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Litigation

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"The greatest Trust, between Man and Man, is the Trust of Giving Counsell," wrote Sir Francis Bacon, as quoted by the First Department in *Ween v. Dow*, an October 2006 decision discussed below.

Although he did not practice in the New York State courts, Sir Francis doubtless understood the nail-biting angst experienced by attorneys who must wait for an appellate opinion to see if their clients' trust will be vindicated. To provide guidance to counsellors, some of the leading cases decided during the past three months by New York's intermediate appellate courts are summarized below.

First Department

Retainer Agreements. If a client doesn't pay her bills, can the lawyer enforce a provision in his retainer agreement allowing him to recover the fees incurred in bringing a collection action? According to a unanimous panel of the First Department in *Ween v. Dow*,[1] the answer is "No." Writing for the court, Justice Eugene Nardelli concluded that such a fee-shifting provision was against public policy and therefore unenforceable. After commenting on the unique fiduciary nature of the attorney-client relationship, Justice Nardelli observed that the provision would not have shifted attorney's fees to the client if she had prevailed in the collection action, rendering it "fundamentally unfair and unreasonable." Further, "[a]side from its lack of mutuality, the clause, even if not so designed, has the distinct potential for silencing a client's complaint about fees for fear of retaliation for the nonpayment of even unreasonable fees."

Corporate Governance. If you resign from a New York corporation, make sure your resignation letter reaches the proper desk. Those are words to the wise after *RST Resources Inc. v. Sumitomo Corp.*,[2] a unanimous unsigned decision and order. In an apparent case of first impression, the First Department held that to be effective, "a letter of resignation from an officer of a New York corporation should be submitted to the person or persons having the power to fill the vacancy," absent a contrary provision in the corporation's bylaws or certificate of incorporation.

Noting "a dearth of case law" on the subject, the panel concluded that a corporation's president's submission of a resignation letter to the company's "then-financial controller" was ineffective. The president failed to show that the recipient was an officer of the corporation, "let alone that he was empowered to fill the vacancy in the office of president."

Insurance. The law of the insured's principal place of business generally will govern in a multistate liability insurance coverage dispute, the First Department clarified in *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*[3] "[W]here it is necessary to determine the law governing a liability insurance policy covering risks in multiple states," the court explained, "the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk." Consequently, in most cases, "the state of domicile is the source of applicable law." Writing for a unanimous panel, Justice David Friedman also noted that, where the insured's principal place of business differs from its state of incorporation, "the state of the principal place of business takes precedence over the state of incorporation."

'[T]o determine the law governing a liability insurance policy covering risks in multiple states, the state of the insured's domicile should be regarded as a proxy for the principal location of the insured risk.'

End-of-Life Decisions. Chantel R., age 26, functions on a first- to second-grade level and lacks the capacity to make health care determinations. Nonetheless, Chantel has expressed anxiety about death. Chantel's guardian has the right to terminate her medical treatment under the Health Care Decisions Act for Persons with Mental Retardation.[4] Chantel's lawyers contended that the act violated the Equal Protection Clause because it gave less weight to her desire not to die than the desires of a mentally competent person. In *Matter of Chantel Nicole R.*,[5] the First Department disagreed. Writing for a unanimous panel, Justice Peter Tom concluded that "a mentally retarded person's expression of a desire to continue life-sustaining measures is categorically distinguishable from the same desire expressed by a mentally competent individual because only the latter has the capacity to appreciate the consequences of the decision and thus the ability to make the choice to pursue an uninformed or irrational alternative." Chantel, in contrast, "has never been competent to make a decision concerning medical care." Thus, "any disparity in treatment of a mentally retarded person is justified by legitimate state interests"—in particular the act's purpose of conferring on the legal guardian of a mentally retarded person the legal authority to make medical decisions on the person's behalf.

