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

CASE LAW DEVELOPMENTS

Court of Appeals Holds Nuptial Agreement Acknowledgment Must Be Executed Contemporaneously, But Not Necessarily Simultaneously

Defects in Certificate of Acknowledgment Can Be Overcome With Extrinsic Evidence

Domestic Relations Law (DRL) § 236 (B)(3) provides that "[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded."

Anderson v. Anderson, 2021 N.Y. Slip Op. 07058, the result of two appeals, resolves two issues relating to whether a failure to comply with the DRL § 236(B)(3) signature acknowledgment requirements renders the nuptial agreement irrevocably unenforceable:

- Must the acknowledgment be contemporaneous with the signing of the agreement?
- May a defect in the certificates of acknowledgment be overcome with extrinsic evidence?

The Court of Appeals noted that in order to determine the requirements of a proper acknowledgement, it was necessary to consider three Real Property Law (RPL) sections: RPL § 292, requiring that "the party signing the document orally acknowledge to the notary public or other officer that [they] in fact signed the document." *Id*. at *3; RPL § 303, mandating that the officer taking the acknowledgement "knows or has satisfactory evidence, that the person making it is the person described in and who executed such instrument"; and RPL § 306, providing that the notary (or other officer) complete, sign and endorse or attach a certificate "stating all the matters required to be done, known, or proved."

The Court stressed the importance of an acknowledgement:

> "Generally, acknowledgment serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person." The acknowledgment also "necessarily imposes on the signer a measure of deliberation in the act of executing the document." And because "[m]arital agreements within [DRL] section 236(B)(3) encompass important personal rights and family interests[,] . . . the formality of acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care" (citations omitted).

Id. at *3–4.

In the first appeal, in *Anderson*, the husband's signature on a nuptial agreement was not acknowledged until nearly seven years later, shortly before he brought a divorce action and in anticipation of his wife's divorce filing. The trial court denied the wife's motion to set aside the nuptial agreement, but the Appellate Division reversed.

The Court of Appeals conceded the mandatory nature of the acknowledgement requirement. However, prior Court of Appeals precedent left open the question as to whether the acknowledgement must be contemporaneous with the signing of the agreement. Endeavoring "to discern and to give effect to the Legislature's intention," the Court concluded that

> the DRL's "obvious spirit and intent" must be understood to require an acknowledgment that is reasonably close temporally to the period when the signing parties have considered the consequences of the nuptial agreement and decided to be bound by its terms. . . . Because a nuptial agreement is not enforceable until both parties have signed and their signatures have been duly acknowledged, a significant delay between

IN THIS ISSUE

Court of Appeals Holds Nuptial Agreement Acknowledgment Must Be Executed Contemporaneously, But Not Necessarily Simultaneously

Court Holds "Disgorgement Payment" to SEC Was Not a "Penalty Imposed by Law" Excluded From Insurance Coverage

They Meant What They Said, They Said What They Meant, the First Department Was Faithful One Hundred Percent

Aybar Update: Governor Vetoes Proposed Legislation

Update: Second Circuit Affirms that CPLR 205(a) Cannot Be Used in Successive Lawsuits

> a signature and acknowledgment calls into question whether there was a shared understanding of the relevant circumstances. We therefore hold that an acknowledgment must be executed contemporaneously, although not necessarily simultaneously, with the party's signing of the agreement (citations omitted).

Id. at *8–9.

The Court asserted that a brief delay between signing and the acknowledgment might be reasonable if, for example, the notary is unavailable immediately. Moreover, the Court noted that where there is excessive delay rendering the acknowledgment ineffective and the agreement unenforceable, the parties can nevertheless reaffirm their agreement by signing it and having it acknowledged again. In determining whether there is an unreasonable delay, a court can consider, among other factors, "the length of the delay, whether the signer or a third party caused the delay, and whether the signer is motivated to comply with the statutory mandates because of changed circumstances in the marriage or an impending divorce action." *Id*. at *11.

Here, by failing to timely acknowledge, the husband could unilaterally revisit the agreement years later and thus delay whether to be bound by that agreement, a luxury the wife did not have. As a result, the Court held that the acknowledgment was ineffective and the nuptial agreement invalid and unenforceable.

In the second case, *Matter of Koegel*, the nuptial agreement was properly signed and acknowledged. The only issue was that the lawyers failed to attest that the signer was known to them, "although that was undeniably the case." That is, the certificates of acknowledgement were defective. The Court ruled that such a defect can be overcome with adequate extrinsic evidence "that the acknowledgment was properly made in the first instance" (citation omitted). *Id*. at *19. In other words, "only in those limited cases where the parties signed and properly acknowledged the agreement can they later seek to present evidence of their prior timely compliance." *Id*. at *20.

