THE COMMERCIAL DIVISION LAW REPORT

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

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Arbitration; attachment; injunction in aid of arbitration; Foreign Sovereign Immunities Act. The parties entered into a consulting agreement under which petitioner would locate an investor to acquire respondents' rights in an oil prospecting license in Nigeria. The consulting agreement provided that any disputes would be resolved in the London Court of International Arbitration. Petitioner, alleging that it located an investor and was due a substantial fee, commenced an arbitration proceeding. Petitioner also commenced this special proceeding seeking an attachment and/or a temporary restraining order ("TRO") and preliminary injunction in aid of arbitration, to freeze assets of respondent located in New York sufficient to secure payment of the potential arbitral award. The court issued a TRO restraining certain of respondent's funds allegedly located in an account in New York, but later received proof that the account was actually located in London. The court noted that where a New York court lacked personal jurisdiction over a party, it cannot attach assets located outside of New York. It rejected petitioner's argument that the London account was a debt owed by the depository and the depository had branches in New York because, under New York law, where the debtor is a bank with more than one branch, the situs of the account is fixed at the branch where the account is carried. The court reasoned that New York adhered to the "separate entity rule," under which a judgment creditor (or potential judgment creditor) must serve the office of the bank where the account is maintained in order to effectuate a restraint or attachment. While this rule has been subject to some criticism and limitation in light of modern technology and banking practices, it still applied insofar as it precluded reaching assets in an account located outside New York. In the alternative to an attachment, petitioner sought a preliminary injunction in aid of arbitration. The court noted that the general rule in New York was that preliminary injunctive relief was unavailable simply to ensure payment of a potential money judgment sought by an unsecured creditor. An exception to this rule exists "where the subject of the action involves a specific fund," but here there was no showing that the underlying arbitration proceeding involved a claim to a specific fund. Petitioner's reliance on a 2005 amendment to CPLR 7502(c) was misplaced; the amendment clarified that preliminary relief in aid of arbitration could be granted even when the arbitration was located in another state or country, but it did not change the standard applied in deciding whether to grant or deny an injunction. In addition, the court concluded that petitioner had not established the traditional criteria for a preliminary injunction, including a probability of success on the merits, the danger of irreparable harm, and a balance of equities in favor of granting the injunction. Finally, the court noted that the funds in the London account were held in the name of the Nigerian government, so that the Foreign Sovereign Immunities Act ("FSIA") would bar any attachment or injunction restraining the account. The foreign sovereign had not waived its immunity, and none of the exceptions to immunity contained in the FSIA applied here. The fact that the foreign sovereign had not appeared in court did not act as a waiver of immunity. Accordingly, the court concluded that neither an attachment nor a preliminary injunction could be granted. However, noting that it had previously granted a TRO restraining the funds, which it now had determined were located in England, the court granted a 20-day stay of its decision and continued the TRO for that period to give petitioner an opportunity to seek any appropriate relief from an English court. Matter of Int'l. Legal Consulting Ltd. v. Malabu Oil & Gas Ltd., Index No. 651773/2011, 3/15/12 (Fried, J.).

Contract; breach; causation. Fraud; causation. Procedure; summary judgment. Plaintiff brought this action alleging that defendants fraudulently induced plaintiff to insure 15 mortgage-backed securitizations and that defendants breached the representations and warranties in the transaction documents. The complaint also asserted claims for breach of the obligation to repurchase non-compliant loans and for breach of the loan servicing covenants. Each securitization comprised a group of mortgage loans sold to trusts, which in turn issued notes and certificates backed by the loans to investors with a promised return of principal plus interest. The rights and obligations of the parties to the securitizations were set forth in transaction documents. Plaintiff insured that payments to the investors would be made even if the payments on the underlying mortgage loans were insufficient. Representations and warranties set forth in the transaction documents were incorporated into the insurance agreements, and plaintiff asserted that it relied upon these representations and warranties when evaluating the risk associated with insuring the securitizations. Plaintiff moved for partial summary judgment on the nature of the proof required to sustain the causes of action alleged in its complaint. First, as to the fraud and breach of warranty claims, plaintiff sought judgment that it need not establish a causal connection between defendants' alleged misrepresentations and payments made pursuant to the insurance policies. Defendants, in opposition, contended that plaintiff must establish that payments made pursuant to the policies were caused by defendants' alleged misrepresentations and not by another cause, including the economic downturn that began in late 2007. After analyzing the relevant case law and statutory provisions (in particular, Insurance Law §§ 3105 and 3106), the court rejected defendants' argument that plaintiff must establish a direct causal link between defendants' alleged misrepresentations and claims made under the insurance policies. To prove its fraud claim, plaintiff was required to show that it issued the insurance policies based on representations made in the policies' applications and that it would not have done so or would have issued the policies on different terms had the alleged misrepresentations not been made. To prove its breach of warranty claim, plaintiff was required to show that defendants' alleged misrepresentations materially increased plaintiff's risk of loss. The court then addressed the issue of whether the proper remedy on these causes of action should be rescission of the policies, as argued by defendants, or rescissory damages, as argued by plaintiff. Noting that rescission may be warranted but impractical, it ruled that rescissory damages, being "the financial equivalent of rescission," would be appropriate in this case. Second, plaintiff sought judgment that its claim for breach of the repurchase obligation did not require a showing that a non-compliant loan was actually in default or that defendants' alleged misrepresentations were the actual cause of default of a particular loan. It argued that, had the parties intended that repurchase only be required if a mortgage loan was in default, the parties would have put that requirement in this portion of the contract. Defendants asserted that the plain language of the transaction documents controverted plaintiff's argument. The court, finding the language of the documents to be ambiguous, held that summary judgment was not appropriate on this issue. MBIA Insurance Corp. v. Countrywide Home Loans, Inc., Index No. 602825/2008, 1/3/12 (Bransten, J.).

