State of New York Court of Appeals

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WEEK OF MAY 5-7, 2015

NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Court of Appeals Hall
20 Eagle Street
Albany, New York

State of New York Court of Appeals

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To be argued Tuesday, May 5, 2015

No. 54 Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. &c. v Herrera Navarro

Francisco Javier Herrera Navarro (Herrera) was a director of Agra Services of Canada, Inc. (Agra Canada) and its subsidiary Agra USA in 2004, when the companies entered into a Receivables Purchase Agreement (RPA) with Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., Rabobank International, New York Branch (Rabobank). In 2005, Herrera and Eduardo Guzman Solis (Guzman), who controlled Agra Canada and Agra USA, executed personal guarantees in favor of Rabobank, including "the punctual payment when due ... of all obligations and liabilities of [Agra USA] to [Rabobank] now or hereafter existing, including without limitation under the [RPA], whether for principal, interest, fees, expenses or otherwise." Herrera's guaranty provided that his liability "shall be absolute and unconditional irrespective of ... any lack of validity or enforceability of any such agreement [or] any other circumstance which might otherwise constitute a defense available to, or a discharge of, [Agra Canada] or a guarantor." Agra USA also guaranteed Agra Canada's obligations to Rabobank.

After Guzman died in 2011, Rabobank learned he had been running a Ponzi scheme and Agra Canada owed Rabobank nearly $42 million. The bank took control of Agra Canada, placed it into receivership in January 2012, and arranged the appointment of a receiver. In March 2012, Rabobank brought a federal action against Agra USA, Herrera and others to recover under their guaranties. Agra USA did not respond. On April 11, 2012, Agra Canada removed all officers and directors of Agra USA, including Herrera, and put an employee of the receiver in charge of the subsidiary. Five days later, Rabobank moved for a default judgment against Agra USA. Agra USA did not appear at the hearing, and the federal court entered a $41,991,980 default judgment against it on April 30, 2012. Rabobank brought this state action against Herrera to recover the amount of the judgment under his guaranty.

Supreme Court denied Rabobank's motion for summary judgment, saying, "Herrera argues that the default judgment is not a legitimate 'obligation' covered by the Guaranty because Rabobank controlled Agra [Canada] and Agra USA at the time of the [federal court] action and caused Agra USA to default.... Given the facts available at this time, it is unclear who controlled Agra USA during the course of the [federal court] action, at the time of default, and when judgment was entered. These are material questions of fact that preclude summary judgment."

The Appellate Division, First Department reversed on a 3-2 vote and granted summary judgment for Rabobank based on Herrera's waiver of all defenses. "[N]o matter how labeled, Herrera's assertion of collusion is, in fact, a defense to his guaranty inasmuch as he offers it in an effort to avoid performance under the guaranty.... Herrera cannot avoid his agreement simply by declaring that a defense is not really a defense because it actually calls into question the validity of the obligation. This exception would swallow the rule whole...."

The dissenters said, "[T]he 'obligation' plaintiff seeks to enforce -- a federal court default judgment of more than $41 million that plaintiff arguably obtained by collusion -- would not, if the collusion is ultimately proven, constitute a valid obligation of Agra USA under defendant's guarantee. An issue of fact exists as to whether plaintiff unfairly brought about the very condition upon which it relies to trigger defendant's guarantee.... The waiver of defenses provision cannot confer on plaintiff the absolute right to recover what it has unilaterally deemed to be an 'obligation,' if in fact no such obligation exists."

For appellant Herrera: T. Barry Kingham, Manhattan (212) 696-6000
For respondent Rabobank: Jonathan D. Pressment, Manhattan (212) 659-7300

State of New York Court of Appeals

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To be argued Tuesday, May 5, 2015

No. 87 People v Hakim B. Scott

On December 7, 2008, Hakim Scott, Keith Phoenix and a third man were driving home from a party in Phoenix's SUV when they stopped at a red light on Bushwick Avenue in Brooklyn. Two brothers, Jose and Romel Sucuzhaney, crossed the street in front of them. Romel was supporting Jose, who was heavily intoxicated. When Phoenix shouted homophobic and ethnic epithets from the window, Jose kicked at the vehicle. Scott got out and struck Jose on the head with an empty beer bottle, knocking him to the ground, then chased after Romel with the broken bottle. Phoenix retrieved a baseball bat from the rear of his SUV and used it to beat Jose. Scott returned several minutes later and the three men fled in the SUV. Jose died of his injuries the next day.

