New York State Law Digest

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

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CHOOSING NEW YORK LAW BUT NOT ITS CHOICE OF LAW RULES

FOREIGN PARTIES AGREEING TO APPLY NEW YORK LAW ARE BOUND BY IT EVEN IF NEW YORK COURT WOULD OTHERWISE CHOOSE FOREIGN LAW

There's no contradiction in that. New York has its own substantive law, known in conflict of laws parlance as its "local law" or "internal law", and it also has its caselaw-created choice of law rules.

If the case has only New York elements, the court goes directly to its own ("local") law to resolve all substantive issues. But when a transaction has had contacts with one or more foreign states – sister states and foreign nations included – the choice of law rules prescribe how the court is to determine whether to apply its own or the foreign law to the substantive rights of the parties.

The choice of law rules underwent a major overhaul during the last half century, producing in New York what has come to be known as the "most significant relationship" test, which was also adopted by the Second Restatement of Conflicts. Under this test, in each case with a multistate involvement the issues are separated and to each issue is applied the law of the state having the most significant relationship to the issue.

The interesting question met in the recent *IRB-Brasil Resseguros, S.A., v. Inepar Investments, S.A.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2012 WL 6571286 (Dec. 18, 2012), is whether a stipulation in the parties' contract, calling for the application of New York law, can make this choice of law process inapplicable.

It can, rules a unanimous Court of Appeals in an opinion by Chief Judge Lippman, and in the *IRB* case it does.

P, a Brazilian company, bought $14 million in notes issued by D-1 (a Uruguayan company) and guaranteed by D-2 (also a Brazilian company). (There was also a stipulation to New York jurisdiction in the contract, making jurisdiction a non-issue and leaving the Court to concentrate on the choice of law matter alone.)

D-2 argued that the guarantee was void under Brazilian law, and that Brazilian law is what the New York courts should apply in the case. The gist of the argument was that the stipulation to New York law meant to refer not just to New York's internal law (its "local law") – which would presumably uphold the guarantee (the Court doesn't get into that) – but to its "whole" law, meaning to its choice of law rules as well. Under those rules, the argument continued, New York would choose the law of Brazil to govern (and void the transaction).

No, the Court says. The stipulation was intended to be a reference to New York's internal ("local") law alone, and not to its choice of law rules. If the parties had wanted the New York courts to apply their choice of law rules, they would have so stipulated explicitly. Says the Court:

> We ... conclude that parties are not required to expressly exclude New York conflict-of-laws principles in their choice-of-law provision in order to avail themselves of New York substantive law.

From a reading of the agreement in this case, one might even conclude that the parties did exclude, expressly, reference to choice of law rules. The agreement says that

> [t]his Agreement, the Notes, and the Guarantee shall be governed by, and construed in accordance with, the laws of the State of New York, *without regard to conflict of laws principles*.

The emphasis is ours, and the clause we have emphasized is a common one used to assure that courts will go directly to the local law of the state stipulated to without considering that state's choice of law rules and where they might lead. The clause is used when the parties want to place themselves entirely in the New York orbit and disregard all other states' laws.

The Court acknowledges that this is precisely what the legislature, in a special package of 1984 statutes, wanted to let the parties secure in big transactions in interstate and international commerce. Two of those statutes are Gen.Oblig.L. §§ 5-1401 and 5-1402; the third is CPLR 327(b), which refers to § 5-1402, which in turn refers to § 5-1401. The three statutes are of a piece, together designed to keep for the New York courts cases involving commercial transactions of "not less than one million dollars" – that's why we said "big" – and in which the parties have stipulated in their contract to both a choice of New York law substantively and the jurisdiction of the New York courts exclusively. (On the jurisdictional side, the forum non conveniens doctrine, which might otherwise dismiss a case like this case for want of New York involvement, is superseded and the New York courts not only may, but must, entertain the case. See Siegel, New York Practice 5th Ed. § 28.)

The statutory package advances New York as a business center, which suits the international business community just fine. Lawyers often use a choice of law clause to secure New York law to govern in transactions with few or even no New York elements. It avoids guessing about what the governing law will be and evinces trust both in New York's law and in its judicial machinery. (The 1984 amendment package is a kind of reciprocal thank you.)

GENERAL PRACTICE

CONVERTING MITCHELL-LAMA CO-OP

Conversion Held Governed by Martin Act, and Vote Whether to Convert Must Be Based on One Vote Per Apartment, Not One Vote Per Share

Petitioner (P) here was a limited profit company operating a 746-unit co-op project in Manhattan. It was organized under the Mitchell-Lama Law of 1955, an act designed to encourage private companies to develop low income housing by promising low-interest governmental loans and tax exemptions in return. The law does allow conversion to a private co-op through a voting process, however, and convert is what P sought to do here in *East Midtown Plaza Housing Co. v. Cuomo*, 20 N.Y.3d 161, ... N.Y.S.2d .... (Nov. 19, 2012). Unsuccessfully.