Contract; breach; no-action clause; misrepresentations and warranties. Trusts; certificates. Derivative action. Procedure; motion to dismiss; CPLR 3211(a)(3); CPLR 3211(a)(7); special proceeding; CPLR 7701. Plaintiffs, holders of certificates issued by two trusts, commenced this derivative action on behalf of the trusts against defendants, who sold loans governed by Pooling and Servicing Agreements ("PSAs") to the trusts. Plaintiffs alleged they informed nominal defendant trustee in writing of misrepresentations in relation to the loans and demanded that the trustee require defendants to repurchase the loans pursuant to provisions of PSAs. The trustee notified defendants of their breach. After defendants failed to repurchase the loans, plaintiffs demanded that the trustee bring an action against defendants. The trustee responded that it needed "additional time to evaluate the matter." Within days of that response, plaintiffs commenced this breach of contract action. The trustee subsequently filed a CPLR § 7701 petition seeking judicial instructions and approval of a proposed settlement agreement it reached with defendants that covered the trusts. Defendants moved to dismiss plaintiffs' complaint on the ground that plaintiffs failed to allege an event of default that would constitute an exception to the PSAs' no action clause and failed to satisfy the pleading requirements for bringing a derivative action. In opposition plaintiffs contended that alleging an event of default was not a necessary condition for filing suit, that they should be excused from complying with provisions of the no-action clause that were impossible to satisfy, and they should be excused from making a futile demand on the trustee. The court granted the motion, reasoning that plaintiffs were required to comply with all provisions of the no-action clause. It further reasoned that plaintiffs' allegations that a conflict of interest led to the trustee's refusal to bring suit against defendants was inconsistent with the trustee's response that it needed more time to evaluate the matter. The court explained that the trustee had, in fact, acted upon plaintiffs' information regarding defendants' alleged misrepresentations, as shown by the settlement agreement. The court concluded that the settlement agreement covered plaintiffs' claims, and plaintiffs' filing of the derivative suit within days of receiving the trustee's response that it needed additional time was premature. Walnut Place LLC v. Countrywide Home Loans, Inc., Index No. 650497/2011, 3/28/12 (Kapnick, J.).

Contract; interpretation. This action arose from the Ponzi scheme perpetrated by Bernard L. Madoff. Plaintiffs moved to renew their prior motion for summary judgment on the issue of whether their recovery should be based on the values shown on their last account statements, as they had argued, rather than limited to their actual loses, as the court had ruled. Plaintiffs argued that two newly discovered facts, namely, the omission of certain limiting language in one of the later insurance policies and an increase in the premium for that policy, showed an intent to extend coverage to the full amount shown on the Madoff account statements. The court said these new facts were extrinsic evidence and could be considered only if the policy was unclear and ambiguous. It found no such ambiguity and therefore determined the parties' intent from the four corners of the policy. In doing so, the court found that the clear and plain language limited plaintiffs to actual losses incurred. Accordingly, the court granted the motion to renew, and upon renewal, adhered to its prior decision. The court then turned to defendants' motion for summary judgment dismissing the complaint on the ground that plaintiffs suffered no actual loss because their aggregated investments made them "net winners." The court reviewed the Primary Bond, including certain defined terms, and found the plain language of the provisions relied on by defendants did not support an aggregation of gains and losses. Since the agreement on its face was reasonably susceptible of only one meaning, the court was not free to alter the contract to reflect its personal notions of fairness and equity. Defendants also claimed aggregation was consistent with plaintiffs' submission of a Single

Proof of Loss. But, given that the agreement unambiguously required the first named insured to act for all insureds, the court could not consider this extrinsic evidence. Lastly, defendants argued plaintiffs' settlement agreement supported aggregation. But, again, as the Primary Bond was unambiguous, the court could not accept this extrinsic evidence. The court did consider the settlement agreement as potential evidence of a recovery by plaintiffs. A provision of the Primary Bond permitted a reduction of loss by recoveries, but the word "Recoveries" was not defined in the Primary Bond. The court referred to the dictionary to determine the plain and ordinary meaning of the word, and concluded that defendants' argument that "Recoveries" included the intangible value that the Net Losers received as a result of the settlement was an unreasonable interpretation. Accordingly, the court did not find support for aggregation of plaintiffs' net wins and losses. However, since the Net Winners did not suffer actual losses, it dismissed the complaint as to them. The actual loss incurred by the Net Losers would be determined at trial. Jacobson Family Investments, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, Index No. 601325/2010, 2/27/12 (Lowe, J.).