Scott was charged, on a theory of accessorial liability, with various homicide counts for the death of Jose and with attempted assault for chasing Romel with the bottle. At trial, Supreme Court denied his motion to dismiss the charges for insufficient evidence, saying the prosecution "established by sufficient evidence [that Scott and Phoenix] were acting in concert as to each and every crime as to each and every victim." The court initially instructed the jury that the crime was alleged to have occurred between December 6 and 7, 2008. The next day, the court told the deliberating jury -- in the absence of Scott, defense counsel and the prosecutor, but with defense counsel's consent -- that the correct dates were December 7 and 8, 2008. Scott was convicted of first-degree manslaughter and attempted assault, and acquitted of murder and hate crime charges.

The Appellate Division, Second Department reduced Scott's aggregate prison sentence to 29 years (25 years for manslaughter and a consecutive term of 4 years for attempted assault), and otherwise affirmed. "Viewing the evidence in the light most favorable to the prosecution..., we find that it was legally sufficient to establish beyond a reasonable doubt that the defendant committed the crime of murder in the first degree ... in connection with the death of Jose." The court also found Scott "was not deprived of his right to be present at all material stages of his trial when the Supreme Court, after discussing an error in the jury charge with counsel for both sides, but without counsel or the defendant present in the courtroom, instructed the jury as to the correct dates that that the crimes were alleged to have been committed...."

Scott argues he "was clearly not guilty of manslaughter as a principal, since the medical examiner testified that Jose died as a result of multiple blows with a heavy object -- clearly the baseball bat -- and not from a single blow with a beer bottle. Nor was there any evidence that appellant shared a 'community of purpose' with Phoenix since there was no evidence of communication of any kind, verbal or otherwise, between Phoenix and appellant. Nor was there any evidence that appellant acted with the intent to have Phoenix cause Jose serious physical injury." Scott says the trial court's correction of its jury charge in his absence "was a 'mode of proceedings' error" requiring reversal "without regard to prejudice."

For appellant Scott: Steven R. Bernhard, Manhattan (212) 693-0085
For respondent: Brooklyn Assistant District Attorney Seth M. Lieberman (718) 250-2516

State of New York Court of Appeals

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To be argued Wednesday, May 6, 2015

No. 88 People v William Middlebrooks *(papers sealed)*
No. 89 People v Fabrice Lowe *(papers sealed)*

The defendants in these separate appeals, who were 18 years old when the crimes were committed, argue that their sentencing courts erred in failing to consider whether they should be granted youthful offender status under CPL 720.10 and 720.20. Both cite People v Rudolph (21 NY3d 497 [2013]), which held that, "where a defendant is eligible to be treated as a youthful offender, the sentencing court 'must' determine whether he or she is to be so treated[,] ... even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request." The question is whether the defendants were "eligible" for YO status.

William Middlebrooks was charged with carrying out four gunpoint robberies with accomplices in and around Buffalo in 2010. He pled guilty to three counts of first-degree robbery and one of second-degree robbery in Erie County Court, and was sentenced to 15 years in prison. He did not raise the issue of YO status at his plea or sentencing.

Fabrice Lowe was arrested with three other men during a traffic stop in Syracuse in 2010, after police officers found a loaded .22 caliber handgun under the driver's seat. Lowe had been sitting in the back seat behind the driver. He was convicted by a jury of criminal possession of a weapon in the second degree and sentenced to 10 years in prison, which the Appellate Division reduced to a 5-year term. Onondaga County Court summarily denied his request for youthful offender consideration.

The Appellate Division, Fourth Department affirmed in both cases. Since Middlebrooks and Lowe were each convicted of an "armed felony," CPL 720.10(2) would make them ineligible for YO status unless the sentencing court, under CPL 720.10(3), found there were "mitigating circumstances that bear directly upon the manner in which the crime was committed" or found the defendant was not the sole perpetrator and his "participation was relatively minor." In Middlebrooks, the Appellate Division said he "offered no evidence of mitigating circumstances..., nor did he specify any facts indicating that his participation in those crimes was 'relatively minor'.... Because defendant was not eligible for youthful offender treatment, the court did not err in failing to make a youthful offender determination...."

