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EDITOR: DAVID L. FERSTENDIG

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

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CASE LAW DEVELOPMENTS

Court of Appeals Holds That Punitive Damages Are Not an Available Remedy in a General Business Law § 349 Action

Concurrence Believes Majority Embarked on "Gratuitous Ride" By Unnecessarily Addressing an Issue That Neither Party Offered "More Than a Glancing Analysis"

In *Hobish v. AXA Equit. Life Ins. Co.*, 2025 N.Y. Slip Op. 00183 (Jan. 14, 2025), the plaintiffs asserted a breach of contract claim and violation of General Business Law (GBL) § 349 against the defendant insurer with respect to a 2007 purchase by a Trust of a universal life insurance policy and the subsequent increase in 2015 of the effective cost of the policy. The Court of Appeals dealt with several issues, but here we focus on the question relating to the plaintiffs' request for punitive damages. While the entire Court agreed that the plaintiffs were not entitled to punitive damages, the concurrence believed the majority went further than necessary.

Initially, the Court concluded that the plaintiffs had *not* "cleared" the "high bar" set forth in its seminal case in *Walker v. Sheldon*, 10 N.Y.2d 401 (1965). In order to recover punitive damages on a contract claim, it must be shown that the fraud was "aimed at the public generally, is gross and involves high moral culpability," or when it "evince[s] a high degree of moral turpitude and demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." 10 N.Y.2d at 405. Breach of contract claims are generally limited to "the contract damages necessary to redress the private wrong." However, "punitive damages may be recoverable if necessary to vindicate a public right." *New York Univ. v Continental Ins. Co.*, 87 N.Y.2d 308, 315 (1995). Thus,

> [t]o state a claim for punitive damages in this context, a plaintiff must allege that "(1) [the] defendant's conduct [is] actionable as an independent tort; (2) the tortious conduct [is] of the egregious nature set forth in *Walker*. . . ; (3) the egregious conduct [is] directed to [the] plaintiff; and (4) it [is] of a pattern directed at the public generally" (citation omitted).

Hobish v. AXA Equit. Life Ins. Co., 2025 N.Y. Slip Op. 00183 at *14.

The essence of the plaintiffs' claim here was that the insurer had falsely marketed and sold the subject policy to elderly consumers by representing that the likelihood of an increase in the cost of insurance (COI) deducted monthly was minimal, even though it intended to raise the COI charges in the future. Thus, the plaintiffs alleged that the defendant fraudulently induced the Trust to purchase the policy. The Court held, however, that the facts did not meet the standard necessary to award the plaintiffs punitive damages:

> First, and most significantly, no party disputes that the policy at issue expressly stated that the COI charges could potentially be increased, and clearly delineated guaranteed maximum COI charges that defendant could apply to the Policy Account. The new COI Rate Scale developed in 2015 resulted in charges below the policy's maximum limits. Second, the record evidence relied upon by plaintiffs fails to raise a triable issue concerning whether defendant's behavior was so egregious, wanton, or malicious as to warrant punitive damages. For example, plaintiffs' principal source of record information on defendant's sales strategies for its AULII policies is the deposition testimony of the salesperson, but that testimony is equivocal and provides no specific communication or statement from defendant that accords with plaintiffs' allegations of wanton fraud. Although

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> plaintiffs claim that defendant planned to increase COI deductions as early as 2007, unrebutted deposition testimony established that any decision to raise the COI Rate Scale would always be "contingent on the actual work being performed," and that no recommendation to increase rates was ever approved by defendant in 2007.

Id. at *14–15.

But the Court did not stop there. Instead, it addressed a conflict among the Appellate Division Departments as to whether punitive damages are generally an available remedy in a GBL § 349 action.

GBL § 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." The statute is concerned with the impact of such conduct on consumer purchases, thus prohibiting deceptive acts misrepresenting the nature or quality of services and products. A private person is permitted to bring a GBL§ 349 action. In addition, a court can increase a damage award "to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section." GBL § 349(h). The First Department, the court that ruled below, held that a court could *not* make an award above the "limited punitive damages" set forth in GBL 349(h). The Second Department has taken the contrary view, permitting punitive damages beyond the statutory cap. *See Wilner v. Allstate Ins. Co.,* 71 A.D.3d 155 (2d Dep't 2010). Apparently, the Fourth Department has not been consistent on this issue.

