# New York State Law Digest

REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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## COURT ADDRESSES "INVERSE CONDEMNATION"

### Term Describes How Landowner Gets Just Compensation When No Proceedings Have Been Brought

When a taking for a public use is involved, either by government proper or by a nongovernmental agency that has been given the condemnation power, formal proceedings are usually brought to resolve the issues, including, of course, the issue of just compensation. But what is "inverse condemnation"? Quoting from the 1980 U.S. Supreme Court decision in *U.S. v. Clarke*, 445 U.S. 253, the Court of Appeals describes "inverse condemnation" as

> the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.

They were not instituted in *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 944 N.Y.S.2d 732 (March 29, 2012), in which the defendant utility (D) attached a box to plaintiff's (P's) apartment in Brooklyn, to which it attached its cable and from which it then attached wires that went out to other buildings in the area. It was using P's building, in other words, as a telephone pole, while all the while misrepresenting to P that this was its right, which it wasn't, and offering no compensation.

Reviewing the history of "inverse condemnation", the Court finds *Corsello* within that category and holds that it supports P's damages claim.

It also finds the claim timely under the applicable three-year period of CPLR 214(4) (injury to property). While more than three years had apparently passed and would have barred the claim, the Court finds it preserved under § 261 of the Real Property Law, which says that when the claim is based on cables or the like attached to an owner's building "no lapse of time whatever" shall bring about a prescriptive right that would not otherwise exist.

Also asserted by P was a claimed violation of General Business Law § 349, which prohibits deceptive practices and allows a money claim as a remedy. This claim, however, did fall within the bar of the statute of limitations. The applicable statute is again the three years of CPLR 214. In this instance the relevant subdivision is the one applicable to statutory claims, subdivision 2.

The injury here was suffered by P more than three years before suit. And P, relying on D's representations, did not within that time frame ask that the box be removed or that P be compensated for its use. (And for this claim, P didn't have the likes of an RPL § 261 to save it.)

(P also asserted a claim of trespass, but that was still pending below and hence is not addressed by the Court.)

As plaintiffs so often do in even roughly analogous cases, P tried to get the court to invoke an estoppel against D, barring it from pleading the time limitation.

Trying to estop a defendant from invoking an apparently applicable time limit is a tough cause for any plaintiff. The major Court of Appeals cases in point are its 1966 *General Stencils* and 1978 *Simcuski* decisions (see Siegel, New York Practice 5th Ed. § 56). Both are cited, and readily distinguished, in *Corsello*. To support an estoppel, activities or representations by the defendant made *after* the accrual of the original claim and designed to get the plaintiff to postpone suit are needed. That wasn't this case, which the Court instead finds typical of the great majority of cases, which fail in their estoppel effort: cases in which "the alleged concealment [by the defendant] consisted of nothing but defendants' failure to disclose the wrongs they had committed".

In an opinion by Judge Smith, a claim based on unjust enrichment is also rejected by the Court, admonishing that "unjust enrichment is not a catchall cause of action to be used when others fail". It applies only in "unusual" situations "in which the defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled".

Class action treatment sought by P is also rejected. Going over the requirements for class treatment in CPLR 901, the Court finds several of its prerequisites lacking.

## OTHER DECISIONS

*SURETY'S RIGHTS*

### Surety on Construction Project Is Not Discharged When Contractor's Payment to Owner Is Applied by Owner to Money Contractor Owed on Prior Project

The construction project was undertaken here by contractor K for a school district (plaintiff P). As their agreement required, K secured a performance bond from defendant D, a surety, incorporating the terms of the construction contract. While the project was under way, P got a notice from the labor department (DOL) requiring P to withhold money to cover sums owed by K on a prior project, unrelated to the present one. DOL later authorized P to release those moneys to K, except for $214,000 that P was to forward to DOL to satisfy K's earlier debt. P did forward it, with K's president agreeing to it.

