NEW YORK COURT OF APPEALS ROUNDUP:

COURT ADDRESSES SEX OFFENDER COMMITMENT, LEMON LAW AND "DECEPTIVE" TRADE PRACTICES

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The Court of Appeals begins the new year with a vacancy created by the retirement of Judge Albert M. Rosenblatt. Judge Rosenblatt was appointed by then-Governor George E. Pataki in 1998, having previously served as a Justice in the Appellate Division, Second Department, as the State's Chief Administrative Judge, and as a Supreme Court Justice and Dutchess County Judge. His was a moderating voice, practical rather than dogmatic, and he was perceived as a "swing vote" on the Court. Separately, Chief Judge Judith S. Kaye, whose term expires in March, is seeking reappointment.

This month we discuss the Court's decision concerning the statutory scheme governing the psychiatric commitment of sex offenders approaching the end of their prison terms, which decision provoked a sharp response from Governor Pataki. We also discuss decisions interpreting New York's Lemon Law, and construing "deceptive trade practice" within the meaning of the Nassau County administrative code but with potentially broader applicability because that phrase also appears in the State's consumer fraud law.

Committing Sex Offenders

State of New York ex rel. Steven J. Harkavy v. Consilvio, called upon the Court to examine New York's statutory law dealing with the serious issue of protecting the public from convicted sex offenders who may pose a risk of recommitting such crimes after the expiration of their terms of imprisonment. The path of the proceeding began in the New York County Supreme Court before Justice Jacqueline W. Silbermann. While Justice Silbermann acknowledged grave concern for public safety from violent sex offenders released from prison, she concluded that the statutory mechanism used by the State to continue the confinement of potential repeat offenders did not comport with the "Constitutionally-protected due process rights" of notice and an opportunity to be heard.[1] She therefore sustained the writ of habeas corpus and ordered the State to produce the Petitioners for individual hearings before her to determine the need for their continued psychiatric confinement. The order was unanimously

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reversed by the Appellate Division, First Department, and the Petition was dismissed.

The core issue before the Court of Appeals was whether the procedures for the involuntary commitment of certain sex offenders following the completion of their prison terms are governed by Correction Law § 402 or article 9 of the Mental Hygiene Law.

Here the Petitioners, felony sex offenders nearing the end of their sentences, had been transferred to the Manhattan Psychiatric Center after being certified by two Office of Mental Health physicians as suffering from a mental illness and posing a high risk of recommitting sexual crimes absent inpatient treatment. The prison superintendents completed the applications for involuntary commitment pursuant to Mental Hygiene Law § 9.27. After being placed in the Psychiatric Center, the Petitioners were examined by a third physician who again found involuntary commitment was required.

In the habeas corpus proceedings seeking their immediate release, Petitioners argued that, because they had still been in prison at the time, it was illegal to transfer them under article 9 of the Mental Hygiene Law and that such transfer could be made only under Correction Law § 402. That section requires a prison superintendent initially to apply to a court for the appointment of two physicians to conduct psychiatric examinations. If they certify that the inmate is ill and in need of psychiatric treatment, the superintendent may then petition the court to issue a commitment order. Notice of the petition must be served on the inmate, who may request a hearing prior to transfer to a psychiatric hospital.

The Court, in deciding which statute applied, accepted Justice Silbermann's conclusion that the Petitioners were imprisoned at the time of their commitment to the psychiatric hospital. It concluded that the Correction Law was intended to protect a prisoner in the evaluation process leading to potential involuntary commitment prior to sentence expiration and must be complied with under the current legislative scheme. Only upon the expiration of a prison sentence would proceedings for further hospitalization be governed by the Mental Hygiene Law.

Accordingly, the Court in an opinion by Judge Carmen Beauchamp Ciparick for a unanimous court (Judge Robert S. Smith filing a concurring opinion), reversed the order of the Appellate Division and remitted the matter to the Supreme Court. For those Petitioners in the custody of the Office of Mental Health and no longer serving a prison sentence, the Court directed an immediate retention hearing under the Mental Hygiene Law. As to future candidates for immediate psychiatric hospitalization prior to the end of their prison terms, the State was directed to proceed under Correction Law § 402, with all of its procedural requirements, including "court supervision, pre-transfer notice and an opportunity to be heard within a reasonable period" prior to their release dates.

While the Court in its conclusion indicated that it was acutely mindful of the fact that the State had proceeded under the Mental Hygiene Law to protect the public from violent sexual predators, the Court had fashioned its remand directions in accordance with the requirements of the Correction Law to achieve that result.

Following the Court's decision, Governor Pataki called the Legislature back into session on December 13, 2006 to enact legislation to facilitate the confinement of dangerous sex offenders after the completion of their prison terms. The Legislature declined to accept the Governor's proposed legislation.

Lemon Law

In Matter of DaimlerChrysler Corp. v. Spitzer, the Court was called upon to resolve an issue of statutory interpretation that, while seemingly straightforward based upon the language of the law, was complicated by the Office of the Attorney General's previous and contrary interpretation. The Court, in an opinion by Judge Victoria A. Graffeo, unanimously sided with consumers and the Attorney General's revised interpretation.

The New Car Lemon Law, Gen. Bus. L. § 198-a, extends new motor vehicle warranties by providing that the manufacturer must correct without charge the breach of any express warranty within the first 18,000 miles or two years from delivery, whichever comes first. It also provides that if the manufacturer is "unable to repair or correct any defect or condition which substantially impairs the value of the motor vehicle to the consumer after a reasonable number of attempts, the manufacturer, at the option of the consumer, shall replace . . . or accept return of the vehicle" for a full refund. (Emphasis added.)

