State of New York
Court of Appeals

To be argued Wednesday, October 6, 2021 (arguments begin at 2 p.m.)

No. 61 J.P. Morgan Securities Inc. v Vigilant Insurance Company

In 2006, the Securities and Exchange Commission (SEC) began a civil enforcement action against The Bear Stearns Companies and its J.P. Morgan affiliates, alleging they facilitated illegal late trading and deceptive market timing for customers, predominantly large hedge funds, enabling them to earn hundreds of millions of dollars at the expense of mutual fund shareholders. Bear Stearns replied that it played a passive role in processing its customers' trades and did not receive any special benefit from the trades, which it said generated $16.9 million in commissions and fees. Bear Stearns negotiated a settlement and consented to a March 2006 SEC order, "solely for the purpose of" SEC proceedings and without admitting 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.

Bear Stearns sought coverage of the disgorgement payment from its primary insurer, Vigilant Insurance Co., and six excess insurance carriers. It argued that it could recover $140 million of the disgorgement, representing the profits its clients made on the illegal trades, while the remaining $20 million was a "high side" estimate of the revenue 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 as a matter of public policy or was excluded from coverage as illegal profits, Bear Stearns filed this breach of contract action.

Supreme Court denied the insurers' motion to dismiss, saying the SEC order did not establish that the disgorgement was based on Bear Stearns' own illegal gains rather than profits that went to its clients. The Appellate Division, First Department reversed and dismissed the suit, saying "disgorgement of ill-gotten gains ... does not constitute an insurable loss." The Court of Appeals reversed the First Department and reinstated the suit in 2013 (21 NY3d 324), saying the SEC order did not "conclusively demonstrate that Bear Stearns ... had the requisite intent to cause harm" to render the payment uninsurable, nor did it establish that the disgorgement "was predicated on moneys that Bear Stearns itself improperly earned as a result of its securities violations."

After further proceedings, Supreme Court granted summary judgment to Bear Stearns, ruling that $140 million of the disgorgement was a covered loss, that it was not uninsurable as ill-gotten gains and was not "excluded under the personal profit exclusion." The court cited "extensive evidence" that the disgorgement "actually represented the gains of its customers rather than its own gains."

The First Department again reversed, ruling the disgorgement was an "uninsurable penalty," not a "loss" covered by the policy. It relied on the U.S. Supreme Court's 2017 decision in Kokesh v SEC (137 S Ct 1635), which it said "establishes that disgorgement is a penalty, whether it is linked to the wrongdoer's gains or gains that went to others" because "it punishes a public wrong, and its purpose is deterrence, whether you are remitting your own ill-gotten gains or those you generated for your customers through violations of the securities law...."

Bear Stearns contends its disgorgement payment was a covered loss under the policy, arguing the First Department misinterpreted Kokesh, which focused on a federal statute of limitations issue, and contradicted this Court's 2013 decision in the case.

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State of New York
Court of Appeals

To be argued Wednesday, October 6, 2021 (arguments begin at 2 p.m.)

No. 62 People v Donovan Buyund

Donovan Buyund was charged with multiple felonies, including sex offenses, for entering a woman's Brooklyn apartment as she slept and sexually assaulting her in June 2014. He pled guilty to first-degree burglary as a sexually motivated felony (Penal Law §§ 140.30[2]; 130.91) in satisfaction of all charges, in exchange for a promised sentence of 11 years in prison and a requirement that he register as a sex offender under the Sex Offender Registration Act (SORA). Supreme Court certified Buyund as a sex offender at sentencing.

On appeal, Buyund argued for the first time that his certification as a sex offender was illegal because first-degree burglary as a sexually motivated felony is not among the crimes listed in Correction Law § 168-a(2)(a) as registerable sex offenses under SORA.

