State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

Week of September 5 thru September 7, 2017

State of New York Court of Appeals

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To be argued Tuesday, September 5, 2017

No. 91 People v John Andujar

A police officer stopped John Andujar as he was driving an Empire Tow Company pick-up truck in the Bronx in February 2013. The officer saw a police scanner in the front left pocket of Andujar's jacket and, when the officer turned it on, he found the receiver was tuned to frequencies used by the 47th and 49th precincts. Andujar was charged with a misdemeanor under Vehicle and Traffic Law § 397, which applies to "a person ... who equips a motor vehicle with a radio receiving set capable of receiving signals on the frequencies allocated for police use or knowingly uses a motor vehicle so equipped...."

Criminal Court granted Andujar's motion to dismiss the charge for facial insufficiency. The prosecution sufficiently alleged only that Andujar's device was a prohibited scanner, not that the truck was "equipped" with it because the scanner was neither attached to the truck nor specifically designed to be used in it, as are radios powered through a vehicle's cigarette lighter, the court said. "[T]he People have not pled any factual allegations that would allow the conclusion that Defendant's vehicle was equipped with the police radio scanner. The superseding information merely states the police scanner was found in Defendant's pocket and that it was capable of receiving police frequencies. There are no allegations that the scanner was specifically prepared to be used with a vehicle, either by having a particular power cord or otherwise."

The Appellate Term, First Department reversed and reinstated the charge, saying the "plain and ordinary meaning" of the word "equips," as it is used in the statute, does not apply only to scanners that are attached to a vehicle. "Given that the scanner was in defendant's jacket pocket, where it could be accessed and operated in the vehicle, within seconds, the accusatory instrument was sufficient for pleading purposes, to satisfy the 'equips a motor vehicle' element of the charge. Had the legislature intended to prohibit only such devices that defendant attached or installed in the vehicle, it would have so stated...," the court said.

For appellant Andujar: Karen M. Kalikow, Manhattan (212) 577-3688
For respondent: Bronx Assistant District Attorney Catherine M. Reno (718) 838-7119

State of New York Court of Appeals

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To be argued Tuesday, September 5, 2017

No. 92 Princes Point LLC v Muss Development L.L.C.

In 2004, Princes Point LLC entered into a contract with companies controlled by the Muss family to buy a 23-acre parcel on Raritan Bay in Staten Island, which had been declared an inactive hazardous waste site in the 1980s. State environmental officials delisted the property in 2001, after Muss Development L.L.C. performed remediation work that included construction of a seawall to prevent erosion. Princes Point made a $1.9 million down payment on the $35.9 million purchase price. A condition precedent to closing required the Muss defendants to obtain government approvals for the development of more than 100 houses. In 2005, after Hurricane Katrina, the state identified defects in the seawall and ordered the Muss defendants to repair it. In March 2006, the parties amended their contract to extend the outside closing date to July 2007; increase the purchase price to $37.9 million and the down payment to $3,995,500; and required Princes Point to pay half the cost of repairing the seawall and obtaining development approvals. The amendment contained a forbearance provision prohibiting Princes Point from bringing "any legal action" against the Muss defendants if the work was not completed by the outside closing date, which was ultimately extended to July 22, 2008. In June 2008, a month prior to the closing date, Princes Point brought this action for rescission of the 2006 amendment and specific performance of the 2004 contract.

Supreme Court dismissed its claims and granted summary judgment to the defendants on their counterclaims, finding Princes Point anticipatorily breached the contract and the contract was terminated. It ruled the defendants were entitled to the $3,995,500 down payment and $911,863 Princes Point paid for the seawall, as well as contractual attorneys' fees and costs.

The Appellate Division, First Department affirmed, saying "because a rescission action unequivocally evinces the plaintiff's intent to disavow its contractual obligations, the commencement of such an action before the date of performance constitutes an anticipatory breach.... Although plaintiff argues that it only sought rescission of the 2006 amendment and specific performance of the 2004 contract, there was one amended contract which defined the parties' rights and obligations. Plaintiff anticipatorily breached that contract by commencing this action." It said the defendants were entitled to retain the down payment and other payments without showing they were "ready, willing, and able to complete the sale because the buyer's anticipatory breach relieved [them] of further contractual obligations.... Once plaintiff commenced the instant action, it would have been futile and wasteful for defendants to continue to seek the approvals in preparation for a closing that plaintiff was tirelessly seeking to avoid."

