

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711.

To be argued Wednesday, May 1, 2013

## **No. 110 Matter of Roth v City of Syracuse**

Norman E. Roth and his real estate companies brought these proceedings under Real Property Tax Law article 7 to challenge tax assessments for tax years 2001 through 2004 on five houses that he rents to college students in the University Hill area of Syracuse. Roth contended, among other things, that the assessments were excessive because the City failed to consider the cost of remediation of lead paint. He cited Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon (88 NY2d 724 [1996]), which said, "Because environmental contamination can depress a parcel's true value, ... it must be considered in assessing real property tax." The prior owners of the houses did not disclose that they contained lead paint when Roth purchased them in the 1970s, and he did not have them tested for lead paint until 2008, when he hired a testing firm that found lead paint and lead contamination at all five properties. He obtained cost estimates from contractors to remedy the lead paint (\$221,750) and to renovate the houses after remediation (\$242,347), but did not hire them.

Supreme Court denied Roth's petition after a trial, finding that lead paint "only becomes hazardous when it starts to deteriorate, flake, chip or peel." It also found that Roth "has taken no steps to have the lead paint removed" and "is not required by federal, state or local law to remove [it]." The court said Roth failed to prove the properties were "contaminated" because he "introduced no evidence at trial demonstrating that [they] contained deteriorating, flaking, chipping or peeling lead, lead dust ... or any other alleged hazardous substances" during the 2001 to 2004 tax years. "While an inference may be drawn that lead based paint existed in the properties during the taxable status dates, because of the subsequent test in 2008 and the fact that lead based paint is no longer manufactured, no such inference may be drawn as to the condition of the paint three to seven years earlier based upon the tests performed." The Appellate Division, Fourth Department affirmed.

Roth argues that Supreme Court imposed "onerous burdens on petitioners not recognized in Commerce Holding or any precedent.... Commerce Holding and a wealth of authority requires that all 'environmental contamination' be considered in tax assessments," but Supreme Court "required petitioners to demonstrate that the subject properties not only contained 'environmental contamination' in the form of lead paint, but that the condition of the lead paint was a health 'hazard' that required 'remediation.'" He argues the court imposed another "requirement on petitioners -- not imposed in Commerce Holding or its progeny -- to demonstrate that they had a legal obligation, or had agreed, to remediate the lead paint ... before they could obtain a reduction in tax assessment."

For appellants Roth et al: Alan J. Pierce, Syracuse (315) 565-4500

For respondent Syracuse: John A. Cirando, Syracuse (315) 474-1285

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## **No. 111 People v Thomas Lee**

Thomas Lee and a co-defendant were charged with stealing jewelry and electronic equipment from the Manhattan apartment of Yin Poy "Nicky" Louie and Louie's wife, Joan Feng Lan Lee, in June 2008. At trial, Joan Lee testified in Cantonese through an official court interpreter, who disclosed that he was acquainted with the witness and was a "friend" of her husband, Louie, who had helped his late father secure bank loans for his real estate business. The translator said he also knew Louie had been "a prominent member" of a Chinatown gang in the 1970s and 80s who "served federal time." Over defense objections, Supreme Court allowed the interpreter to translate Joan Lee's testimony, saying he was a long-time court employee who "has taken an oath to interpret." After her testimony, the court found there "was no issue whatsoever about the translation and its appropriateness," saying "I assume" there were others in the courtroom who knew Cantonese and would have spoken up. Thomas Lee was convicted of second-degree burglary and third-degree grand larceny and sentenced to 10 years in prison.

The Appellate Division, First Department affirmed, ruling that the relationship between the interpreter and the burglary victims did not require a new trial. "[I]t has been termed the better practice to avoid appointing a friend or relative of a party or witness as interpreter" (Matter of James L., 143 AD2d 533...)," the court said. "However, here the court and defense counsel thoroughly questioned the court interpreter about any possibility of bias, and there is no reason to believe that defendant was prejudiced by the use of this interpreter. Unlike the complainant's son who interpreted for his mother in James L., the interpreter here was not a private citizen appointed as an ad hoc interpreter, but a career court employee who was presumably well aware of his duty to translate testimony verbatim and accurately. Furthermore, the interpreter knew nothing of the facts of this case and there was substantial corroborating evidence through the testimony of another witness and video surveillance films."

Thomas Lee argues, "Given the personal relationship between the interpreter and one of the complaining witnesses, the trial court erred in allowing [him] to translate [Joan Lee's] testimony without first inquiring into the availability of a disinterested interpreter. The court's failure to properly monitor the accuracy of [the interpreter's] translation highlighted the difficulties in detecting and measuring the extent of prejudice to criminal defendants once a biased interpreter is appointed. Thus, this Court should articulate a rule that ... where a trial court is confronted with a potentially biased interpreter, such an interpreter should not be appointed unless and until the court determines that no unbiased interpreter is available; if an unbiased interpreter cannot be found, the court must strongly admonish the interpreter regarding the duty to interpret accurately or ensure that there is some other measure in place to evaluate the accuracy of the translation." He also contends the trial court's Sandoval ruling "was excessive and overwhelmingly prejudicial."

For appellant Lee: Arminda B. Bepko, Manhattan (212) 225-2000

For respondent: Manhattan Assistant District Attorney John B.F. Martin (212) 335-9000

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## **No. 112 People v Timothy Williams**

During a Manhattan buy-and-bust operation in June 2007, an undercover officer joined a couple who approached Timothy Williams and asked him if anyone was "out." Williams left briefly, then returned and told them to go around the corner, where they found a woman selling crack cocaine. The officer bought two \$10 bags. The woman was arrested at the scene and Williams was arrested a few blocks away.