Progress by K on the project was then so slow that P terminated and turned to the surety, D, to complete the project. D refused, resulting in this breach of contract action. D defended on the ground that Article 3-A of the Lien Law made all of the moneys payable to K a trust fund to cover claims by others that might arise out of this project and that P's payment of the money to the DOL on an unrelated project was a breach that canceled the surety obligation.

Did this payment towards K's prior obligations release D's surety commitment? In an opinion by Judge Ciparick for the majority, a divided Court of Appeals says no in *Mount Vernon City School District v. Nova Casualty Co.*, 19 N.Y.3d 28, 945 N.Y.S.2d 202 (April 3, 2012; 5-2 decision). The payment did not commit surety D to pay so much as "a dollar more than that amount for which it bonded" contractor K, the Court says.

The dissent, written by Chief Judge Lippman, disagrees. Answering the majority's view that the Lien Law violation here was "irrelevant", it says that, on the contrary, "it matters a great deal". The dissent sees the majority as relying on the fact that the surety did not undertake to complete the project when school district P demanded it. D didn't have to under these circumstances, says the dissent, adding that, anyway, D is not claiming here "as a completing surety"; it is asserting surety rights "that are enforceable well before any possibility of completion arises".

Early in the majority opinion, language in the surety bond itself is quoted, to the effect that

> [t]he Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract.

The majority apparently does not see that language as relevant to the application of the money to the third-party debt incurred by K in this case. The dissent does, however, arguing that the surety sought, with that language, to insulate itself from extrinsic obligations of the contractor. The $214,000, it says, was earned by K "as a progress payment" and that its diversion to another of K's creditors violates the performance bond's prohibition against

> reducing or setting off the balance of the contract price for any of [K's] unrelated obligations.

As soon as P diverted those funds – even to the DOL – in satisfaction of K's obligation on a different project, the risk arose that K "would run out of money prior to finishing" the present job and thus be less likely to be able to finish it. This was an encroachment on D's interest as surety and barred any claim by P against D for breach of contract. Hence the dissent would dismiss P's action.

The Lien Law article applicable here, Article 3-A, was designed to bar the practice of "pyramiding" in the construction industry. The dissent sees its aim as violated here if the money directed into a trust for those working on the present project is applied to an obligation incurred on a different project. The majority dismisses this reference to pyramiding as somehow suggesting that the majority thinks P could insulate itself from a proper demand by present-project beneficiaries. There could be no such insulation, the Court says; P would still have to pay such a demand

The dissent relies heavily on the Court's 2002 *RLI* decision (Digest 508), involving a similar Article 3-A trust. The Court there said that such a trust exists for as yet unpaid workers and suppliers even “before funds are actually due and earned by a contractor”, and that, as a trust, its funds can’t be touched by any but its designated beneficiaries, not even for wages unpaid on another project that the contractor may have undertaken with the owner.

*ADVERSE POSSESSION*

**Adverse Possession Found Established by Beachfront Owner Who Built on Property Both He and His Neighbors Thought Was His**

Beachfront property in Babylon on Long Island contained the parcels at issue here, owned by the town but leased out long term to the parties involved in this dispute. The plaintiff in this declaratory action is the estate of P, one of the lessees.

In the 1960s jetties were built to combat erosion. On what he thought was his own parcel, P then built a boardwalk and dock. Turns out that he was actually building astride the dividing line between his parcel and G’s, but even G thought it was just P’s.

Based on longstanding friendship and with no one ever contesting P’s ownership – or, to coin a phrase for this case, leaseship – P let G and other neighbors use the dock and boardwalk for years, more years than enough to satisfy the 10-year period applicable to adverse possession.

Potential trouble started in 1984, when G had her parcel surveyed and only then learned that P’s structure had encroached five feet onto hers. She showed the survey to P and, she deposed, they both “had a good laugh about it”. She let P continue to use the property just as before. The actual trouble arrived only after G sold her parcel to Ds (defendants here), who then advised P that he could no longer use the portion of the structure that they deemed theirs. Downright unneighborly! It produced this declaratory action by P, *Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 945 N.Y.S.2d 196 (April 3, 2012), and P wins it.

