

Third Circuit Overlooks Jurisdictional Problem in New Jersey Insurance Fraud Claims Decision

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In *Government Employees Insurance Company v. Mount Prospect Chiropractic Center*, No. 23-1378 (3d Cir. Apr. 26, 2024), a decision resolving appeals in multiple cases, the Third Circuit reversed the district courts' decisions that GEICO's claims under the New Jersey Insurance Fraud Prevention Act (IFPA) were not subject to arbitration. The defendant health care providers moved to compel arbitration on the ground that their contracts with GEICO required arbitration of any disputes arising under the agreements or relating to claims for insurance benefits. The defendants also argued that a New Jersey statute relating to no-fault automobile insurance required arbitration of the claims.

The Third Circuit held that both the contracts and the statute independently required arbitration. As explained in this article, however, the Third Circuit had appellate jurisdiction under the Federal Arbitration Act (the FAA) to decide only whether the claims were arbitrable under a written arbitration agreement. Whether the New Jersey no-fault statute mandates arbitration of IFPA claims—a hotly debated issue of New Jersey state law—was outside the scope of that jurisdiction. This jurisdictional issue was not discussed in the opinion or the parties' briefs.

Background to 'GEICO' Decision

No-fault automobile insurance, or personal-injury-protection (PIP) benefits, cover medical expenses for those involved in car accidents, regardless of fault. Typically, the covered person assigns the PIP benefits to the treating health care provider, who submits a claim for payment to the insurer. Insurers are required to establish, with approval of the New Jersey Department of Banking and Insurance (DOBI),

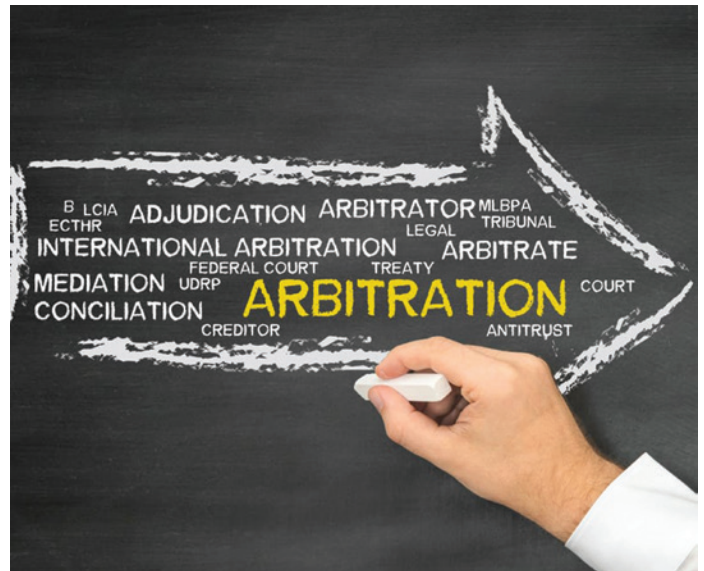


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Decision Point Review Plans (DPRPs). The DPRPs are permitted to condition assignment of benefits on the health care provider's agreement to submit disputes to alternative dispute resolution. See N.J. Admin. Code Section 11:3-4.9(a)(3). GEICO's DPRP contained a clause stating that "any issue arising under [the DPRP], or in connection with any claim for [PIP] benefits" had to be arbitrated.

In addition, New Jersey law provides for mandatory alternative dispute resolution of specified disputes relating to PIP benefits. The statute states: "Any dispute regarding the recovery of medical expense benefits or other benefits provided under [PIP] coverage ... arising out of the operation, ownership, maintenance or use of an automobile may be submitted to dispute resolution on the initiative of any party to the dispute." N.J. Stat. Ann. Section 39:6A-5.1(a). The "dispute resolution" referenced in the statute is not commercial