There were two main issues in the case. The first concerned New York's Martin Act (Gen.Bus.L. Article 23-A), which requires a filing statement with the state's A.G. if the project involves a sale of "securities". The question was whether the filing requirement applied. The Court's answer is that it did.

In an opinion by Judge Graffeo, the Court notes that New York's Martin Act – an anti-fraud measure – has been held to follow the instructions of the federal Blue Sky laws, which have a like mission. It observes that § 352-e(1)(a) of the Martin Act even makes a specific reference to federal law (the Federal Securities Act of 1933). It then notes that under the federal cases changes in the rights of holders of existing securities can amount to a "purchase and sale" of securities such as to trigger the filing requirement under federal law. The federal inquiry focuses on "the economic reality" of the proposed transaction, says the Court, and New York has applied

> a similarly adaptable standard in ascertaining whether an interest qualifies as a "security" within the meaning of the Martin Act.

The privatization of P's apartment complex would make a number of changes in its shareholders' interests, such as by enabling residents "to sell their shares at market rates", which is in "stark contrast" to a Mitchell-Lama co-op, where shares may not be sold at a profit. P even "acknowledges that the ability to sell shares at market prices is the primary reason" for P's seeking to exit the Mitchell-Lama program.

Having been found to involve "securities", in any event, the case brings the filing requirement into play.

The other principal issue in the case was whether the voting required to effect the conversion had to be on a per-apartment or a per-share basis. (Larger units are allotted more shares.) After analyzing the several sources that reflect on that issue, the Court's conclusion is that the voting has to be on a per-apartment basis.

One of the sources consulted for the answer, BCL § 1001, which generally governs the dissolution of a corporation, requires a two-thirds vote of "all outstanding shares", while P's

certificate of incorporation is found to mandate a one-vote-per-apartment rule. The Court finds the latter to prevail, pointing out also that BCL § 1001 refers not just to "all outstanding shares", but to "all outstanding shares *entitled to vote*" (the Court's emphasis). The "statute does not purport to calculate the relative weight to be given to each share entitled to vote", the Court stresses, or to "mandate any specific method of vote calculation". The Court thus concludes that BCL § 1001 is no impediment and that the certificate of incorporation governs the point. The per-apartment provision is therefore held to govern.

And in *East Midtown* it makes all the difference: with per-share voting the result would go one way and with per-apartment voting the other. The per-share vote, which favored the conversion, went P's way; on a per-apartment measure, the conversion would have failed.

So fail it does, and P ends up the loser.

ARGUMENT OVER "MOOTNESS"

Even Though Finally Receiving Care Services, Plaintiff Must Be Heard on Claim of Agency's Failure to Advise of Their Temporary Availability Earlier

She didn't get the services at first, but did ultimately, and her suit against the Human Resources Administration is based on the agency's failure to notify her about a right to temporary services during the pendency of her application. She claimed that right to notice under § 133 of the Social Services Law.

The case turns almost entirely on the so-called "mootness" doctrine, the argument being that because she's now receiving what she sought, her complaint about the lateness is moot and hence beyond the jurisdiction of the courts to consider.

There is an exception to the mootness doctrine, however, under which the claim can go forward even if its present pushers actually have no claim left. This exception has often been recited by the Court of Appeals, as in its terse statement in the Court's 2010 decision in *City of New York v. Maul* (Digest 606), in which the Court said that

> we have consistently applied an exception to the mootness doctrine, permitting judicial review, where the issues are substantial or novel, [and] likely to recur.

In *Coleman v. Daines*, 19 N.Y.3d 1087, ... N.Y.S.2d .... (Oct. 30, 2012), the majority finds in a 4-3 memorandum decision that the exception is met and that the case can go forward. In a temporary-vs.-permanent situation like this, holds the majority, the issue involved is "likely to recur". It says that because of

> the relatively brief nature of the violation, the question is substantial and will typically evade judicial review.

In a three-judge dissenting opinion written by Judge Pigott, the Court points to a 2010 amendment of Soc.Svc.L. § 133 made while the plaintiff's appeal was pending. The dissent sees

in the amendment an address to an applicant's "immediate" and "emergency" needs for care, and that in light of the amendment the claims in *Coleman* cannot recur. It says that

> [i]nterpretation of a defunct statute under which [plaintiff] is admittedly receiving benefits is of little value to future claimants who must now proceed under the current section.

In a footnote, the majority expresses "no opinion with respect to any claims that may be brought under the 2010 amendment" of § 133.

It's interesting to note that the late Judge Theodore Jones was among the four-judge majority in *Coleman*, which may make Court observers disposed to divide the judges philosophically all the more sensitive to the appointment the governor makes to the open seat.