Contract; toritious interference with; agreement in effect or not; economic justification. Plaintiff was a sales agent for garment manufacturers. Defendants were one entity that designed clothes and a second that ran its business. Plaintiff and the designer defendant signed a two-year agreement for plaintiff to sell the defendant's garments. Plaintiff claimed that the agreement designated it as defendant's exclusive sales agent for certain department stores and outlets, but that less than a year after signing, the designer defendant began to sell its clothes through second defendant in plaintiff's "exclusive territory." Plaintiff sued both defendants, alleging damages of over $150,000, but chose to pursue it claims against the designer defendant in arbitration; here, the second defendant moved to dismiss the sole remaining claim, for tortious interference with contract. The individual who owned second defendant and held a fifty-percent ownership interest in designer defendant had e-mailed plaintiff saying "we have been informed" by a third party that plaintiff stated it no longer represented the designer. "While this is a somewhat unusual method to submit your resignation..." the email said, the resignation was accepted "effective immediately." The court found that plaintiff sufficiently pled the existence of a valid contract and its breach and found the email showed that second defendant knew of the agreement and its content. Plaintiff submitted affidavits of buyers, and, although two of three were improperly executed, under plaintiff's attorney's oath, the court considered them. The buyers averred plaintiff had introduced them to designer defendant's clothes and that at certain points defendants instructed them to place orders through second defendant, not plaintiff. Defendants contended the affidavits alleged contacts that took place before the agreement began or after it was terminated by the termination email. Plaintiff contended that designer defendant never properly provided notice of termination under the agreement and plaintiff had replied with its own emails saying the agreement did not provide for early termination and rejecting the termination proposal. Given this, the court found that plaintiff sufficiently alleged that the agreement was in effect while second defendant allegedly began contacting buyers within the exclusive territory and that plaintiff had sufficiently pled that the defendant deliberately procured the breach. Plaintiff's allegations also adequately supported its assertion of "but for" causation. Defendants argued that, as affiliated entities with overlapping ownership, they were economically justified in interfering with one another's contracts. The court distinguished defendants' supporting case law, including a decision that involved an employment contract, where evidence indicated that defendants were reasonably concerned that the employee was damaging their affiliated company. Here, defendants alleged that they heard plaintiff was communicating that it was no longer the designer's sales agent, not that defendant reasonably feared continuing the agreement would damage its economic interest. Nor did the second defendant establish that it acted to preserve its affiliate's financial health. Indeed, plaintiff alleged that designer defendant gained over $2,000,000 from sales made by plaintiff. The court noted that defendants argued that plaintiff itself established their economic justification defense by alleging that the second defendant was selling the designer defendant's merchandise. The court clarified that the allegation was not a statement that defendant believed it was pursuing its economic interest, rather than allowing the sale through the agreement. Defendants also argued that plaintiff failed to plead that defendant acted with malice or used illegal means. The court found, though, that defendants had not conclusively established economic justification, hence plaintiff did not have to plead malice. The motion to dismiss was denied. Due Pesci Inc. v. Threads for Thought, LLC, Index No. 651879/2010, 2/6/12 (Bransten, J).**

Declaratory judgment; summary judgment; leave to renew and reargue; insurance; excess general liability policy; waiver; notice. Plaintiffs owned several manufactured gas plants (MGPs) that over time had generated pollutants contaminating adjoining soil and waterways. Having received several complaints from neighbors and governmental agencies, plaintiffs were aware of the environmental damages caused by the operation of seven MGPs. In an effort to address the ongoing contamination, plaintiffs engaged in a proactive approach consisting of a series of investigative and remedial studies. Plaintiffs sought a declaratory judgment that defendant insurers carriers, which had issued plaintiffs excess general liability policies, had an obligation to defend and indemnify them for the remediation and investigation costs associated with the seven MGPs. Defendants moved to renew a summary judgment motion based on plaintiff's alleged failure to provide timely notice. Plaintiffs, arguing that notice was not required prior to receipt of a third-party claim or significant regulatory involvement, contended that defendants waived the late notice defense by failing to disclaim coverage prior to filing their answer. The court rejected plaintiffs' waiver argument, finding that defendants had issued letters to plaintiffs in which they reserved their late notice defense and requested additional information that plaintiffs failed to fully provide. Defendants, therefore, did not knowingly and voluntarily relinquish their right to disclaim coverage. With respect to six of the seven MGP sites, the court found that several issues of fact precluded summary judgment, notably whether notice was warranted at an earlier time and whether plaintiffs' delay was reasonable under the totality of the circumstances. Although plaintiffs were required to provide immediate notice when an accident or occurrence was reasonably likely to trigger coverage under the excess general liability policies, late notice may be excused based on a reasonable justification for the delay. Other triable issues of fact included whether costs projections reached the required coverage level, whether plaintiffs had a good faith belief regarding their lack of liability, and whether such belief constituted a reasonable excuse for the delay. With respect to the remaining MGP site, however, the court held that plaintiffs failed to provide a reasonable excuse for late notice due to plaintiffs' receipt of a third-party claim involving excess coverage and the long history of complaints made by neighboring property owners regarding environmental damage caused by the site. The court granted defendants' motion for summary judgment as to this site. Long Island Lighting Co. v. Allianz Underwriters Insurance Co., Index No. 604715/1997, 1/31/12 (Kapnick, J.).

General Business Law § 349, Speculative Damages, Fraud, Negligent Misrepresentation. Nine graduates of defendant brought an action alleging that the law school published fraudulent and/or misleading data about employment rates and salaries of its graduates. Alleging that defendant had omitted facts and distorted information in data disseminated to entering classes between 2005 and 2010, plaintiffs asserted that defendant's conduct constituted: (1) unlawful, unfair, deceptive, and fraudulent practices under § 349; (2) fraud through the dissemination of false representations and omissions of material facts; and (3) negligent misrepresentation. Defendant moved to dismiss the complaint based on failure to state a cause of action and on documentary evidence. The court noted that to state a cause of action under GBL § 349, a plaintiff must allege that the defendant's conduct was: (1) consumer oriented; (2) deceptive or misleading in a material way; and (3) that plaintiff suffered injury as a result. GBL § 349(d), however, provides that "it shall be a complete defense that the act or practice is . . . subject to and complies with the rules and regulations of, and the statutes administered by . . . any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by . . . such department, division, commission or agency or the federal courts." First, the court explained there could be no "complete defense" under GBL § 349(d) because the relevant rules and regulations regarding the dissemination of such information were interpreted by the national bar association, which the court described as "akin to a private self-regulatory organization," and not by an "official department, division, commission or agency of the United States." Although acknowledging the increasingly common practice of delegating regulatory powers to private standard-setting bodies, the court reasoned that the state legislature could have included, associations as interpreting bodies in the GBL pursuant to § 349(d), but did not. Next, noting the sophistication of the "reasonable consumers" of defendant's marketing data (i.e. college graduates considering law school), the court held that the representations could not be false or misleading because they were accurate, and the basis of the statistics were revealed with the figures. The court also took judicial notice of the availability of data from sources regarding rates of employment and salary upon graduation from defendant and other law schools. It found that plaintiffs "selectively relied only on the relatively incomplete statistics of these materials and have mischaracterized them in their entirety as a deceptive enticement that makes it appear all jobs reported are full-time law jobs for which a law degree is required or preferred." As such, it concluded that the statements could not have been "materially misleading to a reasonable consumer acting reasonably under the circumstances." The court further held that plaintiffs' damages theory was far too speculative and did not allege facts from which pecuniary damages could be inferred as a direct result of the alleged wrong. The explicit identification of the tuition amount paid by plaintiffs did not overcome the general rule that a court must not speculate as to the "true value" of both a degree, and of a degree with the characteristics allegedly misrepresented by defendants. The court also quoted from a decision in which the Second Circuit Court of Appeals explained that "[a] claim for benefit-of-the-bargain damages must be based on the bargain that was actually struck, not on a bargain whose terms must be supplied by hypotheses about what parties would have done if the circumstances surrounding their transaction had been different." Finally, the court pointed out that it would be impossible to determine what portion of the alleged damages was attributable to "one of the grimmest legal job markets in decades." The court then noted that plaintiffs' damages theory also doomed their fraud cause of action. It held that the same misrepresentations that were lacking with respect to plaintiffs' GBL cause of action were no more persuasive to establish fraud. Further, the court held that plaintiffs' argument that defendant had a duty to clarify statements in its marketing materials was unpersuasive, since the complaint itself made clear that plaintiffs had "access to publicly available information pertaining to the realities of the legal job market." Finally, the court held that the documentary evidence established that plaintiffs' alleged reliance on the representations of defendant were unreasonable as a matter of law, and therefore the fraud and negligent misrepresentation causes of action could be dismissed at the pleadings stage. Gomez-Jimenez v. New York Law School, Index No. 652226/2011, 3/21/12 (Schweitzer, J.).

