NEW YORK COURT OF APPEALS ROUNDUP

'OCCUPY THE FIELD' PREEMPTION, 'SERIOUS INJURY' UNDER NO-FAULT LAW

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DECEMBER 21, 2011

In an action brought by the Attorney General's Office, *People v. First American Corp.*, the Court of Appeals found that the New York statutory and common law claims against real estate appraisal firms were not preempted by federal law. The Court also resolved three appeals from decisions in which the Appellate Division held that, as a matter of law, the evidence the respective plaintiffs presented was insufficient to establish that their injuries from automobile accidents were "serious" as defined in the no-fault statute. In doing so, the Court expressed that, although courts are justifiably skeptical of serious injury claims based upon soft-tissue injuries, the fact finder must resolve issues of witness credibility if certain evidentiary requirements are satisfied. These decisions are discussed below, along with the results in several recent criminal appeals.

Real Estate Appraisals

The case of *People v. First American Corp.* required the review of an alphabet soup of federal statutes enacted and agencies formed during housing crises past and present. The Court (6-1) determined that federal law did not "occupy the field" so as to preempt then-Attorney General Andrew M. Cuomo's action under New York statutory and common law against two real estate appraisal firms.

During the Great Depression (of the 1930s), Congress enacted the Home Owners' Loan Act (HOLA), which created a system of federal savings and loan associations. HOLA created the Federal Home Loan Bank Board (FHLBB) and granted that agency authority to regulate the associations. In response to the savings and loan crisis of the 1980s, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), one of the purposes of which was to "thwart real estate appraisal abuses." FIRREA replaced the FHLBB with the Office of Thrift Supervision (OTS). The current housing and financial crisis spawned the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

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FIRREA required OTS to prescribe standards for real estate appraisals that at a minimum complied with the Uniform Standards of Professional Appraisal Practice (USPAP).[1] FIRREA also envisioned a federal/state relationship that included state certification and licensing of appraisers for federally related real estate transactions. Further, the statute authorized OTS to promulgate regulations that preempt certain state laws. The OTS regulation found at 12 C.F.R. 560[2] explicitly preempts categories of state laws, illustrative examples of which are listed in paragraph (b) thereof. The paragraph (b) list does not include real estate appraisals. Paragraph (c) of that regulation provides that state laws not coming under paragraph (b) are presumptively preempted if they "affect[]" lending operations of federal savings associations.

Dodd-Frank requires appraisal agencies to comply with USPAP and be subject to state licensing. It also expressly does not preempt states from establishing additional requirements applicable to appraisals. Enacted in 2010, Dodd-Frank post-dated the Attorney General's suit. Because the Court found that the action before it was not preempted by HOLA, FIRREA or OTS regulation, it was not necessary for it to address whether Dodd-Frank applied retroactively. Judge Susan Phillips Read's dissent, which argued in favor of preemption, addressed that question and concluded that Dodd-Frank is not retroactive.

Attorney General Claims

The Attorney General sued the defendant real estate appraisal firms in November 2007 for alleged violation of Executive Law §63 and General Business Law §349, as well as under the common law.[2] The defendants had advertised that their appraisals conformed with USPAP, which standards require, inter alia, appraiser "impartiality, objectivity, and independence." However, the complaint alleged, defendants gave in to pressure exerted upon them by non-party mortgage originator Washington Mutual (WaMu) to utilize only appraisers previously selected by WaMu who would furnish appraisals sufficiently high to permit mortgage loans to proceed.

In the Supreme Court defendants presented two preemption arguments: first, that federal statutes and regulations occupied the field of real estate appraisals; and second, that New York's attempt to regulate defendants through enforcement of its laws conflicted with federal law because it restricted WaMu's ability to finance real estate transactions. Following denial of their motion to dismiss, defendants pursued an appeal in the Appellate Division, First Department, but abandoned their conflict preemption argument. The First Department rejected the remaining theory of preemption and affirmed the denial of the motion to dismiss. The Court of Appeals affirmed.

Majority and Dissent Analyses

Judge Carmen Beauchamp Ciparick's opinion for the majority explained that the task before the Court was to ascertain Congress' intent. The Court determined that in passing FIRREA, Congress clearly envisioned state regulation of real estate appraisers in "partnership" with the federal government. The Court then applied 12 C.F.R. 560.2 and concluded that the Attorney General's prosecution of civil claims against real estate appraisal companies for their practices would have at most only an "incidental" impact upon the operations of federal savings associations and not "affect" them. As a result, there was no bar to the Attorney General's suit.

The dissenting opinion relied heavily upon two federal District Court decisions that had held similar claims were preempted, *Cedeno v. IndyMac Bancorp., Inc.* and *Spears v. Washington Mut. Bank*.[3] Judge Read agreed with those courts' interpretation of applicable federal statutes and regulations and also argued that New York courts should defer to federal court interpretation of federal law except where the interpretation appears to be "plainly wrong." The majority opinion had acknowledged those two rulings, but cited two other federal decisions that, it said, had come to the opposite conclusion.[4] The dissent considered those other decisions distinguishable, and would have dismissed the Attorney General's complaint on preemption grounds.