The Court held that this was one of those cases:

> The affidavits of the notaries who actually witnessed the signatures—which were not rebutted—showed that the parties' attempt to comply with the acknowledgment requirement was defective "due to no fault of their own," because the signatories did everything they were supposed to do and complied with the formalities, even though the acknowledgment certificates failed to articulate that compliance in writing. In this instance, allowing proof of the personal knowledge of the signers merely allows John "to conform the certificate to reflect th[e] fact" of the actual events. Since Irene admitted that the lawyer to whom she acknowledged her signature was known to her because he had previously represented her, and the lawyer's affidavit confirmed that she was known to him based on their professional relationship, the evidence overcame the non-compliance with the statutory mandates.

Id. at *20–21.

Court Holds "Disgorgement Payment" to SEC Was Not a "Penalty Imposed by Law" Excluded From Insurance Coverage

Finds That Insurers Failed to Carry Their Burden

The question in *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 2021 N.Y. Slip Op. 06528 (November 23, 2021), was whether a $140 million settlement payment ("disgorgement" payment) by a brokerage house to the Securities Exchange Commission (SEC) was a "penalty imposed by law," excluded from insurance coverage. In a 6-1 decision, the Court of Appeals answered in the negative.

Plaintiffs' predecessor (Bear Stearns) had purchased primary and multiple excess insurance policies from several insurers. The policies provided for "coverage for 'loss' that Bear Stearns became liable to pay in connection with any civil proceeding or governmental investigation into violations of laws or regulations, defining 'loss' as including various types of damages—including compensatory and punitive damages ('where insurable by law')—but not 'fines or penalties imposed by law.'" *Id.* at *2.

In 2003, the SEC began investigating Bear Stearns for violations involving the facilitating of "late trading and deceptive market timing practices," which produced profits for their investor clients as well as brokerage fees. Bear Stearns eventually settled with the SEC, including a $160 million "disgorgement payment" and a $90 million payment for "civil money penalties." The payments were put into a "Fair Fund" to compensate mutual fund investors injured by Bear Stearns' actions. Under the terms of the settlement, the $90 million was ineligible to be used by Bear Stearns to offset sums owed for losses by private litigants and was to be treated as a penalty for tax purposes.

When the insurers refused to cover the $160 million payment, Bear Stearns' successor companies brought this action against the insurers for breach of contract, seeking a declaration of coverage for, among other things, $140 million of the $160 million disgorgement payment. Plaintiffs alleged that the $140 million payment was not a penalty as it was based on estimates by Bear Stearns of profits it generated for its clients through the subject improper trading practices. The trial court granted plaintiffs' summary judgment motion, but the Appellate Division reversed, finding that there was no coverage for the disgorgement payment because it was a "penalty" and therefore uninsurable.

A majority of the Court of Appeals found that the payment was not a "penalty" within the policies' meaning. It noted that this was a question of contract interpretation; absent a public policy violation, contracts will be enforced as written; in the first instance an insured must establish that there is coverage but the insurer has the burden to prove an exclusion defeating coverage; and the latter burden applies equally to limiting language in the coverage definitions as to an exclusion.

The subject policies agreed to pay any "loss" Bear Stearns became legally obligated to pay resulting from a claim. They defined "loss" to include compensatory damages, punitive damages insurable by law, multiplied damages, judgments, settlements, costs, and expenses resulting from any claim. In addition, "loss" covered "costs, charges and expenses or other damages incurred in connection with any investigation by any governmental body." There was an exception, however, providing that "loss" was not to include "fines or penalties imposed by law." And that provision amounted to an exclusion. The Court found that the insurers had not met their burden.

While the phrase "penalties imposed by law" was not defined in the insurance policies, the Court noted that the term "penalty" is

> commonly understood to reference a monetary sanction designed to address a public wrong that is sought for purposes of deterrence and punishment rather than to compensate injured parties for their loss. We have explained that, in the context of statutory penalties, "the word penalty . . . does not apply to actual damages" but, rather, exacts sums from a wrongdoer that "exceed the injured party's actual damages."

Id. at *10–11.

Before the insurance policies had been issued, the Court had determined in *Zurich Ins. Co. v. Shearson Lehman Hutton*, 84 N.Y.2d 309, 312–13 (1994), that where a sanction has both compensatory and punitive components, it is not to be characterized as punitive when interpreting insurance policy provisions. While *Zurich* did not directly address the meaning of the term "penalty," the Court's "analysis nonetheless indicates that a reasonable insured purchasing a wrongful act policy would expect an award or settlement payment that has compensatory purposes and is measured by an injured party's losses and third-party gains to fall within its coverage grant and, concomitantly, not be deemed a penalty." *J.P. Morgan Sec. Inc.*, 2021 N.Y. Slip Op. 06528 at *12.

