Appellate Division Review

Precedent-Setting Decisions in Insurance Law and FOIL

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For many, the first Monday of October marks the beginning of a new season of court watching. But we who follow the Appellate Divisions know that precedent-setting decisions are always in season. Below are some of the late summer highlights from the four departments.

First Department

Insurance. In ***Consolidated Edison v. Allstate***,[1] the Court of Appeals held that liability for long-term environmental damage could be allocated among insurance policies on a pro rata basis based on an insurer's time on the risk, rather than each insurer being jointly and severally liable for all damages. Such a pro rata allocation would apportion risk to the policyholder for those periods of time when it chose not to carry adequate insurance. In ***KeySpan Gas East Corp. v. Munich Reinsurance America,***[2] a case of first impression for New York's appellate courts, the First Department held that risk could also be apportioned to the policyholder for periods when it lacked insurance—not by choice—but because insurance coverage was not available in the marketplace.

The case stems from a 1995 order directing KeySpan to clean up environmental pollution that had accumulated over decades. KeySpan sought indemnification from its insurer not only for the 16 years covered by its insurance policies, but also for periods when insurance coverage was unavailable.

In a unanimous decision authored by Justice Judith J. Gische, the First Department held that the insurer was not required to cover damages outside the period covered by the policies. The court distinguished contrary U.S. Court of Appeals for the Second Circuit and New Jersey Supreme Court precedent on the grounds that the public interest factors on which those courts relied were trumped by the particular policy language here. The KeySpan policies' coverage for occurrences, accidents and conditions that resulted in damage "during the policy period" reflected an allocation based on time on risk, the court concluded. A contrary rule would "expose [the insurer] to risks beyond those contemplated when the policies were purchased."

Due Diligence. In ***IKB International v. Morgan Stanley***,[3] the First Department analyzed the extent of due diligence a sophisticated investor must allege when pursuing a fraud claim. The case arose from plaintiffs' purchase of residential mortgage-backed securities (RMBS) between 2005 and 2007 and the RMBS's

subsequent loss in value. Defendants moved to dismiss plaintiffs' fraud claim on the ground that plaintiffs failed to allege, not only that they relied on the offering documents, but that "they sought additional information about the truthfulness of the representations made in the offering documents or that they requested the loan files for the loans underlying the RMBS."

In an unsigned opinion, the First Department rejected such a "heightened due diligence standard," which would require "a prospective purchaser to assume that the credit ratings assigned to the securities were fraudulent and to verify them through a detailed retracing of the steps undertaken by the underwriter and credit rating agency." Rather, plaintiffs adequately stated a fraud claim where they alleged their advisors analyzed the offering documents and lacked access to the underlying loan documents, and defendants cautioned investors to rely only on the offering documents.

Second Department

FOIL. Pistol permit holders' names and addresses are public records and subject to disclosure under the Freedom of Information Law (FOIL) absent individualized exceptions, the Second Department held in a case of first impression in ***Matter of Gannett Satellite Information Network v. County of Putnam***.[4] In January 2013, the Legislature passed the Secure Ammunition and Firearms Enforcement (SAFE) Act, allowing pistol holders who believe they would be threatened by such disclosure to apply for an exception to keep their names and addresses out of the public records. Prior to that, such information was public.

In 2013, a reporter submitted a FOIL request seeking "the names and addresses of all non-exempt permit holders." Putnam County denied the request, citing exemptions under FOIL for disclosures that would "constitute an unwarranted invasion of personal privacy" and that "could endanger the life or safety of any person." The trial court granted the reporter's subsequent Article 78 petition, and ordered the county to comply with the request.

In an unsigned opinion, the Second Department affirmed. The court explained that the SAFE Act "provides an avenue whereby pistol permit holders may except their name and address from becoming a public record. It does not affect the manner in which the names and addresses that remain a public record may be exempted from FOIL disclosure." If pistol permit holders do not actively except their names and addresses, and if a "narrowly construed" FOIL exception does not apply, the names and addresses are subject to disclosure.

