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## **TOWARD A SECOND BITE AT "APPLE"**

Now that the climate in Albany has apparently become more "clement" for plaintiffs' personal injury lawyers and their clients, as evidenced by Governor Pataki's recent signing into law of the bill increasing the required automobile liability limits (see Dachs, N. and Dachs, J., "The Act That Increases Motor Vehicle Coverage," NYLJ, 9/12/95, p. 3, col. 1), the time may be ripe for a second bite at the "Apple," i.e., a legislative reconsideration and modification of the rule of *Clemens v. Apple*, 102 AD2d 236 (3d Dept. 1994), affd. 65 NY2d 746 (1985), regarding the one-sided application of the principles of collateral estoppel and res judicata to results obtained in no-fault arbitration proceedings.

### **Current Rule**

It is axiomatic that "the doctrines of res judicata and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies . . . when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunal employing procedures substantially similar to those used in a court of law." *Staatsburg Water Co. v. Staatsburg Fire District*, 72 NY2d 147, 152-153 (1988); *Ryan v. New York Tel. Co.*, 62 NY2d 494, 499 (1984). Whether the prior adjudication occurred in the context of an administrative determination, an arbitration, or a full-fledged judicial proceeding, issue preclusion is applicable if there is "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and [there was] a full and fair opportunity to contest the issue now said to be controlling." *Schwartz v. Pubic Administrator of County of Bronx*, 24 NY2d 65, 71 (1969).

### **One-Sided Application**

In several early cases, the determinations of arbitrators adverse to the claimants on medical issues in no-fault insurance arbitrations were held to have a binding effect against the claimants under the doctrine of issue preclusion in the claimants' lawsuits for personal injuries. *See Armijo v. Metropolitan Transp. Auth.*, 77 AD2d 580 (2d Dept. 1980); *Kilduff v. Donna Oil Corp.*, 74 AD2d 562 (2d Dept. 1980).

On the other hand, the determinations of no-fault arbitrators in favor of claimants were held not to have binding or preclusive effect upon the insureds in the personal injury lawsuits. *Kaufman v. Towers Transportation, Inc.*, 63 AD2d 669 (2d Dept. 1978), and *Baldwin v. Brooks*, 83 AD2d 85 (4th Dept. 1981). In those cases, the courts rejected plaintiffs' attempts to apply collateral estoppel to the findings of the arbitrators in their favor and against the no-fault carriers on the issues of whether defendant's vehicle came into contact with plaintiff, and whether certain medical bills were causally related to the accident, respectively, to preclude the insured defendants in their legal actions to recover damages for her personal injuries. The courts agreed with defendants' contentions that they should not be estopped by the arbitration decision against their insurers (who were the no-fault carriers because both accidents involved pedestrians) because they had no part in the arbitration, no interest in its outcome and no reason for participating, were not in privity with the insurer in its capacity as payor or first-party benefits, and, in any event, were not accorded a full and fair opportunity to litigate the issue. *See also Phillips v. Presswood*, 58 AD2d 674 (2d Dept. 1977).

### **"Apple"**

In *Clemens v. Apple*, *supra*, two years after becoming involved in a motor vehicle accident, Clemens underwent surgery for removal of a herniated disc. Alleging that the accident aggravated the degenerative disc condition he suffered from as a result of his Alzheimer's disease, Clemens applied for no-fault benefits to cover the cost of the surgery. That claim was denied by his insurance carrier.

In deciding to challenge the denial of his claim, Clemens had the option of commencing an action, or proceeding to arbitration; he selected arbitration. The arbitration panel found that the carrier was justified in rejecting the claim because there was

insufficient evidence of a causal relationship between the herniated disc and the automobile accident.

Prior to the arbitration hearing, Clemens and his wife had commenced a negligence action against Apple to recover for personal injuries and related damages, alleging that his back and leg were seriously injured in the accident. Following the arbitrators' decision, Apple moved for partial summary judgment on the ground that the arbitration panel's finding collaterally estopped Clemens from asserting that the exacerbated herniated disc condition was a product of the accident.

The Third Department concluded that inasmuch as the parties agreed that the disc injury considered by the arbitrators was also a claimed injury in the personal injury action, and it was apparent from the record that Clemens was accorded a full and fair opportunity during the arbitration to litigate his claim that a causal relationship existed between the accident and his back injury, he was barred from relitigating that issue. The court further held that although Clemens' wife was not a party to the arbitration, her derivative claim, insofar as it related to the disc condition was similarly barred; that although the amount at stake in the arbitration proceeding (about \$1,800) was far less than the damages sought in the personal injury action (\$250,000), the former was not an insignificant amount; that although prohibited from recovering for the herniated disc, Clemens' right to recover for the various other injuries asserted remained unimpeded; that it was Clemens alone who elected the arbitration forum, and that the fact that Clemens chose not to vigorously pursue his arbitration claim or appeal the panel's decision was no justification for barring the application of collateral estoppel.

