

## NEW YORK COURT OF APPEALS ROUNDUP:

### STATUTORY GRACE PERIOD OF CPLR 205(A), POWER OF THE COMPTROLLER TO CONDUCT AN AUDIT, AND COLLATERAL ESTOPPEL

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The Court of Appeals was back in session in October. Court followers will be watching for the decision in the Court's first capital punishment case since the Court has undergone a significant change in its composition, and to see if, as is widely anticipated, Governor Eliot Spitzer will reappoint Associate Justice Carmen Beauchamp Ciparick to the Court.

Among the decisions that the Court handed down last week was one interpreting CPLR 205(a), which provides a six-month grace period for re-filing certain dismissed actions, in which decision the Court chastised corporations and their counsel to "operate with the minimal care necessary to determine, before bringing suit, which of [their corporate] family members has been wronged." We discuss below that decision, as well as a decision holding that the State Comptroller does not have the power to audit the State Insurance Department's Liquidation Bureau, and a decision in a civil case against the notorious Joel Steinberg concerning the collateral estoppel effect of Steinberg's criminal conviction in the death of his adopted daughter, Lisa.

#### Death Penalty

On September 10, 2007, the Court heard oral argument in *People v. Taylor*, the last pending appeal from the imposition of a death sentence under the New York death penalty statute that the Court invalidated in [\*People v. LaValle\*, 3 N.Y.3d 88 \(2004\)](#). This unusual situation has arisen because the trial court in *Taylor* did not use the deadlock jury instruction that was provided for in the statute and that constituted the constitutional defect found in *LaValle*.

The case raises interesting issues of *stare decisis*. The author of the majority opinion in *LaValle*, Judge George Bundy Smith, has retired from the Court, as has another member of the 4-3 majority in that case, Judge Albert M. Rosenblatt. Remaining on the Court are the two other members of the majority, Chief Judge Judith S. Kaye and Judge Carmen Beauchamp Ciparick, as well as the three

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dissenters, Judges Victoria A. Graffeo, Susan Phillips Read, and Robert S. Smith. No death penalty case has reached the Court since Judges Theodore T. Jones and Eugene F. Pigott, Jr. joined it post-*LaValle*.

### **Judge Ciparick**

Judge Carmen Beauchamp Ciparick, whose term expires in January, has reapplied for her seat on the Court. Appointed in 1994 by then-Governor Mario Cuomo, Judge Ciparick has the second-longest tenure of any of the Judges (after Chief Judge Judith S. Kaye), and is the Court's only Hispanic member. If reappointed, Judge Ciparick may remain on the Court until 2012, when she will reach the mandatory retirement age of 70.

### **Statutory Grace Period**

In a unanimous opinion by Chief Judge Judith S. Kaye, the Court resolved an open issue concerning the application of CPLR 205(a) that had been certified to it by the Court of Appeals for the Second Circuit in *Reliance Ins. Co. v. Polyvision Corp.*, and held that the grace period afforded by the statute may not be taken advantage of by a party other than the plaintiff to the original action (or, if the plaintiff dies, by his or her executor or administrator).

CPLR 205(a) codifies a remedial concept having roots that may be traced to 17<sup>th</sup> century England, the Court explained. The provision applies when an action is timely filed, and then terminated other than by voluntarily discontinuance, for failure to obtain personal jurisdiction over the defendant, dismissal for failure to prosecute, or a final judgment on the merits. The plaintiff may bring a new action arising out the same transaction or occurrence and, if service is effected upon the defendant within six months of commencement, the new action will be timely regardless of whether the statute of limitations on the causes of action otherwise would have run.

In *Reliance Ins. Co.*, however, the party seeking to invoke the statute was the parent company of the plaintiff in the prior action. Reliant Insurance Company ("RIC") issued performance bonds insuring a contractor's performance of its construction obligations. When the contractor filed for bankruptcy, RIC succeeded to its rights under existing contracts, including with Polyvision to furnish curtain wall panels. The panels showed signs of premature deterioration in 1990, and in 1994, Polyvision was sued in New York State court for the faulty panels. Unfortunately for RIC, it did not commence that suit. Instead, the suit was filed by a wholly owned subsidiary of RIC, Reliance Insurance Company of New York ("RNY"). Later, after the mistake was revealed, Polyvision moved to dismiss the action on the basis that plaintiff RNY was not the real party in interest, and its motion was granted in 2004.

RIC then commenced an action against Polyvision in federal court, which Polyvision moved to dismiss on statute of limitations grounds. RIC's attempt to invoke CPLR 205(a) in the District Court was unsuccessful, and its complaint was dismissed. On appeal, the Second Circuit certified to the Court of Appeals the question of whether Section 205(a) applies to a new action when the prior action mistakenly was filed in the name of a different, but related, corporate entity. The Court of Appeals held that it does not.

The Court began its analysis by reviewing the text of the statute. On its face, Section 205(a) applies only to a "plaintiff" or the representative of a deceased plaintiff, not to a party related to a plaintiff. RIC argued that "plaintiff" should be read broadly to advance the statute's remedial purpose, but the Court held that precedent and policy required it to reject such an interpretation. With respect to precedent, in rare instances the Court has permitted a party other than the plaintiff to the original action to take advantage of the statute, but only in a representative context, for example when a suit was filed improperly in the decedent's own name after her death, dismissed, and then re-filed by the decedent's administratrix to vindicate the plaintiff's rights. See [\*George v. Mt. Sinai Hosp.\*, 47 N.Y.2d 170 \(1979\)](#). In this case, by contrast, RIC was asserting its own rights, not the rights of RNY.