ASSUMPTION OF RISK

Rollerblader Tripping at Point of Two-Inch Difference in Height Between Drain Culvert and Driveway Is Not Barred from Recovery by "Risk" Doctrine

And may therefore still have a cause of action against the landowner for failure to repair the two-inch differential, a matter that can't be resolved with a summary judgment motion. And there was also a question of causation in the case. *Custodi v. Town of Amherst et al.*, 20 N.Y.3d 83, ... N.Y.S.2d .... (Oct. 30, 2012).

On the "assumption of risk" point, the Court of Appeals was considering the 1975 adoption of CPLR 1411. CPLR 1411 abandoned the "contributory" negligence rule whereby any fault at all imputed to an injured plaintiff barred the plaintiff's recovery altogether. It adopted instead the rule of "comparative negligence", under which percentages of fault are allotted by the jury to both sides, allowing even negligent plaintiffs to recover in tort cases, but with their damages diminished by the percentage of their own culpability.

On the "risk" point itself, the Court of Appeals explains that despite the 1975 amendment it has held

> that a limited vestige of the ... assumption of the risk doctrine – referred to as "primary" assumption of the risk – survived ... in cases involving certain types of athletic or recreational activities[,]

such as professional or sponsored events like collegiate baseball, high school football, recreational basketball, etc.

The Court sees the kind of liability asserted against the private landowner here in *Custodi* as a different matter entirely, apparently adopting the plaintiff's argument that this case is governed by "ordinary premises liability principles".

The defendant landowner's liability to the rollerblading plaintiff on the facts of this case, in other words, is basically the same as it would be to any ordinary pedestrian. The plaintiff was not

regularly blading on defendant's land, but down a street in her own residential neighborhood when she saw a truck blocking her path "and navigated around it by skating onto a driveway entrance" and onto the sidewalk. She then passed several houses on the sidewalk before attempting to turn back into the street, which she did at the point of defendant's property, where she met the two-inch differential between the driveway and the drainage culvert, which ran "the length of the street".

"As a general rule," says the Court in an opinion by Judge Graffeo, application of the "risk" doctrine "should be limited to cases appropriate for absolution of duty", citing as examples "sponsored athletic and recreative activities" and "pursuits that take place at designated venues", like a rink or park.

Here the defendants neither sponsored nor promoted the rollerblading, hence the duty owed to skaters here would be the same as that owed to any ordinary pedestrian, and have to be gauged accordingly.

In a footnote, the Court stresses that it is addressing here only the obligations of the private landowner. All governmental units (town, county, village, agencies, etc.) had for one reason or another been dismissed from the case.

CIVIL COMMITMENT

Judges Disagree on Whether Defendant's Affinity for Underage Girls (Including Statutory Rape) Suffices for Indefinite Incarceration

On three occasions over seven years, the respondent was found guilty of sexual abuse or rape of young girls, two of them minors. He served time for each. Then, after release in 2002, at age 30, he had sex with a 16-year-old, got her pregnant, absconded, was apprehended in Florida, was returned to New York, pleaded guilty to this charge, too, and was given a two-to-four year term.

Interrogation during his incarceration by several doctors produced their conclusion that he was suffering from abnormal sexual arousal impulses known as "Paraphilia", a term listed in the Manual of Mental Orders (DSM), a respected publication. The doctors testified that it fell even more specifically under "Paraphilia NOS" ("not otherwise specified"), implying an absence of any more specific categorization of the condition. But one of the state's doctors also said respondent was suffering from what he termed "Hebephilia" – a term not contained in the DSM but which is understood to mean a tendency to have sex with under-age girls.

Needless to say, expert testimony on the respondent's side contested all this.

This all took place in a proceeding under Article 10 of the Mental Hygiene Law in which the court, in a nonjury trial, found the respondent to be suffering from a "mental abnormality" that called for his civil management, which entails detention in a secure facility. A majority of the Court of Appeals, in an opinion by Judge Jones, finds the evidence sufficient and upholds the determination. *State v. Shannon S.*, 20 N.Y.3d 99, ... N.Y.S.2d .... (Oct. 30, 2012; 4-3 decision).

The three dissenting judges are troubled by the proceedings. In an opinion by Judge Smith, they find that unless "mental abnormality" gets more explicit definition, statutes like these

> could become a license to lock up indefinitely, without invoking the cumbersome procedures of the criminal law, every sex offender a judge or jury thinks likely to offend again.

If existing sentences for sex offenders are too short, the dissent says, then the legislature

> should make them longer, but it should not, and constitutionally cannot, simply substitute civil for criminal proceedings as a means of keeping dangerous criminals off the streets.

The dissent brings the point home by commenting that it finds

> nothing in this record to support a finding that [the respondent] is any more mentally abnormal than any other repeat sex offender.

