State of New York
Court of Appeals

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To be argued Tuesday, April 30, 2019

No. 36 Matter of Eighth Judicial District Asbestos Litigation (Terwilliger v Beazer East)

Donald Terwilliger worked in the coke oven department of the Bethlehem Steel plant in Lackawanna from 1966 until his retirement in 1993. He died of lung cancer in 2012. His estate brought this products liability action against Honeywell International, Inc. and others, alleging that Terwilliger's cancer was caused by exposure to asbestos and coke oven emissions at the steel plant. Honeywell was sued as successor to the Wilputte Coke Oven Division of Allied Chemical Corp., which designed and built five coke oven batteries -- each battery consisting of 77 coke ovens -- at Bethlehem Steel between 1941 and 1970. Honeywell moved for summary judgment dismissing the complaint against it, arguing that coke ovens are not products for purposes of strict products liability and that Wilputte's contract with Bethlehem to build the coke plant was primarily for services, including the design and construction of coke oven batteries at the Bethlehem site, not a contract for the sale of products. It cited Matter of City of Lackawanna v State Bd. of Equalization & Assessment of State of N.Y. (16 NY2d 222 [1965]), which held that Bethlehem's coke ovens were taxable real property, not tax-exempt "moveable machinery," under the Real Property Tax Law (RPTL).

Supreme Court denied the motion, saying coke ovens, which process coal into coke for steel production, "are more like machines or equipment than a building. Though the oven may be large, size alone does not define the object.... [U]like a structure or building, the oven functioned as a machine or equipment used to transform a raw material into an end product, to wit: coke. Strict products liability applies to machines ... and therefore to the coke ovens.... Lackawanna is not determinative of this motion. While Bethlehem's coke ovens (when grouped together) are considered real property, or more narrowly, not exempt from real property taxation, that does not necessarily preclude them from strict products liability." It noted that, although the RPTL "defines elevators as real property, manufacturers of elevators are subject to strict products liability...." The court also found the Wilputte/Honeywell contract with Bethlehem was not primarily for services because, unlike an architect or construction contractor who provide services, "Honeywell was in the business of selling coke ovens. Incidental to that sale was the service of constructing the coke oven plant.... When these ovens functioned as intended, they released carcinogenic emissions about which defendants failed to warn. The transaction between Honeywell and Bethlehem, when regarded in its entirety[,] is more like the sale of goods than a contract for services."

The Appellate Division, Fourth Department reversed and dismissed the claims against Honeywell. It noted that, in City of Lackawanna, "the Court of Appeals concluded, when discussing the nature of these coke oven batteries, that '[t]here is no doubt that, by common-law standards, these structures would be deemed real property. Their magnitude, their mode of physical annexation to the land and the obvious intention of the owner that such annexation be permanent would, indeed, compel that conclusion." In light of the scale of construction required for just one coke oven battery, "a multistage process that took place over approximately 18 months," the Appellate Division said "we conclude that service predominated the transaction herein and that it was a contract for the rendition of services, i.e., a work, labor and materials contract, rather than a contract for the sale of a product.... We further conclude that a coke oven, installed as part of the construction of the 'great complex of masonry structures' at Bethlehem..., permanently affixed to the real property within a coke oven battery, does not constitute a 'product' for purposes of plaintiff's products liability causes of action...."

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No. 37 Nadkos, Inc. v Preferred Contractors Insurance Company Risk Retention Group

Nadkos, Inc., as general contractor on a Brooklyn construction project, hired Chesakl Enterprises, Inc. as a subcontractor for structural steel work and required it to name Nadkos as an additional insured on its general liability policy from Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC). In May 2015, a Chesakl employee was injured in a fall at the work site and brought a personal injury action against Nadkos and Chesakl, among others. On August 25, 2015, Nadkos's insurer tendered the injury suit to Chesakl and PCIC for defense and indemnification. A week later, on September 1, PCIC disclaimed coverage to Chesakl based on several policy exclusions. On November 16, 2015, PCIC disclaimed coverage to Nadkos based on the same exclusions. Nadkos's insurer advised PCIC that it failed to give timely notice of its disclaimer to Nadkos as required by Insurance Law § 3420(d)(2) and had therefore waived any coverage defenses as to Nadkos. PCIC responded that it was a foreign risk retention group (RRG) chartered under the laws of Montana and, thus, was not subject to section 3420(d)(2), a New York statute. An RRG is insurance company owned and operated by its policyholders, who engage in similar activities and face similar liability risks.