Middlebrooks and Lowe argue that, under Rudolph, the courts should have considered the mitigating circumstances and minor participation factors in CPL 720.10(3) to determine whether they were eligible for youthful offender status despite their armed felony convictions. Middlebrooks says, "Unless this Court authorizes a limited extension of Rudolph to require sentencing courts to consider the factors in CPL 720.10(3) in every case involving a young offender, the full benefits conferred by the youthful offender statute cannot be effectuated."

For appellant Middlebrooks: Barbara J. Davies, Buffalo (716) 853-9555
For respondent: Erie County Assistant District Attorney David A. Heraty (716) 858-2424
For appellant Lowe: Philip Rothschild, Syracuse (315) 422-8191 ext. 0179
For respondent: Onondaga County Ch. Asst. District Attorney James P. Maxwell (315) 435-2470

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To be argued Wednesday, May 6, 2015

No. 90 El-Dehdan v El-Dehdan, a/k/a Sam Reed *(papers sealed)*

In this divorce action, Supreme Court's referee issued a determination on equitable distribution in December 2009, which awarded two parcels of real property to Jacqueline El-Dehdan (El-Dehdan), one in Brooklyn and one in Queens. El-Dehdan later learned her former husband, Salim El-Dehdan, also known as Sam Reed (Reed), had already disposed of both properties. Reed sold the Brooklyn parcel for $950,000 in March 2009. He transferred the Queens parcel to a third party in April 2009, apparently without consideration. In January 2010, Supreme Court issued an order directing Reed to "deposit immediately" with El-Dehdan's attorney the net proceeds of the March 2009 transfer (about $776,046). When Reed did not comply, El-Dehdan moved to hold him in civil and criminal contempt. In opposition, Reed submitted an affidavit stating that he no longer possessed the proceeds of the March 2009 transfer. At the contempt hearing before the referee, Reed conceded that he received the January 2010 order and that he did not deposit any money with El-Dehdan's attorney pursuant to it. Reed invoked his constitutional privilege against self-incrimination in response to all questions about the proceeds of the March 2009 transfer and about whether he had an account at the bank to which the proceeds were wired. The referee found Reed had dissipated marital assets, but said El-Dehdan failed to meet her burden to establish either civil or criminal contempt.

Supreme Court rejected the referee's report and held Reed in civil, but not criminal contempt. It found he was aware of, and disobeyed the January 2010 order to turn over the proceeds of the Brooklyn sale. A party may claim the Fifth Amendment privilege in a civil proceeding, the court said, "but the 'privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence.'"

The Appellate Division, Second Department affirmed, ruling El-Dehdan was not required to prove that Reed willfully disobeyed the court order. While criminal contempt requires proof of "willful" misconduct, it held that willfulness is not an element of civil contempt. El-Dehdan "met her burden of establishing ... that the defendant was fully aware of the January 2010 order, which was a lawful and unequivocal mandate of the court, and that he disobeyed that mandate...," and the burden then "shifted to [Reed] to offer competent, credible evidence of his inability to pay...." Instead, Reed invoked his Fifth Amendment right and refused to answer questions about the sale proceeds, it said, and Supreme Court was permitted to draw an adverse inference from his refusal. "'[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them'...."

Reed argues that "the difference between civil and criminal contempt is not the existence of willfulness, but the level of willfulness required.... Without a willfulness element [for civil contempt], defendants like Mr. Reed could be thrown in jail for simply failing to pay court-ordered debts." He says federal and state constitutional protections against self-incrimination "do not permit a negative inference from a defendant's invocation of his Fifth Amendment rights where both civil and criminal penalties are being sought in the same proceeding," a situation that forced him to choose to "protect against civil liability, and testify as to his lack of funds; or protect against criminal liability, and assert his privileges under the Fifth Amendment."

For appellant Salim El-Dehdan (Reed): Donna Aldea, Garden City (516) 745-1500
For respondent Jacqueline El-Dehdan: Karina E. Alomar, Ridgewood (718) 456-1845

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To be argued Wednesday, May 6, 2015

No. 91 People v Jose Inoa

Jose Inoa was charged with murder for hire, conspiracy and other crimes for allegedly shooting Edward Contreras to death and wounding an associate in a Washington Heights grocery store in January 2005. Police investigators said Oman Gutierrez had been the leader of a marijuana distribution ring in the neighborhood until he was imprisoned in 1999 and Contreras took control of the territory. When Gutierrez was released from prison in December 2004, investigators said he conspired with former members of his drug operation to regain control of the territory and recruited Inoa to kill Contreras.