No-Fault/Serious Injury

Three cases decided together under the caption *Perl v. Meher* turned on whether the evidence presented by the plaintiffs was adequate to warrant having their claims of serious injury from an automobile accident determined by a jury. The issue was of sufficient importance for New Yorkers for Fair Automobile Insurance Reform and the New York State Trial Lawyers Association to submit amicus briefs.

The actions had in common that plaintiffs were involved in automobile accidents, claimed to have received soft-tissue injuries as a result, and asserted that their injuries met one or more of the criteria of the statutory definition of "serious" set forth in the Comprehensive Motor Vehicle Insurance Reparations Act, Insurance Law §§5101, et seq. (commonly known as the "no-fault law"), in which case the statute would not preclude them from seeking damages for non-economic loss, i.e., pain and suffering.

The actions also had in common that at least a majority of each of the panels of the Appellate Division concluded the evidence of serious injury was deficient, as a matter of law, and therefore took the decision away from the trier of fact. In one action, the First Department affirmed the Supreme Court's dismissal of the complaint on defendants' motion for summary judgment. In another, the Second Department reversed the Supreme Court's denial of defendants' motion for summary judgment. And in the third, the Second Department reversed the trial court's denial of defendants' motion for entry of judgment in their favor after the jury returned a verdict in favor of plaintiffs.

The opinion of Judge Robert S. Smith for the unanimous Court began with the observation that "[n]o-fault abuse…abounds," with no-fault claims accounting for 53 percent of fraud reports received by the Insurance Department and serious injury claims a significant source of abuse. The opinion stated, however, that the Court's reversal of the decisions in two of the cases before it did not suggest that lower courts were unjustified in their general skepticism toward soft-tissue serious injury claims. It continued, however, that there are cases in which "the role of skeptic is properly reserved for the finder of fact, or for a court that, unlike ours, has factual review power."

The Court's opinion reaffirms and establishes certain principles:

1. A plaintiff's subjective complaints are insufficient to establish serious injury, as a matter of law; serious injury claims must be supported by "objective evidence."[5]

2. Subjective complaints may be substantiated either with quantitative expert evidence, such as a numeric percentage of loss of range of motion, or with an expert's qualitative assessment provided that it has an objective basis comparing the plaintiff's condition to normal function.[6]

3. A doctor's report that merely records a patient's subjective complaints does not have an "objective basis."

4. A quantitative assessment of a plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation.

The latter ruling is important. It was based upon the conclusion that it is not unreasonable for a doctor to ascertain the quantitative severity of an injury long after it has occurred, and that to hold otherwise would penalize injured parties who in the first instance seek out medical care rather than a doctor experienced in developing evidence suitable for use at trial.

In two of the appeals, the Court reversed the Appellate Division, although it noted that both cases had "troubling features." In the remaining case the Court upheld the Appellate Division's decision, finding no evidence in the record to support that the injuries at issue were serious.

Criminal Decisions

Last month, the Court handed down decisions in several criminal appeals, some of which we describe briefly here. In *People v. Rivers*, the Court "put…to rest" dictum from a nearly century-old decision that had continued to be cited for the proposition that experts may not testify either that a fire was intentionally set or that the facts are

consistent with a fire being intentionally set, *People v. Grutz*, 212 N.Y. 72 (1914). The science of fire investigation has progressed since *Grutz* was decided, so that the admissibility of testimony by an arson expert must be determined according to the guidelines applicable to all expert testimony, the *Rivers* Court ruled.

Two appeals involved the shackling of a defendant during a jury trial where the trial court made no finding on the record that leg irons were necessary. In *People v. Clyde*, the Court found that it was improper to have the defendant in leg irons; however, it held that the error, although of constitutional dimension, was harmless due to the overwhelming evidence of defendant's guilt. In *People v. Cruz*, the record did not establish that the jury could not see the shackles around the defendant's ankles and the jury may have inferred the defendant was shackled because the defense table was surrounded by bunting whereas the prosecution table was not. The Court concluded that the error was not harmless and reversed the conviction.

The Court also reversed one first-degree robbery conviction on the ground that the prosecution failed to prove that a stun gun was a "dangerous instrument" (*People v. Hall*), and another because the trial court failed to instruct the jury as to the statutory definitions of "appropriate" and/or "deprive," which form part of the definition of "larcenous intent" (*People v. Medina*).

Endnotes:

1. The USPAP are promulgated by the non-profit The Appraisal Foundation.

2. The action was filed in Supreme Court, New York County, removed by the defendants to the U.S. District Court for the Southern District of New York on a theory of federal question jurisdiction, and then remanded to the Supreme Court upon motion by the Attorney General.

3. See *Cedeno v. IndyMac Bancorp, Inc.*, 2008 US Dist LEXIS 65337 (S.D.N.Y. 2008) and *Spears v. Washington Mut. Bank*, 2009 US Dist LEXIS 21646 (N.D. Cal. 2010).

4. See *Bolden v. KB Home*, 618 F.Supp.2d 1196 (C.D. Cal. 2008) and *Fidelity Nat. Info. Solutions, Inc. v. Sinclair*, 2004 US Dist LEXIS 6687 (E.D. Pa. 2004).

5. Quoting *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 (2002).

6. Id.