Princes Point argues that "the relief of rescission or reformation of the amendment only, specific performance of the contract without the amendment or with a reformed amendment, and a permanent injunction enjoining the termination of the contract did not seek to nullify the entire contract and did not in any way indicate Princes Point's 'unqualified and clear refusal' to close on the purchase of the property." In any case, the lower court "erroneously determined that [defendants] were not required to show that they were ready, willing and able" to complete the sale, it says, citing Pesa v Yoma Development Group, Inc. (18 NY3d 527).

For appellant Princes Point: John S. Ciulla, Garden City (516) 747-7400
For respondents Muss Development et al: Scott E. Mollen, Manhattan (212) 592-1400

State of New York Court of Appeals

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To be argued Tuesday, September 5, 2017

No. 104 Makinen v City of New York

Police Officers Kathleen Makinen and Jamie Nardini brought this federal suit against the City of New York and individual police officials under the New York City Human Rights Law (NYCHRL), alleging the defendants discriminated against them based on a mistaken perception that they were alcoholics. They said they suffered emotional and financial damages due to disruptions of their professional and personal lives caused by compelled compliance with alcohol treatment programs and by threats of disciplinary action, among other things.

The New York Police Department referred the officers to its Counseling Services Unit (CSU) based on allegations by Makinen's ex-husband and Nardini's ex-boyfriend that they were alcoholics. Makinen, who was referred to CSU in 2007, 2008 and 2010, was diagnosed by its staff as suffering from alcohol dependence. Nardini was referred just once in 2010 and was diagnosed as suffering from alcohol abuse. CSU directed both officers to participate in treatment programs. However, the federal jury found Makinen and Nardini were not actually alcoholics and returned a verdict in their favor under NYCHRL section 8-107(1)(a). It awarded compensatory and punitive damages of $46,100 to Makinen and $105,000 to Nardini.

Section 8-107(1)(a) of the NYCHRL prohibits employment discrimination based on an "actual or perceived ... disability;" and section 8-102(16)(a) defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." However, section 8-102(16)(c) provides, "In the case of alcoholism, drug addiction or other substance abuse, the term 'disability' shall only apply to a person who (1) is recovering or has recovered and (2) currently is free of such abuse." The City defendants argue on appeal that the NYCHRL "does not allow discrimination claims based on a mistaken perception of active alcoholism" because, under section 8-102(16)(c), only recovered or recovering alcoholics are defined as having a disability. The plaintiffs argue the section's narrowed definition of disability applies only to people who actually suffer from alcoholism, not to those who are mistakenly perceived to be alcoholics.

The U.S. Court of Appeals for the Second Circuit found that, due to "the absence of authority from New York courts," it is unclear how it should "reconcile the broad, remedial purpose of the NYCHRL with the specific language of section 8-102(16)(c)." It is asking this Court to resolve the issue in a certified question: "Do sections 8-102(16)(c) and 8-107(1)(a) of the New York City Administrative Code preclude a plaintiff from bringing a disability discrimination claim based solely on a perception of untreated alcoholism?"

For appellants City et al: Assistant Corporation Counsel Kathy Chang Park (212) 356-0855
For respondents Makinen and Nardini: Lisa F. Joslin, Albany (518) 432-7511

State of New York Court of Appeals

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To be argued Tuesday, September 5, 2017

No. 90 Matter of Madeiros v New York State Education Department

In 2013, after audits by the State Comptroller disclosed widespread financial abuses by providers of preschool special education programs, Education Law § 4410 and related regulations were amended to encourage municipalities to conduct fiscal audits of the programs and require the municipalities to obtain approval of their audit plans from the State Education Department to ensure the plans were consistent with guidelines and standards issued by the Department. In September 2013, attorney Pamela A. Madeiros submitted a Freedom of Information Law (FOIL) request to the Education Department seeking copies of its audit guidelines, standards and procedures; any audit plans that had been submitted by municipalities; and any related communications between the Department and municipalities.

The Department denied her request under FOIL's law enforcement exception, Public Officers Law § 87(2)(e), which permits agencies to withhold records that "are compiled for law enforcement purposes and which, if disclosed, would: i. interfere with law enforcement investigations or judicial proceedings; ... or iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures." After Madeiros filed this suit to challenge the determination, the Department released 55 pages of documents relating to its audit guidelines and standards, but contended the remaining documents fell within the law enforcement exception because disclosure of specific audit procedures would enable providers to "evade or circumvent the audit process."

