New York State Law Digest

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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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Welcome back from what I hope was a very pleasant, relaxing and joyous summer. In this edition of the *Digest* we are including a discussion of some decisions that could not make their way into an earlier edition. In addition, this year there have been a comparatively large number of CPLR bills that have been passed by both houses. Although some have yet to be signed by the governor, a few have, and I will address two of them below.

CASE LAW DEVELOPMENTS

Majority of Court of Appeals Holds That an Insurer's Failure to *Disclaim* Coverage Promptly Does Not Constitute an Unfair Claim Settlement Practice

Law Is Concerned with Failures to *Disclose*, Not to Disclaim

The facts and various issues discussed in *Nadkos, Inc. v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 2019 N.Y. Slip Op. 04641 (June 11, 2019), can be a bit complicated. Thus, I am limiting my discussion here to its treatment of the interplay of Insurance Law § 2601(a) and Insurance Law § 3420(d). The former provides that certain insurer's actions, "if committed without just cause and performed with such frequency as to indicate a general business practice, shall constitute unfair settlement practices." One of those actions (under subdivision (a)(6)) is the failure to promptly *disclose* coverage, pursuant to §§ 3420(d) or (f)(2)(A). Insurance Law § 3420(d)(1) requires an insurer to respond within 60 days to an insured's or injured person's *request for insurance information*, while subdivision (d)(2) provides that written notice be given, as soon as reasonably possible, if the insurer disclaims liability or denies coverage.

The issue the Court of Appeals wrestled with was whether the failure "to promptly disclose coverage" in § 2601(a)(6) included Insurance Law § 3420(d)(2)'s timely disclaimer requirement. Stated differently, is an insurer's failure promptly to disclaim coverage an unfair claim settlement practice? A large majority of the Court replied in the negative.

The majority asserted that Insurance Law § 2601(a)(6) qualifies its reference to Insurance Law § 3420, by limiting it only to an insurer's failure to promptly *disclose* coverage, as opposed to *disclaiming* coverage. Thus § 3420(d)(1), which requires an insurer to confirm the existence of an applicable liability policy and to provide the coverage limits, falls within the definition of disclosure. "Conversely, an insurer does not disclose coverage by merely notifying the insured that it is not liable or will not provide coverage—a notification required by section 3420 (d) (2)." *Id*. at *7.

The Court insisted that the statutory language supported its position. It reasoned that if § 2601(a)(6) included both the disclosure and disclaimer requirements, then its use of the term "disclosure" would be superfluous. Moreover, § 2601(a)(6) also references § 3420(f)(2)(A), which pertains to disclosure requirements of supplemental uninsured/underinsured motorists insurance coverage limits. Conversely, the legislature could have used "simpler, more direct language" such as "failing to promptly notify the insured pursuant to section 3402(d) and section 3420(f)(2)(A)," or "violating section 3420(d) and section 3420(f)(2)(A)." The existing language suggests that § 2601(a)(6) was concerned with an insurer's *disclosure* of the existence and limits of insurance, not a *disclaimer* or a denial of coverage.

The majority maintained that its position was supported by the legislative history. Prior to 2008, Insurance Law § 3420(d) only included the timely disclaimer requirement and § 2601(a)(6) referred only to § 3420(f)(2)(A). However, when the disclosure requirement in § 3420(d)(1) was added in 2008, § 2601(a)(6) was amended to cross-reference § 3420(d). "The inescapable inference is that the Legislature did not consider violations of section 3420 (d) (2) to be an unfair claim settlement practice when it amended section 2601." *Id*. at *10.

The dissent by J. Wilson criticized the majority for putting New York "out of the mainstream," and declaring "that

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contrary to the national consensus, common sense and the plain text of our insurance laws, the legislature intended to make an insurer's refusal to confirm or deny coverage promptly not an unfair claims practice, all by adopting an amendment the text of which did exactly that." *Id*. at *13. The dissent read the statutory framework quite differently: "When the legislature said [in § 2601(a)(6)] 'subsection (d)' [of § 3420] it meant 'subsection (d),' that is, both subsection (d)(1) and (d)(2). The legislature surely knew how to separate out paragraphs in a section—it did so in the very part of the statute at issue here, expressly including 'subparagraph (A) of paragraph two of subsection (f).'" *Id*. at *27.

