New York State Law Digest

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

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ADDITURS AND REMITTITURS

Parties' Procedural Options When Faced with Additurs or Remittiturs Are Reviewed

These devices appear when the court finds a damages verdict excessive or inadequate. In each instance the issue is raised by the objecting party's motion for a new trial.

If excessiveness is the objection, remittitur is the subject, the objectant is the defendant (D), and D's motion for a new trial is granted unless the plaintiff (P) stipulates to accept a lower figure that the court deems the maximum supportable on the facts.

If inadequacy is the objection, additur is the subject, the objectant is P, and P's motion for a new trial is granted unless D stipulates to pay the higher sum that the court deems the minimum warranted on the facts.

Note that the practice is not for the court simply to substitute the figure it deems appropriate, but only to grant a new trial "unless" the opposing party accept the court-set figure. (See Siegel, New York Practice 5th Ed. § 407.) This can pose a procedural dilemma for the party confronted with the "unless" option: whether to accept the new figure and give the stipulation, or refuse it and either accept the new trial or else get a judgment entered on the objectionable verdict and appeal it.

The dilemma has seldom been the subject of extensive address by the courts. It gets that address from the Court of Appeals in its recent decision in *Oakes v. Patel*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 1294518 (April 2, 2013).

Because of the more frequent tendency of juries to over-award rather than under-award damages in tort cases, remittitur is statistically the more frequent phenomenon. It's perhaps an irony, therefore, that this most extensive address yet comes in an additur context. No matter, though; the guidance offered works on either side.

Oakes was a medical malpractice action involving a hospital, several physicians, a CT-scan-reading company, and an insurer.

Oakes had suffered the severe and painful symptoms of an aneurism near the brain, which, because it remained undetected by reason of negligent treatment, evolved into a totally debilitating stroke. A jury found various of the defendants responsible and awarded $5.1 million in damages, $4 million of which was for damages elements calling for especially substantial compensation. The trial court ordered a new trial unless defendants (Ds) stipulated to increase all damages to $17.4 million. They refused, accepting the new trial instead. The new trial produced an even higher figure than that set by the judge, so the new total came out to be $17.8 million.

Now of course Ds wanted to go back and accept the stipulation. There's no going back, holds the Court of Appeals in an opinion by Judge Smith, because a party that wants to challenge the amount of an additur or remittitur on appeal must do so before a new trial takes place.

The Court explains that the chief benefit of these devices is that when they're accepted, they spare the parties and the court the burden and expense of a second trial, a benefit that's lost when appellate review takes place only after the second trial. And proceeding in that way also gives the party who has rejected the stipulation "an unjustified tactical advantage" because now, knowing what the second jury has awarded, the appellant would have the opportunity to compare it with the (previously rejected) stipulated sum and just choose the more beneficial.

The lesson from this phase of *Oakes* is that "a party dissatisfied with the size of an additur or remittitur", if it would seek appellate review of it at all, must do so before the new trial.

The *Oakes* decision, a tour de force in the tort realm, has many phases. We've done one here. Just below we do another: the "necessarily affects" provision of appellate practice.

OTHER DECISIONS

THE "NECESSARILY AFFECTS" PROVISION

Court Takes More Generous View of Provision Whereby Order During Action Can Get Review as Part of Later Appeal from Final Judgment

Oakes, treated just above for the "additur" problem, had another major procedural issue perhaps just as controversial: the situation in which an order has been made on a motion in a case, but the order doesn't put an end to it, i.e., is not "final". The loser on the motion (L) has not immediately appealed it — which, in New York practice, L is usually allowed to do — instead staying in and then losing the whole ball game when final judgment goes against L. On appeal from the judgment, L wants also to secure a review of the earlier order. Does such review lie?

The matter is governed by CPLR 5501(a)(1), which preserves such an order for review as part of the final judgment only when it "necessarily affects" the judgment. The quoted clause has been a constant source of trouble.

