

## NEW YORK COURT OF APPEALS ROUNDUP

### MEDICAL MONITORING, SHIELD LAW FOR JOURNALISTS, BIDDING AT AUCTION

ROY L. REARDON AND WILLIAM T. RUSSELL JR.\*  
SIMPSON THACHER & BARTLETT LLP

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We welcome the new year by discussing three decisions issued by the Court of Appeals in December. The first decision answered a question certified by the U.S. Court of Appeals for the Second Circuit by declining to recognize a cause of action for medical monitoring brought by smokers who have not been diagnosed with a smoking-related disease. In the second decision, the court applied New York's journalistic shield law to protect a New York reporter from being required to disclose her sources in an action brought in Colorado arising out of the tragic Aurora movie theater shooting. Finally, the court found that the statute of frauds did not enable a successful auction bidder with "buyer's remorse" to avoid his obligation to complete the purchase.

#### Medical Monitoring

Writing on behalf of a four-judge majority in [Caronia v. Philip Morris USA](#), Judge Eugene F. Pigott declined to recognize an independent equitable cause of action for medical monitoring on behalf of smokers who had not yet suffered an injury in the form of a smoking-related disease. Although the majority and the dissent in this case reached opposite conclusions, each based their decision largely on a detailed analysis of the policy implications of their respective views.

Plaintiffs are all current or former heavy smokers over the age of 50, none of whom have been diagnosed with lung cancer. They commenced an action in the U.S. District Court for the Eastern District of New York asserting claims against Philip Morris sounding in negligence, strict liability and breach of the implied warranty of merchantability. They requested equitable relief including the creation of a court-supervised program providing them with Low Dose CT Scanning of the chest (LDCT)

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\* Roy L. Reardon and William T. Russell Jr. are partners at Simpson Thacher & Bartlett LLP.

at Philip Morris' expense. They subsequently amended their complaint to allege, as a separate cause of action, an equitable claim for medical monitoring. The district court dismissed plaintiffs' claims.

The Second Circuit affirmed the dismissal of the negligence, strict liability and breach of warranty claims but questioned whether New York would recognize a cause of action for medical monitoring. Accordingly, the Second Circuit certified questions of law to the Court of Appeals asking whether under New York law a heavy smoker who has not been diagnosed with a smoking-related disease may pursue an independent equitable cause of action for medical monitoring, and, if so, what are the elements of such a cause of action, what is the applicable statute of limitations, and when does such a cause of action accrue.

Judge Pigott, joined by Judges Victoria Graffeo, Susan Phillips Read and Sheila Abdus-Salaam, answered the first question in the negative, thereby mooting the remaining questions. The court began by noting that it is a bedrock principle of New York's tort system that a plaintiff must suffer some physical harm before being able to obtain a recovery. A mere threat of future harm is not enough. Because plaintiffs have not alleged any physical injury or property damage, they can only recover if the court recognizes a new tort in the form of an equitable claim for medical monitoring.

While plaintiffs claimed that such a cause of action is consistent with existing New York decisions that permit medical monitoring as a form of damages for an existing tort, the court explained that the authorities cited by plaintiffs still require that a plaintiff suffer an actual injury. The court further noted that the highest courts in other states are divided on this issue. Some, like Massachusetts, recognize an independent cause of action for medical monitoring in the absence of personal injury or property damage while others do not.

The court acknowledged that it had the authority to recognize a new tort cause of action and that there are some significant policy reasons that favor doing so here. The court, however, considered the fact that permitting recovery without physical injury could permit millions of potential plaintiffs to flood the courts while depleting the tortfeasors' resources available to compensate individuals who have actually suffered an injury.

The court also considered the absence of any framework for the implementation and administration of a monitoring program and noted that the Legislature is in a better position to study the impact and consequences of creating a new cause of action. Accordingly, the court declined to recognize a new, independent equitable cause of action for medical monitoring in the absence of an injury. The court did note that a plaintiff who had suffered an actual injury could still obtain medical monitoring as a form of consequential damages for an existing tort cause of action.