At trial, the prosecution relied heavily on recorded telephone conversations involving Inoa, Gutierrez and other alleged conspirators. Many of the conversations were coded and oblique and Eldia Duran, a participant in the conspiracy who became a cooperating witness for the prosecution, explained them for the jury. Supreme Court also allowed the prosecution to call Detective Rolando Rivera as "an expert in decoding phone conversations" to explain the recordings. Defense counsel repeatedly objected and moved for a mistrial, saying, "Detective Rivera was qualified as an expert in coding without having to articulate a methodology.... [H]e's not only being given the [imprimatur] of an expert but, ultimately, all he's doing is summing the People's case. He's simply a glorified fact witness." Inoa was convicted of murder in the first and second degrees, attempted murder, conspiracy in the second degree, and other charges. He was sentenced to an aggregate prison term of 73⅓ years to life.

The Appellate Division, First Department affirmed, saying the trial court "properly exercised its discretion in permitting a detective to testify as an expert with regard to coded or unexplained language" in the recorded calls, "and the detective did not go beyond the proper bounds of expert testimony.... The expert's opinion was based on 'facts in evidence or on those personally known and testified to by the expert'..., and he properly relied on information 'of a kind accepted in the profession as reliable' or provided by 'a witness subject to full cross-examination'...."

Inoa argues, "Detective Rivera's 'expert' testimony extended far beyond the scope of his area of expertise, often relied on hearsay sources, bolstered the key testimony of witness Duran, and served to make him a virtual 'summary' witness of the People's entire case, thoroughly usurping the jury's role." Under the First Department's ruling, he says, "Once a police investigator has been dubbed an 'expert,' he or she will no longer be constrained by the normal rules of evidence, particularly those against bolstering and hearsay."

For appellant Inoa: John R. Lewis, Sleepy Hollow (914) 332-8629
For respondent: Manhattan Assistant District Attorney Christopher P. Marinelli (212) 335-9000

State of New York Court of Appeals

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To be argued Wednesday, May 6, 2015

No. 92 Brown & Brown, Inc. v Johnson

Theresa A. Johnson was hired by Brown & Brown of New York, Inc. (BBNY), an insurance broker, in December 2006 to provide actuarial analysis as its vice president of underwriting. She had been director of actuarial services for Blue Cross/Blue Shield in Buffalo. On her first day of work at BBNY, Johnson signed a number of documents including an Employment Agreement, which contained three covenants: a non-solicitation clause prohibiting her from soliciting or serving any BBNY client for two years after termination of her employment; a clause prohibiting her from disclosing confidential information; and a clause prohibiting her from inducing other workers to leave BBNY's employment. The agreement provided that it was to be governed by Florida law, which favors enforcement of restrictive covenants. BBNY terminated Johnson's employment in February 2011, and she was soon hired by Lawley Benefits Group, LLC. Six months later, BBNY and its corporate parent, Florida-based Brown & Brown, Inc. (BBI), brought this action against Johnson and Lawley, including a breach of contract claim against Johnson for allegedly violating the non-solicitation agreement, among other things. The defendants moved for summary judgment dismissing the suit.

Supreme Court found the Florida choice-of-law provision was unenforceable because the employment agreement bore no reasonable relationship to Florida. The court granted the defense motion to dismiss the breach of contract claim against Johnson, "except to the extent that Plaintiffs can establish that [she] violated the non-solicitation provision ... through trading on or using client relationships she initially developed while working for" BBNY.

The Appellate Division, Fourth Department modified by dismissing the entire claim for breach of the non-solicitation clause. It said the Florida choice-of-law provision "is unenforceable because it is 'truly obnoxious' to New York public policy," in part because Florida law prohibits courts from considering the hardship a restrictive covenant imposes on an employee, while "under New York law, a restrictive covenant that imposes an undue hardship ... is invalid and unenforceable for that reason...." It found the non-solicitation clause was overbroad and rejected the plaintiffs' request that it be partially enforced to the extent they could show that Johnson solicited clients she met while working at BBNY. "[P]artial enforcement may be justified 'if the employer demonstrates an absence of overreaching [or] coercive use of dominant bargaining power...,'" it said, citing BDO Seidman v Hirshberg (93 NY2d 382). "Here, it is undisputed that Johnson was not presented with the Agreement until her first day of work with plaintiffs, after [she] already had left her previous employer. Plaintiffs have made no showing that, in exchange for signing the Agreement, Johnson received any benefit from plaintiffs beyond her continued employment...."