Nadkos brought this action seeking a declaration that PCIC was obligated to defend and indemnify it based, in part, on PCIC's late notice of disclaimer under section 3420(d)(2). PCIC moved for summary judgment dismissing the suit, contending that section 3420(d)(2) was preempted by the federal Liability Risk Retention Act of 1986 (LRRA), which permits chartering states to regulate the operation of RRGs and preempts most forms of regulation by nondomiciliary states. However, the LRRA preserves the power of nondomiciliary states to regulate in certain areas, including compliance by RRGs with the states' unfair claim settlement practices laws. Nadkos argued that PCIC's late notice of disclaimer was an unfair practice under Insurance Law § 2601(a)(6), which provides that an insurer's failure to "promptly disclose coverage" pursuant to section 3420(d) is an unfair claim settlement practice "if committed without just cause and performed with such frequency as to indicate a general business practice."

Supreme Court granted PCIC's motion and dismissed the suit, ruling that the LRRA preempts the application of section 3420(d)(2) to out-of-state RRGs like PCIC. The court also ruled that "one untimely notice does not arise to the level of an unfair claims settlement practice."

The Appellate Division, First Department affirmed the preemption ruling. It said a violation of the prompt disclaimer requirement of section 3420(d)(2) is not an unfair settlement practice under section 2601(a)(6), which requires insurers to "promptly disclose coverage" and applies only to section 3420(d)(1), which "sets forth time requirements for an insurer to 'confirm' liability limits and 'advise' when sufficient identifying information is lacking (i.e., disclose ... information), while paragraph (2) sets forth time requirements for an insurer to 'disclaim' ... coverage (i.e., make a determination to deny coverage)." Further, because a failure to disclaim under section 3420(d)(2) "results in coverage being extended beyond the scope and clear language of a policy," it said, applying the statute "to PCIC or to any other RRG would directly or indirectly regulate these groups in violation of" the LRRA.

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To be argued Tuesday, April 30, 2019

No. 38 People v John Giuca

In October 2003, college student Mark Fisher was shot to death in Brooklyn a few blocks from the home of John Giuca, where Fisher had spent the night drinking with Giuca and others. Giuca and a co-defendant were charged with the murder. At the trial in 2005, three witnesses testified about conflicting statements Giuca made to them implicating himself in the murder. One of those witnesses, John Avitto, testified that Giuca admitted his complicity in the murder while they were jailed together on Rikers Island. Prior to Giuca's trial, Avitto pled guilty to burglary under a deal that his case would be dismissed if he successfully completed drug treatment and, if he failed to complete the treatment program, he would face 3½ to 7 years in prison. In June 2005, about three months before his testimony, Avitto absconded from the treatment program and contacted the police offering information about Giuca's murder case. A warrant was issued for Avitto's arrest, but detectives and a prosecutor accompanied him to a court hearing, informed the court that he was cooperating in a murder case, and he was allowed to reenter the treatment program. Giuca did not learn until after his trial that the prosecutor who accompanied Avitto to his plea violation hearing was the lead prosecutor in his murder trial. Avitto testified at the trial about Giuca's alleged admission at Rikers and also testified that he had been doing well in his drug program and that he had not been promised anything by police or prosecutors in exchange for his testimony. Giuca was convicted of felony murder, first-degree robbery and weapon possession, and was sentenced to 25 years to life in prison.

In 2015, Giuca filed a CPL 440.10 motion to vacate his conviction on the ground that the prosecution violated its Brady obligations by failing to disclose that the lead prosecutor in his case had intervened at Avitto's plea violation hearing, information he said he could have used to impeach Avitto's credibility. Giuca also claimed the prosecution deprived him of a fair trial by failing to correct Avitto's false testimony about his conduct in drug treatment and other matters.

Supreme Court denied the motion, saying Giuca "failed to prove either that there was any understanding or agreement between Avitto and the People about conferring any benefits" or that "the People failed to disclose any such agreement." Even if it was error not to disclose the lead prosecutor's role at Avitto's hearing, the court said there was "no reasonable possibility" that it affected the verdict.

The Appellate Division, Second Department reversed and ordered a new trial, saying "the prosecutor had a duty to disclose the circumstances surrounding Avitto's initial contact with the police regarding the defendant's case, the circumstances surrounding the prosecutor's appearance in court with Avitto [on his plea violation], and the information that the prosecutor provided to the court at that appearance.... The prosecutor further had a duty to correct Avitto's testimony regarding his contact with her and with detectives ... and his progression in drug treatment.... While the evidence presented at the hearing did not demonstrate 'the existence of an express promise' between Avitto and the District Attorney's office, there was 'nonetheless a strong inference' of an expectation of a benefit 'which should have been presented to the jury for its consideration'" because it "tended to show a motivation for Avitto to lie."

The prosecution argues, "The Appellate Division's Brady ruling was incorrect for two reasons. First, there was no agreement with the witness that he would receive a benefit for his testimony, and the prosecutor was not required to disclose information that a defense attorney might have been able to use to suggest, falsely, that such an agreement existed. Second, the undisclosed information was not 'material' under Brady, because it would have been cumulative to the impeachment information already known to the defense, and because there was substantial evidence of defendant's guilt...."

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