State of New York
Court of Appeals

To be argued Wednesday, June 6, 2018
No. 78 People v Steven Myers

Steven Myers was charged with committing a burglary in the Town of Salina, Onondaga County, in April 2012. He pled guilty to third-degree burglary three months later under a plea bargain that would permit him, if he successfully completed a court-supervised drug treatment program, to plead instead to a misdemeanor and receive a conditional discharge. Prior to entering his plea, when Myers waived his right to indictment by grand jury, County Court said, "The application for grand jury waiver meets the requirements of the statute so I'm going to sign the order approving the waiver and order the information filed." The record does not reflect whether the court explained the rights he was waiving or inquired into his understanding of the waiver. Myers failed to complete the treatment program and was ultimately sentenced to two and one-third to seven years in prison.

On appeal, Myers claimed his grand jury waiver was invalid because the court did not engage in any colloquy about the waiver and there was no record evidence that he signed the waiver in open court. New York Constitution article I, section 6, which permits defendants to waive their right to indictment by grand jury, provides that "such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel." CPL 195.20, which governs waivers of indictment, similarly provides, "The written waiver shall be signed by the defendant in open court in the presence of his attorney." Neither provision addresses what steps, if any, a judge must take to ensure that a defendant understands the waiver.

The Appellate Division, Fourth Department affirmed his conviction, saying, "[W]e reject defendant's contentions that his waiver of indictment is invalid because there was no colloquy on that subject and no evidence in the record that his waiver was executed in 'open court' (CPL 195.20). A colloquy is not required in connection with a waiver of indictment ... and, 'even [when] the plea minutes are silent,' the 'open court' execution requirement of CPL 195.20 is satisfied where, as here, the court's order approving the indictment waiver 'expressly found that defendant had executed the waiver in open court'...."

Myers argues his indictment waiver is invalid because, as for a waiver of any "substantial right," it must be knowing, intelligent and voluntary, and the trial court offered no explanation and made no inquiry to ensure he understood the rights he was waiving. He says he "was never orally informed that he was giving up his right to appear before the Grand Jury; his right to attack the evidence that was presented to the Grand Jury; and his right to attack other potential defects in the Grand Jury proceedings. Just as this Court would not permit a knowing, intelligent, and voluntary Waiver of Right to Trial by Jury or Waiver of Right to Appeal to be exclusively based on a Form, it should not permit the Waiver of Indictment to be based strictly on a Form...."

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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 or gspencer@nycourts.gov.

To be argued Wednesday, June 6, 2018
No. 64 Garcia v New York City Department of Health and Mental Hygiene

In December 2013, the New York City Board of Heath amended Health Code article 43 and 47 to require that children between the ages of 6 and 59 months who attend child care and school-based programs under the jurisdiction of the City Department of Health and Mental Hygiene (DHMH) be vaccinated against the flu each year. The amendments include exemptions for cases where "the vaccine may be detrimental to the child's health" or a parent objects on religious grounds. A school or child care provider "may," but is not required to, refuse to allow an unvaccinated child to attend, but they would be subject to fines of $200 to $2,000 for each unvaccinated child they admit. In 2015, Magdalena Garcia and four other mothers of young children enrolled in New York City child care or preschool programs brought this suit against the Board of Health and DHMH to enjoin them from enforcing the flu vaccination amendments, claiming they were preempted by state law or, alternatively, that the Board exceeded its regulatory authority under Boreali v Axelrod (71 NY2d 1 [1987]).

Supreme Court granted the plaintiffs' motion for a permanent injunction, finding the amendments were preempted by the state's Public Health Law.

The Appellate Division, First Department affirmed on different grounds. It said there was no state preemption because, under the Public Health Law, "local governments have the authority to adopt local health regulations subject only to minimum statewide standards;" but the regulations "are nevertheless invalid because the particular scheme adopted by the Board ... exceeded the scope of its regulatory authority." Under the first Boreali factor, it said the Board "did not merely balance costs and benefits, but instead improperly made value judgments by creating a regulatory scheme with exceptions not grounded in promoting public health.... [T]he challenged amendments do not prohibit [an unvaccinated child] from attending child care or school.... Instead, the provider or school can, in effect, opt out of the vaccination requirement ... upon payment of a monetary fine.... That the Board of Health made improper policy choices is further evidenced by the fact that the flu shot requirement applies only to the 2,283 larger licensed child care facilities in New York City that the Board regulates, and does not cover the 9,241 providers that fall under state regulation." It said the fourth Boreali factor also favored the plaintiffs "because no special expertise was relied upon to develop the unique scheme that was adopted here."

The Board and DHMH say the First Department "acknowledged that a targeted enactment of the State Legislature vests the Board with authority to adopt vaccination rules and recognized the Board's long history of doing so. Nor did the court dispute that the Board could adopt a rule requiring flu vaccination for children attending day care. Its objections went only to the particulars of this rule. That approach conflicts with the core of Boreali. The court faulted the Board for limiting its rule to larger and more formal day care facilities that it directly regulates and that represent more significant congregate settings for the spread of disease than smaller, home-based programs. The court also criticized the Board's selection of an escalating monetary fine, not a strict bar on attendance, as the penalty for violations. But those subsidiary choices are precisely the type that regulatory agencies are empowered to make. And using regulatory restraint as a sword to strike down agency action makes no sense, since Boreali analysis is meant to discern when an agency has gone too far."

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State of New York
Court of Appeals

To be argued Wednesday, June 6, 2018
No. 79 Ambac Assurance Corporation v Countrywide Home Loans, Inc.