It even goes so far as to label the purportedly expert testimony in the case, on the "Paraphilia NOS" and even more particularly on the "Hebephilia" matters, as "junk science".

CONSTRUING INSURANCE EXCLUSIONS

Damage to Building Caused by Excavation Next Door Is not Covered because Man-Made Causes Are among Listed Exclusions

In its 2009 *Pioneer* decision (Digest 595), the Court of Appeals held that damage to a building caused by an excavation next door was included in the coverage of an insurance policy. The insured prevailed when the Court found that the exclusions in the policy covered only natural, not man-made, causes. The cause in *Pioneer* was man-made: a deliberate excavation undertaken by an adjoining owner.

In a situation almost identical on its facts – damage to a building caused by an excavation next door – the result is just the opposite in *Bentoria Holdings, Inc. v. Travelers Indemnity Co.*, 20 N.Y.3d 65, ... N.Y.S.2d .... (Oct. 25, 2012), and the insurer wins because of one additional clause in the insurance contract. In listing "earth movement" as an exclusion, the clause adds:

> whether naturally occurring or due to man-made or other artificial causes.

That alone turns the case away from *Pioneer*, holds the Court in an opinion by Judge Smith. The insurer ends up with summary judgment dismissing the insured's complaint.

It's almost as if the insurer in *Bentoria*, just on the verge of issuing its policy, had read the *Pioneer* case and hurriedly responded by including the "artificial causes" clause. Should the includer expect a nice bonus at Christmas?

INSURANCE BROKER'S DUTIES

Where Coverage for Employees Is Specifically Asked for but not Included, Insured May Have Claim against Broker

And that is so, holds a divided Court of Appeals, even if the insured failed to review the policy after receiving it. Ideally, the insured should read the policy and promptly call attention to any flaw in its expected coverage, but the Court holds that if the insured specifically asked its broker to include a particular coverage, and the policy, read or not, omits it, a claim may lie against the broker. *American Building Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, ... N.Y.S.2d .... (Nov. 19, 2012; 4-2 decision).

The issue presented in such a case is one of fact: whether the insured specifically asked for the particular coverage.

The insured here sold building materials to contractors from its plant in the Bronx. It claims to have specifically told its broker, the defendant, that no retail business was conducted from the Bronx location; that only employees, never customers, entered the premises; and that it wants the coverage to protect the employees. The policy nevertheless contained a clause excluding coverage for employees.

When an employee was later injured, the insurer disclaimed coverage, ultimately leading to this suit by the insured against the broker for procuring insufficient insurance. The appellate division said the suit would not lie because of the insured's failure to read the policy. It granted the broker's motion for summary judgment.

The Court of Appeals reverses, and what the reversal means, of course, is that as long as the insured has "specifically requested" a given coverage, apparently even if only orally, the insured is entitled to assume that the broker has secured it.

In an opinion by Judge Ciparick, the Court concedes that "[t]his would be a more difficult case if it rested on plaintiff's uncorroborated word alone", but that in this case there also stood the corroborating fact that since "no one but employees ever entered the premises, the coverage defendant obtained ... hardly made sense".

The Court also acknowledges that there has been a difference of opinion among the appellate courts about whether the insured who receives a policy is presumed to have read and understood it.

The dissenting judges, in an opinion by Judge Pigott, would adhere to the old rule of *Metzger v. Aetna Ins. Co.*, 227 N.Y. 411, ... N.Y.Supp. .... (1920), which held that the insured is "conclusively presumed" to know the content of the policy "and assent to it". The majority abandons that rule in deference to the current rule of comparative negligence under which, it says, the failure to read the policy should not bar the action against the broker "altogether", but merely figure as an element in balancing fault.

The dissent cites the Court's 1997 *Murphy* decision (Digest 454), which held that brokers are not "personal financial counselors and risk managers, approaching guarantor status", but that case was concerned with an insured's effort to make a broker liable as an "excess" insurer for failing to suggest – recommend – higher coverage to the insured. The majority finds that decision, relating to a broker's alleged duty to make recommendations to the insured, off point. Here in the *American* case advice from the broker was not an issue. The terms of the insured/broker agreement were alleged to have been settled. The only issue was whether they were, and that was an issue of fact needing trial.

Quite often a broker will enclose with the policy a letter to the insured at least outlining the basic features of the coverage included. If the point is basic enough, the letter should include a reference to it.

Ordinary everyday insureds like us are likely to recognize the situation in *American* and to appreciate its holding. Opening a thick envelope at the end of the year and finding inside the renewal of a big homeowner's policy – and bill – is the perfect opposite of a Christmas present. (The emotion changes, of course, and becomes one of retroactive pleasure if a loss is later sustained and help is wanted. The perpetual love/hate relationship of the insurance process?)