Chief Judge Jonathan Lippman, joined by Judge Jenny Rivera, issued a strong dissent. The dissenters argued that the "judicial hesitance and legislative deference" of the majority decision did not serve the ends of justice. Lippman pointed to the high mortality rate for lung cancer largely due to the latent nature of the disease and explained that by the time symptoms manifest themselves, it is often too late for effective treatment. LDCT, on the other hand, provides the ability to detect lung cancer tumors at a much earlier state when treatment is likely to enjoy much higher success rates. According to Lippman, this presents a very compelling case for the exercise of the court's equitable power to recognize a new cause of action. Not only would it promote the interest of public health, it would also reduce costs for potential defendants in that the expense of monitoring is likely to be substantially less than the costs of post-diagnosis treatment combined with the costs incurred in defending wrongful death suits. In addition, permitting such suits to proceed would serve an important deterrence function.

The dissenters dismissed the majority's concerns regarding a potential flood of litigation by noting that such concerns can be addressed by carefully tailoring the elements of the cause of action to include requirements such as demonstrating an enhanced risk of cancer based on specifically defined factors and proving the existence of an effective screening method that is reasonably necessary given that enhanced risk of cancer. These policy considerations, however, did not sway the majority, and New York joins the list of states that decline to recognize an independent cause of action for medical monitoring. Judge Robert Smith took no part in the decision.

## **Shield Law in Colorado Action**

In [\*Matter of Holmes v. Winter\*](#), another divided court addressed the jurisdictional reach of New York's journalistic shield law. This case arose out of the tragic movie theater shooting in Aurora, Colo., in 2012. Given the extreme amount of media attention generated by the case, the trial court in Colorado issued gag orders limiting pretrial publicity by either side including an order specifically precluding any party from revealing information concerning the discovery or contents of an allegedly incriminating notebook that the defendant, James Holmes, had apparently mailed to a psychiatrist before the shootings, and which Holmes claimed contained patient-psychiatrist privileged communications that would be inadmissible at trial. Nevertheless, a New York-based reporter for Fox News, Jane Winter, published an online article in which she described the contents of the notebook and indicated that she learned the information from two unidentified law enforcement sources.

Holmes filed a motion for sanctions in the Colorado trial court and sought to obtain Winter's testimony in order to learn the identity of her sources. Pursuant to the Uniform

Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings—adopted by all 50 states and codified in New York as CPL 640.10(2)—Holmes obtained a certificate from the Colorado court finding that Winter was a material and necessary witness in a sanction proceeding against the law enforcement officials. Holmes then commenced a proceeding in New York Supreme Court pursuant to CPL 640.10(2) for the issuance of a subpoena compelling Winter to appear in the Colorado proceeding.

Winter opposed the application arguing, *inter alia*, that New York's journalistic shield law rendered the identity of her sources absolutely privileged. Holmes argued that under the court's decision in *Matter of Codey (Capital Cities, Am. Broadcasting Co.)*, 82 NY2d 521 (1993), any privilege issues in connection with a CPL 640.10(2) application should be decided by Colorado as the "demanding state." The Supreme Court granted Holmes' application and issued the subpoena directing Winter to appear in the Colorado proceeding. The court found that Winter was a material and necessary witness and that compliance with the subpoena did not impose an undue hardship. The court determined that any other issues raised by Winter, including her argument that the identity of her sources is privileged, were beyond the scope of a CPL 640.10(2) proceeding and should be resolved by the Colorado court. The Appellate Division, First Department, affirmed in a three-two decision, and Winter appealed as of right.

In a decision by Judge Graffeo joined by Chief Judge Lippman and Judges Abdus-Salaam and Rivera, the court reversed and held New York's journalistic shield law precludes the issuance of the subpoena by a New York court. The court began by noting New York's long history of protecting the freedom of the press, including protecting the identity of confidential sources, dating back to the trial of John Peter Zenger during the colonial era.<sup>1</sup> In accordance with that historical tradition, the Legislature adopted the journalistic shield law in 1970 which provides reporters with an absolute privilege against the disclosure of the identity of confidential sources.

The court acknowledged that the decision in *Codey* set forth a general rule that a claim that the requested testimony would be inadmissible in the demanding state is not a proper basis for the sending state to deny a subpoena request. The court also noted, however, that *Codey* left open the possibility that in a future case a "strong public policy" of New York might justify refusal of relief pursuant to CPL 640.10(2). 82 NY2d at 530, n. 3. In this case, the New York court was not being asked to rule about the admissibility of the testimony under Colorado law. Rather, it was being asked to refrain from issuing the subpoena on the basis of a New York law providing an absolute privilege against disclosing the specific information sought in the Colorado proceeding. Because this protection to reporters is such a core principle of New York law, it falls within the public policy exception envisioned in *Codey* and provides a basis for New

York courts to avoid issuing process to compel attendance at a criminal proceeding in another state pursuant to CPL 640.10(2).