Insurance; viatical or life settlement contract. Fraud; duty to inquire; statute of limitations. Plaintiff invested in two viatical settlements, entering into a $100,000 purchase agreement with defendant. Viatical settlements involve sale of a life insurance policy by a terminally ill or elderly person, the viator, at a price discounted from the policy's face value. The investor pays the policy premiums and collects the benefits when the viator dies. The industry rose along with the AIDS pandemic and declined with the introduction of protease inhibitors. Co-defendant, an escrow agent for the transaction, provided plaintiff with letters containing details about each viator and policy, and first defendant sent plaintiff life-expectancy reports for each. Approximately four years passed. The premiums in escrow got paid out, and plaintiff received bills for premiums and fees to keep the first policy in force. Subsequently, plaintiff entered into a letter agreement with defendant under which defendant reimbursed plaintiff for premiums and fees he had paid to date and paid those due on both policies for the next three years. In return plaintiff agreed not to sue defendant during that time. Finally, though, plaintiff sued defendants for breach of contract, fraudulent inducement, and related wrongs. Defendants moved to dismiss. At oral argument plaintiff withdrew some claims, including breach of contract. The question was whether the statute of limitations had expired on the remaining claims. Considering claims for violation of GBL § 349, the court explained that the gravamen of such complaints is deceptive business practices that induce unrealistic expectations, and that CPLR § 214 (2), which applies only where liability 'would not exist but for a statute,' applies and sets a three-year statute of limitations. However, plaintiff was injured approximately 10 years before he brought his suit, when the viators exceeded their life expectancies. A claim for violations of GBL § 350, which applies to false advertising but involves an identical standard of recovery, also had expired. The other causes of action sounded in fraud and were governed by CPLR § 213 (8), which states that the action must be brought within the greater of six years from its accrual or two years from the time the plaintiff discovered the fraud or could have discovered it with due diligence. The claim for fraudulent inducement accrued when plaintiff entered into the contract for the viatical settlements, which he did well over six years before bringing suit, hence he had to rely on the two-year discovery provision. To determine when the period began to run, courts use the two-step test of inquiry notice and constructive knowledge. When circumstances are such to suggest to a person of ordinary intelligence that he has been defrauded, a duty of inquiry arises, the court explained. Three years before plaintiff sued, plaintiff's then-attorney sent defendant letters saying plaintiff had reason to believe that neither the policy, nor the insured, nor the doctor providing the viators' certification existed, which showed that plaintiff had reason to suspect that he had been defrauded. The two-year statute of limitations then started to run because plaintiff was aware of enough operative facts that, with reasonable diligence, he could have discovered the fraud. The court found that life-expectancy reports plaintiff had received contained all the operative facts of his claim; in effect plaintiff argued that the reports' numbers would have yielded much higher life expectancies if properly calculated. Plaintiff argued he only discovered this inconsistency when he retained a medical expert after defendants moved to dismiss. However, once a plaintiff has knowledge of facts suggesting fraud, discovery of new information about the same fraud does not toll the statute of limitations. Plaintiff argued that it would be unreasonable to expect a person of ordinary intelligence to understand the reports' medical contents, especially when a summary sentence unequivocally stated the life expectancy in months. However, this argument assumed that the statute did not begin to run until plaintiff knew everything he needed to prevail; it also supposed that the court was imputing knowledge of the alleged fraud, when plaintiff had actual knowledge. Contrary to plaintiff's argument, equitable estoppel did not prevent defendants from pleading the statute of limitations defense, because plaintiff possessed timely knowledge sufficient to create a duty to inquire. Moreover, plaintiff did not allege defendants concealed the first fraud with a subsequent and independent fraud. The fraud claims were dismissed. Breach of fiduciary duty claims against the co-defendant remained. The court explained that the applicable statute of limitations depended on the remedy requested and whether the claim was based on fraud. In regard to the claim based on co-defendant allegedly aiding and abetting first defendant's fraudulent scheme, the fraud claim was not merely incidental to the breach claim and the limitations period was six years under CPLR § 213 (8). But in any case the claim's timeliness turned on the viability of the fraud claims, which had to be dismissed, and so the breach claim failed, too. Plaintiff also claimed that the co-defendant invested plaintiff's money in ways inconsistent with the purchase agreement. But the court found that plaintiff had discovered this, and demanded his money back, well over six years before suing, so even if the six-year limitation applied, the period had run. Finally, the statute also applied to plaintiff's allegation that co-defendant refused to return his monies. The complaint was dismissed in its entirety. Kelly v. Legacy Benefits Corp., Index No. 104485/2010, 3/12/12 (Kapnick, J.).