There are two circumstances in which the Law creates a rebuttable presumption that the "reasonable number" requirement has been met. The "repair presumption" arises when the same defect has been the subject of repair "four or more times," and the "days-out-of-service" presumption arises when the vehicle has been out of service "for a total of 30 or more days." The manufacturer may rebut these presumptions by demonstrating either that the defect does not, in fact, substantially impair the vehicle's value, or that the condition was caused by "abuse, neglect, or unauthorized modifications or alterations." A consumer may resolve disputes with the manufacturer by lawsuit or arbitration.

DaimlerChrysler and other manufacturers commenced an article 78 proceeding to enjoin the Attorney General and the association that administers Lemon Law arbitrations from using a new interpretation of the Law adopted under then-Attorney General (now Governor) Eliot Spitzer. From 1987 to 2002, the Attorney General had taken the view that a consumer should be required to demonstrate that the condition still existed at the time of the trial or arbitration – in effect giving manufacturers an extension of time within which to correct a condition and creating a disincentive to consumers to continue to seek repairs. The Attorney General reconsidered the matter in 2002, and took the view that no such burden should be imposed on consumers. Petitioners conceded that repair prior to the time of trial or arbitration hearing would not defeat the "days-out-of-service presumption," but contended that it should defeat the "repair presumption." The Court disagreed.

The Court employed several rules of statutory construction in order to determine the intent of the Legislature in enacting the Lemon Law. Unambiguous language should be construed to give effect to its "plain meaning," and in the context of the statute as a whole. If

the Legislature had wished to create an exception for vehicles repaired after the presumption had been satisfied, it could have done so explicitly, and did not. In addition, remedial statutes should be construed liberally, in this case in favor of consumers. Finally, the Court reviewed the legislative history, and found that it buttressed the Court's reading of the Law, observing that: "nothing in the legislative history indicates an intention to require consumers to leave their vehicles in disrepair pending arbitration or trial."

Deceptive Trade Practices

The Court bucked the trend of ever-expansive interpretations of what "deceptive" means in the context of consumer fraud statutes and unfair or deceptive trade practices acts, finding in *Matter of Food Parade, Inc. v. Office of Consumer Affairs of County of Nassau*, that offering a product for sale after the expiration date that appears on the packaging does not constitute a "deceptive trade practice" for purposes of the Nassau County administrative code, unless the retailer alters or disguises the expiration date. Although its holding is narrow in scope, the decision is significant because "deceptive" practices are actionable under a number of laws, federal and state, including N.Y. Gen. Bus. L. § 349.

The majority opinion was authored by now-retired Judge Albert M. Rosenblatt. Judge Victoria A. Graffeo dissented. Judge Eugene F. Pigott, Jr. took no part in the decision.

The article 78 proceeding was commenced by Shoprite, which had been fined $3,600 by the Nassau County Department of Consumer Affairs for displaying 144 products with expired manufacturers' dates, including vitamins, infant formula, and nasal decongestant. The agency's theory was that, in displaying these products for sale, the supermarket had misled consumers by making an "implied representation" that the expiration dates had not yet passed. If the items had been undated, the Court stated, the agency's assertion "could well be true." In this case, however, there could be no such implied representation because the fact that the products were outdated was expressly stated on the packaging.

The majority pointed to the General Business Law provisions addressed to expiration dates. Section 820(1) makes it unlawful for a retailer to knowingly offer any over-the-counter drug for sale past the manufacturer's expiration date. Section 820(2) makes it unlawful for a retailer to knowingly alter, obliterate or remove the expiration date on such products. The Nassau County code could, but does not, specifically prohibit such conduct, and instead prohibits only misleading or deceptive conduct, which could not be found under the circumstances.

Judge Graffeo's spirited dissent relied upon one of the same principles of statutory construction cited in her opinion for the Court in *Matter of DaimlerChrysler*, discussed above, namely that remedial statutes should be construed broadly to effectuate their purpose. Further, under the Uniform Commercial Code, by offering a product for sale a retailer impliedly warrants that it is fit for its intended uses, which baby formula and other products may not be after the manufacturers' expiration dates. On this basis, the dissent argued, it was not irrational for the County consumer affairs agency to conclude that placing expired products on the shelf

amounts to a misleading statement, especially given the "reasonable consumer" standard.

Judge Graffeo noted that the Court of Appeals has construed State consumer protection law to prohibit representations or omissions "likely to mislead a reasonable consumer acting reasonably under the circumstances,"[2] and quoted a 1977 Court of Appeals decision for the proposition that a "reasonable" customer is not necessarily the "average" customer, but includes "the ignorant, the unthinking and the credulous."[3]

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[1] There were two proceedings before Justice Silbermann. In an earlier proceeding, the court sustained the writ of habeas corpus, conditionally discharged the Petitioners from the custody of the psychiatric center, mandated that the State to allow Petitioners to be examined by two court-appointed physicians, and directed the discharge of those not found by both physicians to be mentally ill, in need of hospital care and treatment, and who posed no substantial threat of physical harm to themselves or others. For Petitioners found by both physicians to be in need of involuntary confinement, the court directed compliance with the requirements of the Correction Law or the Mental Hygiene Law. Both orders issued by Justice Silbermann were appealed and were unanimously reversed in the Appellate Division, First Department.

[2] Quoting Gaidon v. Guardian Life Ins. Co. of Am., 94 N.Y.2d 330, 344 (1999) (internal quotations omitted).

[3] Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 273 (1977).