The Court of Appeals in *Hobish* noted that "in determining whether punitive damages are available to a private plaintiff bringing a General Business Law § 349 claim, 'we look to the statute—not to whether the nature of the wrong alleged would permit recovery under traditional concepts of punitive damages in tort law' (citation omitted)." *Id*. at *18. The Court focused on the private right of action provision, which provides for "layered damages," that is, actual damages, or 50 dollars, whichever is greater; discretionary treble damages with a $1,000 cap; and attorneys' fees. While treble damages have been viewed as having a punitive effect, the statute does not refer to "punitive damages." The Court emphasized the "balanced remedies" of the statute, which reflected legislative compromises that resulted in a private right of action. On the one hand, the statute's standard to recover treble damages, "willful and knowing," is "substantially less onerous than the general standard for punitive damages." On the other hand, GBL § 349 limits the damages to a cap of $1,000, which a court has the discretion to award.

The Court also pointed to the fact that GBL § 349(h) has remained essentially the same since the private right of action element was added to the statute 44 years ago, despite legislative proposals attempting to increase damages or to provide specifically for the recovery of punitive damages. In contrast, other similar statutes providing a private right of action have increased damages or adjusted remedies. Thus, the Court concluded that punitive damages were unavailable under GBL § 349(h).

A concurring opinion by Judge Halligan, joined by Chief Judge Wilson and Judge Rivera, insisted that the majority should not have decided the issue as to whether GBL § 349(h) permits punitive damages in addition to the remedies authorized by the statute. The concurrence noted that the Court did not have to reach the issue with other grounds available, based on a question for which neither party offered "more than a glancing analysis." In fact, "[n]either party actually examines the legislative history of this particular provision or section 349 more broadly. Nor do we have before us the views of the New York Attorney General, who has weighed in on numerous other cases involving section 349's scope (citations omitted)." *Id.* at *23.

The concurrence pointed to possible conflicting evidence of legislative intent. In addition, the majority's seeming comparison of treble and punitive damages "ignores that treble damages may be intended to deter particular statutory violations or to ensure rigorous and robust private enforcement, in addition to simply punishing egregious misconduct." *Id*. at *24.

The concurrence also took exception to the majority's failure to discuss other relevant issues bearing on the question. Moreover, the fact that the relevant question was in dispute and was preserved for review "does not mean that we 'need to resolve it' here and now," where an alternative ground was available:

> In explaining why punitive damages are not available for plaintiff's breach of contract claim, the majority concludes that plaintiffs simply have not raised a triable issue of fact as to the type of egregious, deliberate conduct that has long been the hallmark of punitive damages. That is an easy call, especially since the charges at issue were less than the cap included in the policy. I believe that conclusion forecloses punitive damages, period—whether for plaintiff's breach of contract claim, section 349 claim, or any other claim that might give rise to such damages.

Id. at *27.

The concurrence concluded that "judicial modesty" was particularly appropriate here:

> Courts often decide questions on narrow grounds and reserve harder issues for another day. And our Court regularly "considers only those arguments . . . which arise by necessity in our analysis of the questions explicitly presented." Such judicial modesty is especially prudent where an issue has not been fully subjected to the crucible of the adversarial process and there is a sufficient alternative ground for deciding the case. Thus, "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further." Anything more is a "gratuitous ride," and one that I would not embark upon here (citations omitted).

Id. at *27–28.

DHCR Properly Interpreted HSTPA as Applying to Apartments Subject to Deregulation Order Prior to HSTPA's Effective Date, Where Leases Did Not Expire Until After That Date

Moreover, Its Interpretation Did Not Constitute an Impermissible Retroactive Application

As part of an omnibus amendment entitled "Housing Stability and Tenant Protection Act of 2019" (the HSTPA), "luxury deregulation" of rent-stabilized residences was repealed. Prior to the HSTPA, previously rent-stabilized vacant apartments that met a deregulation rent threshold could be deregulated. In

addition, already-occupied apartments could be deregulated if the tenant's rent and income met certain deregulation thresholds.

The HSTPA's repeal applied prospectively in the sense that it did not apply to apartments already deregulated before the effective date of the statute. *Matter of 160 E. 84th St. Assoc. LLC v. New York State Div. of Hous. & Community Renewal*, 2024 N.Y. Slip Op. 06377 (Dec.19, 2024), addresses the situation where apartments had been ordered prior to the repeal to be deregulated when the current lease expired, but the leases were not to expire before June 14, 2019, the effective date of the HSTPA. The Division of Housing and Community Renewal (DHCR) had interpreted the HSTPA as being applicable to that situation. Thus, those apartments would remain rent-stabilized. The Court of Appeals was asked whether the DHCR interpretation was proper and whether it constituted an impermissible retroactive application. It found in favor of the DHCR on both counts.

