medical expense benefits in the amount of \$9,400.00 that included medical expense benefits for treatment he allegedly received from Dr. Josh Anderson, D.C. (Anderson) at Alivio Chiropractic Clinic, Inc. (Alivio). (R. at A-4.) Appellant received the award on December 27, 2004, (R. at A-3), and proceeded by filing a Notice of Motion and Motion to Vacate the Arbitrator's Award pursuant to Minn. Stat. § 572.19, subd. 1(1) and (3) on March 21, 2005. (R. at A-1.)

In response, Respondent filed a Motion to Dismiss for Lack of Jurisdiction, (R. at A-7 to A-14), and an Application to Confirm Arbitration Award & to Dismiss the Motion to Vacate the Award. (R. at A-28 to A-30). Respondent's motion was scheduled for May 25, 2005. (R. at A-31). On May 20, 2005, Appellant sent a letter to Judge Kevin S. Burke informing the court that Appellant was unable to defend itself in regards to Respondent's motion because the core substance of its defense was sealed pursuant to a Protective Order. (R. at A-32). However, Appellant also informed the court that it had obtained permission from the court that issued the Protective Order to conduct an ex parte in camera review of the supporting documentation with Judge Burke. (R. at A-32.)

Therefore, Appellant requested the following: 1) an ex parte in camera review of the documents; 2) permission to place the amount of the arbitration award with the Court; and 3) that the Court stay all further proceedings until the Protective Order was lifted. (R. at A-32.) Respondent objected to Appellant's request as being untimely and without

a formal motion. (R. at A-36.) The hearing went forward as scheduled on May 25, 2005 before Judge Burke. Burke Hrg. Transcr. 1 (May 25, 2005).

At the hearing, Appellant reiterated its position that it could not render a defense to Respondent's motion due to a Protective Order issued by Judge Paul A. Magnuson of the Federal District Court. Id. at 3:10-25. Respondent contended that if there was a protective order in place, it should have been presented to the arbitrator, Id. at 4:21-24, and that a new record could not be created for the first time in the current motion proceeding. Id. at 4:25. Judge Burke ultimately decided to ask another judge to conduct the ex parte hearing and ordered that that discussion be sealed until further order of the Court. Id. at 11:3-12.

Then, immediately following the hearing with Judge Burke on May 25, 2005, the ex parte in camera hearing regarding the issue of the Protective Order was conducted by the Honorable E. Anne McKinsey. McKinsey Hrg. Transcr. 1 (May 25, 2005). During this hearing, Appellant informed the Court that for approximately the last two years, it had been investigating a scheme involving Alivio Chiropractic, Dr. Josh Anderson, Andrea Kay Bongart, Alex Aguilar and Attorney Mark Karney that was exploiting illegal aliens in the State of Minnesota to obtain no-fault benefits. Id. at 4:8-16. Appellant informed the Court that Respondent's claim was involved in the scheme. Id. at 4:19-20.

In addition, Appellant explained to the Court that the reason it sought to file its federal RICO Complaint under seal was because a witness who was cooperating with them in their investigation into the scheme was being harassed and threatened by more than one of the named defendants and that the harassment was captured on video

surveillance tapes at the witness' place of employment, Los Gallos. Id. at 4:17-25 and 5:1-25. Los Gallos refused requests from the witness' attorney and Appellant to produce copies of the surveillance tapes; therefore, given the fact the tapes were only available from forty to forty-five days before they were recorded over or destroyed, Appellant sought to go ahead and file its Complaint under seal and sought a temporary restraining order to obtain the tapes. Id. at 6:5-20.

Appellant informed the Court that the federal district civil RICO claims are relevant to Respondent because he is identified as clamant number five of fifty-five in the RICO Complaint. Id. at 7:11-16. Appellant also made it clear to the court that it wasn't alleging the arbitrator engaged in fraud or undue means. Id. at 7:25 to 8:1-2. Appellant then provided Judge McKinsey with a copy of Judge Magnuson's findings wherein he found the sealing of the RICO Complaint to be appropriate. Id. at 14: 4-10.

On May 25, 2005, Judge Burke issued an Order that reserved Respondent's motion to dismiss, granted Appellant's request to deposit the amount of the arbitration award with the court, and granted Appellant's request to stay all further proceedings until the Protective Order was lifted. (R. at A-38.) In compliance with the Court's Order, Appellant deposited a check for \$9,400.00 with the court administrator. (R. at A-39 to A-40.)