Turns out that G’s post-survey kindness about letting P continue to use the property in the same way as before was, however generous, no real favor to P, because – under the Court’s holding – by 1984 P’s right had ripened into outright ownership (“leaseship”) through adverse possession.

In an opinion by Judge Jones, the Court reviews in depth the elements needed for adverse possession and finds them all met here in that the occupation was (1) hostile, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period.

The Court finds only elements (1) (hostility) and (4) (exclusivity) in dispute here and resolves both in P’s favor.

Hostility need not involve enmity, the Court shows, highlighting the fact that while P allowed some friends and neighbors to use the dock and boardwalk, “he did not grant such access to the general public”. In present context that establishes both adequate “hostility” and “exclusivity”.

Wouldn’t it be an amusing irony if P were now to bar D from using even that part of the dock that originally belonged to D’s predecessor?

*STATUTORY CONSTRUCTION*

**Social Services Law Amendment Held Designed to Give Psychiatrists Medicaid Reimbursement for Just One Year, Not Permanently**

The "dual eligibles" involved here are patients entitled to both Medicare and Medicaid benefits. Their claims for treatment are first submitted for Medicare coverage, and for what Medicare doesn't pay – sums described by the Court of Appeals as "the deductible and the coinsurance amount" – they may then look to the state program, Medicaid. *New York State Psychiatric Ass'n, Inc. v. New York State Department of Health*, 19 N.Y.3d 17, 945 N.Y.S.2d 191 (March 29, 2012), concerns the amount allowed by New York for the Medicaid coverage of patients treated by psychiatrists, whose association is among the plaintiffs here.

There were a series of New York amendments addressed to Medicaid coverage for particular categories of care providers for particular years. The principal one involved here is a 2006 amendment that increased the Medicaid amount for psychiatrists from what had been 20% to 100%. The issue was whether the increase was intended to be permanent, or just for the 2006/7 fiscal year.

Just for the year, holds the Court in an opinion by Judge Ciparick.

From the mass of cases reciting various rules of statutory construction, any litigant is likely to find one to support its position in a given case. Two are involved in this case, and the essential issue is: which prevails?

One, and perhaps the one most frequently seen, is the rule that a statute should be construed based on its plain language. That rule, applied here by itself, would have upheld the plaintiffs' position, because even the Court itself suggests that the statute "may appear unambiguous". But it's not applied here by itself. It has a competitor: the rule that legislation should be considered as a whole and the overall intent of the legislature discerned, and applied. That's the rule that rules the roost here.

The Court notes that the statute is part of a budget bill for a given year, and that the plaintiffs' reading

> would create fiscal consequences extending far into future years, while [the defendant] DOH's ... construction ... better ... comports with the legislative purpose that prompted the enactment – a temporary, one-year, coinsurance enhancement program to benefit psychiatrists.

*DISPUTE OVER BONUSES*

**On Sharply Disputed Facts Over Brokerage Employee's Entitlements, Jury's Verdict Binds and Employee Wins**

That's really the gist of *Ryan v. Kellogg Partners Institutional Services*, 19 N.Y.3d 1, 945 N.Y.S.2d 593 (March 27, 2012).

When plaintiff Ryan (P) left his employment to join defendant Kellogg's brokerage partnership (D), it was at D's invitation and included an oral commitment – so P says – for a salary of $175,000 and for a "guaranteed bonus" of an equal sum.

P signed an "acknowledgment" that the new employment was to be "at will" and terminable by either side at any time. On the facts of *Ryan*, however, the Court of Appeals finds that all the money P claims was for labors already performed and hence not affected by the acknowledgment.