Second Department

Contempt. Fines of $1 million per day were properly imposed on the New York City transit workers' union for its abortive strike in December 2005, the Second Department held in *New York City Transit Authority v. Transport Workers Union of America*.[6] Writing for a unanimous panel, Justice Howard Miller rejected the argument that the contempt citation deprived the union of its Sixth and Fourteenth Amendment rights to a jury trial. Rather, the fines for violating an antistrike injunction "had both a retrospective, criminal component as well as a prospective, civil component." The portion that was intended to compel the union to end the strike constituted a "coercive, per diem sanction" that was "civil in nature," and thus did not require a criminal jury trial. Even if the fines (which totaled $2.5 million) were regarded as criminal sanctions for prior misconduct, in light of the local's size and financial resources, they did not reach the level of a "serious" fine that would require a jury trial. The Second Department did not view the fines as excessive "in any way."

Driving While Intoxicated. The defendant in *People v. Litto*[7] allegedly veered into oncoming traffic after inhaling a spray can of "Dust-Off" while driving. In an unsigned 3-1 decision and order (Justice David S. Ritter

dissenting), a panel of the Second Department affirmed the dismissal of two charges: driving while intoxicated under Vehicle and Traffic Law §1192(3) and second-degree vehicular manslaughter under Penal Law §125.12.

Those statutes, the majority observed, apply only to intoxication caused by alcohol. A separate statute, Vehicle and Traffic Law §1192(4), covers operation of a motor vehicle while under the influence of drugs or narcotics. It is unclear, however, whether that statute extends to off-label consumption of "Dust-Off."

Condominium Owners. The Second Department resolved several issues of first impression concerning the rights of condominium owners in *Caprer v. Nussbaum*.[8] Writing for a unanimous panel, Justice Robert A. Spolzino held that condo unit owners lack standing to assert individual claims for damage to the condominium's common elements or funds. A condominium owner may sue derivatively for injury to common property, however. Even though no statute authorizes condominium owners to maintain derivative suits, the Second Department found such a right in the common law. "The same factors that caused the courts to fashion the derivative action procedure for shareholders and limited partners . . . apply to condominium unit owners," Justice Spolzino wrote.

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Guardians. A guardianship order was struck down on due process grounds in *Matter of Rhodanna C.B. v. Pamela B.*,[9] a 3-1 decision by Justice William F. Mastro. The Supreme Court had effectively authorized the guardians of Rhodanna, a mentally incapacitated woman living at home who was not institutionalized, to consent to administration of psychotropic drugs or shock therapy over her objection, without any durational limit on that authority, judicial review of Rhodanna's capacity, or judicial review of the propriety and necessity of the proposed treatment.

Recognizing that mental capacity can change, the Second Department observed that "due process requires that the question of capacity be evaluated each time the administration of psychotropic medication or electroconvulsive therapy is proposed over the patient's objection." Consequently, the Second Department reversed the judgment, adding a provision directing the guardians not to authorize the administration of psychotropic medication or electroconvulsive therapy to Rhodanna "without her consent or a further order of the court following a hearing."

Third Department

Plea Allocutions. Taking a plea allocution is the responsibility of the court, not of counsel, the Third Department concluded in *People v. Robbins*.[10] In that case, a County Court delegated responsibility for conducting the plea allocution to defense counsel, and then informed the defendant that his lawyer was "no longer representing you in the sense of protecting you." Noting that the Third Department had "long criticized the practice of courts delegating the duty to conduct the plea allocution," Justice Thomas E. Mercure, writing for a unanimous panel, ruled that delegating the factual allocution in its entirety to defense counsel impermissibly placed counsel in a "position adverse to defendant during a critical stage of the proceedings." The appellate court held the guilty plea involuntary and reversed the conviction.

Health Insurance. Unanimously rejecting the state's new, money-saving interpretation of Civil Service Law §167-a, the Third Department held in *United University Professions v. State of New York*[11] that the state is required by law to reimburse fully the Medicare Part B premiums paid by participants in the New York State Health Insurance Plan (NYSHIP).

Section 167-a, which mandates that eligible NYSHIP participants enroll in the federal Medicare Part B plan as their primary insurance and makes the NYSHIP supplemental insurance, provides that "[e]mployer contributions to the health insurance fund shall be adjusted as necessary to provide for [Medicare] payments."