BBNY and BBI argue that, under Florida or New York law, the non-solicitation clause should be partially enforced to limit its application to clients Johnson worked with while employed by BBNY. They say Florida law should govern that determination, since the provisions of Florida law "which the Fourth Department characterized as 'truly obnoxious' to New York policy are unrelated to the issue of partial enforcement...;" but even under New York law, "courts routinely grant partial enforcement of non-solicitation covenants ... where, as here, the employer seeks no more than to protect a legitimate business interest."

For appellants Brown & Brown et al: Alun W. Griffiths, Manhattan (212) 818-9200
For respondents Johnson et al: Preston L. Zarlock, Buffalo (716) 847-8400

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To be argued Thursday, May 7, 2015

No. 93 Branch v County of Sullivan

Sharen Branch filed this wrongful death action against Sullivan County on behalf of the estate of her son, Robert Bastian, who was a 17-year-old student at Sullivan County Community College (SCCC) when he suffered a fatal heart attack in his dormitory in November 2007. Branch alleged the County was negligent in failing to have a defibrillator -- and an employee trained in its use -- available for medical emergencies at the dormitory. The County moved for summary judgment dismissing the suit, arguing that it did not owe a duty of care to Bastian because it did not own, operate, maintain or control the dormitory where he lived or SCCC. Branch responded that SCCC is a "department" of the County, which is the sponsor of the college pursuant to Education Law § 6302, and therefore the County had a legal duty to ensure that SCCC made a defibrillator available.

Supreme Court granted the County's motion to dismiss. "As the sponsor of the college, the County is only responsible for the College's fiscal operation...," it said. "The College's operations ... are governed by its own Board of Trustees" and "Education Law § 6306(5) assigns responsibility for the maintenance of buildings and facilities to the Board of Trustees.... The statutory scheme designating its Board of Trustees as the sole party responsible for the operation of the College's facilities shields Sullivan County, the local sponsor, from liability that might otherwise attach...."

The Appellate Division, Third Department affirmed, rejecting Branch's argument that SCCC is an alter ego of the County and should be treated as a County department for liability purposes. "Although defendant has a role in the fiscal oversight of SCCC as its local sponsor..., it is the board of trustees ... that is responsible for its day-to-day management...," the court said. "Here, defendant established that, beyond its role as sponsor and contributor of a portion of SCCC's operating budget, it does not have input into the board's allocation of resources and has no role in the day-to-day operation and management of the school. Moreover, defendant established that it did not own the building where decedent suffered his fatal heart attack. Accordingly, in the absence of 'ownership, occupancy, control or special use of the property' by defendant, it did not owe decedent a duty...."

Branch argues that SCCC "is an instrumentality of the County" and, "as SCCC's alter ego," the County is liable for negligence at the school. "[T]he statutory scheme governing the establishment and administration of community colleges in New York, which does not expressly define the juridical identity of a community college or explicitly vest such institution with the right to sue or be sued, supports the conclusion that SCCC is an instrumentality (or arm) of the County and has no independent juridical existence and, thus, the County is the real party in interest against whom suit may properly be brought."

For appellant Branch: Michael H. Sussman, Goshen (845) 294-3991
For respondent County: Bryan R. Kaplan, Monticello (845) 701-1312

State of New York Court of Appeals

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To be argued Thursday, May 7, 2015

No. 94 People v Steven Lashway *(papers sealed)*

Steven Lashway was convicted of three counts of second-degree rape in 1990 and was sentenced to 10½ to 21 years in prison. Prior to his release in 2004, he was designated a risk level III sex offender under the Sex Offender Registration Act (SORA), based in part on his having a prior felony sex crime conviction. He was later found to have a mental abnormality under Mental Hygiene Law article 10 and confined to a psychiatric facility, where he violated parole by assaulting a staff member and was returned to prison.