What is the test for whether the order "necessarily affects" the final judgment in this all important appellate sense? One test, not perfect but helpful, is to ask whether, assuming that the nonfinal order or judgment is erroneous, its reversal would undermine the final judgment. If it would, it's a reviewable item; if it would not, and the judgment can stand despite it, then it's not reviewable. (Examples of various kinds are noted in Siegel, New York Practice 5th Ed. § 530.) As the Court acknowledges in *Oakes*, however, its opinions have rarely discussed the meaning of the "necessarily affects" phrase.

Its application "to orders granting or denying motions to amend pleadings has been particularly vexing", the Court laments. It cites some such motions in which review was allowed, thus at least "implicitly" assuming that the order necessarily affected the final judgment (citing its 1998 *Whalen* decision [Digest 466] as an example). But it also points to other of its cases in which, in brief footnotes "without further elaboration", it has gone the other way. These latter the Court now overrules. In *Oakes*, it allows the review.

The motion to amend in *Oakes* was made by one of the defendants, K. K sought the amendment to add the defense of release to its pleading.

Having freed itself of its prior holdings that an amendment of pleadings is not reviewable, the Court finds review in this case warranted under the "necessarily affects" standard, a standard bench and bar may now consider to be a broadened one, although we are still not able to discern just how broad that is.

Because precise lines have still not been set, is there at least a rule of thumb for a party aggrieved by a court's disposition of a motion, if the action still remains to be tried but the party wants to preserve all appellate options?

One option, available perhaps only in New York, is to take an immediate appeal from the order itself. (In federal practice and in most other states such a route would generally be closed and the party would just have to wait for judgment and, if aggrieved by that, appeal the judgment and bring the order up for review as part of it.)

If the loser follows the New York immediate-appeal option, there is, alas, a further warning posted in New York practice: if that appeal is still pending undetermined when later final judgment comes on in the case, the entry of that judgment requires the dismissal of the appeal from the nonfinal order. That admonition comes from the Court's 1976 *Matter of Aho* decision.

If the order does qualify as one that "necessarily affects" the final judgment, of course it will get its review as part of the final judgment — assuming the final judgment is appealed — notwithstanding the now mandated dismissal of the earlier appeal. On that front, the *Oakes* stretch of the "necessarily affects" phrase may offer some relief.

We repeat: it may. There's nothing certain here.

Yet another aspect of the *Oakes* opinion is its treatment of when, in the retrial of a tort case, especially a retrial resulting from an additur or remittitur, the issue of causation gets reopened. We'll leave the reader to the *Oakes* opinion for that, and for the factual details underlying the "additur" and "necessarily affects" issues that we've considered in this and the above digest.

<u>SALES TAXES</u>

Method Amazon Uses to Help Sales to New Yorkers — Contracting to Have Local Websites Include a "Link" to Amazon — Suffices as Basis for Taxation of Amazon Sales to New Yorkers

Two national websites bring declaratory and/or injunction actions against defendant *New York Department of Taxation and Finance* (DTF) to bar the taxes, contending that they're insulated by the federal Commerce Clause. The better known of these two plaintiffs is *Amazon.com, LLC*, but the other — *Overstock.com, Inc.*, which has a similar national retail business — is the first listed of the two cases.

The opinion, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 1234823 (March 28, 2013; 4-1 decision), describes each plaintiff as a Delaware company with huge retail sales generated from its website base outside New York. Each makes use of numerous local websites, however, with which, through contract arrangements, the two maintain an "Associates" or "Affiliates" relationship. The company had such with many New York websites. Each such site includes a link to the national company. A potential user can just click on the link and jump onto the company's national site. And the dollars roll in. The plaintiffs didn't want any of those dollars to be peeled off the roll for sales taxes.

