

NEW YORK COURT OF APPEALS ROUNDUP

APPLYING TWO LAWS PASSED AFTER 9/11 ATTACKS

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Pending the governor's action in filling the vacancy caused by Judge Carmen Beauchamp Ciparick's retirement from the Court of Appeals, the court—as can be seen if you visit its "live" website—is sitting with a five-judge bench. Arguments have been lively, and the bench is very active.

In this column we deal with three appeals, decided jointly by the court, that involve three police officers who developed cancer following their early response to the attacks upon the World Trade Center on Sept. 11 and their entitlement to enhanced benefits. Also, we cover the court's view of the ability of the prosecution to use legislation passed after the 9/11 terrorist attack to deal with such acts with appropriate severity and the applicability of such statutes to "gang" activity. Finally, we comment upon a unanimous decision of the court having implications involving the continued status of New York and its established body of commercial law to deal with international contracts which, but for legislation passed in New York in 1984, would render such cases subject to the substantive choice of law of other jurisdictions.

9/11 First Responders

The Court of Appeals found that the statutory presumptions set forth in the World Trade Center Law applied in a trio of cases, [*In the Matter of Bitchatchi v. Board of Trustees of the New York City Police Department Pension Fund, Article II, In the Matter of Maldonado v. Kelly and In the Matter of Macri v. Kelly*](#), involving police officers who became ill after their service as first responders in connection with the Sept. 11 terrorist attacks on the World Trade Center.

New York City police officers who become disabled may apply for ordinary disability retirement benefits or more generous accidental disability retirement (ADR) benefits. In

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order to qualify for ADR benefits, a police officer must establish that his or her disability is the "natural and proximate result of an accidental injury received in...city-service."¹ In most cases, the burden is on the ADR benefits applicant to establish causation. After the Sept. 11 terrorist attacks, however, the Legislature enacted Section 13-252.1 [1] [a] of the New York City Administrative Code which provides that police officers who performed rescue, recovery or cleanup operations at specific locations – including the World Trade Center and the Fresh Kills Landfill on Staten Island – within 48 hours after the attack or for at least a total of 40 hours in the first year after the attack are entitled to a rebuttable presumption that their condition was incurred in the line of duty. In other words, the burden is on the New York City Pension Fund to establish by "competent evidence" that the officer's condition was not caused by the hazards encountered at the World Trade Center and other related sites.

Karen Bitchatchi, Frank Macri and Eddie Maldonado are all New York City Police officers who spent the requisite time working on rescue and recovery efforts at the World Trade Center and the Fresh Kills Landfill. All of them subsequently developed cancer and Macri eventually succumbed in 2007. They all applied for ADR benefits, and the Pension Fund denied their applications. All three of them commenced Article 78 petitions. Bitchatchi's and Macri's petitions were granted and Maldonado's petition was denied by the Supreme Court. The Appellate Division, First Department, affirmed all three decisions.

Writing for a unanimous court, Judge Victoria Graffeo affirmed the First Department's decisions in *Bitchatchi* and *Macri* and reversed its decision in *Maldonado*, finding that all three officers were entitled to ADR benefits. The court noted that the Legislature enacted the World Trade Center presumption because of the evidentiary difficulties inherent in establishing that non-trauma conditions like cancer were caused by exposure to toxins present at the World Trade Center and related locations. The Legislature did not create a "per se" rule allowing ADR benefits for all first responders but rather created a presumption that the Pension Fund could rebut with "competent evidence." Accordingly, the Pension Fund cannot simply rely on a lack of evidence tying the officer's disability to exposure at the World Trade Center.

The court found that in each of the three cases, the Pension Fund had failed to come forward with sufficient evidence to rebut the presumption. While the Pension Fund argued in the *Maldonado* case that the presumption was inapplicable because Maldonado had a preexisting cancer that may have been aggravated by exposure at the World Trade Center, the court found that the Pension Fund had failed to preserve the issue for review, so this remains an open issue under the World Trade Center Law.

Gang-Related Crimes

In [*People v. Morales*](#), the Court of Appeals declined to apply New York's anti-terrorism statutes to traditional gang-related criminal activity. Shortly after the terrorist attacks on Sept. 11, 2001, the Legislature passed the Anti-Terrorism Act of 2001, which included Article 490 of the Penal Law and provided for substantial sentence enhancements for defendants who commit a "crime of terrorism." Penal Law §490.25 provides that a person commits an act of terrorism when he or she "commits a specified offense" with the "intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping."

Defendant Edgar Morales was alleged to be a member of a Bronx street gang known as the St. James Boys or "SJB." On April 17, 2002, Morales and several other members of the SJB went to a christening party at a church in the Bronx where they got into a fight with members of a rival gang. Morales allegedly fired five shots from a handgun which tragically resulted in the paralysis of a young man and the death of an innocent 10-year-old girl.

Morales was arrested and charged with intentional murder in the second degree, gang assault in the first degree and criminal possession of a weapon in the second degree. He was also charged with crimes of terrorism pursuant to Penal Law §490.25 based on these underlying predicate offenses. At trial, the state argued that Morales' crimes constituted crimes of terrorism because he and the other SJB members were acting with the "intent to intimidate or coerce a civilian population" as set forth in Penal Law §490.25.