Insurance Law; obligation to defend; exclusions; property damage. Plaintiff brought this action against defendant to enforce defendant's duty to defend and indemnify plaintiff under certain insurance policies. Prior to purchasing a commercial general liability policy and an umbrella policy from defendant, plaintiff had sold a commercial freezer system to a bakery. The system was intended to enhance the bakery's production times and efficiencies, but it allegedly never functioned properly, and it caused the bakery to suffer damages through loss of production. The bakery's claims against plaintiff were reported to defendant, which disclaimed coverage on the ground that the poor functioning of the freezer system did not qualify as an "occurrence." It deferred any determination on the duty to defend until suit was filed. The bakery then filed the underlying action against plaintiff in Texas state court. The underlying action was removed to the District Court for the Western District of Texas, then transferred to the Eastern District of New York. Defendant formally disclaimed any obligation to defend and/or indemnify plaintiff in the underlying action, and plaintiff brought this lawsuit to enforce its rights. Defendant then moved for summary judgment, and plaintiff cross-moved for partial summary judgment in the duty to defend. Defendant argued that the allegations in the underlying action did not qualify as an "occurrence" under the policies, as no accident occurred and there was no property damage. In its analysis, the court first looked to "occurrence" and "property damage" as defined in the policies. The court explained that an insurer has a broad duty to defend and may be relieved of such duty by a policy exclusion, but it bears the burden of demonstrating that: (1) the allegations of the complaint place it wholly within the exception; (2) the exclusion is subject to no other reasonable interpretation; and (3) there is no possible legal or factual basis upon which the insurer may eventually be obligated to indemnify the insured. The court stated that it is well settled in New York that commercial general liability policies containing work product exclusions—such as the policies at issue—do not insure against workmanship itself, but rather workmanship that creates liability by causing bodily harm or property damage to something other than the work product. The court distinguished the cases on which defendant relied, noting that the alleged economic loss in the underlying action resulted from the loss of use of tangible property belonging to a third person (i.e. the cakes ruined as a result of the freezer's malfunction), and was not incurred to remedy the insured's own work product. The court held that the underlying action alleged an "occurrence" that resulted in "property damage" as defined within the policies. The court also granted plaintiff had the right to seek independent counsel because defendant did not oppose that branch of plaintiff's cross- motion. I.J. White Corp. v. Columbia Casualty Co., Index No. 651505/2011, 1/6/12 (Ramos, J.).

Insurance Law 3224-a; Prompt Pay Law; private cause of action; pleadings. Plaintiff medical center commenced a lawsuit against defendant insurance company alleging breach of contract and violation of Insurance Law § 3224-a, the "Prompt Pay Law," in connection with six patients treated by plaintiff who were covered under defendant's insurance policies. Plaintiff also asserted a cause of action for unjust enrichment. Defendant moved to dismiss for failure to state a cause of action on the basis that the Prompt Pay Law does not contain an express private right of action and one cannot be inferred from the statutory scheme. Defendant also moved to dismiss based on documentary evidence. The Prompt Pay Law governs when an insurer must pay a provider or patient for a claim. Under the law, an insurer must pay a claim within thirty days of receipt of an electronic claim or forty-five days if received by other means, if the insurer is clearly liable. If liability is at issue, the insurer must pay any undisputed portion and provide written notification why it is not otherwise liable or that additional information is needed within thirty days of receipt. If an insurer fails to comply in that regard, it must pay the full claim amount plus interest. The court noted that in determining whether a private right existed under the Prompt Pay Law, it must consider three factors: (1) whether plaintiff was of the class for which the benefit was enacted; (2) whether a private action would promote the legislative purpose; and (3) whether such right was consistent with the legislative scheme. Holding that plaintiff satisfied the first and second factors, the court turned to the third, i.e. whether a private right was consistent with the legislative scheme. It rejected the defendant's argument that the right of a third-party Superintendent to investigate and enforce the statute barred a private cause of action. The Prompt Pay Law was enacted to protect providers and patients from the failure to have their claims paid on time and, in the event of non-payment, the ability to actively pursue interest on the claim. The fact that the Superintendant could also pursue fines and investigate under the statute did not negate a private right by a provider or patient to pursue its remedies for nonpayment of claims under the statute. The court noted that a private cause of action was consistent with the legislative scheme when it afforded rights to individuals and imposed an affirmative duty to perform such rights on another. It rejected the case law cited by defendant on the basis that the cases dealt with the general oversight of insurance and not individual rights. The court also noted that the fact that the Senate and Assembly had considered and not yet passed bills explicitly adding a private right of action relating to a similar topic did not preclude a private right of action in the existing statute and would only bolster the current statute. In its complaint, plaintiff alleged that defendant failed to pay plaintiffs' claims in full and did not provide notice within the required forty-five days. The court found that these allegations were enough to sustain a cause of action and denied defendant's motion to dismiss. Based on the standard of proof for motions under CPLR 3211(a)(1) and the contract submitted in support of the motion, the court agreed with defendant's argument that plaintiff improperly pled unjust enrichment since the existence of a contract was undisputed. As such, the unjust enrichment cause of action was dismissed. Maimonides Medical Center v. First United American Life Insurance Co., Index No. 17935/11, 2/22/12 (Demarest, J.). **