After 40 years of interpreting the statute to mandate full reimbursement of the federal premiums, in January 2006, the state reinterpreted §167-a to mandate that the state reimburse participants' Medicare Part B premiums according to the percentages of Civil Service Law §167[1] (90 percent for individuals and 75 percent for their dependents). Justice Anthony T. Kane wrote that the plain language of §167-a, the legislative purpose of protecting those over 65 from premium increases, and the state's "correct long-standing interpretation of that statutory scheme," showed the state's new interpretation to be "arbitrary, capricious and contrary to law."

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Fourth Department

Joint Parental Decision-Making. May a court awarding joint custody of a child provide that final decision-making authority shall shift between the parents, depending on whether it is an odd- or even-numbered year? The Fourth Department vacated such a provision in *Fiorelli v. Fiorelli*.[12] In an unsigned memorandum, the unanimous panel reasoned that granting this authority "to one parent in even-numbered years and the other parent in odd-numbered years is both arbitrary and contrary to the concept of joint parental decision-making."

Fraudulent E-Mails. In *People v. Carmack*,[13] the Fourth Department rejected the attorney general's novel attempt to prosecute alleged e-mail scam artists under New York's forgery laws. The defendant had solicited orders for dietary supplements and other products using a computer program that hijacked e-mail addresses to make the solicitations appear to be from other individuals or entities.

In an unsigned memorandum opinion, the panel held that because the e-mails were not "instruments" described in Penal Law §170.10(1) (such as deeds, wills or contracts), they could not be forged. Further, because the computer program at issue had legitimate uses and thus was not "specifically designed for use in... forging written instruments," the defendant could not be convicted of possession of a "forgery device" under the statute. The attorney general was not completely disarmed, however, as the panel affirmed the sentence based on valid convictions for identity theft and falsifying business records.

High-Low Agreements. The trial judge's failure to disclose to the jury and the nonsettling party that the other defendant and the plaintiff had entered a into "narrow high-low agreement" did not require reversal of a damages award of $3.75 million in an asbestos case, the Fourth Department held in *Reynolds v. Amchem Products, Inc*.[14] In a 3-1 unsigned memorandum (Justice L. Paul Kehoe dissenting), the Fourth Department affirmed the judgment against the nonsettling defendant, even though the settling defendant had agreed with the plaintiff that, regardless of the verdict, its liability would be between $155,000 and $185,000. The majority rejected the nonsettling defendant's contention that it was unfairly prejudiced by not knowing about the agreement. The settling defendant "retained the incentive to minimize its own culpability and to magnify the culpability" of its codefendant, the court explained, while the nonsettling party "failed to show how the [high-low] agreement realigned loyalties so as to prejudice [it]."

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Endnotes:

1. 2006 N.Y. Slip Op. 07227 (1st Dept. Oct. 5, 2006).
2. 2006 N.Y. Slip Op. 07111 (1st Dept. Oct. 3, 2006).
3. 2006 N.Y. Slip Op. 06937 (1st Dept. Sept. 28, 2006).
4. N.Y. Sess. Laws Ch. 500, pg. 1274 et seq. (McKinney 2002).
5. 2006 N.Y. Slip Op. 06628 (1st Dept. Sept. 21, 2006).
6. 2006 N.Y. Slip Op. 07153 (2d Dept. Oct. 3, 2006).
7. 2006 N.Y. Slip Op. 07180 (2d Dept. Oct. 3, 2006).
8. 2006 N.Y. Slip Op. 07443 (2d Dept. Oct. 17, 2006).
9. 2006 N.Y. Slip Op. 07870 (2d Dept. Oct. 31, 2006).
10. 2006 N.Y. Slip Op. 07640 (3d Dept. Sept. 11, 2006).
11. 2006 N.Y. Slip Op. 08962 (3d Dept. Nov. 22, 2006).
12. 2006 N.Y. Slip Op. 08380 (4th Dept. Nov. 17, 2006).
13. 2006 N.Y. Slip Op. 08490 (4th Dept. Nov. 17, 2006).
14. 2006 N.Y. Slip Op. 06953 (4th Dept. Sept. 29, 2006).

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