Supreme Court ordered the release of two more pages and otherwise dismissed her petition. Saying the Comptroller's audits "revealed frequent abuses, and in some cases, resulted in referrals for criminal prosecutions," it ruled the withheld information "is appropriately limited to nonroutine audit techniques and procedures compiled for law enforcement purposes."

The Appellate Division, Third Department affirmed. As with the Comptroller's audits, it said, "there is no reason to doubt" that the municipal audits at issue here "are also aimed at uncovering financial malfeasance. As such, while the guidelines and related documents did not arise from a specific law enforcement investigation, they were nevertheless compiled with law enforcement purposes in mind...." The withheld documents are exempt from FOIL because disclosure "would indeed reveal to 'unscrupulous [providers] the path that an audit is likely to take and alert[] them to items to which investigators are instructed to pay particular attention,'" the court said, citing Matter of Fink v Lefkowitz (47 NY2d 567).

Madeiros argues the Department cannot invoke the law enforcement exception because the records it withheld "were not compiled for law enforcement purposes," but instead relate to its oversight of "routine fiscal audits." She says the records are not shielded by subdivision (i) of the exception because there are no pending "law enforcement investigations or judicial proceedings" with which disclosure might interfere; nor by subdivision (iv) because it "applies only to *criminal* investigative techniques or procedures," while these audits "are administrative in nature, not criminal." She says the Appellate Division decision "is contrary to the ... clear legislative intent to impose a broad standard of disclosure upon State agencies."

For appellant Madeiros: Cynthia E. Neidl, Albany (518) 689-1400
For respondents Education Dept. et al: Asst. Solicitor General Jeffrey W. Lang (518) 776-2027

State of New York Court of Appeals

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To be argued Wednesday, September 6, 2017

No. 93 Matter of City of Schenectady v NYS Public Employment Relations Board

In 2007, while its negotiations on a new contract with the Schenectady Police Benevolent Association (PBA) were stalled, the City of Schenectady announced that it would no longer follow the negotiated disciplinary procedures in its expired contract with the PBA, which gave the PBA the right to appeal police disciplinary determinations to a neutral arbitrator. Instead, the City unilaterally adopted procedures that gave its public safety commissioner the authority to issue final disciplinary determinations, as provided by Second Class Cities Law article 9. In 2008, the City issued Police Department General Order 0-43, which imposed the new disciplinary procedures for police officers without negotiation.

The PBA filed an improper practice charge with the State Public Employment Relations Board (PERB), contending the City violated the Taylor Law by refusing to negotiate. The City argued that because the Second Class Cities Law, enacted in 1906, pre-dated the Taylor Law's enactment in 1967, the provisions of article 9 giving police disciplinary authority to City officials prohibit collective bargaining on the subject. An Administrative Law Judge sustained the PBA's charge and PERB affirmed, ruling that the Taylor Law superseded article 9 and made police discipline a mandatory subject of negotiation. PERB relied largely on Second Class Cities Law § 4, which states that the law's provisions "shall apply ... until ... changed, repealed or superseded pursuant to law." PERB said section 4 "reveals a statutorily planned obsolescence for that law resulting from subsequent enactment of state or local legislation."

Supreme Court confirmed PERB's determination and the Appellate Division, Third Department affirmed, citing the "broad supersession provision" in Second Class Cities Law § 4. "[T]he Legislature intended to allow any or all of the provisions of the Second Class Cities Law to be supplanted by later laws applicable to the same subject matter.... Accordingly..., Second Class Cities Law article 9 does not require 'that the policy favoring collective bargaining should give way,'" it said, distinguishing the case from M/O Patrolmen's Benevolent Assn. of City of N.Y. v New York State Pub. Empl. Relations Bd. (6 NY3d 563) and M/O Town of Wallkill v Civil Serv. Empls. Ass. (19 NY3d 1066).

Schenectady argues that "PERB's conclusion that the adoption of the Taylor Law in 1967 superseded those provisions of the [Second Class Cities Law] which specifically commit police discipline to the discretion of local officials, thereby rendering the subject of police discipline a mandatory subject of collective bargaining, is contrary to accepted rules of statutory construction; conflicts with the prior decisions of this Court in Patrolmen's Benevolent Assn. and Town of Wallkill; and undermines what this Court has previously characterized as the important public policy favoring the authority of public officials over the police."