From 2004 to 2006, Countrywide Home Loans, Inc. sponsored 17 residential mortgage-backed securities (RMBS) transactions by pooling more than 375,000 residential mortgage loans, with a total principal balance of about $25 billion, and then selling the securities to investors. Countrywide obtained unconditional and irrevocable insurance policies for the transactions from Ambac Assurance Corporation, after providing the insurer with representations and warranties about the quality of the underlying mortgage loans and about its own business practices. Ambac's policies guaranteed payment of principal and interest owed to the investors, in the event borrowers of the underlying loans missed payments. If there were a breach of the representations and warranties that "materially and adversely affects the interests of" Ambac, the insurance and indemnity agreements required Countrywide to repurchase or substitute non-conforming mortgage loans. When a severe recession struck in 2007 and 2008, the RMBSs performed poorly as the underlying borrowers began to default, and Ambac was required to pay claims from a growing number of investors. In 2010, Ambac filed this suit to recover its claim payments from Countrywide, alleging that Countrywide breached its contractual representations and warranties and that it fraudulently induced Ambac to issue the insurance policies by making false statements about the quality of the underlying loans and Countrywide's operations.

Supreme Court ruled Ambac was not required to show that it justifiably relied on Countrywide's warranties or that its losses were caused by breaches of those warranties in order to establish its fraudulent inducement claim. In insurance cases, it said, Insurance Law § 3105 does not require such proof. It said Ambac could not recover for all claims paid under its policy, but only losses it could attribute to non-conforming loans. The court said the repurchase provision in one section of the insurance agreements was Ambac's sole remedy only for breaches of warranties in that section, but did not limit its remedies for breaches of other sections to the repurchase of non-conforming loans. It dismissed Ambac's claim for attorneys' fees, saying the parties did not make "unmistakably clear" they intended to permit such recovery.

The Appellate Division, First Department modified, saying Ambac must show both that it justifiably relied on the warranties and that its losses were a direct result of their breach. Justifiable reliance and loss causation are "essential" elements of any fraud claim, it said. Insurance Law § 3105 does not apply here and, in any case, it "contains no language suggesting that the legislature intended to relax the well-settled elements of a common-law fraud cause of action." It agreed with the lower court that Ambac was not entitled to recover all of its payments on claims, which would amount to "rescissory damages.... Ruling otherwise would inequitably allow Ambac to recoup the money it paid out for loans that complied with all warranties..., but which resulted in default due to the housing market collapse or other risks Ambac insured against." However, it said the lower court erred on the issue of remedies because, under the "plain language" of the agreements, Ambac's "sole remedy" for any breach is Countrywide's obligation to repurchase non-conforming loans. It affirmed the denial of attorneys' fees.

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State of New York
Court of Appeals

To be argued Wednesday, June 6, 2018
No. 80 Stega v New York Downtown Hospital

Dr. Jeanetta Stega was a medical researcher at New York Downtown Hospital (NYDH) and chair of its Institutional Review Board (IRB), which approves and oversees the hospital's biomedical research involving human subjects, when, in 2011, she wrote the patent application and research protocol for a clinical trial of a new drug developed by Luminant Bio-Sciences, LLC to treat metastatic cancer. Luminant paid her $50,000 for the work. She says she recused herself from the IRB's deliberations when it later approved the Luminant study. In 2012, after NYDH learned of the payment from Luminant, officials accused Stega of taking money from a research sponsor that actually belonged to the hospital and they placed her on administrative leave. After an investigation, NYDH's counsel concluded Stega had a conflict of interest due to her role as chair of the IRB when it approved Luminant's study, and she was fired. A month later, Stega filed a formal complaint with the U.S. Food and Drug Administration (FDA), which regulates the work of IRBs, expressing concern that patients in clinical trials overseen by the NYDH IRB would not be properly supervised. An FDA investigator conducted an inspection of NYDH and said in his report that Dr. Stephen Friedman, the hospital's acting chief medical officer, told him that Stega had "channeled" funds from Luminant to her own research group, that she claimed to another researcher that she could use her IRB position to get a patient into his study against his wishes, and that all of the IRB's approval's made while she was chair were "tainted." Stega brought this defamation action against NYDH and Friedman, claiming Friedman's statements were false, impugned her professional integrity, and undermined her standing with the FDA as a medical researcher.

Supreme Court denied the defendants' motion to dismiss the claim, finding Friedman's statements were not protected by an absolute privilege because the FDA investigation was not part of a quasi-judicial proceeding.

The Appellate Division, First Department reversed and dismissed the suit on a 3-1 vote, saying, "Given both the nature of an FDA investigation into the propriety of the hospital's research protocols and the importance of the unimpeded flow of thoughts and information in this investigative context, as a matter of law and public policy, statements to such an investigator must be protected by an absolute privilege...." It said FDA compliance proceedings for IRBs, "which include the possibilities of an adversarial regulatory hearing before the FDA ... and subsequent judicial review..., qualify as a quasi-judicial process by an administrative agency.... Therefore, statements made to an investigator in the course of the initial investigation by the FDA ... are protected by an absolute privilege.... Furthermore, there is a strong public interest in ensuring that those with information about research protocols for newly developed drugs are encouraged to speak fully and candidly, without any need for self-censorship."

The dissenter said the FDA investigation was not a quasi-judicial proceeding and, thus, Friedman's statements were entitled only to a qualified privilege and could be actionable if made with malice. The investigation "could lead to a hearing on whether the IRB would be disqualified; however, such a hearing would ultimately involve the IRB and NYDH, but not Stega.... Further, while the FDA regulatory scheme ... provides for subsequent judicial review, it does not afford Stega, the subject of the investigation, due process protections. Therefore, regardless of the nature of the FDA's proceeding, it would not be adversarial to Stega and would not provide a forum for her to challenge the alleged defamatory statements.... [A] finding of qualified privilege offers ample protection to the speaker, because malice must be proven, and, as with any defamation claim, truth is a complete defense."

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