NEW YORK COURT OF APPEALS ROUNDUP:

TORT REFORM IMPACT ON COMMON LAW INDEMNIFICATION, COLLECTIVE BARGAINING AND SUPERFUND TAX

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Last month the Court of Appeals held that the CPLR § 1601 provision limiting the liability of a joint tortfeasor for non-economic loss applies to claims for common law indemnification. Separately, in two cases decided together, the Court observed that "the public interest in preserving official authority over the police remains powerful," and therefore held that the public policy expressed in laws investing local officials with authority over police discipline outweighed the policy expressed in the Taylor Law that the terms and conditions of public employment be subject to collective bargaining. Finally, in a case arising out of a waste disposal tax that violated the commerce clause, the Court struck the tax in its entirety rather than modify its provisions to cure the constitutional defect.

Indemnification

In a decision that significantly affects the rights of those entitled to indemnification in tort cases, a unanimous Court, in an opinion by Judge George Bundy Smith, reversed the Appellate Division, Fourth Department, and held that such rights with respect to non-economic loss are subject to the same limits as those imposed on joint tortfeasors under CPLR § 1601.

Frank v. Meadowlakes Development Corp. involved Stephen Frank, an employee of Home Insulation and Supply, Inc. ("Home Insulation"), who suffered serious injury in an accident at a construction job site owned by Meadowlakes Development Corporation ("Meadowlakes"). Frank and his wife sued Meadowlakes and D.J.H. Enterprises, Inc. ("D.J.H."), the general contractor, for personal injuries and loss of consortium. Meadowlakes, in a third-party claim, sought indemnification from Home Insulation.

After a bifurcated trial, the jury apportioned liability as follows: 10% to Frank, 10% to Home Insulation, and 80% to D.J.H. The trial court directed a verdict against Meadowlakes and D.J.H under Labor Law § 240(1). The Franks settled with D.J.H. for $300,000,

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and with Meadowlakes for $1.4 million. Thereafter, on motion, the trial court granted Meadowlakes' motion for common-law indemnification against the employer, Home Insulation, for the full amount of its settlement payment, plus interest.

Home Insulation appealed, arguing in part that granting complete indemnification to Meadowlakes was improper. Home Insulation asserted that its liability for indemnity should be limited to the 10% of fault assigned to it by the jury, in accordance with CPLR § 1601(1). That section provides that, in a personal injury action involving two or more jointly liable tortfeasors in which a defendant is held liable for 50% or less of the liability assigned to all liable parties, the liability of such defendant to the plaintiff for non-economic loss shall not exceed his equitable share (here 10%) determined in accordance with the relative culpability of all those who caused or contributed to the total liability.

Meadowlakes successfully argued in the Appellate Division that, as a vicariously liable party under Labor Law § 240(1), it was entitled to shift its entire loss to the actual wrongdoer, and that CPLR Article 16 did not limit such entitlement by reason of a provision found in CPLR § 1602(2)(ii) preserving indemnity rights. The two-Justice dissent in the Appellate Division concluded that the majority's determination was totally contrary to the intent of the Legislature in enacting tort reform in 1986, as reflected under CPLR Article 16, and that holding Home Insulation liable for 100% of the loss when it had been adjudged to be only 10% liable was error.

The Court of Appeals agreed with the dissenters, concluding that CPLR Article 16 should be construed as a whole in determining the intent of the Legislature. Its purpose was to place the risk of an "impecunious defendant" who was principally at fault on those seeking recovery, rather than a "low-fault deep pocket defendant." Thus, holding Home Insulation liable for more than 10% of Plaintiffs' non-economic loss could not stand.

The end result: Home Insulation as indemnitor is liable to Meadowlakes for all economic loss and one-ninth of the non-economic loss (Frank's 10% share being excluded from the calculation because he was not an indemnitor).

Police Discipline

The issue posed in *Matter of Patrolmen's Benevolent Ass'n of The City of New York v. New York State Public Employment Relations Board,* as succinctly stated by the Court, was: "Is there a public policy strong enough to justify excluding police discipline from collective bargaining?" The Court held that where such policy is established in laws that expressly provide for local officials' control of police discipline, the answer is "yes."