For appellant Schenectady: Christopher P. Langlois, Albany (518) 462-0300
For respondent PERB: David P. Quinn, Albany (518) 457-2678
For respondent PBA: Michael P. Ravalli, Albany (518) 432-7511

State of New York Court of Appeals

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To be argued Wednesday, September 6, 2017

No. 94 People v Brian Novak

In August 2012, Brian Novak was arraigned in Schenectady City Court on uniform traffic tickets charging him with a misdemeanor count of driving while intoxicated and related traffic infractions. In August 2013, the District Attorney's Office filed a superseding prosecutor's information charging him with the lesser offense of driving while ability impaired along with the related infractions. Novak proceeded to a bench trial before Schenectady City Court Judge Matthew Sypniewski, who found him guilty of all charges.

Novak appealed his conviction to Schenectady County Court. After he filed his appellate brief, Judge Sypniewski was elected to County Court and Novak's appeal was assigned to him. Judge Sypniewski affirmed Novak's conviction.

The parties to this appeal agree there are no constitutional or statutory provisions in New York law that expressly address the question of whether judges may determine appeals taken from their own decisions, but Novak argues that Judge Sypniewski should have disqualified himself "to maintain the appearance of impartiality" and abused his discretion when he did not. When "a Judge has presided as the trier of fact over an Appellant's criminal trial..., and Appellant thereafter challenges the Judge's conduct of the trial, that same judge should not be in a position to review his rulings and verdict on appeal," he says. Novak relies on federal law, which prohibits the practice by statute (28 USC § 47) and federal court rulings.

The prosecution argues there was no abuse of discretion because there has not "been any allegation that Judge Sypniewski as an elected judicial official did not have the competence and intellectual integrity to objectively evaluate the issues before him on appeal and render a decision regardless of the prior judicial contact with the appellant.... In this regard, a judge presiding over defendant's appeal is not unlike a judge presiding over a CPL 440 motion filed in a case where the same judge was the trier of fact. Judges deciding post-conviction 440 motions of their own verdicts at trial is common practice that goes uncontested.

Among other issues, Novak argues that his conviction must be vacated because the accusatory instrument on which he was tried was jurisdictionally defective. He was originally charged in simplified traffic informations (traffic tickets), and Novak cites lower court rulings that "a simplified traffic information is not the type of accusatory instrument that can be superseded by a prosecutor's information," as was done in his case. The prosecution argues that, although CPL 100.50 does not name "simplified traffic informations" among the charging documents that a prosecutor's information may supersede, Novak was served at his arraignment with a supporting deposition and bill of particulars along with the ticket charging him with DWI. This gave him sufficient notice of the allegations and met "all of the requirements necessary for a valid information," which was properly superseded by the prosecutor's information charging him with DWAI.

For appellant Novak: Danielle Neroni Reilly, Albany (518) 366-6933
For respondent: Schenectady County Asst. District Attorney Tracey A. Brunecz (518) 388-4364

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To be argued Wednesday, September 6, 2017

No. 95 People v James L. Carr

In 1993, Buffalo police investigating the stabbing death of 81-year-old Percy Blake Saunders found James Carr's fingerprint at the murder scene. Carr admitted entering the victim's home, but said no one else was present at the time. He testified before a grand jury and waived immunity, acknowledging that the grand jury "is investigating the charges of burglary in the second degree, burglary in the first degree, murder in the second degree and any other matter of every nature pertaining thereto." After presenting the evidence, the prosecutor asked the grand jury to consider only the charge of second-degree burglary. Carr was indicted and convicted on that count and was sentenced to 7 to 15 years in prison.

While he was incarcerated, a fellow inmate claimed Carr had admitted that he committed the murder. The prosecutor presented the informant's testimony and other evidence to a second grand jury, which indicted Carr on charges of second-degree murder and first-degree robbery. He was convicted at trial and sentenced to 37½ years to life in prison.

Carr filed this CPL 440.10 motion to vacate the judgment, contending the prosecutor violated CPL 190.75(3) by submitting the murder and robbery charges to the second grand jury without court permission. The statute requires court authorization to resubmit a charge that has been dismissed by a grand jury. He cited People v Wilkins (68 NY2d 269), which held, "The prosecutor's withdrawal of a case from the Grand Jury after presentation of the evidence is the equivalent of a dismissal by the first Grand Jury, and the prosecution may only resubmit the charges with the consent of the court." Supreme Court denied Carr's CPL 440.10 motion.