Appellant had filed a Civil RICO complaint in Federal Court captioned as Progressive Northern Insurance Company, et. al. vs. Alivio Chiropractic Clinic, Inc.; Joshua Jason Anderson, D.C.; Alexis Alarcon Aguilar; Andrea Kay Bongart, individually and d/b/a Sunshine Clinical Bodyshop; and Mark Anthony Karney, attorney at law, d/b/a

Karney & Associates., Case number: 05-CV-0951 (PAM/RLE). (R. at A-70 to A-A-235.) The Temporary Restraining Order for the surveillance tapes was ignored by Los Gallos and on May 31, 2005, Appellant moved the Honorable Judge Donovan Frank for an Order to Show Cause against Los Gallos that was heard on June 2, 2005. (R. at A-240.) Judge Frank ordered that Appellant be given access to the surveillance tapes and continued the hearing until June 7, 2005. (R. at A-241.) Appellant was finally given access and the evidence was retained. On June 7, 2005, a hearing was conducted to unseal the filing of the Complaint which was granted that day. (R. at A-244 to A-245.)

Appellant then called to schedule a motion to vacate for July 8, 2005 before this Court. However, since Appellant had eight additional arbitration awards that needed to be addressed involving Defendant Alivio Chiropractic Clinic that had transpired prior to the filing of the Civil Rico Complaint and one arbitration that was pending, Appellant in the interest of judicial economy and consistency of ruling requested to consolidate those cases before one Judge. (R. at A-41 to A-44.) On June 27, 2005, Appellant sent a letter to Judge Burke requesting consolidation of the cases and requesting a continuance of the July 8, 2005 hearing. (R. at A-41 to A-44.) On June 28, 2005, the District Court addressed the issue of consolidation, which Appellant received on Friday, July 1, 2005. (R. at A-49.)

On July 6, 2005, Appellant received a letter from Respondent's attorney addressed to the Court dated June 28, 2005 requesting that the hearing move forward. (R. at A-45 to A-48.) On June 30, 2005, Appellant sent Respondent a letter addressing his contentions regarding the Protective Order and the issues involved in this case. (R. at A-

252 to A-259.) Shortly thereafter on July 6, 2005, Appellant sent another letter to the District Court requesting a continuance of the July 8, 2005 hearing in order to consolidate the motions to vacate/stay further proceedings on the medical bills from Defendant Alivio Chiropractic pursuant to Minnesota General Rules of Practice, Rule 113.03 and to request the release of \$6,757.00 from the \$9,400 that was deposited with the Court to the Respondent to satisfy the medical expense benefits awarded to the other medical providers not subject to the Federal Civil RICO Complaint. (R. at A-50 to A-54.)

On July 7, 2005, the District Court issued an Order denying Appellant's request and requiring the parties to appear at the hearing on July 8, 2005. (R. at A-55.) The hearing occurred on July 8, 2005 and ended with an offer to settle the dispute to Respondent's attorney. Burke Hrg. Transcr. 2 17:6-25 (July 8, 2005). He was given until July 13, 2005 to decide whether to accept the offer as noted by the District Court or to pursue further litigation on the motion to vacate. *Id.* at 24:24-25. It was not until July 18, 2005 that Respondent's attorney sent a letter to the District Court rejecting the offer. (R. at A-269 to A-271.) (Respondent raised issues involving Unfair Claims Practices Act and other new legal issues by letter that were not argued at motion.)

On August 8, 2005, the District Court issued its Order denying Appellant's motion to vacate the arbitration award. (R. at A-272 to A-A-275.) Respondent served the Order on Appellant, which was received on August 15, 2005. (R. at A-276 to A-282.) Then, on August 12, 2005, Respondent's attorney sent a letter to the Court requesting that it enter judgment and enclosing a proposed order. (R. at A-283 to A-285.) The District Court Ordered entry of judgment against the Appellant on August 15, 2005. (R. at A-301.)