In 2010, Lashway applied for a reduction of his SORA risk classification to level II under Correction Law § 168-o. Clinton County Court obtained an updated recommendation from the Board of Examiners of Sex Offenders, then denied the application without a hearing. The Appellate Division reversed and remitted the matter for a hearing. County Court obtained another updated recommendation from the Board in 2012, and it approved Lashway's request for copies of all documents the Board listed in its 2010 and 2012 updates. The Board produced five of the seven listed documents within a week, six days before the hearing, but said it could take several weeks to retrieve the other two documents from a storage facility. At the hearing, Lashway sought an adjournment until the remaining documents were produced. The court denied his request and, after the hearing, denied his application for a reduced risk level.

The Appellate Division, Third Department affirmed in a 3-1 decision, saying Lashway's arguments for a reduced risk level were not persuasive. It also ruled County Court did not err in denying him an adjournment, noting the Board's recommendations said only that it "reviewed" the undisclosed documents, not that it relied on them. "More significantly, County Court was not bound by the Board's recommendation...." While Lashway was entitled to discovery of the documents, it said "all discovery is subject to certain limitations and the court has 'considerable discretion to supervise the discovery process'...." It rejected the dissenter's argument that denial of the adjournment deprived Lashway of due process. "Due process is 'a flexible concept' ... and a defendant's due process rights in [a reclassification] context are similar, but not identical to, the rights of a defendant in an initial risk assessment.... Here..., defendant was neither denied the ability to offer relevant materials in support of his application nor prevented from defending himself against any evidence or documentation relied upon by County Court in deciding [it]."

The dissenter said denial of the adjournment deprived Lashway of due process and a fair hearing. While the lower court was not bound by the Board's recommendation, "in practice, the Board's recommendation is often among the most influential factors considered by a sentencing court in making its classification determination.... I believe that principles of due process require that [a defendant] be afforded access -- through prehearing discovery -- to all material considered on or influencing his reclassification petition...." Although "the court itself did not posses or rely upon the withheld materials, ... the court did expressly rely on the Board's recommendation, which did consider the materials." "While it may be debatable whether the denial of this material" affected the outcome, he said, "I cannot agree that the error was harmless or overlook the deleterious precedential value of an affirmance in this case."

For appellant Lashway: Marcy I. Flores, Warrensburg (518) 623-4845
For respondent: Clinton County Asst. District Attorney Nicholas J. Evanovich (518) 565-4770

State of New York Court of Appeals

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To be argued Thursday, May 7, 2015

No. 95 Universal American Corp. v National Union Fire Insurance Company of Pittsburgh, PA

Universal American Corp. provides health insurance and services to people covered by Medicare and Medicaid. Its products include Medicare Advantage plans, a federally-regulated alternative to Medicare in which medical providers submit claims for services in the same way they do for traditional insurance policies. Many of Universal's claims are submitted and "auto-adjudicated" through its computer system, generating payment without manual review. In July 2008, Universal American purchased a Computer Systems Fraud Rider from National Union Fire Insurance Company of Pittsburgh, PA, which provides coverage for: "Loss resulting directly from a fraudulent (1) entry of Electronic Data or Computer Program into, or (2) change of Electronic Data or Computer Program within the Insured's proprietary Computer System ... provided that the entry or change causes (a) Property to be transferred, paid or delivered, (b) an account of the Insured, or of its customer, to be added, deleted, debited or credited, or (c) an unauthorized account or a fictitious account to be debited or credited."

Universal says it suffered $18 million in losses in December 2008 on fraudulent claims against its Medicare Advantage plans, most of which were submitted and processed through its computer system. The perpetrators, doctors and clinics in three southern states, enrolled new members by paying kickbacks to some patients for use of their personal information and by stealing that information from other patients. The fraudulent providers were not enrolled in Universal's plans, but were able to submit claims after obtaining a National Provider Identifier from the federal Centers for Medicare and Medicaid Services. When National Union denied its claim for $7.8 million, after deductible, Universal brought this action for breach of contract and declaratory judgment.

Supreme Court granted National Union's motion for summary judgment and dismissed the complaint. It said the key clause in the rider, providing coverage for "fraudulent entry" of data into Universal's computer system, is not ambiguous and limits coverage to "an unauthorized entry into the system ... by an unauthorized user, such as a hacker," not the submission of fraudulent claims by "an authorized user."