The Appellate Division, Fourth Department affirmed, saying the prosecutor did not withdraw the murder and robbery charges from the first grand jury as in Wilkins. "Although the presentation had been completed..., we conclude that charging the grand jury with only one offense did not constitute the functional equivalent of the dismissal of the murder and robbery counts. Indeed, although it was clear that defendant was a suspect in the victim's death, there was no direct evidence presented to the first grand jury tying defendant to those additional offenses. Instead, 'the witnesses, at best, provided only an inferential link to [those additional crimes],'" the court said, quoting People v Gelman (93 NY2d 314).

Carr argues that, "because the [first] Grand Jury was informed early in the proceedings that they were considering a murder charge, and the defendant was a suspect, the prosecutor was required to obtain leave from the court before resubmitting the charges to a second Grand Jury." He says the presentation of evidence was complete, and exceeded the presentation made in Wilkins because "the Grand Jury here was presented with prosecution-controlled testimony from the Appellant himself.... [T]he withdrawal [of charges] here met and exceeded the standard required for the withdrawal of the charges to equal a dismissal by the Grand Jury" under Wilkins.

For appellant Carr: Evan M. Lumley, Buffalo (716) 885-2889
For respondent: Erie County Assistant District Attorney Nicholas T. Texido (716) 858-2424

State of New York Court of Appeals

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To be argued Wednesday, September 6, 2017

No. 103 Matter of Honorable J. Marshall Ayres

J. Marshall Ayres, a non-attorney justice of the Conklin Town Court in Broome County since 2009, is asking the Court of Appeals to overturn a determination of the State Commission on Judicial Conduct removing him from office.

The Commission found Ayres improperly interfered in two matters pending in other courts, including a traffic ticket issued to his 30-year-old daughter for using a cell phone while driving. It said he "made two back-channel attempts" to have the case transferred from a Kirkwood town justice he viewed as biased, because Ayres had fired the judge's wife when she was his court clerk, to a second judge. He first asked a clerk to transfer the ticket, then called the second judge directly and asked him to handle the case. "After these attempts to have the ticket transferred proved unsuccessful, [Ayres] attended the pre-trial conference with his daughter, where ... he acted as her advocate, attempted to intimidate the prosecutor and invoked his judicial position in arguing that the ticket should be dismissed...," the Commission said. "While the instinct to help a child is understandable, a judge's '"paternal instincts" do not justify a departure from the standards expected of the judiciary'...." In the second matter, it said he sent "eight unauthorized letters -- five of which were ex parte --" to a Broome County Court judge who was handling an appeal of a $2,949.42 restitution order Ayres issued in a petit larceny case. The Commission said he "abandoned his role as a neutral arbiter and became an advocate, repeatedly telling the court that the appeal lacked 'merit' and should be dismissed ... while making biased, discourteous and undignified statements about the defendant and his attorney."

The Commission, citing his "impermissible, ex parte advocacy" in both matters, said, "If a judge initiates ex parte communications, the public would have reason to doubt whether the judge would reject such private discussions in his own court." It said Ayres' "failure to recognize the impropriety of his actions and to modify his behavior when ethical concerns were brought to his attention exacerbates the underlying misconduct and 'strongly suggests that, if he is allowed to continue on the bench, we may expect more of the same'...."

Ayres argues, in part, that he is entitled to "immunity" for conduct on behalf of his daughter because "I was relying on the advice of the Resource Center and subsequent statements by the Commission," which he said "instructed us that it was permissible for a judge to be present at their child's court hearing, provided they were there only as a parent and did not attempt to use their judicial position ... to obtain special favors or outcomes." He says he "was present only as a parent," and his efforts "were not intended to influence the disposition of the ticket but simply ... to ensure my daughter would receive a fair and impartial hearing." His ex parte letters about the appeal in County Court were prompted by a letter he received from that judge, he says. "Not being an attorney, and relying on my training in the private sector of responding directly to the person who contacted you, I forwarded my letter back to" the County Court judge. He says, "The Town of Conklin would be better served by having an experienced judge who has learned from his mistakes ... rather than installing a new inexperienced justice who may repeat the same mistakes I have made."