Significantly, the court took express note of the fact that "It may well be that concluding as we have has serious and adverse policy considerations in that no-fault claimants will be discouraged from proceeding in arbitration against their own insurers for medical expenses." 102 AD2d 238. Nevertheless, the court refused to depart from "the now firmly established principle that collateral estoppel is applicable to arbitration proceedings." Id.

### **Court of Appeals**

The Court of Appeals, which reviewed the case by permission of the Third Department, unanimously affirmed for the reasons set forth in that court's order and the additional reason that the Third Department's order was fully consistent with the Court of Appeals' then-recent holding in *Ryan v. New York Telephone*, *supra*, to the effect that where, as in *Clemens*, "plaintiffs freely elected to proceed to arbitration with the assistance of counsel (*Matter of American Ins. Co. [Messinger - Aetna Cas. & Sur., Cos.]*, 43 NYS2d 184, 191) despite the availability of an alternate judicial forum . . . , and had the opportunity to employ procedures substantially similar to those utilized in a court of law . . . , plaintiffs had a full and fair opportunity to litigate the question whether Mr. Clemens' herniated disc condition was causally related to the automobile accident," and would, therefore, be collaterally estopped from raising that issue again in the personal injury litigation. 65 NY2d at 748-749.

The *Clemens* Court placed great weight upon the fact that plaintiff voluntarily chose the arbitration forum and, thus, should not be heard to complain if the result was not to his liking. Indeed, the Court went so far as to suggest that, strategically, Clemens should have delayed or deferred determination of his no-fault claim until after the conclusion of his personal injury action.

### **Maldonado**

The *Clemens* rationale was promptly expanded upon in *Maldonado v. Nu-Way Fuel Oil Burner, Inc.*, 131 AD2d 735 (2d Dept. 1987). In that case, the plaintiffs themselves were not the ones who chose arbitration as the forum for determination of their health service claim; instead, it was their assignee, the hospital, that chose to arbitrate the claim. Following a hearing, the arbitrator determined that the hospital had failed to meet its burden of demonstrating that the offending vehicle was the vehicle owned by the defendant. The award to that effect was subsequently confirmed by a judgment. Despite that award and judgment, plaintiffs brought a plenary personal injury action against the defendant, which then moved to dismiss the complaint upon the ground that the arbitration award conclusively established that its vehicle was not involved in the accident. Although the trial court denied defendant's motion, the Second Department reversed and dismissed the complaint, stating, in pertinent part, "Clearly, any personal injury action on behalf of the

plaintiffs against Nu-Way is barred by the previous arbitration between Mr. Maldonado's assignee and Nu-Way's insurance carrier, as the hospital, with which the plaintiffs were in privity, had a full and fair opportunity to litigate the issue of the vehicle's identity in the prior forum" [citing, *inter alia*, *Clemens*, *supra*).

It is clear that had the plaintiffs prevailed before the arbitrator, the result could not have been used in their favor because the defendant in the action was not a party to the arbitration -- only the insurer was. See *Baldwin v. Brooks*, *supra*. Moreover, the conclusion that plaintiffs, in this situation, had a full and fair opportunity to litigate an issue critical to their case where the arbitration was controlled not by plaintiffs, but by their health care provider, whose risk was limited to the bill under consideration, seems, to us, questionable, at best, and particularly harsh, at worst.

An interesting sidelight to the *Maldonado* case, which exacerbates the harshness of that decision, is that in opposing Nu-Way's motion to dismiss, plaintiffs cross-moved for an order joining MVAIC as a party to the action because of the difficulty in identifying the offending vehicle. Although the trial court did not address the cross-motion, the Second Department held that MVAIC's participation was "premature," thus thwarting MVAIC from participating in the action. The court pointed out that plaintiffs would be required to establish his right to proceed against the MVAIC independently. As stated by the court, "The arbitrator's award is not binding on MVAIC, which was not a party to the arbitration and did not have its interests represented in that forum. Should the plaintiffs now proceed against MVAIC, the issue of the vehicle's identity and ownership may be relitigated at the preliminary hearing provided for under Insurance Law § 5218(b)."

Thus, plaintiffs in *Maldonado* faced the possibility of losing on all fronts. They lost in the action because the arbitration award precluded them from showing that Nu-Way's vehicle was involved in the accident. In the proceeding against the MVAIC, they may lose because MVAIC might be able to demonstrate that Nu-Way's vehicle was, in fact, involved in the accident. All this, because the hospital, as is the general custom in the health care industry, required the patient to assign his rights to it in lieu of immediate payment.