The Court initially noted that interpreting a repeal provision in a statute is no different than interpreting other enactments. The Court owed no deference to DHCR's interpretation because "'this appeal does not call upon us to interpret a statute' requiring 'specialized knowledge and understanding of underlying operational practices or . . . an evaluation of factual data and inferences to be drawn therefrom . . .' (citations omitted)"; the question here is "'one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent' (citation omitted)"; and, in determining the legislative intent "'the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' (citations omitted)." *Id.* at *8.

The Court looked to the language of the HSTPA, which stated that the repeal "shall take effect immediately." Thus, as of June 14, 2019, when the HSTPA became law, there was no provision in New York law under which an apartment could become luxury deregulated: "Apartments can be removed from rent stabilization only 'through regular, officially authorized means.' Since luxury deregulation became unavailable upon the HSTPA's passage, there is now no statute authorizing DHCR to exempt previously qualifying apartments from rent stabilization if they were not luxury deregulated as of June 14, 2019." *Id.* at *9.

The Court rejected the petitioner's argument that once the DHCR issued a luxury deregulation order before the repeal, the order became final, and the apartment was exempt as a matter of law. The premise for the petitioner's argument was that the prior version of the

> former RSL § 26-504.3 did not condition the finality or validity of an order of luxury deregulation on the expiration of the lease in effect at the time the order issued. As a result, petitioner concludes that the pre-repeal order—granting it luxury deregulation at some point after the repeal—was intended by the legislature to be unaffected by the repeal.

Id. at *10.

The Court acknowledged that the apartments met the prior criteria for luxury deregulation and, thus, the DHCR was statutorily required to issue the deregulation order when the tenant's income and rent crossed the mandated thresholds. However, the Court disputed that the apartment immediately became exempt from rent regulation. In fact, before the passage of the HSTPA, the Rent Stabilization Law (RSL) did not require immediate deregulation in those circumstances. Thus, the "apartment became deregulated only upon the expiration of the lease in effect at the time a deregulation order was issued." *Id.* at *11. In addition, DHCR's deregulation order expressly stated "that the subject housing accommodation is deregulated, effective upon the expiration of the existing lease."

The Court also held that the DHCR's interpretation did not constitute an impermissible retroactive application:

> DHCR did not retroactively vitiate the landlord's interests when it declined to find the apartment deregulated, inasmuch as the conditions for luxury deregulation had not been fully satisfied because the tenant's lease had not yet expired and the enactment of the HSTPA prevented that deregulation from coming into effect. Because this analysis requires only a prospective application of part D of the HSTPA, the statute is not impermissibly retroactive.

Id. at *13.

Furthermore, the DHCR's interpretation was in line with the

> legislative intent because, as discussed above, the legislature expressly found that deregulation "has permitted speculative and profiteering practices and has brought about the loss of vital and irreplaceable affordable housing for working persons and families." As a result, the legislature determined that there was an emergent need to repeal luxury deregulation "in order to prevent uncertainty, potential hardship and dislocation of tenants living in housing accommodations subject to government regulations as to rentals and continued occupancy as well as those not subject to such regulation (citations omitted)."

Id. at *13–14.

Submitting Defective Papers in Timely Fashion to Commence Proceeding Not Correctible Under CPLR 2001

Failure is Nonwaivable Jurisdictional Defect Rendering Proceeding Untimely

In the December 2024 edition of the *Law Digest*, we addressed the issue of the failure to file the initiating papers. We noted what appeared to be a conflict as to whether the failure is a non-waivable jurisdictional defect. *Sharp v. Rodriguez*, 2025 N.Y. Slip Op. 00358 (3d Dep't Jan. 23, 2025), was an Article 78 proceeding challenging a determination finding the petitioner, an incarcerated individual, guilty of violating prison disciplinary rules. The petitioner timely *submitted* (within four months of the final determination) an initial petition and supporting papers to the County Court Clerk. The papers were rejected, however, because of defects in form, which prevented them from being *filed* with the County Clerk's office. The Third Department held that CPLR 2001 could not correct that defect and the failure to file was a nonwaivable jurisdic-

tional defect. "Accordingly, petitioner's June 2023 filings are insufficient to constitute timely filing for statute of limitations purposes (citations omitted)." *Id.* at *3.