For petitioner Ayres: J. Marshall Ayres (pro se), Conklin (607) 775-3374
For respondent Commission: Edward Lindner, Albany (518) 453-4613

State of New York Court of Appeals

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To be argued Thursday, September 7, 2017 (arguments begin at noon)

No. 96 American Economy Insurance Company v State of New York

American Economy Insurance Company and other insurers that provide workers' compensation coverage filed this suit to challenge the constitutionality of a 2013 amendment, Workers' Compensation Law § 25-a(1-a), which phases out a special fund that pays benefits to injured workers whose cases were closed and later reopened. The amendment ended the transfer of liability for newly reopend cases to the fund as of January 1, 2014, nine months after it was enacted. The special fund had been financed since 1948 by annual assessments on workers' compensation carriers, who were allowed to pass the cost on to the employers they insured. In proposing the amendment, the Governor said the fund was unnecessary "because the premiums [insurers] have charged already cover this liability," and closing it would save employers about $300 million per year. The insurers, arguing that premiums for policies issued before October 1, 2013 did not address liability for reopened cases, claim the amendment impermissibly imposes retroactive liability on them for those policies in violation of the Contract, Due Process, and Takings Clauses of the U.S. Constitution and the state Takings Clause.

Supreme Court dismissed the suit, ruling the amendment did not have a retroactive effect. The new law, "closing the Fund to reopened ... claims filed up to nine months after its enactment, cannot be said to apply retroactively.... On the contrary, the nine-month postponement in closing the Fund furnishes clear evidence that the Legislature intended the amendment to have a prospective application.... The fact that the benefits may relate to an injury that occurred prior to the enactment of § 25-a(1-a) does not render it retroactive.... A statute is not retroactive when made to apply to future transactions merely because such transactions relate to or are founded upon antecedent events...." Finding no Contract Clause violation, it said "plaintiffs fail to allege the existence of any contracts which entitle them to continue shifting ... liability to the Fund.... At best, the amendment merely renders plaintiffs' policies with their insureds less profitable." It ruled there was no taking because the amendment "neither increases the amount of compensation owed to claimants; not does it appropriate the carriers' assets for the use of the State."

The Appellate Division, First Department reversed and declared the law unconstitutional as applied to policies issued before October 1, 2013. "It is essentially undisputed that the premiums charged for policies prior to October 1, 2013 took into account the transfer to the Fund of reopened claims under the former [statute], and thus, did not account for potential future liability relating to such claims...," it said. The amendment "actually 'altered the carrier's preexisting liability'..., imposing on plaintiffs substantial new retroactive liability that has not and cannot be offset by premium increases." It said retroactive application of the amendment "violates the Contract Clause ... because it retroactively impairs an existing contractual obligation ... '[w]here ... the insurer does not have the right to terminate the policy or change the premium rate'.... Defendants failed to show that the impairment is 'reasonable and necessary to serve a significant and legitimate public purpose....' Indeed, the legislation's stated purpose of preventing a windfall to insurance carriers was based upon the erroneous premise that premiums already cover this new liability. Retroactive application would also constitute a regulatory taking...."

For appellants State et al: Deputy Attorney General Steven C. Wu (212) 416-6312
For respondents American Economy et al: Seth P. Waxman, Washington, DC (202) 663-6000

State of New York Court of Appeals

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To be argued Thursday, September 7, 2017 (arguments begin at noon)

No. 97 People v Peter Austin

Peter Austin was found guilty of breaking into two Bronx businesses in 2009, based largely on DNA evidence from blood found at the crime scene. In October 2012, after the prosecution was ordered to turn over the blood samples to the defense and as the trial was set to begin, Hurricane Sandy flooded the police warehouse where the samples were stored with contaminated water. The federal Occupational Safety and Health Administration closed the warehouse as a health hazard and the blood evidence could not be retrieved.

Supreme Court denied Austin's request for an adverse inference charge allowing the jury to infer that the missing DNA evidence would not have supported the prosecution's case. It said the instruction would be "inappropriate ... in this case where the flooding is unprecedented.... Blame the police department for not having foreseen the unprecedented and therefore move materials?... I'm not giving that charge." The court also cut off defense counsel when he sought to address the missing evidence during summation. Austin was convicted of two counts of third-degree burglary and sentenced to 7 to 14 years in prison.