After P started work at D, a dispute arose about the bonus, and P apparently agreed to a postponement of it to a later time. P wasn't happy about it but agreed to "take one for the team" by accepting the postponement. So the Court recites. Confronted with a direct disagreement on most of the key facts, the Court of Appeals narrates the basics of the case as P alleged them but points out that D, through its managing partner, testified that P "was making it all up". (That does suggest a dispute, doesn't it!)

In a jury trial (which this case was) in circumstances like that, the issues boil down to a stark one of credibility, and a court, usually with some relief, just takes the facts as adopted in the verdict and applies the law to them. That's the *Ryan* case, which Ryan wins because the jury resolved everything his way.

On the law side, the statute of frauds was a key issue, D interposing three separate provisions in the General Obligations Law that D claimed barred the action. Primary among them was § 5-701(a)(1), the statute that bars alleged oral agreements not capable of being performed within a year. But this agreement could be performed within a year, the Court finds. Quoting from its 1998 *Cron* decision (Digest 462), the Court says that as long as a contract may be interpreted to make performance within a year a possibility, the statute of frauds won't bar it, and it was a possibility here.

Another issue in the case concerned attorneys' fees. The claims by P were all found to be in essence claims for wages under the Labor Law, making its § 198(1) applicable; it provides that if the employee prevails in court, the court may require the employer to pay attorneys' fees to the employee. Here P of course did prevail, thus justifying the appellate division's allowance of the attorneys' fees, which the Court upholds.

D argued that the Court's 2000 *Truelove* decision (Digest 490) was in point, and supported D's position. *Truelove* also involved the issue of whether payments due were wages or a bonus, but in that case other factors were present that led the Court to conclude that the alleged "wages" were strictly a bonus because they were "more in the nature of a profit-sharing arrangement ... contingent and dependent ... on the financial success of the business enterprise".

The bonus agreed to here in *Ryan* had no such contingency attached to it; it was due without reference to the success or failure of the firm. Hence *Truelove* was not involved in the case at all. (And in its lower-case mode, it never is, in litigation.)

*N.Y. DONNELLY ACT*

**Insufficient Nexus to New York Bars Application of New York Law to Alleged Foreign Conspiracy Involving Reinsurance Transactions**

And not just transactions involving reinsurance, but also the reinsurance of reinsurers. The Court of Appeals details the transactions, centered around Lloyd's of London and its extensive marketplace, in *Global Reinsurance Corp. v. Equitas Ltd.*, 18 N.Y.3d 722, 946 N.Y.S.2d 71 (March 27, 2012).

To give the background some perspective – although it turns out that when the law is finally applied the background lends itself to summary treatment – we note that there are insurers, and reinsurers, and also in this case entities that provide "retrocessionary reinsurance", i.e., a kind of reinsurance to reinsurers who, having taken on the risks of reinsurance, then want to spread their own risks among other insurance companies, called "cedents" in the argot.

The retrocessionary reinsurance was sought here for risks of "environmental, catastrophic and asbestos related origin" in a realm known as "non-life" coverage, sought by the reinsurers here because they "did not accurately appreciate the magnitude" of the risks and the "persistence of the liability they would engender". Because the various Lloyd's insurance syndicates were unable to respond, the individual natural-person participants who handle Lloyd's underwriting formed a special decision-making entity called "Equitas", the defendant in this New York action. (In this secluded argot, incidentally, the individuals are called "Names", which we mention only gingerly. We don't think the Digest should engage in name-calling, although we will always bow to a good bad pun.)

The plaintiff is a New York branch of a German reinsurance corporation that objected to the newly aggressive attitude of Equitas in resisting claims that the now superseded original cedents had been paying more readily. The plaintiff found – as disgruntled clients are wont to do – anti-competitive practices that it claimed to be violative of the federal Sherman Act as well as the New York Donnelly Act (Gen.Bus.L. § 340 et seq.).