The state argued that rival gangs constituted a civilian population for purposes of the statute and that, even if rival gangs are not deemed a civilian population, there was sufficient evidence that the SJB engaged in acts intended to intimidate Mexican-Americans generally in the relevant area of the Bronx. To support this argument, the state introduced evidence of numerous other criminal acts committed in the area by the SJB including unrelated assaults, murders and other crimes. Morales was convicted of, inter alia, three crimes of terrorism based on the underlying predicate offenses and sentenced to an aggregate prison term of 40 years to life.

The Appellate Division, First Department, found that there was insufficient evidence of intent to intimidate or coerce a civilian population and reduced the convictions for the three crimes of terrorism to the underlying predicate offenses. The First Department remanded the case back to the Supreme Court for resentencing based on the reduced convictions.

In a unanimous decision written by Judge Victoria Graffeo, the Court of Appeals agreed that Morales' crimes did not fit within the ambit of the Anti-Terrorism Act but reversed the First Department's decision and ordered a new trial for Morales on the underlying primary offenses.² The court noted that the phrase "intent to intimidate or coerce a civilian population" is not defined but found that a precise definition is not necessary. Even if one assumes that all Mexican-Americans in the relevant geographic area of the Bronx could be deemed a "civilian population" for purposes of the statute, the court found that there was not sufficient evidence to demonstrate that Morales and the other SJB members acted with the intent to intimidate all members of that community. Rather, the evidence established, at most, that they acted with intent to intimidate a rival gang.

The court concluded that there was no indication, however, that the Legislature intended for the Anti-Terrorism Act to apply to traditional gang-related crime like this. The court based its conclusion on the fact that the examples of terrorism included in the act's legislative findings included incidents such as the Sept. 11 attacks on the World Trade Center and the Pentagon, the 1995 Oklahoma City bombing and the 1988 bombing of Pan Am Flight No. 103 over Lockerbie, Scotland, among others.

Expanding the reach of the Anti-Terrorism statute as broadly as the state argued would turn every gang assault or organized crime murder into a potential act of terrorism. Accordingly, the court found that while Morales' acts were tragic, they did not constitute acts of terrorism within the meaning of Penal Law Article 490. Moreover, the state's introduction of a large volume of evidence concerning other, unrelated criminal acts committed by the SJB created a reasonable possibility that the jury's findings were prejudicially influenced and the court therefore ordered a new trial on the underlying predicate offenses.

No Need for Conflict Analysis

In a decision important to maintaining New York State as a commercial and financial center for the resolution of international contract disputes, Chief Judge Jonathan Lippman, for a unanimous six-judge court, held in [*IRB Rosseguros, S.A. v. Inepar Investments S.A. and S.A. Industria e Construcoes*](#) that where parties clearly choose to agree that the law of New York shall govern the rights and obligations between them in accordance with General Obligations Law §5-1401, New York substantive law shall apply and no conflicts-of-law analysis is required.

The dispute arose out of the issuance by Inepar in 1996 of \$30 million of Notes to raise capital and refinance debt previously incurred by Inepar and IIC. IIC owned a 60 percent interest in Inepar and specialized in providing equipment and electrical services to power companies. The Notes were denominated in dollars and paid interest at the rate of 9.9 percent per annum. A Fiscal Agency Agreement under which Inepar was the

issuer, IIC the guarantor and Chase Bank the fiscal and paying agent, governed the Notes Program.

The Agreement stated that it, together with the Notes and Guarantee, shall be governed by, and construed in accordance with, the law of the State of New York, without regard to conflict-of-laws principles. The Guarantee provided it would be governed by and construed in accordance with the laws of New York.

In 1984 the New York Legislature passed provisions of the General Obligations Law to enable parties to have New York courts apply New York law to their agreements even when the contracts had insufficient contacts or relationships with New York to be held to have "the most significant relationship to the transaction and the parties." These laws, included in the court's opinion, were specifically intended so that parties to contracts with multi-jurisdictional contacts not dominated by New York could be assured nonetheless that New York's well-developed commercial law would apply.

Here, plaintiff IRB had bought \$14 million of Inepar's Notes and had received only eight interest payments, with no payment of principal, when Inepar defaulted. IRB sued Inepar and IIC (the Guarantor) in New York. Inepar defaulted in the action but IIC moved for summary judgment claiming (1) its Board of Directors had never authorized the Guarantee that was void under Brazilian law and (2) New York's choice-of-law principals should apply and the Guarantee should be declared void because of the dominance of Brazil to the parties and the transaction.

Relying upon the mandatory effect of General Obligations Law §5-1401, the motion court denied IIC's motion for summary judgment and granted IRB's motion as to liability, sending the damages issues to a special referee. The Appellate Division affirmed the motion court, but reduced the interest rate payable to the New York statutory interest rate of 9 percent rather than the 9.9 percent provided for in the Notes. The court granted leave to appeal.

In unanimously affirming the Appellate Division, the court reviewed the history of the applicable provisions of the General Obligations Law and the Legislature's clear intent, concluding that New York's substantive law must apply. In doing so, it flatly rejected IIC's assertion that the "whole" of New York's law should apply such that a typical conflicts-of-law analysis would result in the application of Brazilian law to the transaction.

The court similarly rejected IIC's argument that the Guarantee's choice-of-law provision needed to expressly exclude New York's choice-of-law principles for New York substantive law to apply, holding that no express exclusion is required.

Endnotes:

1. Administrative Code of the City of New York §13-252.
2. The authors' firm represented the Center on the Administration of Criminal Law at New York University School of Law as amicus curiae before the Court of Appeals.

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