It pointed out that the majority had disregarded the noun "coverage," which followed the verbs "disclose" and "disclaim," and thus, "'disclaimer' is the means by which insurers 'disclose' the existence of *coverage*." *Id*. at *32. The dissent noted that informing an insured that a policy exists is of a little help either to the insured or the injured person until the insurer advises whether it intends to cover the claim. Paraphrasing Seinfeld (on reserving a rental car), merely stating whether there is an insurance policy is not enough. What really matters is whether you have coverage.

On Certified Question, Court of Appeals Holds That Bond Issuer's Obligation to Pay Interest Terminates When Claim to Principal Is Time-Barred

Insists That Its Prior Decision in *NML Capital* Did Not Reach This Issue

In *Ajdler v. Province of Mendoza*, 33 N.Y.3d 120 (2019), the issue presented to the Court of Appeals, via a certified question, related to a bondholder's ability to enforce a conditional obligation to make post-maturity *interest payments*, in the absence of a timely action to recover the *principal*.

In the underlying federal action commenced nine-and-a-half years after the bonds' maturity date, the plaintiff sought to collect his share of the principal ($7 million) of bonds valued at $250 million and all accrued and unpaid biannual interest payments allegedly due under an indenture ("Indenture"). The bonds were issued pursuant to that Indenture. The district court granted defendant's motion to dismiss, on the ground that all claims for principal and accrued interest were time-barred. The Second Circuit agreed that the claim for principal was untimely under the Indenture's four-year prescription period but found that New York law was inconclusive as to whether plaintiff's claim for post-maturity interest that came due in the four years prior to commencement of the action was timely. Thus, it certified the following question to the New York Court of Appeals:

> If a bond issuer remains obligated to make biannual interest payments until the principal is paid, including after the date of maturity, do enforceable claims for such biannual interest continue to accrue after a claim for principal of the bonds is time-barred?

The Court here initially noted that generally interest is viewed as an "incident to the principal as opposed to a separately enforceable debt." As a result, "receipt of the principal bars a subsequent claim for the interest," unless there is contrary contractual language. *Id*. at 126. Simply stated, once the principal is extinguished, so too is the interest.

The plaintiff argued that the Court's decision in *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250 (2011), supported his position. There, the Court held,

> based on a nearly identical indenture provision requiring the bond issuer to make biannual interest payments "until the principal was repaid" that, where principal was not repaid on the maturity date, the bond issuer was obligated to make interest payments until the principal was actually repaid. Plaintiff argued that because we did not expressly cabin our holding in *NML Capital* to timely claims for principal, defendant was obligated to make biannual interest payments until plaintiff's share of principal was actually repaid or the Indenture merged into a judgment, regardless of whether the bondholder sued before a claim to recover the principal was untimely.

Ajdler, 33 N.Y.3d. at 124.

However, the Court here in *Ajdler* stated that the *NML Capital* case never reached the issue as to the viability of claims for unpaid post-maturity interest payments *after* the expiration of the statute of limitations on claims for unpaid principal. In fact, the limitation period had not run on plaintiff's claim for principal in *NML Capital*.

Reverting back to the issue here, the Court reiterated that once a creditor no longer has a right to the repayment of principal, there is no basis to allege a right to post-maturity interest. Thus, once a claim on the principal is untimely, there is no viable claim to recover post-maturity interest payments.

Confidentiality Provision in Mental Hygiene Law § 33.13 Does Not Require Automatic Sealing of Entire Court Record

Court Stresses New York's Long-Standing Public Policy of Open Judicial Proceedings

Matter of James Q. (Commissioner of the Off. for People with Dev. Disabilities), 32 N.Y.3d 671 (2019), focused on the extent of the confidentiality provision contained in Mental Hygiene Law (MHL) § 33.13, applicable to facilities licensed or operated by the Office of Mental Health or the Office for People with Developmental Disabilities. Specifically, the question was whether the provision protecting patients' and clients' clinical records requires automatic sealing of the entire court record of proceedings involving insanity acquittees who have dangerous mental disorders.