However anti-competitive the practices might be, the Court does not find a specific enough New York involvement to justify the application of its Donnelly Act. Addressing the plaintiff's claim of conspiracy in an opinion by Chief Judge Lippman, the Court says that

> [f]or a Donnelly Act claim to reach a purely extraterritorial conspiracy, there would, we think, have to be a very close nexus between the conspiracy and injury to competition in this state. That additional element is not discernible from the pleadings before us.

Especially, we might add, in an action wherein the complainant is not a New York entity, but a New York branch of a foreign one.

The authors of the Donnelly Act, the Court continues, never intended to allow "the sort of highly intrusive international projection of state regulatory power now proposed".

At one point in its opinion the Court says that not even the federal Sherman Act would reach this kind of competitive restraint, “imposed by participants in a British marketplace, that only incidentally affected commerce in this country”.

The two-judge concurrence written by Judge Smith goes along with the majority opinion except for this and other references to the federal antitrust laws, about which it would express no opinion; it finds sufficient support in the record to conclude that the contacts of New York in this case fall short of justifying the New York Donnelly Act’s application.

*STARTING TIME OF STATUTE OF LIMITATIONS*

**Divided Court Holds That in Demand Cases, Contract Statute of Limitations Starts Not When Demand for Payment Is Made, But When Right to Make the Demand Arises**

In certain instances a demand may be necessary before a claim in a contract situation can be said to accrue (so as to start the running of the statute of limitations). CPLR 206(a) is in point on that, providing that when a demand is necessary, time starts “when the right to make the demand is complete”. The statute lists some exceptions, however, the most notable of which is in CPLR 206(a)(2): that most typical of instances in which a depositor seeks to withdraw money from an ordinary bank account. There a demand is a prerequisite.

In other situations in which a demand may play a role, not listed in the statute and reliably more complicated, the whole case may turn on the “demand” issue, and yet statutory guidance is lacking. Caselaw must then be looked to.

Henceforth to be a leading case on the subject is the Court of Appeals’ most recent decision on point, *Hahn Automotive Warehouse, Inc. v. American Zurich Ins. Co.,* 18 N.Y.3d 765, 944 N.Y.S.2d 742 (March 29, 2012), but it’s a 4-3 decision destined to be at best a perplexing guidepost.

In *Hahn*, the plaintiff insured (P) had a detailed arrangement with the insurer (D) to cover the various potential liabilities arising out of P’s auto parts operations. The policies fell into four different categories, with premiums part of a complex arrangement, even contemplating some “retrospective” calculations, i.e., calculations based on facts to be acted on and invoiced at a later time.

As described in the dissenting opinion in *Hahn*, written by Judge Read,

> the insurance contracts in this case essentially created a running tally of debits and credits, which remained open until such time as all claims or expenses for a particular policy year were resolved – or ... until [the insurer, D] designated an adjustment as being final. It was only at this point, when the final amount of a retrospective premium could be calculated, that a claim would accrue under these policies in the absence of a demand for payment.

To the dissent, a key element in the arrangement was therefore the making of a demand for payment by D. In the dissenters’ reading, no claim for payment could “accrue” until then and hence the statute of limitations would not start until then. To them, therefore, the insurer's claims were timely because brought within six years of its demand.

To the majority, however, in an opinion written by Judge Graffeo, accrual of the claim occurred when the insurer's right to make the demand was ripe, and not that later time of an actual demand.

The Court relies in large measure on a "consistent line of Appellate Division precedent" holding that the claim accrues, and the statute starts, when the claimant has the legal right to make the demand. In those appellate division decisions, the statute "was triggered when the party that was owed money had the right to demand payment, not when it actually made the demand".

The majority stresses that D even acknowledged that it could have billed P "years earlier". Hence to uphold D's position, says the Court, would allow a similarly situated defendant "to extend the statute of limitations indefinitely" merely by withholding a demand.

The dissent's response is that the arrangements here explicitly contemplated the spacing of calculations of sums due, and that under the majority's ruling the claim could accrue – and become barred by the statute of limitations – before the insured could even know "whether it owes the insurer any money at all, much less how much".