The Appellate Division, First Department affirmed on a 3-1 vote, saying Austin was not entitled to an adverse inference charge. "[A]ssuming the materiality of the physical blood evidence and that defendant had requested it with reasonable diligence, the evidence ... was not lost or destroyed by agents of the State within the meaning of [People v Handy (20 NY3d 663)]. Rather, the evidence was destroyed or rendered inaccessible as the result of a meteorological event beyond human control.... [T]he Handy adverse inference charge is a penalty for destruction of evidence, not for mere tardiness on producing it.... While we do not condone the People's slowness in fulfilling their disclosure obligations..., the evidence in question was not lost as a foreseeable result of the passage of time, but as a consequence of a natural catastrophe that happened to occur just before this case went to trial." It also questioned the relevance of the blood samples, since they "would not have told [jurors] anything about the accuracy of the DNA match" and Austin "never expressed any interest in conducting an independent DNA analysis."

The dissenter said, "[T]he decision regarding the weight afforded to the DNA evidence destroyed while in the People's custody..., including the reasons it is no longer available, belongs to the jury, not the judge. This is because the People were ordered to, but did not, produce this evidence before its destruction. The judge, in refusing to give the requested permissive jury instruction that the jurors could, if they wanted, draw an unfavorable inference from the missing evidence, improperly usurped for herself the juror's role in evaluating the excuse given for the unavailability of blood samples collected by law enforcement.... This error was compounded when the judge sustained her own objection to defense counsel commenting on the missing evidence during summation." She said the blood samples, the "only evidence connecting defendant to the crimes," were clearly material. And she argued "the majority is reading the phrase 'agent of the State' ... far too narrowly" in Handy, which "makes it abundantly clear that the instruction should be given even where destruction of evidence is not deliberate or done in bad faith...."

For appellant Austin: Mark W. Zeno, Manhattan (212) 577-2523 ext. 505
For respondent: Bronx Assistant District Attorney Matthew White (718) 838-6100

State of New York Court of Appeals

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To be argued Thursday, September 7, 2017 (arguments begin at noon)

No. 98 Excess Line Association of New York (ELANY) v Waldorf & Associates

Excess Line Association of New York (ELANY) is a nonprofit association of excess line insurance brokers created in 1988 by Insurance Law § 2130 "to facilitate and encourage compliance by its members with the laws of this state and the rules and regulations of the superintendent [of insurance] relative to excess line insurance." Excess line policies are issued by insurers that are not authorized to do business in New York to cover risks that authorized carriers will not insure. Such policies must be procured by licensed excess line brokers, all of whom are deemed by the statute to be members of ELANY. The statute's declared purposes include "protecting persons seeking insurance" and "protecting revenues of this state;" and it requires brokers to submit information about each excess line policy to ELANY and pay a stamping fee, which is ELANY's sole source of funding.

In 2011, ELANY brought this action against Waldorf & Associates and related excess line brokers, alleging they mischaracterized policies issued by Lloyd's of London as non-excess line policies in order to avoid their obligations under the Insurance Law to pay state taxes on the premiums, pay stamping fees to ELANY, and submit documentation for the policies to ELANY, among other things. It asserted causes of action for fraud, negligence, and violations of General Business Law §§ 340 and 349.

Supreme Court dismissed the suit, ruling that ELANY lacked capacity to sue, that section 2130 did not give it a private right of action, and that it failed to state a cause of action.

The Appellate Division, Second Department affirmed, saying, "[N]one of the provisions of the statute confers upon [ELANY] by necessary implication the capacity to sue to enforce the provisions of the Insurance Law. Rather, the broad enforcement powers of the Superintendent, the lack of enforcement powers granted to ELANY, and the requirement that ELANY function under the supervision of the Superintendent 'negate[] any inference of a legislative intent to confer that power'.... Relatedly, ELANY has no private right of action under the Insurance Law, since it is not one of the class for whose particular benefit the statute was enacted, and, further, because creation of such a right would be inconsistent with the legislative scheme, which places enforcement in the Superintendent...." It also ruled ELANY failed to state a cause of action.

ELANY argues that, while it "may not have the capacity to sue in order to penalize or discipline" licensed brokers who are subject to the authority of the Superintendent, it has the implied capacity and standing to sue "to fulfill its 'functional responsibility' to encourage compliance with the excess line law" and collect the stamping fees that fund its operations. "It is ELANY that has 'functional responsibility' to impose and collect the stamping fee from its members and it is ELANY that has 'functional responsibility' to review excess line policies, assess the stability of unauthorized insurers and to oversee compliance with the excess line law and its Plan of Operation. In order to fulfill this 'functional responsibility,' ELANY, by 'necessary implication,' has to have the capacity to enforce the obligations imposed on its members."

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