Here, after the defendant was charged with rape in the third degree, criminal possession of a weapon in the third degree, assault in the third degree and related offenses, he entered a plea of not responsible by reason of mental disease or defect. Following a mandatory psychiatric examination and hearing, the court found the defendant to have a dangerous mental disorder and issued a six-month commitment order. Two subsequent retention orders were obtained by the Commissioner of the Office for People with Developmental Disabilities (the Commissioner). When the Commissioner sought again to renew the retention of the defendant's custody, it attached to its application, as required, an affidavit from a psychiatric examiner, stating that the defendant had a "dangerous mental disorder." It also incorporated the examiner's six page "Report of Examination," setting forth the defendant's clinical diagnosis. The parties agreed that the

report should be sealed. However, the defendant moved to seal the entire court record.

The Court of Appeals ruled that automatic sealing of the entire court record was not appropriate. It stressed that New York's long-standing, sound public policy that judicial proceedings "are presumptively open to the public" extended to records of those proceedings. The relevant statute here, MHL § 33.13, does not refer to the sealing of court proceedings. It creates a confidentiality requirement prohibiting the public disclosure of clinical records of patients or clients of a state agency by the agency itself, without a court order. The Court reasoned that, had the legislature intended to include a sealing requirement, it easily could have expressly done so. Moreover, the plain language of MHL § 33.13 did not support the argument that a "'clinical record' includes the entire record of court proceedings or dictates to a court how to manage its own records." *Id*. at 677. The Court concluded that to interpret MHL § 33.13 to provide for the automatic sealing of an entire court record would disregard the "institutional value of open judicial proceedings."

> In balancing the privacy rights of a defendant with the public's right to know how dangerous mentally ill acquittees are managed by the courts, the legislature eschewed an automatic sealing requirement of the court record. We refuse to disturb that balance today. Here, defendant demanded an automatic seal in stark contrast to a case specific analysis that demands a court to find good cause sufficient to rebut the legislative presumption of public access for any sealing, in part or whole, upon due consideration of the competing and compelling interests of the public and the parties (citations omitted).

Id. at 679–80.

CPLR AMENDMENTS

At times, CPLR amendments can be technical in nature and other times relatively minor. However, in the case of the two mentioned below, they represent a significant change in the law and were a part of larger legislation aimed at impacting the rights of victims of child sexual abuse and tenants.

CPLR 208, 214-g and 3403: The Child Victims Act

The Child Victims Act, signed into law on February 14, 2019 (ch. 11), is designed to protect the rights of child sexual abuse victims, including those whose claims would have been otherwise time-barred. The Act impacts several statutes, including the CPLR, the General Municipal Law, the Judiciary Law and the Penal Law, among others.

On the civil side, most significantly, CPLR 208, which deals with the toll for infancy and insanity, was amended to add a subsection (b) (the existing statute becoming subsection (a)). It extends the statute of limitations to bring a civil action for the sexual abuse of a child (as defined in the statue and the Act) until the plaintiff reaches 55 years old. CPLR 214-g was also added to revive for one year from August 14, 2019 previously time-barred actions for child sexual abuse. In addition, (i) CPLR 3403(a) was amended to provide for a trial preference for actions revived under CPLR 214-g; (ii) the written notice of claim requirements are dispensed with in actions against certain governmental agencies (General Municipal Law § 50-e and § 50-i. *See also* Court of Claims Act § 10(10), Education Law §3813(2)); and (iii) the Judiciary Law was amended to provide for judicial training in connection with crimes involving the sexual abuse of minors and for the promulgation of relevant rules "for the timely adjudication of revived actions." *See* Judiciary Law § 219-c, as amended, and new § 219-d. In that regard, the Uniform Rules were amended, effective July 31, 2019, with special provisions relating to actions revived pursuant to CPLR 214-g. *See* 22 NYCRR § 202.72.

