State of New York
Court of Appeals

To be argued Thursday, May 18, 2023

No. 51 IKB International v Wells Fargo Bank (and three other actions)

Plaintiffs IKB International and two related companies purchased more than $1 billion of residential mortgage-backed securities (RMBS) certificates issued by more than 100 RMBS trusts. The defendants are banks that served as Trustees of the RMBS trusts. The IKB plaintiffs brought these actions against the Trustees in 2016, alleging that their investments are almost worthless due to the Trustees' breaches of their contractual, fiduciary, and statutory duties, including a duty to enforce repurchase protocols that require the sellers of the securities to cure, substitute, or repurchase mortgage loans that do not conform to the representations and warranties they made regarding the quality of the underlying mortgages. The Trustees moved to dismiss on multiple grounds and contended, in part, that they did not have sufficient notice – prior to a contractually defined "Event of Default" (EOD) – of any breaches of representations and warranties to trigger their duty to enforce the repurchase protocols on behalf of investors. They also contended that all of IKB's claims were barred by "no-action clauses" in the trusts' governing agreements, which prohibit investors from suing to enforce their rights unless they first demand that a Trustee initiate the suit and obtain consent to the litigation from at least 25% of all investors.

Supreme Court, among other things, denied the Trustees' motions to dismiss the pre-EOD breach of contract claims based on failure to enforce the repurchase protocols, the post-EOD breach of contract claims, and claims for breach of conflict of interest and post-EOD breach of fiduciary duty.

The Appellate Division, First Department modified, in a 3-2 decision, by granting dismissal motions "as to the post-[EOD] breach of contract claims insofar as related to the subset of trusts governed by pooling and servicing agreements (PSAs) requiring written notice from an authorized party to constitute an event of default and the post-[EOD] breach of fiduciary duty claims insofar as based on alleged failures to act as contractually required...," among other things. The court said IKB's "noncompliance with the no-action clauses in the governing agreements is not a ground for dismissal of the complaints. Plaintiffs' compliance was excused because 'it would be futile to demand that the trustee commence an action against itself'...." It said that "Supreme Court correctly found that the provision that '[t]he Trustee agrees to ... exercise the rights referred to above for the benefit of all present and future [certificateholders]' imposed an express duty on the trustees to enforce the repurchase protocol for the benefit of the investors.... Notably, defendants do not dispute plaintiffs' assertion that 'the rights referred to above' include the right to have noncompliant loans repurchased...."

In a partial dissent, two justices disagreed with the majority "on two threshold issues. First, the agreements do not state that the trustee is under a [pre-EOD] affirmative duty to enforce the seller's repurchase obligations. The majority, in the guise of contract interpretation, creates an affirmative duty not found in the agreements. Second, to the extent that the agreements require written notice to be given to the trustee in the event of an EOD, [we] would vacate the motion court's decision on this issue and remand for a determination whether the written notice was sufficiently specific to permit the [post-EOD] claims to proceed under U.S. Bank N.A. v DLJ Mtge. Capital, Inc. (38 NY3d 169 [2022])."

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State of New York
Court of Appeals

To be argued Thursday, May 18, 2023

No. 49 People v Michael Worley

Michael Worley was 19 years old in December 2012, when he was charged with forcibly raping a 12-year-old girl in his family's Brooklyn apartment. He pled guilty to attempted first-degree rape and was sentenced to three and a half years in prison. Prior to his release from prison in 2016, the Board of Examiners of Sex Offenders prepared a risk assessment instrument (RAI) by assessing Worley points for various risk factors, including 15 points for factor 12 (refused or expelled from treatment) and 10 points for factor 13 (unsatisfactory conduct while confined). His total score of 115 made him a presumptive level three offender. The Board noted that Worley had been referred to sex offender treatment, but was removed for disciplinary reasons. It also noted that he had received multiple disciplinary sanctions for fighting, drug use, creating disturbances, and other things.

At his Sex Offender Registration Act (SORA) hearing, Worley challenged the assessment of points for risk factor 12, arguing that he did not refuse to participate in treatment, but was not allowed to participate because of his prison disciplinary violations. Removing those points from his RAI would make him a presumptive level two offender. When Supreme Court suggested that "the extensive disciplinary history may be a reason for [upward] departure," Worley complained that the prosecutor had not requested a departure and that he had "no notice of departure" prior to the hearing. The court ultimately declined to assess any points for risk factor 12 and then said, "So, based upon the 100 points [Worley] would be required to register as a Level Two sex offender.... However, I do use the extensive prior disciplinary history established by the record for an upward departure to level three." When Worley objected that the court could not grant an upward departure on its own without a request from the prosecutor, the prosecutor asked for an upward departure. Worley objected that he was entitled to 10 days notice of such a request. In the end, the court designated him a level three sexually violent offender.