Malpractice; legal. Standards of recovery for breach of fiduciary duty and legal malpractice. Contract; breach by over-billing. In the action giving rise to this suit for legal malpractice and breach of fiduciary duty, plaintiff had sued the buyer of his public relations firm in connection with agreements effecting the firm's sale. After some claims were dismissed and settlement negotiations ended, a jury found against plaintiff, and the court found that in bringing the action plaintiff had triggered a prevailing-party clause in an employment agreement that was one of the agreements at issue. In the prior suit, the court determined that defendants were entitled to over $800,000 in attorneys fees; plaintiff was billed $250,000 for his own representation. Here, plaintiff sued his former attorney and three law firms that had employed the attorney during the course of the prior suit. Plaintiff had retained the first defendant law firm to represent him in selling his public relations firm; individual defendant had been assigned to the case and continued representing plaintiff as he moved to the other two defendant firms. The written retainer executed before the law suit had set a fee cap of $50,000. Plaintiff brought claims of breach of fiduciary duty and malpractice sounding in tort and contract. Plaintiff alleged that defendants breached their fiduciary duty through three types of incidents: failing to advise him before execution of the retainer agreement that a claim for breach of the employment agreement could trigger the prevailing-party clause; advising him to reject the settlement package: and, improperly, shifting legal work from attorneys to paralegals and secretaries to get around the retainer's $50,000 fees cap. The court explained that when a fiduciary duty claim is based on facts different from those underlying a legal malpractice claim, the fiduciary duty claim is governed by a lower standard of recovery than the malpractice. Here, though, plaintiff based the claim on the same three incidents that underlay his malpractice claims, and his allegations made it clear that the fiduciary duty arose out of the attorney-client relationship that began before execution of the retainer. Therefore, since the fiduciary duty claim was governed by the same standard of recovery as the malpractice claims, it was dismissed as duplicative of them. The court noted that the retainer provided that defendants could not "guarantee...success..." and that plaintiff had "sole discretion to accept or reject any proposed settlement." Plaintiff did not allege that defendants were negligent in prosecuting the underlying action, and at deposition in the underlying action plaintiff admitted he himself knew of defendants' counterclaim to recover attorneys' fees. Hence even if plaintiff proved defendants failed to competently advise him, their failure could not be held the proximate cause of his damage. The court concluded that the allegations of failure to render competent legal advice on the prevailing-party clause and potential settlement were insufficient to support malpractice claims sounding in tort or contract and dismissed those claims. In regard to the claim of malpractice based on breach of the retainer by over-billing, the court noted that the retainer provided that the attorney defendant's fees were $150 per hour and "other" fees $100 per hour, and set a total fee cap of $50,000. Finding that plaintiff adequately alleged that defendants shifted work and billed $250,000, the court determined that the doctrines of account stated and voluntary payment did not, contrary to defendants' argument, operate as complete affirmative defenses at this juncture. The voluntary payment doctrine was not applicable where payment was made under protest, or circumstances showed a payor's right to preserve the right to dispute the demand; here, plaintiff's correspondence questioned the invoices' accuracy and he requested a copy of the schedule to the retainer that contained the fee cap provision. Therefore, the claim for legal malpractice by breach of the retainer by over-billing survived. Stevens v. Sokolow Carreras LLP, Index No. 114317/2010, 1/18/12 (Ramos, J.).

Mortgage loans; securitization; fraud; misrepresentation; causation; insurance; summary judgment standard. Plaintiff brought this action alleging that defendants fraudulently induced plaintiff to insure four securitizations of home equity mortgage loans and one securitization of a "closed-end seconds" originated by defendants. Defendants sold or conveyed these mortgage loans to trusts, which then issued notes backed by the loans to investors with a promised return of principal with interest. The obligations of the parties to the securitizations were set forth in contracts (the "transaction documents"). Defendants also issued prospectuses and supplemental prospectuses for each securitization. Plaintiff issued an insurance policy for each securitization guaranteeing that it would pay any shortfall if the payments received from the loans were insufficient to cover payments due. It alleged that it relied upon representations and warranties defendants made in the transaction documents, prospectuses and supplemental prospectuses and that it had been damaged as a result. Plaintiff moved for partial summary judgment seeking a judgment declaring that: 1) to succeed on its put-back claims it needed to establish only that a loan breached a representation or warranty in a way that materially and adversely affected plaintiff's interest in the loan at the time the representation or warranty was made and that it was not required to prove that the allegedly non-compliant loan was non-performing or show the cause of the loan's non-performance; 2) to prove fraud it was not required to show a causal link between the defendants' purported misrepresentations and claims payments or loan defaults; and 3) to prove fraud it needed to establish only that defendants' purported misrepresentations induced it to issue insurance policies on terms it would not have agreed to had it known of the purported misrepresentations and that it did not need to show a causal connection between defendants' purported misrepresentations and the claims payments plaintiff made pursuant to the insurance policies. In opposition, defendants argued that plaintiff needed to prove that the claims payments plaintiff made were caused by defendants' purported misrepresentations and not by any other causes, including the economic downturn. The court granted plaintiff's motion in part. It held that plaintiff failed to demonstrate that the transaction documents were unambiguous and subject only to one interpretation regarding the put-back claims. It also identified issues of fact related to whether the documents required plaintiff to prove that the non-performance was caused by a misrepresentation made by the defendants on the put-back claims. However, the court held that, pursuant to New York common law and Insurance Law §§ 3105 and 3106, plaintiff needed to prove only that defendants' purported misrepresentation induced it to issue the insurance policies and not any causal link between defendants' purported misrepresentations and claims payments. The court reasoned that materiality was determined by whether the plaintiff had been induced to accept an application that it might otherwise have refused and not by proving a causal link between the misrepresentation and the loss suffered. The court further held that rescissory damages were available to plaintiff if successful in proving liability. Syncora Guarantee Inc. v. Countrywide Home Loans, Inc., Index No. 650042/2009, 1/3/12 (Bransten, J.).