arbitration, which provides a range of remedies and access to reasonable discovery procedures. Rather, it is a limited process conducted before an organization called Forthright, which is governed by regulations promulgated by DOBI. Among other things, the New Jersey Appellate Division has explained that “if the insurance carrier is successful [in PIP dispute resolution], there is no ‘award,’” thus suggesting that insurers cannot obtain monetary remedies. *N.J. Coal. of Health Care Providers v. Dep’t of Banking & Ins.*, 732 A.2d 1063, 1094 (N.J. App. Div. 1999). And discovery in PIP dispute resolution is limited to matters relating to medical history and treatment. See *Selective Ins. Co. of Am. v. Hudson E. Pain Mgmt. Osteopathic Med. & Physical Therapy*, 5 A.3d 166, 173 (N.J. App. Div. 2010), *aff’d*, 46 A.3d 1272 (N.J. 2012); *In re N.J. Healthcare Coal.*, Order No. A12-114 (Dep’t of Banking & Ins. Nov. 23, 2012). Moreover, Forthright arbitrators handle tens of thousands of small disputes relating to the appropriateness of medical treatment that are different from the type of complex insurance fraud that insurers often allege under the IFPA involving, for example, kickbacks, unlawful self-referrals, and medical practices that are unlawfully owned or controlled by non-physicians. See Forthright 4th Quarter 2023 Rep. to DOBI.

GEICO filed cases in the U.S. District Court for the District of New Jersey alleging that health care providers fraudulently obtained PIP benefits in violation of the IFPA, in addition to other causes of action. The defendants moved to compel arbitration. The district judges concluded that the IFPA itself forecloses arbitration and that under the federal McCarran-Ferguson Act—which exempts state insurance laws from preemption—the IFPA controlled even if the FAA would have required enforcement of the parties’ arbitration agreements. Questions relating to the arbitrability of IFPA claims against health care providers have been a fertile ground for litigation in New Jersey federal and state courts. The New Jersey Supreme Court and Appellate Division have not yet decided whether the state no-fault insurance law requires insurers to pursue IFPA claims for damages in Forthright dispute resolution and prevents litigation of those claims, although it is clear that parties have a constitutional right to a jury trial on IFPA claims for damages, see *Allstate N.J. Ins. v. Lajara*, 117 A.3d 1221, 1233 (N.J. 2015).

The Third Circuit addressed three issues in its opinion: (1) whether the IFPA forecloses arbitration of claims under it and thus “reverse preempts” the FAA as to the arbitrability of those claims; (2) whether

the parties’ contracts required arbitration of GEICO’s claims; and (3) whether the New Jersey no-fault insurance statute required GEICO to submit its claims to the alternative dispute-resolution system established under that law. The court stated that it had jurisdiction to decide the appeal under Section 16(a) of the FAA, but it did not address its appellate jurisdiction in any detail. The Third Circuit clearly had appellate jurisdiction to decide the first two issues, but it did not have jurisdiction under the FAA to decide the third issue.

Lack of Appellate Jurisdiction to Decide Statutory Issue

The Third Circuit based its jurisdiction over the appeal on Section 16(a)(1)(B) of the FAA. That section provides a right to an immediate appeal from an order “denying a petition under Section 4 of this title to order arbitration to proceed.” 9 U.S.C. Section 16(a)(1)(B). Section 4 of the FAA provides that “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. Section 4. And Section 2 of the FAA, the centerpiece of the statute, states that “[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. Section 2.

Thus, Section 2 of the FAA requires enforcement of a contractual agreement to arbitrate, Section 4 provides a procedure to move to compel compliance with a written arbitration agreement, and Section 16(a) provides for an immediate appeal of an order denying a motion to enforce a written arbitration agreement. Whether a state statute requires arbitration is outside the FAA’s scope. Indeed, the Third Circuit so held in *Palcko v. Airborne Express*, 372 F.3d 588 (3d Cir. 2004), where the court explained that FAA Section 16(a) gave it jurisdiction to review whether a dispute was arbitrable under the FAA but not whether the dispute was arbitrable under state law. *Id.* at 594. *Palcko* illustrates in the arbitration context the principle that “a single order is not appealable in its entirety just because a portion of that order is appealable.” *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 209 (3d Cir. 1990).