Worley argued on appeal that he was denied his constitutional right to due process and to the statutory notice required by Correction Law § 168-n(3), which states, "If the district attorney seeks a determination that differs from the recommendation submitted by the board, at least ten days prior to the [SORA hearing] the district attorney shall provide to the court and the sex offender a statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations."

The Appellate Division, Second Department affirmed without expressly addressing the lack of notice regarding an upward departure. It said Supreme Court "properly determined that the defendant's extensive number of disciplinary violations while confined was an aggravating factor not adequately taken into account by the guidelines..., the People proved the existence of this factor by clear and convincing evidence...," and "the court providently exercised its discretion in upwardly departing from the presumptive level two designation...."

Worley argues the hearing court violated due process and the Correction Law by granting the upward departure with no prior notice to him. He says "all four Appellate Division departments have consistently held that a SORA hearing court's sua sponte assessment or determination, with no advance notice, violates the Correction Law and due process, and this Court and federal courts have recognized that fair notice is the bedrock of any constitutionally fair procedure." He also argues the hearing court improperly based the upward departure on his disciplinary record "because 10 points had already been assessed under factor 13 for unsatisfactory conduct while confined" and thus, "the prosecution failed to establish a qualifying aggravating factor not already taken into account by the guidelines."

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State of New York
Court of Appeals

To be argued Thursday, May 18, 2023

No. 50 People v Christopher J. Weber

Christopher Weber was 17 years old in 2013, when he was charged with engaging in oral sex with a 10-year-old relative in Monroe County. He pled guilty to first-degree sexual abuse and was sentenced to one year of interim probation to be followed by a youthful offender adjudication if he successfully completed probation. However, two months into his term, he was charged with engaging in intercourse and other sexual conduct with a 12-year-old girl in 2014. County Court revoked his interim probation and resentenced him to three years in prison in the first case. In the second case, Weber was adjudicated a youthful offender in 2015 after he pled guilty to first-degree rape and related crimes. He was sentenced to one to three years in prison.

Prior to Weber's release in 2018, the Board of Examiners of Sex Offenders assessed him 110 points on a risk assessment instrument (RAI) for his 2013 offense, making him a presumptive level three offender. The total included 10 points under risk factor 1 for use of forcible compulsion. At his Sex Offender Registration Act (SORA) hearing, Weber challenged the 10 points assessed for forcible compulsion and also sought a downward departure. The prosecution did not seek an upward departure. County Court denied Weber's request, assessed the full 110 points in the RAI, and designated him a risk level three offender.

At the Appellate Division, Fourth Department the prosecution conceded that points for forcible compulsion should not have been assessed and the court agreed, making Weber a presumptive level two offender, but the prosecution asked for a remittal to seek an upward departure by County Court. Weber objected that the request was unpreserved because the prosecution had not sought an upward departure at his SORA hearing. The Appellate Division remitted the case.

County Court determined that an upward departure to risk level three was warranted. It said the RAI did not "adequately take into account" that Weber, while on probation for his 2013 conviction, was arrested for new sex crimes and ultimately pled guilty.

The Appellate Division affirmed, rejecting Weber's claim that the prosecution request for an upward departure was unpreserved. "[A]lthough the People did not request such a departure during the original SORA proceeding," it said, "there was no reason for them to do so inasmuch as the court had classified defendant as a level three risk based upon the presumptive risk level yielded by the score on his risk assessment instrument...." It further held the upward departure was justified by Weber's conduct while on probation in 2014.

Weber argues the Appellate Division erred by remitting his case and he should be designated a level two offender. He says, "At SORA hearings, the parties must assert their right to a discretionary departure from the defendant's presumptive risk level..." and, at his hearing, "the People had a full and fair opportunity to seek an upward departure to seek an upward departure but simply failed to pursue that option as an alternative basis for a level three classification." Because the prosecution did not request an upward departure at his initial hearing, County Court did not rule on it and "that issue was not properly before the Appellate Division on Mr. Weber's original SORA appeal. Accordingly, the Appellate Division had no authority to grant the People ... any affirmative relief on their unasserted claim."

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