Insurance. New York Insurance Law §3425(d)(1) requires an insurer to notify a policyholder of its intention to condition renewal "upon [a] change of limits or elimination of any coverages." In a case of first impression in the ***Second Department, the court in Gotkin v. Allstate Insurance***[5] held that this provision applies to the issuer of an umbrella policy that seeks to change the underlying limits that apply before the umbrella policy kicks in.

In addition to a primary automobile insurance policy, plaintiff maintained an excess liability insurance policy with Allstate. Without informing plaintiff, Allstate subsequently increased the amount of the underlying insurance that plaintiff must maintain before the umbrella policy's coverage became available, creating a $150,000 gap between the two policies. The trial court granted summary judgment to Allstate, concluding that Insurance Law §3425(d) did not apply because the limit of the umbrella policy remained $1 million and the increase in the required underlying coverage did not constitute a reduction of the limit.

In a unanimous opinion authored by Justice Jeffrey A. Cohen, the Second Department reversed. The court held that a "change of limits" of an umbrella policy includes a change of the required underlying coverage limits: "Simply stated, this was a change of the coverage provided, and, thus, Allstate was required to provide notice." Because Allstate failed to do so, "reformation is the appropriate remedy."

Third Department

Plea Agreements. In ***People v. Clark***,[6] the Third Department concluded that a claim of potential juror bias in a grand jury proceeding would be forfeited upon a guilty plea. Due to confusion on this issue during sentencing, however, the court gave the defendant an opportunity to withdraw his plea.

Defendant was charged with possession and sale of a controlled substance. During the sentencing hearing, defendant told the trial court, "I guess the only thing I wanted to say is that I wanted to make sure—I know you can't appeal this, but I wanted to appeal the things that—[defense counsel] said I can go to the appellate court, because the member of the

grand jury was a friend of mine for six years, a neighbor."

Defense counsel responded, "[h]e certainly can appeal it," and the trial court told defendant that "if you feel you have an appealable issue that the Appellate Division can hear you certainly have the right to appeal." Without deciding whether the defendant was deprived of meaningful representation, Justice Michael C. Lynch, writing for the panel majority, explained that the trial court should have realized the defendant had been given erroneous advice and conducted a further inquiry whether defendant wanted to proceed with his plea.

Fourth Department

Juries. If you see something, say something, the Fourth Department reminds trial counsel in the reprise of ***People v. Mack***.[7] The defendant was convicted of gang assault in the first degree. The Fourth Department reversed,[8] holding that the trial court's failure to respond to two substantive notes from the jury before accepting the verdict constituted a "mode of proceedings" error. Such an error— which requires reversal and is immune to the rules governing preservation and waiver—is reserved for the most fundamental flaws that affect the organization of the court or the mode of proceedings prescribed by law (for example, shifting the burden of proof from prosecution to defense).

The Court of Appeals, in turn, reversed and declined to expand this "narrow" but admittedly "not easily defined" category of errors.[9] Defense counsel had adequate notice to object to the trial court's procedure, and the Court of Appeals did not want to encourage gamesmanship and incentivize defense counsel to not object and then claim error if the jury convicts.

On remand to the Fourth Department, the panel majority declined to exercise its discretion to hear the unpreserved claim that the trial court failed to give the jury "such requested information or instruction as the court deems proper" as required by N.Y. C.P.L. §310.30. Taking its cue from the Court of Appeals, the majority noted that defense counsel may well have declined to object for strategic reasons. If defense counsel thought his client was prejudiced by the court's approach, it behooved him to speak up.

Endnotes

1 98 N.Y.2d 208 (2002).

2 2016 N.Y. Slip Op. 05945 (1st Dept. Sept. 1, 2016).

3 2016 N.Y. Slip Op. 05779 (1st Dept. Aug. 11, 2016).

4 2016 N.Y. Slip Op. 05999 (2d Dept. Sept. 14, 2016).

5 2016 N.Y. Slip Op. 05359 (2d Dept. July 6, 2016).

6 2016 N.Y. Slip Op. 05831 (3d Dept. Aug. 18, 2016).

7 2016 N.Y. Slip Op. 05825 (4th Dept. Aug. 17, 2016).

8 117 A.D.3d 1450 (4th Dept. 2014).

9 27 N.Y.3d 534 (2016).

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