At Williams' trial, the deliberating jury sent several notes requesting clarification and instruction. The judge responded to one note, asking for "clarification of what it means to be 'in concert,'" without any clear indication in the record that he first disclosed it to and discussed it with counsel. When the jurors sent another note asking for a written definition of acting-in-concert, the judge, with the consent of both attorneys, sent a court officer to "tell them no written instructions allowed. The court will tell them about in concert as often as they need to hear it." Williams was convicted of two drug sale charges and sentenced to 7½ years in prison.

The Appellate Division, First Department affirmed. Regarding the first note, it said, "Defendant did not provide a record sufficient to permit review of his claim that the court failed to disclose the contents of a jury note to defense counsel. The record, including the recorded colloquy on a similar note received a short time later, warrants an inference that in an unrecorded conversation, defense counsel was apprised of the contents of the note in question...." Regarding the second note, it said the trial court "lawfully directed a court officer to perform the ministerial act of informing the jury that the court would not provide written instructions...." The Appellate Division ruled that Williams' request for an agency instruction was properly denied because his behavior "was clearly that of a steerer" for the drug seller.

Williams argues that the trial court, in its response to both notes, violated the requirements of CPL 310.30 and committed mode of proceedings errors under People v O'Rama (78 NY2d 270) and People v Tabb (13 NY3d 852). He says the record "fails to demonstrate that the court communicated the content of a substantive jury note" and consulted defense counsel before responding to the first note. Regarding the second note, he says the court "improperly delegated a judicial function to a court officer in response to a substantive jury inquiry." He also argues he was entitled to a jury instruction on the agency defense because "there was ample evidence to support the inference that [he] was acting as an agent of the buyers."

For appellant Williams: Laura Lieberman Cohen, Manhattan (212) 577-3621

For respondent: Manhattan Assistant District Attorney Daniel R. Alonso (212) 335-9000

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## **No. 113 J.P. Morgan Securities Inc. v Vigilant Insurance Co.**

In 2006, the Securities and Exchange Commission (SEC) began a civil enforcement action against affiliates of The Bear Stearns Companies, alleging they facilitated illegal late trading and deceptive market timing for certain customers, predominantly large hedge funds, enabling them to earn hundreds of millions of dollars at the expense of mutual fund shareholders from 1999 to 2003. Bear Stearns refuted the charges, saying it played a passive role in processing its customers' trades and did not receive any special benefit from the trades, which generated only \$16.9 million in fees and commissions. Bear Stearns negotiated a settlement and consented to a March 2006 SEC order, "solely for the purpose of" SEC proceedings "and without admitting or denying the findings," in which it agreed to pay "disgorgement" of \$160 million and civil penalties of \$90 million. The SEC order censured Bear Stearns for "willfully" violating securities laws and ordered it to cease and desist. The New York Stock Exchange (NYSE) issued an order with nearly identical findings, and its sanction was satisfied by Bear Stearns' payment to the SEC.

Bear Stearns sought coverage of the \$160 million disgorgement payment from its primary insurer, Vigilant Insurance Co., and six excess insurance carriers. It asserted that \$140 million of the negotiated disgorgement represented the profits its customers made on the illegal trades and the remaining \$20 million was an estimate "on the high side" of the fees and commissions it received. The professional liability policies covered any "Loss" Bear Stearns incurred as a result of "any Wrongful Act." The term "Loss" includes compensatory damages and settlements, but not "fines or penalties imposed by law" or costs that are legally uninsurable. The policies also exclude claims based on Bear Stearns "gaining in fact any personal profit or advantage to which [it] was not legally entitled." When the insurers disclaimed coverage on the ground that the disgorgement was not an insurable loss or was excluded from coverage, Bear Stearns and two of its J.P. Morgan affiliates filed this breach of contract action. The insurers moved to dismiss.

Supreme Court denied the motion, saying the SEC order "does not contain an explicit finding that Bear Stearns directly obtained ill-gotten gains or profited by facilitating these trading practices," and thus does not establish that the disgorgement was excluded from coverage.

The Appellate Division, First Department reversed and dismissed the suit, saying "disgorgement of ill-gotten gains ... does not constitute an insurable loss. The public policy rationale for this rule is that the deterrent effect of a disgorgement action would be greatly undermined if wrongdoers were permitted to shift the cost ... to an insurer." It said Bear Stearns' settlement offer and the SEC and NYSE orders "are not reasonably susceptible to any interpretation other than that Bear Stearns knowingly and intentionally facilitated illegal late trading for preferred customers, and that the relief provisions of the SEC order required disgorgement of funds gained through that illegal activity."

Bear Stearns argues the disgorgement is a covered loss because it "neither received ill-gotten gains nor was unjustly enriched.... [T]he SEC claimed the power to force Bear Stearns to pay amounts allegedly received by its customers.... It was the assertion of that power ... that accounted for the payment agreed to here." It says, "The Appellate Division contravened New York public policy when it held that coverage for Bear Stearns' loss should be nullified, whether or not the loss constituted the return of Bear Stearns' own ill-gotten gain, to preserve the deterrent effect of " disgorgement. The court also erred, it says, "when it found Bear Stearns 'guilty' of willful misconduct notwithstanding that there had been no trial, no adjudication of any kind, and no admission by Bear Stearns...."

For appellants Bear Stearns et al: John H. Gross, Manhattan (212) 969-3000

For respondents Vigilant et al: Joseph G. Finnerty III, Manhattan (212) 335-4500