CPLR 5003-a Does Not Apply Where the Release or Stipulation of Discontinuance Is Defective

Thus, Plaintiff Was Not Entitled to Seek a Judgment, Including Interest, Costs, and Disbursements

CPLR 5003-a provides a mechanism by which a party who entered into a valid settlement agreement can protect the right to receive prompt payment of the settlement. CPLR 5003-a sets forth specific time periods within which a settlement payment must be made, depending on whether it is to be made by a private or public defendant. With respect to the latter, CPLR 5003-a(b) provides that where "the settling defendant is a municipality or any subdivision thereof, or any public corporation that is not indemnified by the state, it shall pay all sums due to any settling plaintiff within ninety days of tender, by the settling plaintiff to it, of duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff."

Where the settling defendant fails to pay the settlement in a timely fashion, the plaintiff can enter judgment against the non-paying defendant, without further notice, in the amount set forth in the release plus interest from the date of the tender of the release and stipulation of discontinuance, together with costs and disbursements. CPLR 5003-a(e).

However, in order to trigger the statute, a *proper* release and stipulation of discontinuance must be provided. Thus "'[a] judgment predicated upon a defendant's failure to make timely payment may not be entered where the plaintiff tenders a defective general release or a defective stipulation of discontinuance following the settlement' (citation omitted)." *Raymond v. City of New York*, 2025 N.Y. Slip Op. 00120 (2d Dep't Jan. 8, 2025), at *4. In *Raymond*, the general releases provided by the plaintiffs were defective in that they lacked certain required language. As a result, "the releases were insufficient to trigger the 90-day period within which the defendants were required to make payment of the settlement amount, and, accordingly, the plaintiffs were not entitled to seek a judgment including interest, costs, and disbursements based on nonpayment under CPLR 5003-a(e) (citation omitted)." *Id.* at *4–5.

Simple advice: make sure all releases and stipulations of discontinuance (and any other settlement documents, for that matter) contain the required language. Even putting aside the issue above concerning the applicability of CPLR 5003-a, some of these form-oriented documents can foster a bit of laziness. Read all documents closely to ensure that they are accurate and reflect the particular circumstances of your case!

CPLR 308(2) Requires Delivery to Person of Suitable Age and Discretion

Person With Mental Capacity of Eight-Year-Old Child Does Not Satisfy the Standard

CPLR 308(2) permits the use of leave and mail service in the first instance for service on a natural person. The two-step process first requires that the initiating pleadings be left with a person of suitable age and discretion at the defendant's actual place of business, dwelling place, or usual place of abode. *Citimortgage, Inc. v. Leitman*, 232 A.D.3d 847 (2d Dep't 2024), discussed, among other things, whether the person served was one of "suitable age and discretion." The standard applied has been that "[t]he person to whom delivery is made must objectively be of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant (citations omitted)." *Id.* at 848. Many of the reported cases have focused on the age of a child (under 18) served when determining whether the child was of suitable age and discretion.

In *Citimortgage,* the mental capacity of the person served was implicated. The defendant's motion to dismiss submitted a treating physician's affirmation representing that the family member to whom delivery was made (E.L.) had a brain and spinal tumor, seizures, and developmental delay, with a *mental capacity* of an eight-year-old child. Note that the plaintiff did not even contest the defendant's assertion contention that E.L. was not a person of suitable discretion. Instead, it argued that the defendant clearly was "aware of the action" and that plaintiff had a meritorious cause of action. The trial court granted the defendant's motion to dismiss, and the Appellate Division affirmed. Since the plaintiff conceded that the person served was not of "suitable age and discretion," the service was defective. The fact that the defendant may have received notice of the action was of no moment. "'Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court' (citation omitted)." *Id.*

THE UNIFORM RULES

22 N.Y.C.R.R. § 202.48 and Settling or Submitting an Order or Judgment Within 60 Days

Court Must Direct that Proposed Order or Judgment Be Settled or Submitted

An appeal lies from an order or judgment, but not from a decision. Fortunately, most courts issue orders, not decisions. However, when a decision is issued, it should be converted into an order. 22 N.Y.C.R.R. § 202.48(a) provides that proposed orders or judgments must be settled or submitted within 60 days after the signing and filing of the decision "directing that the order be settled or submitted." An order is "settled" by serving a "notice of settlement" together with a proposed order. Failure to do so, "shall be deemed an abandonment of the motion or action." However, as the rule provides, it only applies where the court *directs* that the order or judgment be settled or submitted.

In *U.S. Bank, N.A. v. Royal,* 231 A.D.3d 994 (2d Dep't 2024), after a trial in a mortgage foreclosure action, the trial court ordered that the plaintiff's predecessor in interest (HSBC) "may proceed with the foreclosure." The Appellate Division held that HSBC was not required to file a notice of settlement of a proposed judgment because "the trial order did not direct that a proposed judgment or order be settled or submitted for signature."

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