The Appellate Division, Second Department agreed and modified the sentence by vacating the requirement that Buyund register as a sex offender. It said the "clear and unambiguous" language of Correction Law § 168-a(2)(a)(iii) "defines a sex offense as 'a conviction of or a conviction for an attempt to commit any provisions of [subparagraphs (i) and (ii) of the statute] committed or attempted ... as a sexually motivated felony defined in section 130.91 of [the Penal Law].'" Since first-degree burglary under Penal Law § 140.30 is not one of the Penal Law sections listed in Correction Law § 168-a(2)(a)(i) and (ii), it said Buyund's conviction was not a registerable sex offense under SORA. "While this may not have been the intent of the legislature, the omission of a critical grammatical signpost or a parenthetical number preceding 'as a sexually motivated felony' clearly limits the qualifying sexually motivated felony offenses only to those enumerated in subparagraphs (i) and (ii).... '[W]here a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'" Rejecting a prosecution claim that Buyund failed to preserve his challenge to his sex offender certification, the court said the certification "violated his right to be sentenced as provided by law.... Thus, the defendant was not required to preserve his argument for appellate review."

The prosecution argues, "[T]he self-evident legislative intent behind the language at issue was to make all sexually motivated felonies registrable offenses. This intent is apparent from the language of the statute (poorly phrased though it may be) when read in the context of the purpose of SORA and SOMTA, and is explicitly stated in the relevant legislative history. Consequently, the Second Department erred by reading the statute literally, ignoring the absurdity of the resulting rule, and arbitrarily curtailing the class of registrable offenses under SORA." The prosecution also contends Buyund's claim should be rejected because he failed to preserve it by raising it in Supreme Court. "Contrary to the conclusion of the Appellate Division, a defendant's certification pursuant to SORA is not part of the sentence, and thus a challenge to the defendant's SORA certification does not fall within the illegal-sentence exception to the preservation requirement."

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State of New York
Court of Appeals

To be argued Wednesday, October 6, 2021 (arguments begin at 2 p.m.)

No. 26 Ortiz v Ciox Health LLC

This federal class action hinges on whether Public Health Law § 18, which gives patients in New York a right of access to their medical records, provides a private right of action for patients to seek damages for alleged violations of the statute. More specifically, the question raised is whether there is an implied private right of action for damages when medical providers violate section 18(2)(e) of the statute, which allows them to impose a "reasonable charge" for paper copies of medical records, but limits the charge to no more than 75 cents per page. The U.S. Court of Appeals for the Second Circuit is asking this Court to resolve the issue in a certified question.

In 2016, Vicky Ortiz requested through her attorney copies of her medical records from The New York and Presbyterian Hospital (NYPH) for use in a negligence lawsuit against her former nursing home. NYPH had contracted with a predecessor of Ciox Health LLC to fulfill requests for records and bill the patients. The company provided the records to Ortiz, but charged her $1.50 per page. Her attorney informed NYPH that the Public Health Law limited the copying fee to a maximum of 75 cents per page. Ortiz paid the overcharge because she needed the records for her lawsuit, then she filed this action against Ciox and NYPH. Shortly after the filing, Ciox refunded the amount it had charged her beyond the statutory maximum.

U.S. District Court dismissed the suit, finding the statute provides neither an express nor implied private right of action. It said Ortiz satisfied the first prong of the three-part test for determining whether the Legislature intended to provide such a right because she was a member of the class for whose benefit the statute was enacted, but not the remaining two prongs. While "the Legislature clearly intended to control patient costs" by limiting the price per page for copies, the court said "it is debatable whether recognition of a private right of action would promote the legislative purpose" because the threat of "civil lawsuits against health care providers ... would likely add to the growth in medical costs." As for the third prong, it found "a private right of action would not be consistent with the legislative scheme." The Legislature authorized the state health commissioner "to impose substantial fines for violations" of the Public Health Law and authorized private parties to compel compliance with the law through article 78 actions. In light of those remedies, the court said it is likely the Legislature considered and rejected a private right of action.

The plaintiff argues that a private right of action is implied in section 18(2)(e) because all three prongs of the test are satisfied. The statute "has no extensive enforcement mechanism. The existing methods of enforcement expressly were not intended to be exclusive and do not address Appellant's direct and personal harm. An implied private right of action to enforce the statutory limit of $0.75 per page for medical records furthers the legislative goal and coalesces smoothly with the existing statutory scheme." The plaintiff cites an unpublished State Supreme Court ruling that section 18 provides a private right of action, which was upheld, without analysis, by the Appellate Division, First Department in Feder v Staten Island Univ. Hosp. (273 AD2d 155).

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