The New York City PBA sought to annual a decision of the Public Employment Relations Board ("PERB") that it need not bargain with the PBA over certain matters of discipline, despite the fact that those matters had been the subject of expired collective bargaining agreements. PERB had taken that position based upon decisions of the First, Second

and Third Departments of the Appellate Division.

In the Court of Appeals, however, PERB supported the argument of the New York City PBA, and the Orangetown PBA in the companion case of *Matter of Town of Orangetown v. Orangetown Policemen's Benevolent Ass'n,* that the Appellate Division decisions were wrong. Because the case turned on the weight to be given competing public policies, the Court of Appeals determined that PERB's judgment on the matter was not entitled to deference. The Court agreed with the courts below that the local laws in question trumped Civil Service Law Article 14 (the Taylor Law).

The Taylor Law requires collective bargaining over the "terms and conditions of employment" where an employee organization has been certified or recognized. The presumption that terms and conditions of employment are subject to mandatory bargaining may be overcome, however. Judge Robert S. Smith's opinion for the Court (6-0) (Chief Judge Judith S. Kaye taking no part in the decision), reiterated that an express legislative exemption from collective bargaining is not required for the Court to find that the policy reasons for excluding a given subject are greater than the general policy favoring collective bargaining.

It was important to the Court's decision that the Taylor Law specifically states that its procedures for disciplining public employees should not be construed to repeal or modify pre-existing laws. The "law" giving the New York City Police Commissioner authority over police discipline was found in the City Charter and Administrative Code. In the case of Orangetown, the Rockland County Police Act, as well as Town and Village statutory provisions, invested the Town Board with authority over police discipline. The Court held that these "legislative commands" must be obeyed, and Taylor Law must give way to them.

Superfund Tax

The New York statutory scheme of special assessments to finance environmental cleanup had taxed disposal of remediation waste resulting from out-of-state hazardous waste cleanups, but not such waste from in-state cleanups. It also exempted disposal of hazardous waste generated in-state that was subject to a generator tax under a different provision of the Environmental Conservation Law, but did not exempt waste generated outside of New York that was subject to another state's comparable generator tax. By the time that *CWM Chemical Services, L.L.C. v. Roth* reached the Court of Appeals, the State was no longer disputing that the Superfund disposal tax violated the commerce clause of the federal constitution.

The issue left for review was the proper remedy – should the Court adopt the approach taken by the Supreme Court and extend to out-of-state cleanup and process wastes the exemptions afforded in-state cleanup and process wastes, or (as the State urged) adopt the approach taken by the Fourth Department and eliminate the in-state exemptions thereby expanding the tax significantly, or adopt some third approach.

In an opinion for the unanimous Court by Judge Susan Phillips Read, the Court charted its own course. Following guidance provided by Chief Judge Cardozo, the Court

attempted to divine whether, had it foreseen the partial invalidity of its enactment, the Legislature would have wanted the statute "enforced with the invalid part exscinded, or rejected altogether." *Quoting People ex rel. Alpha Portland Cement Co. v. Knapp,* 230 N.Y. 48, 60 (1920). The Court found that it was not at all clear the Legislature would have wished to increase taxes on New York environmental cleanup activity had it been "blessed with the gift of foresight." Rather than alter the disposal tax to cure its constitutional infirmities, therefore, the Court severed from the Superfund scheme and struck down the tax.

The difficulty with revising the disposal tax either to extend the New York exemptions to out-of-state waste or to remove the New York exemptions, was that the statutory scheme served multiple and competing purposes, revenue generation being just one of them. Another purpose was to discourage certain conduct, and still another was to encourage other conduct. The remedy imposed by the Appellate Division would have increased revenue, but discouraged desirable environmental cleanup and, in some circumstances, subjected New York businesses to double taxation, which the Legislature had sought to avoid.

The Court held that striking the disposal tax in its entirety best preserved the multiple legislative purposes because waste-end taxes were but a small portion of the Superfund's overall financing, and such remedy preserved the generator tax. Obviously, if the Legislature concludes there is a better way in which to satisfy the competing interests served by the Superfund scheme without unlawfully discriminating against interstate commerce, it is free to adopt a revised disposal tax.