Respectfully, then, the Third Circuit did not have appellate jurisdiction under FAA Section 16(a) over all the issues it resolved on the appeal. Although it did not discuss any alternative grounds for jurisdiction, the court might have based jurisdiction to decide the statutory issue on the doctrine of pendent appellate jurisdiction. But doing so would have arguably stretched that doctrine beyond its bounds. The doctrine is “discretionary and narrow,” *Palcko*, 372 F.3d at 594, and applies only if the otherwise-non-appealable issue is inextricably intertwined with an appealable issue or when deciding an otherwise-non-appealable issue is necessary to ensure meaningful review of the lower court’s decision. *O’Hanlon v. Uber Techs.*, 990 F.3d 757, 765 (3d Cir. 2021).

In the *GEICO* case, the Third Circuit held that the contracts and the statute were alternative and independent grounds to compel arbitration of GEICO’s claims. Because the Third Circuit could have reached the same result in its decision without considering the non-appealable issue of whether the state no-fault insurance law required arbitration, the contract and statutory issues were not inextricably intertwined. The Third Circuit has previously explained: “[I]f we can adjudicate the appealable order [in *GEICO*, contract-based arbitration] without venturing into otherwise nonreviewable matters [in *GEICO*, statutory dispute resolution under state law], we have no need—and therefore no power—to examine those matters.” *Id.* (internal quotation marks omitted).

Nor was deciding the statutory issue necessary for a meaningful review of the district courts’ orders. The district courts denied arbitration because they held that the IFPA does not permit it. The Third Circuit meaningfully reviewed—and reversed—that order under the FAA by holding that the IFPA did not foreclose arbitration and that the parties’ contracts required it. Since the statutory ground to compel dispute resolution was independent of the contract basis, it was not necessary for the Third Circuit to address the statute to meaningfully review the district courts’ decisions: Arbitration would have proceeded regardless of the Third Circuit’s interpretation of the state no-fault law.

Although the court did exercise pendent appellate jurisdiction in *Palcko* to review whether the

dispute was arbitrable under state law, that case is distinguishable. There, the defendant sought to enforce an arbitration agreement under both the FAA and state law. The district court denied the motion because it concluded that the arbitration agreement fell under an exemption in the FAA for the employment contracts of transportation workers and that the exemption preempted state arbitration law. See *Palcko*, 372 F.3d at 591. The Third Circuit affirmed the appealable aspect of the order—that the FAA exemption applied. *Id.* at 594. The court held that it also needed to address whether the dispute was arbitrable under state law to ensure meaningful review because that non-appealable issue arose out of the same contract as the appealable issue and declining to resolve it would leave in place the district court’s holding (which the Third Circuit ultimately reversed) that the claims were not arbitrable on the ground that the FAA preempted state law. See *id.* at 594-95. In contrast, the alleged obligations to arbitrate in *GEICO* arose out of different instruments—a contract and a state statute—which had to be separately interpreted, and the Third Circuit would have reversed the district courts regardless of the state statute.

The Third Circuit’s exercise of appellate jurisdiction over the state statutory issue was significant because that issue is very much in debate in New Jersey courts and the parties’ briefs did not devote extensive attention to it. That limited briefing appears reflected in the court’s short, two-paragraph discussion of the matter, which did not address many arguments germane to whether the New Jersey legislature intended no-fault dispute resolution to apply to IFPA claims. Among other things, the Third Circuit did not consider the principle of constitutional avoidance; that is, since the New Jersey Constitution guarantees a right to a jury trial on IFPA damages claims, whether courts must interpret the no-fault dispute-resolution statute—which, unlike a contractual arbitration agreement, is not a waiver of the right to a jury trial—to avoid the constitutional problem of requiring alternative dispute resolution of those claims.

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