Option agreement; parol evidence; inadvertence and error; injunctive relief. In an action concerning an option agreement to purchase two-thirds of the subject LLC membership interests, the plaintiff moved for summary judgment, requesting that the court enforce the option and order defendants to cede control of the LLC and procede with the transfer. The court granted plaintiff's motion and ordered defendants to assist plaintiff in determining the net consolidated book value of the LLC, enjoining defendants from frustrating plaintiff's exercise of its right to acquire the interests. The court also interpreted loan agreements and the option and determined that the option permitted, but did not require, that the consideration for the purchase of the LLC be paid by assumption or satisfaction of its debt. Plaintiff had the sole discretion to pay the purchase price by satisfaction of the LLC's debt or by cash, or by any combination of its choosing. In opposition to plaintiff's position, defendants moved to submit additional, parol testimony to overcome summary judgment by showing that a portion of the consideration to be paid, the debt to be assumed by the purchaser, did not exist because that loan was never funded. The deposition testimony was by one of the defendants, stating that he signed but did not read the document acknowledging that the loan funding had been made. Although the court granted defendants' motion to submit the testimony in opposition to plaintiff's motion, it held that these subsequent protestations of inadvertence and error after signing were insufficient to raise a triable factual issue. The court also granted injunctive relief precluding the defendants from taking any action to conflict with or frustrate plaintiff's efforts to get the information it needs to proceed to closing, e.g., a determination of the net consolidated book value of the LLC. Cammeby's Equity Holdings LLC v. Mariner Health Care, Inc., Index No. 650778/2011, 3/15/12 (Sherwood, J.).

Option agreement and exercise; "no waiver" clause; extrinsic evidence; fraudulent inducement; specific performance. Plaintiffs brought this action to enforce an option agreement to purchase the LLC membership interests in a defendant at a specified dollar amount, to be paid either by assumption and then release of certain debt and/or by cash. The court had previously determined that the option agreement was "clear and unambiguous," precluding defendants from offering any extrinsic evidence. When plaintiffs moved for summary judgment and specific performance, defendants moved to amend their answer to add an affirmative defense of fraudulent inducement, believing that defense would enable them to introduce previously barred parol evidence. The court held that particularly in light of a "no waiver" clause in the option agreement, a brief hand-written note by one of the plaintiffs did not constitute an agreement that could supersede the signed agreement of all parties, and that the need to determine the amount of the debt portion of the purchase price did not render the option unenforceable nor preclude summary judgment in plaintiffs' favor. The court also held that plaintiffs satisfied the agreement's notice requirement. Where a certain act must be performed "from and after exercise of the option," "exercise of the option" meant completion of the closing and payment of consideration – not from the time the notice of election to exercise the option was given. Additionally, to the extent that defendants asserted that there were open questions relating to any required regulatory approvals, the court held that whether such approvals were required prior to the acquisition must be determined by the relevant regulatory authorities. The court stated that any failure of the entity being purchased to cooperate with the purchasers' efforts to obtain such approvals constituted a breach of the option. The court also denied defendants' request for leave to amend their answer to include a defense based on verbal promise, finding no evidence of material misrepresentations that would have induced reliance and induced defendants to enter into the option agreement. Therefore, besides knowingly excluding the proposed defense from its initial answer, the proposed amendment lacked merit. Moreover, the court held that oral representations between "sophisticated business people" represented by "skilled lawyers" were precluded by the merger clause that excluded reliance on anything not in the written document executed by all parties. Schron v. Grunstein, Index No. 650702/2010, 3/15/12 (Sherwood, J.).

Public Health Law § 4406-d; breach of contract; CPLR 3211(a)(7); pleadings. Plaintiff physician brought an action individually and on behalf of his medical P.C. for breach of contract in violation of Public Health Law (PHL) 4406-d, arising out of defendants' refusal to allow plaintiffs to renew their participation in defendants' medical plans. Defendants, three medical plan providers, moved to dismiss for failure to state a cause of action and upon documentary evidence. Plaintiffs participated in defendants' health care plans under a renewable three year contract. At the end of the third year, plaintiffs received written notice from defendants of the plans' nonrenewal. Plaintiffs alleged that defendants did not renew solely because of prior complaints made against defendants, including an action for unpaid invoices. PHL § 4406-d(5)(a), (b) and (c) prohibit a health care plan contract from being terminated solely because the provider has, respectively, advocated on behalf of an enrollee, filed a complaint against the plan or appealed a decision of the health care plan. Defendants contended that PHL § 4406-d(5) did not apply as pled because plaintiffs' prior lawsuit was a collections matter and not advocacy, and that a complaint was not filed with a governmental body. Plaintiffs opposed by asserting that the collection action resulted from repeated refusals by defendants to pay for medically necessary services rendered to patients, and that the suit was brought on behalf of those patients indirectly to avoid having to charge patients for these services. The court stated that the violation fell within the advocacy prong of the statute if patient advocacy was the determining factor in a non-renewal, such that the provider would not have been terminated had it not engaged in the protected advocacy. The prong applied only if a complaint was filed with a governmental body. In deciding the motion under the standard for CPLR 3211(a)(7), the court noted that the issue is whether the proponents of the pleading have a cause of action and not whether they stated one. Although the proponents are given the benefit of the truth in their facts, the outright contradiction by evidence of those facts could be enough to warrant a dismissal. In looking at whether plaintiffs' actions were advocacy within the meaning of PHL 4406-d, the court examined defendants' own admission that the sole reason for non-renewal was that plaintiffs made too many complaints about claim reimbursement procedures. The court concluded that because reimbursement denial placed a financial burden on the plan enrollee, plaintiffs' challenge of these procedures could be construed to benefit the patients and therefore fell within the advocacy aspect of the statute. Then, turning to whether the complaints had been made to a government agency as required, the court found that plaintiffs' filing of a collection action in small claims did not support this requirement. Although plaintiffs alleged generally that they filed complaints with the Attorney General's Office and Department of Health, which would qualify under PHL § 4406-a(5), the allegations were not pled with sufficiency. In a passing remark, the court noted that the plaintiff did not plead that he appealed a decision of the health care plan, and therefore, this aspect of the cause of action must also be dismissed. Noting that the plaintiff could amend the complaint, the court granted defendant's motion as to PHL § 4406-d(5)(b) and (c), but sustained plaintiffs' cause of action under subsection (a). Kamhi v. EmblemHealth, Inc., Index No. 5486/2011, 3/21/12 (Demarest, J.). **