The Appellate Division, First Department agreed, saying the "unambiguous plain meaning" of the computer fraud rider, covering loss from a fraudulent 'entry of electronic data' or 'change of electronic data' within the insured's proprietary computer system, was intended to apply to wrongful acts in manipulation of the computer system, i.e., by hackers, and did not provide coverage for fraudulent content consisting of claims by bona fide doctors ... authorized to use the system for reimbursement for health care services that were not provided."

Universal argues the key clause is ambiguous, and must be resolved in favor of the insured, because "fraudulent entry of electronic data" could apply equally to entry of fraudulent data as to fraudulent entry into the computer system. "[W]hether a submitting party has (or lacks) 'credentials' to enter an invoice in Universal American's computer system ... has no bearing on whether the submission is 'fraudulent.' Whether any particular 'entry of data' was 'fraudulent' depends on the truth or falsity of the submission, and therefore necessarily on its content." It says the lower courts' interpretation of the policy "resulted in negating any coverage at all."

For appellant Universal American: Richard H. Dolan, Manhattan (212) 344-5400
For respondent National Union: Barbara A. Lukeman, Manhattan (212) 940-3010

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To be argued Thursday, May 7, 2015

No. 96 Shipley v City of New York (reargument)

On January 10, 2005, one day after 17-year-old Jesse Shipley was killed in an automobile accident in Staten Island, an autopsy was performed, with the consent of his father, by Dr. Stephen de Roux of the Medical Examiner's Office. Dr. de Roux removed organ tissue samples and the brain, which was preserved for later neuropathologic examination. Jesse's body was released the same day, but his parents were not told that his brain had been retained. They held a funeral and buried him on January 13. About two months later, students from Jesse's high school saw his brain in a jar, labeled with his name, during a field trip to the Staten Island office of the medical examiner. The field trip was cut short and Jesse's sister, a student at the school, soon learned of the situation and informed the parents, Andre and Korisha Shipley, who had thought Jesse's brain was buried with his body. Neuropathologists conducted their examination of the brain a few days later. In October 2005, the brain was returned to the Shipleys, who held a second funeral service and burial. Dr. de Roux later testified that the two-month interval between the autopsy and the examination of Jesse's brain was not uncommon because "I wait months, until I have six brains," before summoning a neuropathologist from Manhattan to examine them.

The Shipleys brought this action for emotional distress against the City and Medical Examiner's Office based, in part, on alleged violation of their common-law right of sepulcher, which gives the next of kin the right to possession of a decedent's body for preservation and burial. Supreme Court denied the City's motion to dismiss the claim, finding there were unresolved questions regarding whether the defendants' failure to inform the Shipleys that their son's brain was not returned with his body interfered with their right of sepulcher.

The Appellate Division, Second Department affirmed that portion of the order. While the Medical Examiner's Office had authority to perform the autopsy and retain the brain for further testing, it said, the office "also has the mandated obligation" under the right of sepulcher and Public Health Law § 4215(1) "to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled," a duty that "is clearly for the benefit of, and is owed directly to, the next of kin. Furthermore, it may be satisfied in the present context by the simple act of notifying the next of kin that, while the body is available for burial, one or more organs have been removed for further examination.... This requirement, hardly onerous in nature, strikes an appropriate balance between the fulfillment of the legitimate scientific and investigative duties of the Medical Examiner's Office and the recognition of the long-established rights of next of kin to receive and provide final repose to the remains of their loved ones." After trial, a jury awarded the Shipleys $1 million in damages. The Second Department reduced the award to $600,000.

The City argues that neither the right of sepulcher nor Public Health Law § 4215(1) apply to "those parts of a body that have appropriately been removed during the course of an authorized autopsy. It follows that neither requires the New York City Medical Examiner to turn over such parts to the decedent's next of kin once the legitimate purposes for the retention of the parts have been fulfilled." It says the office satisfied its obligations when it returned Jesse's body to the Shipleys after the autopsy but, even if the office had a duty to return all organs, the Appellate Division had "no basis in statute or common law" for "imposing an additional, newly found duty" to notify the next of kin when any organs are removed for further examination. In any event, the City argues it cannot be held liable because the Shipleys did not demonstrate the existence of a special relationship.

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