Finally, the Penal Law was also amended to extend the tolling of the statute of limitations to bring a criminal action for the sexual abuse of a child to age 23 (instead of 18). Criminal Procedure Law § 30.10(3)(f).

The sponsors memorandum succinctly describes the awful predicament victims of child sexual abuse faced prior to these amendments:

> New York is one of the worst states in the nation for survivors of child sexual abuse. New York currently requires most survivors to file civil actions or criminal charges against their abusers by the age of 23 at most, long before most survivors report or come to terms with their abuse, which has been estimated to be as high as 52 years old on average. Because of these restrictive statutes of limitations, thousands of survivors are unable to sue or press charges against their abusers, who remain hidden from law enforcement and pose a persistent threat to public safety.
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> Passage of the Child Victims Act will finally allow justice for past and future survivors of child sexual abuse, help the public identify hidden child predators through civil litigation discovery, and shift the significant and lasting costs of child sexual abuse to the responsible parties.

CPLR 213-a: Residential Rent Overcharges and the Housing Stability Protection Act of 2019

The "Housing Stability Protection Act of 2019," signed into law on June 14, 2019 (ch. 36), effected significant changes impacting tenants' right in various ways, including in the areas of rent stabilization and luxury deregulation (repealing high-rent vacancy deregulation and high-income deregulation). Here, we will discuss the amendment to CPLR 213-a, dealing with residential rent overcharges, which was, in essence, repealed and replaced with a totally different statute. The pre-amendment statute read as follows:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

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Thus, under the old statute, there was a four-year statute of limitations and a four-year look-back period with respect to the examination of the rental history. The Court of Appeals had carved out an exception, permitting examination of a rental unit's history beyond the four-year period, where there was evidence that the landlord engaged in fraud to evade rent regulation. *See Matter of Grimm v. State of New York Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 N.Y.3d 358 (2010).

The amended statute provides that:

> No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed, however, an overcharge claim may be filed at any time, and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges.

As a result, the new statute permits the award of overcharge penalties or damages for a period of no more than *six* years before the action is commenced or complaint filed. Even more significant is that the amendment appears to eliminate the statute of limitations to bring an action ("an overcharge claim may be filed at any time"). The overcharge is to be calculated in accordance with the existing law for calculating such overcharges. Other provisions of the Act require a court, when "investigating complaints of overcharge and in determining legal regulated rent," to "consider all available rent history which is reasonably necessary to make such determinations." This will expand the permissible areas of discovery in litigating rent overcharge claims. *See 699 Venture Corp. v. Zuniga*, 2019 N.Y. Slip Op. 29200 (Civil Ct. Bronx Co. 2019).

The sponsors memorandum explains the overall justification for the Act:

> Rent regulations were enacted in response to an ongoing housing shortage crisis, as evidenced by an extremely low vacancy rate. Under tight rental markets, tenants struggle to secure safe, affordable housing, and landlords have little incentive to keep tenants in place long term by offering consistently low rent increases. Today, the City of New York and municipalities in Nassau, Westchester, and Rockland counties struggle to protect their regulated housing stock, which provides and maintains affordable housing for millions of low and middle income tenants. Rent regulations have been proven to protect tenants while allowing owners to invest in their buildings. Municipalities struggling with the same housing pressures deserve to have the same access to rent regulations that New York City residents have had for decades. This would allow local governments the opportunity to protect their housing stock as well, so residents can afford to live there without the threat of eviction, the fear of rapid and unaffordable rent increases, or rent burden.
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> As has been extensively documented, New York State ranks only 39th in the nation for tenant protections. For tenants who rent market-rate units, this legislation would ensure they do not face unreasonable barriers to applying for and being offered leases; have more notice if a landlord wants to bring a court proceeding against them; allow more leniency throughout any eviction proceeding, including stays of eviction and executions of warrants; and ensure that any eviction that is executed is done so in the interest of justice.

The Act took effect immediately and applies to "any claims pending or filed." The amendment to CPLR 213-a and the Housing Stability Protection Act of 2019 represent a significant victory for many tenants.

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