The Court acknowledged that "neither the label assigned to the payment by the SEC and Bear Stearns, nor the mere fact that injured parties may ultimately receive the funds, is dispositive." *Id*. at *15. Nevertheless, the $140 million figure was arrived at through a valuation of customers' gains (through improper trading tactics) as a measure of corresponding losses suffered by other investors. Thus, unlike the $90 million penalty payment, this award was based on a measure of the harm created. The payment was placed in a fund to compensate injured investors. The "disgorgement" of profits was viewed by the SEC as an equitable remedy and not a penalty. The $90 million sanction was to be treated as a penalty for tax purposes, while the disgorgement payment was not viewed as such.

In dissent, Judge Rivera argued that the disgorgement payment was a nonrecoverable penalty. She maintained that the primary purpose of "disgorgement" is not compensatory, but "to deter wrongdoing, by depriving the wrongdoer of fraudulently obtained profits—their own or those of another party—and thus punish the wrongdoer." *Id.* at *21; the SEC's primary goal here was to prosecute Bear Stearns for a public wrong; case law suggests that disgorgement is primarily punitive and not compensatory; and disgorgement funds could be paid directly into the Treasury general fund and not distributed because it would not be justified based on administration costs or where victims cannot be identified, suggesting that they are not compensatory.

They Meant What They Said, They Said What They Meant, the First Department Was Faithful One Hundred Percent

Reaffirms That the Catalyst Theory Applies in CPLR Article 86 Cases Despite Other Departments Ruling to the Contrary

CPLR Article 86, the New York State Equal Access to Justice Act (EAJA), is based on, but not identical to, its federal counterpart, the Federal Equal Access to Justice Act, 28 U.S.C. § 2412(d). CPLR 8601 provides that a "prevailing" party in an action against the State can recover attorneys' fees and other expenses "unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." The "catalyst theory" provides that even where the government moots an action voluntarily by granting the relief sought, the plaintiff can nevertheless recover attorneys' fees because the claim was a catalyst for favorable governmental action.

In the July 2021 edition of the *Law Digest*, we reported that the Second, Third, and Fourth Departments had rejected the catalyst theory. We also noted that in *Solla v. Berlin*, 106 A.D.3d 80 (1st Dep't 2013), *reversed on other grounds*, 24 N.Y.3d 1192 (2015), the First Department had formally recognized the catalyst theory.

If you had thought that the First Department may have relented after the 2017 and 2021 decisions of the other Departments to the contrary, you would be wrong. Recently, in *Matter of Liu v. Ruiz*, 200 A.D.3d 68 (1st Dep't 2021), the First Department reaffirmed its holding in *Solla*. In doing so, it noted that:

- *Solla* ruled in favor of applying the catalyst theory to a state EAJA case even though the U.S. Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Department of Health & Home Resources*, 532 U.S. 598 (2001), had held that the catalyst theory no longer applied to federal statutes that awarded attorneys' fees to the prevailing party.
- *Solla* indicated that CPLR Article 86 was explicitly enacted to be similar, but not identical, to the federal counterpart; that there were significant differences between the state and federal statutes; and that these differences "militated against applying *Buckhannon* to the state statute."

The court in *Matter of Liu* concluded that the ruling in *Solla* remains the law in the First Department and that the respondent here did not offer any new arguments:

> We note that the Court of Appeals, in a case that post-dated its own decision in *Solla*, and that recognized the State EAJA as a remedial statute, stated that "limitations should not be read into such remedial statutes unless the limitations proposed are clearly expressed" (*Kimmel v State of New York*, 29 NY3d 386, 397, 57 N.Y.S.3d 678, 80 N.E.3d 370 [2017]). Although *Kimmel* did not involve the catalyst theory, it supports this Court's reasoning in *Solla* as to why the catalyst theory is available under the State EAJA. Based on the reasoning employed in *Solla*, we reaffirm our holding in that case (citation omitted).

Id. at 76.

Mootness Exception Applies

Matter of Liu raised a few other interesting issues that merit mentioning. To do so, however, a brief review of the underlying facts is necessary.