### **The Problem**

It is well-established that the primary legislative purpose underlying the enactment of the no-fault law was to ensure "that every auto accident victim will be compensated for substantially all of his economic loss promptly and without regard to fault." Report of the Joint Legislative Committee on Insurance Rates, Regulation and Recodification of the Insurance Law, N.Y. Legis. Doc. 1973, No. 18, p. 7. "The law was enacted to reduce the need for lengthy litigation and provide swift compensation without cumbersome procedures." *Johnson v. Hartford Ins. Co.*, 100 Misc.2d 367, 370 (Sup. Ct. Monroe Co., 1979).

The obvious effect of decisions discussed above is to place the insurer in the enviable position of having nothing to lose and everything to gain by withholding benefits to a claimant -- in clear contravention of the purpose of the no-fault law. If the claimant proceeds to arbitration and loses, he or she may have lost more than the relatively few dollars in medical expenses or lost earnings sought to be recovered; the claimant may have lost a substantial portion or all of his or her personal injury action. On the other hand, if the insurer loses, the loss had no effect beyond the parameters of the no-fault claim. The few extra dollars it will have to pay as interest or attorney's fees is well worth the potential benefit it could have received had the result gone the other way.

As a result, claimants who have been denied no-fault benefits, often shortly after an accident, must forego their arbitration remedy for fear that a negative decision in arbitration regarding a single medical bill will prevent them from fully pursuing their personal injury claims in court. Accordingly, claimants who can afford to advance the cost of their treatment will wait until the personal injury litigation is completed, which may take several years, before demanding arbitration. The insurer will neither be concerned nor bothered by such delay because it will not be forced to pay interest on the eventual recovery, inasmuch as interest is suspended if the claimant does not request arbitration or initiate a lawsuit within thirty days after receipt of a denial of claim, until such action is taken (11 NYCRR 65.1[g][3]). Indigent claimants will find themselves between the proverbial rock and a hard place and either forego required medical care or risk litigation disaster by proceeding to arbitrate or litigate the issue. Or, claimants distrustful of the arbitration process may opt to litigate in court, a situation likely to wreak havoc with the court's

calendars -- again a contravention of the policy behind the no-fault law. This is to say nothing about the financial impracticality of engaging in formal litigation to recover relatively small amounts of money.

Clearly, the one-way application of collateral estoppel to no-fault arbitration awards is a problem in need of a solution.

### **The Solution**

Despite the rigidity of its holding in *Clemens*, *supra*, the Court of Appeals itself subsequently laid out the road towards a solution to this problem in *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, 153 (1988). Therein, concerning the doctrine of collateral estoppel in a different context, the Court stated, as follows: "[W]e have consistently emphasized that these principles are not to be mechanically applied as a mere checklist. Collateral estoppel is an elastic doctrine and the enumeration of these elements is intended as a framework, rather than a substitute, for analysis. For example, the question whether a party had a full and fair opportunity to contest the prior decision is not answered simply by reference to the procedural benefits available in the first forum or by a conclusion that the requirements of due process were satisfied (see *Gilberg v. Barbieri*, 53 NY2d 285, 292). Instead, the analysis requires consideration of "the realities of litigation," such as recognition that if the first proceeding involved trivial stakes, it may not have been litigated vigorously (see, *id.*, at 292-293; *Schwartz v. Public Adm'r.*, *supra*, at 72). "In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings (see *Gilberg v. Barbieri*, *supra*, at 291-292; *People v. Berkowitz*, 50 NY2d 333, 344; *Matter of Venes v. Community School Bd.*, 43 NY2d 520, 524)."

Decisions in other contexts have reflected a move toward lessening the burdens associated with application of the doctrine of collateral estoppel to results obtained in administrative proceedings, and even to results obtained in court, depending upon such factors as the size and importance of the claim, the nature of the prior forum, and other

"practical realities." In Stevenson v. Goomar, 148 AD2d 217 (3d Dept. 1989), involving a determination of the State Board of Professional Medical Conduct, the court held that "where, as here, a party to a civil action seeks to invoke his right to a jury trial and he has not initiated or otherwise affirmatively sought to litigate the matter at the administrative level, fundamental fairness and the policy considerations . . . require that preclusive effect not be given to the administrative determination. To conclude otherwise would result in the substantial erosion of rights far more fundamental and important than the concepts of finality and judicial economy served by the doctrine of collateral estoppel." In Gilberg v. Barbieri, 53 NY2d 285 (1981), the Court of Appeals held that a conviction in a City Court for the petty offense of harassment does not collaterally estop and cannot later be used to preclude the defendant from disputing the merits of a civil suit for assault, involving the same incident and seeking \$250,000 in damages, since the City Court action was a relatively minor one, and because of the relative insignificance of the charge, the defendant had no constitutional or statutory right to a jury trial, as he would have had in a true criminal prosecution; he could not reasonably expect or be expected to defend with the same vigor; and he was not afforded the same opportunity to litigate his liability in the City Court as he would in the Supreme Court.