The very next day, Appellant requested a motion for reconsideration of the August 8, 2005 Order by letter pursuant to Minnesota Rules of General Practice, Rule 115.11 on the basis that Alivio Chiropractic had recently counterclaimed in the federal case alleging that they had an assignment of the benefits for the outstanding balances owed on the arbitration awards and on the basis that the District Court did not address the issue of vacating the arbitration award for corruption and fraud. (R. at A-286 to A-300.)

Then, on August 22, 2005, at the request of the District Court, Respondent's attorney responded to Appellant's request for reconsideration by stating that it was a "violation of the Rules of Civil Procedure;" therefore "there is no pleading or motion before the Court and, accordingly, no response is appropriate." (R. at A-306 to A-307.) Appellant's request for reconsideration was denied on September 6, 2005. (R. at A-308 to A-312.)

ARGUMENT

I. 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.

The District Court determined that it had no legal basis to say an arbitration award "simply because Progressive filed a civil action against Alivio Chiropractic Clinic in federal court." (R. at A-274.) The District Court, in support of its legal contentions within the Order, discusses an analogy it alleged Appellant made that likened the federal civil RICO suit to a federal bankruptcy proceeding and stated that Appellant's motion to stay the award appeared to be a form of pre-judgment attachment that it determined must occur in the federal case and not in a separate proceeding that "happens to have a

common party to the state and federal suits.” (R. at A-274.) However, Appellant never made such an argument before the District Court in its Memorandum of Law or at the hearing. See (R. at A-56 to A-300.) and Burke Hrg. Transcr. 2 (July 8, 2005).

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. Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State, § 1, 56 A.L.R. 2d 335 (1957-2005). However, “abatement” is a matter of right and a “stay” of further proceedings is a matter of discretion. Id. citing Evans v. Evans, 186 S.W.2d 277 (Tex. Civ. App. 1945).

On the issue of whether a pending suit in federal court between the same parties and concerning the same subject matter is grounds for abatement, a number of states have held in the negative on that issue. Id., §2. In Minnesota, earlier cases applied a “priority over action” analysis in determining whether to abate a state court proceeding. 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).

However, a “stay” of proceedings is not a matter of right, but a matter of comity and discretion. Stay of Civil Proceedings Pending Determination of Action in Federal Court in Same State, § 2, 56 A.L.R. 2d 335 (1957-2005). 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. 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).

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. 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). 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.” Id. The court should also consider the desirability of avoiding piecemeal litigation in making a decision on whether to defer to another court. 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).

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.

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

A. Prior Commencement of Action.

In this particular case, in order to meet the appeal deadline Appellant had to file its motion to vacate the arbitration award by March 21, 2005, which it did. (R. at A-1 to A-5.) Appellant started its action in federal court based upon federal civil RICO violations, allegations of fraud and other causes of action on May 18, 2005. While the state court action to vacate the award alleged to be procured by corruption and fraud on the part of the Respondent's treating chiropractor and others was filed prior to the commencement of 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.

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 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.

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. There should be no doubt in any party's mind who it is that Appellant is going after in both the federal court action and in the state court motion to vacate based on corruption and fraud.

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 Chiropractic 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 Chiropractic Clinic, Inc. 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 Chiropractic Clinic, Inc. (R. at A-289 to A-300.) 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. (R. at A-289 to A-300.)

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 Chiropractic Clinic. Secondly, this counterclaim was the first time that Appellant was made aware that the claimants had assigned those benefits to Alivio Chiropractic Clinic and Dr. Anderson. Therefore, because Alivio Chiropractic Clinic 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.

II. The district court can vacate a portion of an arbitration award based on corruption and fraud while confirming the remainder of the award.

According to its Order, the trial court attempted to address the issue of whether Appellant may withhold a portion of the arbitration award regarding Alivio Chiropractic Clinic. (R. at A-274.) However, the only conclusion it reached, as stated above, was that there was no legal basis to stay an arbitration award because of a civil action filed in federal court. (R. at A-274.) Therefore, the court ultimately failed to reach a conclusion and did not render a decision on the actual issue that was presented.

The relief Appellant was seeking from the trial court was an order vacating the portion of the award involving Alivio Chiropractic Clinic or in the alternative, staying further proceedings on that portion of the award until the federal case was resolved. (R. at A-66.) The issue regarding the stay of the proceedings is discussed above leaving the issue for discussion here of whether the trial court could vacate the portion of the award relative to Alivio Chiropractic Clinic, Inc. while at the same time confirming the award with regard to the remainder of the Respondent's providers.