Petitioner-mother filed a child support violation petition in Family Court seeking to enforce child support arrears against the father. After a hearing, the Support Magistrate issued findings of fact and concluded that the father did not willfully violate the child support order. Petitioner served her objections to the findings of fact, and the father served his rebuttal. Absent a timely ruling on her objections, the mother sought mandamus relief against the Chief Administrative Judge of the New York City Family Court (CAJ),

to compel a decision on the mother's objections. After a favorable decision on the mother's pending objections, the petition was denied as academic, the proceeding dismissed as moot, and the lower court refused to award counsel fees.

The Appellate Division held that the petition was not properly dismissed, finding that an exception to the mootness doctrine applied here. Those exceptions include: "(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" (Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715, 409 N.E.2d 876, 431 N.Y.S.2d 400 [1980])." The Appellate Division agreed with the mother

> that this is not the first time in this case that the issue has arisen. Further, the issue is not likely to be resolved without application of the exception, because the Family Court can so easily obviate it by issuing a decision on the objections, albeit after the expiration of the 15 days. . . . We also find that the mother raises an important and substantial question. Whether the Family Court is actually mandated to decide objections to support orders within the short time frame set forth in the statute is not a trivial one. Parents relying on support payments or ordered to make them should know if finality on the amount in question will be forthcoming within days, months or years of the issuance of a final support order, since the answer might have a profound effect on choices they make.

Id. at 72–73.

Governor's Executive Orders Did Not Justify Delay in Ruling

Another contention made in *Matter of Liu* was that there was substantial justification for the delay in the ruling on the mother's objections because the deadline in question was implicitly suspended by the Governor's executive orders in response to the COVID-19 pandemic. Specifically, the March 20, 2020 Executive Order No. 202.8 (to which we have referenced repeatedly in the Law *Digest*) provided that "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including . . . the family court act . . . is hereby tolled." The Appellate Division found, however, that "[t]his language does not help the CAJ because the time for the court to rule on objections in a proceeding like this one that had already been 'commenced' and where the operative documents had already been 'filed' and 'served' was not affected by the Governor's order." *Id.* at 76.

Aybar Update: Governor Vetoes Proposed Legislation

In the November 2021 edition of the *Law Digest,* we referred to the Court of Appeals' decision in *Aybar v. Aybar*, 37 N.Y.3d 274 (2021). There, the Court held that a foreign corporation's business registration did not constitute consent to general jurisdiction in New York. We noted that there was pending proposed legislation which had passed both houses, including the addition of BCL § 1301(e), explicitly providing that such registration "constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation."

However, Governor Hochul vetoed the bill, stating, in part, that it would deter out-of-state companies from doing business here entirely or compel them to limit their business in New York. The result would be a loss of tax revenue, jobs, products and services, undermining the state's competitiveness. In addition, the "substantial uncertainties" created by the bill for businesses would increase their risks, "including the prospect of increased and unforeseen litigation in New York and would raise their costs of doing business in New York." There would also be an increase in litigation bearing no nexus to New York "thereby overwhelming an already taxed judiciary and impeding due process. We cannot sustain a healthy State economy if we ask businesses to gamble with their futures, especially in light of the economic unpredictability caused by the COVID-19 pandemic."

Update: Second Circuit Affirms that CPLR 205(a) Cannot Be Used in Successive Lawsuits

In the May 2021 edition of the *Law Digest*, we referred to the decision in *Ray v. Ray*, 2021 U.S. Dist. LEXIS 56990 (S.D.N.Y. March 25, 2021), in which the District Court held that CPLR 205(a) cannot be used in successive lawsuits. The Second Circuit affirmed, holding "that CPLR section 205(a), New York's 'Saving Statute,' does not permit a litigant to file an otherwise untimely 'new action' within six months of a 'prior action,' where that prior action was, itself, only made timely by a previous application of section 205(a)." 2021 U.S. App. LEXIS 38166 (2d Cir. December 27, 2021), at *9.

Second Circuit Declines to Certify Question to the New York State Court of Appeals

The Second Circuit noted that it declined to certify the question presented in *Ray v. Ray* to the New York State Court of Appeals because such a decision is discretionary and was not called for here. While it has done so "where the statute's plain language does not indicate the answer," here the statute's plain language provides the answer to the question. The court also noted the "drawbacks" in certification:

> First, "while certification can serve federalism objectives, significant federalism interests can also cut *against* certification," particularly in diversity jurisdiction cases where "certification . . . substantially undermines the diverse litigant's entitlement to the federal forum." . . .
>
> Additionally, as Judge Leval recently reminded us, "certification almost invariably results in substantial increase to the expenses the parties incur and inevitably delays the resolution of the case, sometimes for well more than a year." Confronted with a series of litigations that has lasted more than two decades, we are hardly inclined to require that the parties appear before more tribunals than are necessary to resolve their claims.

Id. at *8–9.

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