Moreover, by statute, collateral estoppel effect has been denied to traffic convictions (Vehicle & Traffic Law, §155) and determinations in small claims actions (Uniform City Court Act, Uniform Justice Court Act, New York City Civil Court Act, §1801). Gilberg, supra, 53 NY2d at 293.

The question that we believe naturally arises is, why should such notions not similarly be applied to no-fault arbitration proceedings?

### **Proposed Legislation**

Insofar as the Court of Appeals has already spoken on this issue (in Clemens), it would appear that the quickest and most effective way to correct the inherent injustice in the existing system is through the legislative process. Indeed, legislation that would amend section 5106 of the Insurance Law by adding a new subsection (d), to provide that, with respect to an action for serious personal injury permissible under section 5104, an award or decision of an arbitrator or master arbitrator "will not constitute a collateral estoppel of

the issues arbitrated, either affirmatively or defensively, but such an award or decision may be admissible as relevant evidence by a party to such an action," has previously been introduced.

This legislation, S.2442 (sponsored by Guy J. Velella) and A.4007 (sponsored by Stephen B. Kaufman), passed both houses in 1993, but was vetoed by then-Governor Cuomo. The bill was re-introduced in 1994, at which time it passed the Assembly, but was buried at the Committee level in the Senate. According to our sources, the legislation will be re-introduced in the next session, commencing January 1996.

Proponents of the new legislation contend that it will eliminate the inequalities in the present law by allowing claimants seeking reversal of improper denials of no-fault benefits prompt resolution of their claims through arbitration. Such supporters as the New York Public Interest Research Group, New York City Public Advocate Mark Green and former Attorney General G. Oliver Koppell have hailed the bill as redressing "inequalities" created by the collateral estoppel doctrine and encouraging greater use of no-fault arbitration. Proponents further note the even-handed approach of the bill, evidenced by the provision that it is to be applied to both affirmative and defensive use of collateral estoppel and the provision that the arbitration award or decision may be admissible as evidence by either party.

Opponents of the proposed legislation, who appear to be limited to insurance companies and trade groups, have criticized the bill because it would give claimants a second chance to litigate issues after their resolution in arbitration and would thus result in increased court congestion and increased costs for insurers and their customers.

### **Conclusion**

It has been held that the no-fault law "should be employed as a sword to gain immediate benefits for the insured, not as a shield to minimize an insurer's potential damages." *Yanis v. Texaco*, 85 Misc.2d 94, 97 (Civil Ct. N.Y. Co. 1975). Indeed, the courts have been uniform in construing that the no-fault law should be interpreted to fulfill the policies that the Legislature had in mind. *Maida v. State Farm*, 66 AD2d 852, 853 (2d Dept. 1978); *Colon v. Aetna*, 64 AD2d 498, 508 (2d Dept. 1978).

It is essential that the right afforded to claimants to dispute denials of medical treatment and reimbursements not be rendered illusory because of warranted fears of the potentially disastrous and far-reaching effects of a negative decision in arbitration. The proposed amelioratory legislation appears well-constructed to serve the laudable goals of the no-fault law by evening the playing field for carriers and claimants alike, and, accordingly to permit prompt resolution of claims through arbitration.

However, while the proposed bill only pertains to admissibility of the arbitrator's finding as evidence, and does not go to the weight of that evidence, the reality of the situation is that the award will inevitably be given great weight by the trier of fact. Accordingly, in our view, neither party, especially the plaintiff, should be allowed to use the award or decision for any purpose in the action. If it is unfair to charge the plaintiff who participated in some measure in the arbitration proceeding with the result obtained therein, it would seem to be even more so with respect to the defendant, who took no part in the arbitration proceeding.

In his 1993 veto message, former Governor Cuomo described the arguments in favor and in opposition to the no-fault collateral estoppel bill as both being "reasonable," but he said he was "reluctant," without more information, "to change a system which has successfully maintained stability in the auto insurance market since 1974." By his recent signing of the 25/50 automobile liability insurance law, Governor Pataki has evidenced that he is less concerned with maintaining stability in the auto insurance market than in the protection of the rights and well-being of the millions of drivers and automobile accident victims in the State. It is not known what action Governor Pataki will take on the no-fault collateral estoppel bill when and if it again passes both houses in the next legislative session. We believe that law, logic and public policy dictate that some corrective Regulation, whether it be the current proposed bill or an amended bill, be signed into law.

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