Unhappy with the prospect of being called upon to impose and collect New York sales taxes and citing U.S. Supreme Court cases construing and applying both the Commerce and Due Process clauses, each company launched a constitutional attack on the taxing statute: Tax Law § 1101(b)(8)(vi). The attack was originally based on both the face of the statute as well as on how it was applied, but only the issue of its facial invalidity reaches the Court of Appeals. Examining it in depth, the Court rejects the attack and sustains the tax.

The issue boils down to a question of whether the company's New York contacts sufficed to support the tax. One of the U.S. Supreme Court decisions cited, *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992), involving a similar "presence" issue with a mail order business, stuck to what the Court of Appeals describes as a "bright line presence requirement" used in still earlier U.S. Supreme Court decisions. The New York Court of Appeals believes that such a bright-line requirement would no longer be applied by the Supreme Court to the present facts.

The intervening changes in technology are at the root of the Court's conclusion. The traditional rule has been that the taxed entity must be shown to have a physical presence in the taxing state, and the cases rejecting the tax have each found such a presence lacking. The question is whether that test must still be applied, or, perhaps more accurately, whether — if "presence" is required — it still has to be "physical". Writing the majority opinion, Chief Judge Lippman says that

> The world has changed dramatically in the last two decades, and it may be that the physical presence test is outdated. An entity may now have a profound impact upon a foreign jurisdiction solely through its virtual projection via the Internet.

The Court adds that while physical presence is not "typically" associated with the Internet, the legislature has seen significance in the physical presence of a "resident website owner ... such that the physical presence of the website owner becomes relevant to Commerce Clause analysis".

The statute applies the tax only to the sum by which the seller's gross annual receipts from sales to New Yorkers exceeds $10,000. Business beyond that level gives rise to a presumption of local solicitation, but the presumption is rebuttable by the seller and the statute includes standards by which the seller can effect the rebuttal. There was no successful rebuttal here, the Court finds.

Stressing that mere advertising in the state is not an adequate taxing base (with which general proposition the majority would agree), Judge Smith, the dissenter, sees the whole arrangement between company and local websites here as just that — mere advertising — and sees the statute as trying to "turn advertising media into an in-state sales force through a presumption".

A Due Process attack was similarly rejected by the Court. (The dissent is based solely on the majority's reading of the Commerce Clause.)

WAGE LAWS

Wage Minimums Set by Labor Law for Work Projects of Public Agencies Don't Apply to New Firehouse Project of Village Volunteer Fire Department

If the volunteer department — in this case a fire corporation under Not-for-Profit Corp. Law § 1402 — were a municipal corporation it would clearly be covered by the wage statute in point, Labor Law § 220. The labor commissioner and the appellate division both found the volunteer department to be the "functional equivalent" of such a municipal corporation and hence subject to the wage statute, but the Court of Appeals disagrees and holds the wage requirement inapplicable.

After the village refused to build a new firehouse, the volunteer department, deeming one necessary, arranged for financing on its own and proceeded with the building. This involved contractors who were required by the labor department to pay their workers the statutory minimum wage. Claiming they didn't have to, the contractors brought this Article 78 proceeding to review the determination.

They win. On a 4-1 vote, the Court of Appeals overturns the determination and agrees with the contractors: they were not subject to the wage requirement. *M.G.M. Insulation, Inc. v. Gardner*, 20 N.Y.3d 469, ... N.Y.S.2d .... (Feb. 19, 2013).

The volunteer department's contractors would have been subject to the wage law if the department were a "public agency", but it's not, holds the Court in an opinion by Judge Pigott. The statute covers "four specific public entities", the Court explains: "the state, a public benefit corporation, a municipal corporation or a commission appointed pursuant to law". The volunteer department here is none of these, the majority holds, noting also that the "functional equivalent" test relied on by the agency here was rejected by the Court in its 2010 *New York Charter School* decision (Digest 611).

The Court acknowledges a 2007 amendment by which the statute's coverage was "expanded ... to include contracts involving other types of entities", and says some volunteer fire departments might be covered by the amendment, but that, anyway, "[a]t the time of this contract ... the 2007 amendment ... did not exist".