As a matter of policy, the Court expressed concern that a rule allowing a "related" corporation to invoke Section 205(a) could have significant ramifications, as it potentially could be applied to "far-flung affiliate[s]" of the original plaintiff. In addition, a broad reading of "plaintiff" for purposes of the statute likely would be applicable to individuals, as well, further extending the scope of Section 205(a). The Court was reluctant to adopt an expansive interpretation that would "breathe life into otherwise stale claims – some, like this one, going back nearly 20 years."

### **Comptroller's Powers**

In *Matter of Dinallo v. DiNapoli*, the issue was whether the State Comptroller had the authority to audit the New York State Insurance Department Liquidation Bureau (the "Bureau"). In an opinion by Judge Eugene F. Pigott, Jr. for a unanimous Court, the Court held that the Comptroller did not have such power.

In reaching its decision, the Court reviewed the functions of the Superintendent of Insurance, which supervises and regulates the State's insurance industry, and acts as a court-appointed receiver for insurance companies in financial distress. In the latter role, the Superintendent has broad powers to act as a fiduciary to manage the business of such insurance companies, and to marshal and manage their assets for the benefit of policyholders, creditors, and the general public.

As a receiver, the Superintendent may either rehabilitate or liquidate an insolvent domestic insurer. If liquidation is appropriate, the Superintendent asks the Supreme Court for a liquidation order and, when the order issues, takes possession of the property of the insurer, and notifies creditors to submit their

claims. The Superintendent, in effect, becomes the insurer with title to all of its property and other rights. During the rehabilitation and liquidation processes, the Bureau, a separate part of the Insurance Department, conducts the operations of the insurer.

The dispute in *Dinallo* arose out of a request by the Comptroller in January 2004 to audit the financial management and operating practices of the Bureau. The Bureau rejected this request, and ultimately brought a special proceeding to quash subpoenas *duces tecum* served by the Comptroller, challenging the Comptroller's authority to conduct an audit. In the proceeding, the Comptroller sought a declaration of its power to pre-audit all Bureau expenditures and post-audit the Bureau's operations, relying upon the State Constitution and various State statutes. The Supreme Court held that the Comptroller had no such power, but the Appellate Division, First Department, reversed in a 3-2 decision.

The Court of Appeals, in reinstating the judgment of the Supreme Court, outlined the Constitutional and statutory basis upon which the Comptroller is designated as the "independent auditing official for the affairs of the State" with power to audit funds under state control and to superintend "the fiscal concerns of the State." (Citations omitted.) The Court nonetheless held that, because liquidation of an insurer does not implicate the finances of the State, or monies of or under the control of the State, the Comptroller has no power to audit the Bureau. The Court also held that when the Superintendent operates as a receiver for a distressed insurer, it is standing in the insurer's shoes and not functioning as a public official with responsibility for regulating the insurance industry. Finally, the Court concluded, when the Bureau assumes control of the day-to-day functioning of the insurer, it is not doing so for the State, but rather pursuant to the order of the Supreme Court that empowered it to stand in the insurer's shoes.

### **Collateral Estoppel**

In *Launders v. Steinberg*, the plaintiff sought to collaterally estop the defendant, based on his prior criminal conviction, from contesting certain claims in this civil proceeding. In a memorandum opinion, the Court confirmed that, for collateral estoppel to apply, there must be an "identity of issue which has necessarily been decided in the prior action, and there must have been a full and fair opportunity to contest the decision now said to be controlling." Quoting [\*Buechel v. Bain\*, 97 N.Y.2d 295, 303-04 \(2001\), cert. denied, 535 U.S. 1096 \(2002\)](#).

The case arose out of the tragic death of six-year old Lisa at the hands of Joel Steinberg. Steinberg delivered a fatal blow to the head of the child, then went out to dinner. When he returned later, he and his companion, Hedda Nussbaum, free-based cocaine. Paramedics were not summoned until approximately 8-10 hours after the injury was inflicted, and approximately 40 minutes after the child had stopped breathing. Steinberg was tried for murder in the second degree for the blow that he inflicted on the child, of which charge he was acquitted, and for

manslaughter in the first degree for having struck the child with intent to cause injury and then failing to obtain medical assistance, causing her death, for which he was convicted.

A civil action was brought subsequently by Lisa's birth mother as administratrix of Lisa's estate against Steinberg, Nussbaum, and agencies and employees of the City of New York. The trial court granted summary judgment against Steinberg on plaintiff's fifth, sixth and seventh causes of action, finding that Steinberg was collaterally estopped from contesting those claims. The seventh cause of action was based upon the same conduct for which Steinberg was charged and convicted, namely injuring Lisa on her last night and then failing to secure prompt medical treatment for her. The fifth and sixth causes of action, however, were based upon alleged prior incidences of abuse.

The Appellate Division, First Department, divided (3-2) over whether plaintiff was entitled to summary judgment on her fifth and sixth causes of action. Because a major portion of Steinberg's criminal trial had focused on the abuse of Lisa in the weeks prior to her death and because Steinberg's defense at the criminal trial included asserting that Hedda Nussbaum had been Lisa's abuser, the Appellate Division majority reasoned, "Steinberg's conviction means the jury found credible the testimony of witnesses who testified about Steinberg's abuse of Lisa prior to the night of the final blow." The Appellate Division ruled that Steinberg was estopped from contesting the civil claims predicated on this earlier abuse.

The Court of Appeals disagreed. Although evidence of prior acts of abuse by Steinberg was introduced at the criminal trial, the jury in that case was not *required* to determine that Steinberg had committed such acts in order to convict him of the manslaughter charge. Thus, whether he had committed the prior acts was not "necessarily decided" in the criminal trial, and Steinberg was entitled to a civil jury trial on the fifth and sixth causes of action against him.