Statute of frauds; oral distributorship agreement; UCC § 2-201(1); merchant's exception; GOL § 5-701. Notice to terminate contract of indefinite duration; UCC § 2-309(3). Plaintiff, a long-time buyer for resale of defendant's products, allegedly expanded its business operations in contemplation of selling more of defendant's products. Defendant declined to continue selling to plaintiff because a larger customer (also a re-seller) objected. Plaintiff alleged it had an enforceable oral distributorship agreement. Defendant moved for summary judgment, arguing that the statute of frauds barred the action. The court held that UCC § 2-201, which requires that contracts for the sale of goods over $500.00 be in writing, applied to oral distributorship agreements. Plaintiff contended that the merchant's exception to the statute of frauds, under which an unsigned confirmation can satisfy the statute of frauds, was triggered by the use of written confirmations for each order. Plaintiff argued that because the confirmations contained a provision reserving to defendant the right to refuse any order, the confirmations must have contemplated a relationship beyond the particular sale. Nonetheless, because the confirmations were specific to particular sales, did not reference plaintiff's distribution of defendant's products within a particular area, and did not use the words, "distribution," "distributor" or "distributing," the court found that the confirmations established only individual sales and did not give rise to an inference of a distributorship agreement sufficient to defeat summary judgment. The court also found that GOL § 5-701, which requires that contracts not to be performed within one year of making be in writing, applied to the alleged distributorship agreement because plaintiff did not allege that the agreement could be performed within a year or had a fixed duration. Finally, because the court found that there was no enforceable contract, UCC § 2-309(3), which requires reasonable notice to terminate contracts of indefinite duration, did not apply. Accordingly, the court granted summary judgment for defendant. <u>Habitat, Ltd. v. The Art of the Muse</u>, Index No. 19481/2009, 1/26/12 (Emerson, J.).**

Summary judgment; cross motion. Real property; lis pendens; vacatur. Contract; breach. Covenant of good faith and fair dealing. Right of first refusal. This case concerns a parcel of real property. In a prior action, third-party asserted a claim for specific performance against defendants. Third-party entered into a contract with defendants to purchase the property. Plaintiffs, lessees of the property, asserted their right of first refusal under their lease with defendants to purchase the property. Plaintiffs and defendants closed on the contract. The prior court dismissed the third-party's complaint and vacated the lis pendens. Plaintiffs filed their action against defendants, alleging that defendants violated plaintiff's right of first refusal under the lease by entering into the prior contract for sale with third-party. Plaintiffs also allege that defendants breached the covenant of good faith and fair dealing by failing to provide tax bills for 2008/2009. Defendants, moving for summary judgment, argued that judicial estoppel precluded plaintiffs from inequitably adopting a different position in another action simply because their interests had changed, and that the lease was silent as to any requirement to provide the tax bills to the plaintiffs. Plaintiffs contended that it defendants provided the tax bills for 20 years. The court granted defendants' motion for summary judgment on the breach of contract claim, holding that plaintiffs were judicially estopped from taking a different position in this action from what they took in the prior case. The court denied summary judgment as to the claim for breach of the covenant of good faith, finding triable issues of fact as to whether the defendants' failure to provide the 2008/2009 tax bills was intended to prevent performance of the contract. <u>Hampton Bay Diner Corp. v. Charos Properties, LLC,</u> Index No. 19130/2011, 01/12/12 (Emerson, J.).**

Summary judgment; legal malpractice; use of deposition testimony. Plaintiffs brought this action for legal malpractice alleging that defendant failed to properly advise plaintiffs in connection with mortgage securitizations and the issuance of a legal opinion stating that a trust would qualify as a real estate mortgage investment conduit ("REMIC") for income tax purposes. Plaintiffs included a loan to a Chicago hospital in a 1997 securitization they issued. When the hospital went into bankruptcy, plaintiffs were forced to settle a trustee's lawsuit (the "federal action") for millions of dollars, which they alleged they would not have had to pay but for defendant's legal malpractice. Specifically, plaintiffs claimed that defendant failed to advise them that, under the Internal Revenue Code, substantially all of the assets of a REMIC trust must contain mortgages principally secured by an interest in real property, based on the reasonable belief of the sponsor. Defendants moved for summary judgment and in opposition, plaintiffs submitted deposition testimony obtained in the federal action. Recognizing that such evidence would be inadmissible at trial or in support of defendants' own motion, the court ruled that here, since defendants had an opportunity to cross examine those same witnesses in depositions in the pending action, it was appropriate to consider the prior deposition testimony. In considering the merits of the summary judgment motion, the court reviewed compelling testimony that defendant's advice was comprehensive and not negligent, but also noted that this testimony was somewhat inconsistent and came from a biased source. These flaws raised issues of credibility and "questions about whether [plaintiffs were] properly instructed by [defendant] on how to value loan collateral to ensure compliance . . . " These issues could not be resolved on summary judgment, and the court held that defendant did not establish as a matter of law that it properly advised its client about the REMIC rules. The court also disposed of defendant's arguments that the firm had not been asked to render advice with respect to the value of appraisals performed for plaintiffs, holding that this determination also was best left in the hands of the jury. The court held that defendant had not established a lack of proximate cause, noting that adverse rulings from the federal action established that the damages could, in fact, have been due to malpractice. <u>Nomura Asset Capital Corp. and Asset Securitization Corp. v. Cadwalader, Wickersham & Taft LLP</u>, Index. No. 116147/2006, 1/11/12 (Schweitzer, J.).

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