The dissent is written by Chief Judge Lippman, who observes that the applicable statute says nothing about public agency contracting, simply requiring that the prevailing wage be paid to workers engaged in the performance of "any public work", which this work was. Here the fire corporation was acting in the stead of a clearly covered municipal entity for, the dissent finds, "the frankly acknowledged purpose of avoiding the prevailing wage requirement".

It finds further support for the commissioner in Article I, § 17 of the state constitution, which says that no worker doing "public work" shall be paid "less than the rate of wages prevailing in the same trade" in the area where the public work is taking place. The pre-amendment statute applicable at the times involved in this case merely contained what the legislature acknowledged to be a "loophole", comments the dissent, and hence hardly deserves the "decisive import" the majority accords the pre-amendment version.

EVICTION FROM PUBLIC HOUSING

Penalty of Eviction for Defrauding City Housing Authority by Concealing $27,000 of Income Is Not So Disproportionate as to Shock Conscience

The rent takes into account the tenant's income. Here the tenant got an income-paying job she didn't have before, but didn't report this to the Housing Authority. When the Authority learned of it, it brought eviction proceedings against her, which succeed. Her concealment was deliberate, the Court finds, and the penalty of dismissal was within the administrative powers of the Authority to impose. *Perez v. Rhea*, 20 N.Y.3d 399, ... N.Y.S.2d .... (Feb. 14, 2013).

When the tenant brought this Article 78 proceeding to overturn the decision, she pleaded for the first time that she would become homeless if evicted, a contention she did not make before the agency. She had three children, two of which had problems, and there was no doubt that the situation aroused sympathy. But, holds the Court of Appeals, there is only "limited availability" of public housing, and waiting lists of applicants with equal appeals to sympathy.

The tenant did make some restitution here after being found out, but even that was for only part of what she defrauded the agency out of.

In upholding the eviction in an opinion by Judge Pigott, the Court found it necessary to sound this note of warning:

> If residents believe that the misrepresentation of income carries little to no chance of eviction, the possibility of restitution ... may not serve adequately to discourage this illegal practice. The deterrent value of eviction, however, is clearly significant and supports the purposes of the limited supply of publicly-supported housing.

The agency and trial court also took that position. Only the appellate division disagreed (and even there, with a dissent); it had referred to and relied on a dictum in one of its earlier decisions to the effect that a public housing tenancy is "a tenancy of last resort", implying that eviction is inevitably a drastic remedy and hence shocking to the conscience. That would in turn almost automatically invoke one of the grounds that Article 78 recognizes for overturning the administrative determination. (See CPLR 7803[3].)

There is no such automatic parallel, holds the Court; "reviewing courts must consider each petition on its own merit". Hence the appellate division erred by importing and applying its prior "tenancy of last resort" dictum.

ZONING

Alleged Evils of Check-Cashing Establishments Can't Be Remedied with Zoning Barriers

A town ordinance is therefore struck down in *Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2013 WL 530640 (Feb. 14, 2013), in an action brought successfully by check-cashing interests for declaratory and injunctive relief.

The merits or demerits of check-cashing entities as a policy matter were not before the Court in *Sunrise* because the town predicated its ordinance solely on its zoning powers. These are conferred by § 261 of the Town Law, which lists the various things that a town may consider in adopting a zoning regulation — things like the location, size, and height of buildings and their use "for trade, industry, residence or other purposes". The Court discerns from its earlier decisions the "fundamental principle of zoning" that shows it to be concerned with regulating the use of the land, not "the person who owns or occupies it".

In seeking out the town's motivation for the restriction, the Court could find only "a memorandum from a deputy town attorney" concluding among other things that the presence of check-cashing establishments has a negative effect on "young and lower income people" by encouraging them to "remain in the cash-only economy" and deterring them from saving. "This is bad for society as a whole", the memo concludes.