In a dissent joined by Judge Pigott, Judge Smith agreed with the majority that New York's journalistic shield law represented a strong public policy that, in the right case, could justify a refusal to issue a subpoena in a CPL 640.10(2) proceeding, but he did not believe that this was such a case. Because the communications at issue here took place in Colorado, conflict of laws principles would require the application of Colorado law, and the imposition of New York's journalistic shield law represents an excessive expansion of New York jurisdiction. Judge Read also dissented but voted to affirm for the reasons set forth in the First Department's majority decision.

## **Statute of Frauds**

In [\*Jenack v. Rabizadeh\*](#), Judge Rivera wrote for a unanimous court in finding that the statute of frauds did not provide an auction buyer with the ability to avoid the consequences of his winning bid. William J. Jenack Estate Appraisers and Auctioneers, Inc. sells fine art and antiques at public auctions. As is common in the trade, Jenack permits buyers who cannot be present at the live auction to bid online, by telephone or by submitting absentee bids in advance of the auction. Absentee bid forms are available on Jenack's website. The bid forms notify buyers that payment is due within five days of a successful bid and require buyers to provide their name, contact information, credit card information and a list of the items on which they intend to bid along with the amount of their bid.

Jenack conducted an auction on Sept. 21, 2008. A few days before the auction, Rabizadeh submitted a signed absentee bid form for a \$400,000 bid on a 19th century Russian silver/enamel covered box with a gilt interior that had been assigned item lot number 193 by Jenack. Rabizadeh was assigned bidder number 305 which was then written on the top of his absentee bid form. Rabizadeh was the successful bidder and Jenack's chief clerk recorded Rabizadeh's winning bid by amount and bidder number on a "clerking sheet" which listed each auctioned item by lot number, description and the number assigned by Jenack to the consigner. Jenack's name also appeared at the top of the clerking sheet.

Jenack sent Rabizadeh an invoice for the Russian box shortly after the auction and, when Rabizadeh refused to pay, Jenack commenced an action for breach of contract. Rabizadeh moved for summary judgment on the grounds that he was not liable to Jenack because there was no written contract as required by the statute of frauds.

Jenack cross-moved for summary judgment arguing that the clerking sheet and other bid documents satisfied the statute of frauds by complying with the requirements of General Obligations Law §5-701(a)(6). That section of the GOL provides that an auction sale satisfies the statute of frauds if, at the time of the sale, the auctioneer enters into a sale book the nature and price of the property sold, the terms of the sale, the name of the purchaser and the name of the person on whose account the sale was made. The trial court denied Rabizadeh's motion, granted Jenack's cross-motion and conducted a non-jury trial on damages after which it entered a \$402,398 judgment in favor of Jenack.

Rabizadeh appealed and the Appellate Division, Second Department, reversed finding that the documents did not comply with GOL §5-701(a)(6) because the clerking sheet did not include the name of the person on whose account the sale was made. The court granted leave to appeal.

The court noted that the seller's identity was not identified in any writing other than by a number. This was consistent with industry practice as many sellers insist on anonymity throughout the process. Accordingly, this case raised a concern in the industry that a decision rejecting this practice could have a chilling effect on the auction business. The court explained, however, that the statute does not require specification of the "seller's" identity; rather, it requires identification of the "name of the person on whose account the sale was made."

In this case, because the auctioneer acts as the seller's agent in the transaction, identification of the auctioneer on the clerking sheet satisfied the requirements of GOL §5-701(a)(6). Accordingly, there was a binding agreement between Janeck and Rabizadeh, and the court directed that the judgment entered by the trial court be reinstated. Rabizadeh was not able to avoid the consequences of his winning bid, and the auction business can continue to function unchanged.

## **Endnotes:**

1. See "Crown v. John Peter Zenger," Historical Society of the New York Courts, <http://www.nycourts.gov/history/legal-history-new-york/legal-history-eras-01/history-new-york-legal-eras-crown-zenger.html>.

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