Appellant sought to vacate the arbitration award on the basis it was procured by corruption, fraud or other undue means. Minn. Stat. §572.19, subd. 1(1). The district court's power to vacate or modify an arbitrator's award is purely statutory. According to the Uniform Arbitration Act, an application to modify or correct an award may be joined in the alternative with an application to vacate the award. Minn. Stat. §572.20, subd. 3 (2005). Therefore, pursuant to the strict reading of the statute, there is no reason why the

trial court could not have vacated the portion of the award regarding Alivio while at the same time confirming the remainder of the award.

III. The district 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.

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.

Minn.Stat. §572.19, subd. 1(1). 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 Chiropractic Clinic. Appellant does not allege fraud on the Respondent or the arbitrator; however the arbitrator entered an award for Alivio Chiropractic Clinic based on the fraudulent documents submitted at the arbitration; therefore it was procured by fraud.

The Trial Court, while it was presented with and recognized this issue at the July 8, 2005 hearing, it did not make a specific finding in its Order denying the request to stay and to vacate the arbitration award. Therefore, it is assumed that the Court, based on its comments at the hearing, found that an arbitration award could only be vacated for corruption, fraud and undue means on the part of either the party or the arbitrator.

However, a number of cases have set aside arbitration awards due to witness perjury or submission of fraudulent documents since such submission constitutes fraud.

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).

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.

Minn.Stat. §65B.54, subd. 4. 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.

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. Minn.Stat. §541.05 Subd. 1(6)(2000). 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. See Herrmann v. McMenemy and Severson, 590 N.W.2d 641, 643 (Minn. 1999). 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.¹ Appellant's cause of action for fraud against Alivio Chiropractic Clinic and others accrued when it could bring an action against Alivio Chiropractic Clinic, 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

¹ 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.Cmwlth. 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).

activity by the medical provider. Such activity is akin to fraud upon the court. It is also 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.

IV. The district court violated Appellant's due process rights when it issued an Order denying Appellant's motion without an evidentiary hearing on the issue of corruption and fraud.

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. Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1975). 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. See Medina v. Foundation Reserve Ins. Co., 123 N.M. 380. 940 P.2d 1175 (1997).

In the present case, the trial court during the July 8, 2005 hearing had an exchange with Respondent's counsel on the issue of the stay and partial payment of the award. Burke Hrg. Transcr. 2 18:4-25; 19:1-25; and 20:1-25 (July 8, 2005). The trial court indicated that if Respondent's counsel would not accept the partial payment and agreement to defend and indemnify that he would "issue an order on scheduling, when

we want briefs and memorandums and stuff like that, but I don't understand why we're going to do this over 2600 dollars." Id. at 21:14-17. The trial court gave Respondent's counsel a week to decide on whether to accept the offer or continue with litigation. Id. at 24:20-25. Respondent rejected the offer and without the required evidentiary hearing, the trial court issued an Order denying the request for a stay and motion to vacate the arbitration award with out a finding of fact or conclusion of law on the issues presented in the motion to vacate the award. (R. at A-272 to A-275.)

The Order credits Appellant with arguments it did not make and ignores the arguments that it did make. Id. In short, the Order denying Appellant's motion to vacate the arbitration award is void of any factual or legal basis for doing so despite the arguments and evidence submitted before, during and after the hearing. Appellant even requested a motion for reconsideration of the Order by letter pursuant to Rule 115.11, which the trial court rejected based on a ruling that such a motion must be made by formal notice of motion and motion. This ruling by the court is not correct and not what the clear language of the rule states.

In addition, this ruling was made after the trial court requested that Respondent's counsel respond to Appellant's request for a motion for reconsideration. (R. at A-306.) However, Appellant was not asked to respond to any of Respondent's letters rejecting the offer by the Appellant at the hearing on July 8, 2005 before it arbitrarily issued its order. Appellant requests that the Trial Court's Order dated August 8, 2005 denying the motion to vacate be reversed and remanded for an evidentiary hearing on the corruption, fraud and undue means alleged during the arbitration process.

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 for additional findings of fact by the Trial Court.

Dated: 22 Nov. 05

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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).