In an opinion by Judge Smith, the Court says that whatever be the merits of this view as a policy matter, "it cannot be implemented through zoning" because the town's zoning powers are circumscribed by state law.

The town had tried to show that the presence of check-cashing establishments tend to lead to crime in an area, or in any event that such entities are "predatory and exploitative", "tend to keep a neighborhood down", and even facilitate robberies. The Court's answer is that even assuming that "a concern about armed robberies" would justify a zoning regulation, this case hasn't the facts to support the ground.

The appellate division had also upset the ordinance, but on the basis of a Banking Law provision governing "the licensing of check-cashers", which it found preemptive. The preemption ground is not reached in the Court of Appeals, which affirms solely on the basis of the zoning issue.

REINSURER'S RIGHTS

Insurer's Settlement in Asbestos Cases, and Its Allocation Among the Various Settled Claims, Affects Reinsurer's Liability and Poses Issues of Fact Barring Summary Judgment

The Court of Appeals takes note of reinsurance industry "jargon" that designates the main insurer — the one seeking recovery from the reinsurer — as the "cedent" (because it has ceded part of its risk to a reinsurer), and then referees a battle royal between the two over asbestos injuries' coverage in *United States Fidelity & Guaranty Co. v. American Re-Insurance Co.*, 20 N.Y.3d 407, ... N.Y.S.2d .... (Feb. 7, 2013).

The cedent here, USF&G, was the plaintiff (P), suing its reinsurer (D) for the part of the claimed reinsurance coverage that D rejected.

P had settled the various asbestos-grounded personal injury claims for almost $1 billion and then had to allocate the sum among the various settled claims. The reinsurance policy had a "follow the settlements" clause, meaning that it would adopt the terms of the cedent's underlying policy in determining the reinsurer's obligations. But the law interpolates a "good faith" requirement, and at issue here was the good faith of P in allocating the settlement.

P in the underlying policy had a $200,000-per-person coverage limit. Reinsurer D was obliged to cover any loss above $100,000. This meant of course that D's own liability also ended up with a $100,000 per claim cap.

D argued that in allocating the huge settlement sum among the various underlying claims, P came up with an allocation that benefited itself. In an opinion by Judge Smith, the Court says that that's to be expected, and it's okay as long as no bad faith is involved. But that was the main rub here.

If P allotted the settlement entirely to individual losses of $100,000 each, P would end up with the whole bill and reinsurer D would be off the hook. If P allotted it entirely to losses of $200,000 each, D would carry half that cost. P would naturally, to the extent it could, choose that course, but could it? And does the "follow the settlements" clause mandate deference to that allocation? As a rule P could, and as a rule deference would indeed be required, but with the proviso on both points that the cedent has made the allocation in good faith.

The Court finds that in this case the good faith issue is one of fact that can't be disposed of by summary judgment. Much of the opinion treats the standards for reviewing the validity of the allocation, and how to determine "good faith" in this context.

The Court concludes that "objective reasonableness" should ordinarily govern, but it adds that this does not imply "disregard of a cedent's own interests". "Cedents are not the fiduciaries of reinsurers", the Court points out.

It quotes favorably from the 2010 decision by the federal Third Circuit in *Travelers v. INA*, 609 F.3d 143, that

> to establish a breach of ... good faith, it is not sufficient simply to demonstrate that a particular allocation decision increased the insurer's access to reinsurance, at least not where the insurer is able to point to some legitimate (i.e., non-reinsurance-related) reason for the challenged decision.

The Court equates its own use of "reasonable" with the Third Circuit's use of "legitimate" in the quotation, and in its own words holds that the allocation

> must be one that the parties to the settlement ... might reasonably have arrived at in arm's length negotiations if the reinsurance did not exist.

Now going into the detailed background of the claims, including the result of an involvement with a California court, the Court finds a number of "arm's length" factors on which a fact-finder could determine the allocation to be reasonable in *USF&G*, i.e., made in good faith.

It remands the case for resolution of the issue as one of fact.