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The City's Appellate Practice: Recent State Cases

My previous column considered recent activities of the Law Department's Appeals Division in the federal appellate courts, focusing on several cases involving important questions of law and public policy, including a timely discussion of the city's amicus in Windsor v. United States. This brief survey of some of the cases handled by the division in the state appellate courts over the past year further illustrates the breadth and scope of the division's practice. These cases include an examination by the Court of Appeals of the relationship between the state's interest in legislation concerning the city and the Home Rule Clause of the state constitution, the provision of counsel to indigent criminal defendants, city liability arising from regulatory activities, and, finally, the interplay between secrecy surrounding investigations conducted during the McCarthy era and our modern Freedom of Information Law.

Taxis and Home Rule

Innovative proposals for improving taxi service for all New Yorkers championed by Mayor Michael Bloomberg and David Yassky, his chair of the Taxi and Limousine Commission (TLC), have given rise to rulemaking and litigation that have involved a number of divisions of the Law Department. One of these initiatives tackles the long-standing problem of providing street hail taxi service to uptown Manhattan and the other boroughs. Previously, a limited number of yellow taxis possessing medallions issued by the TLC were the only vehicles authorized to accept passengers by street hail throughout the five boroughs of New York City. However, much of the city is underserved by these taxis, which make over 95 percent of their pick-ups in three locations: Manhattan's central business district, JFK International Airport, and LaGuardia Airport.

In December 2011 and February 2012, Governor Andrew Cuomo signed into law chapter 602 of the Laws of 2011, as amended by chapter 9 of the Laws of 2012 (the HAIL Act), which creates a new class of licensed (and metered) livery vehicles that may accept street hails in all five boroughs, except in Manhattan's central business district (south of East 96 Street and West 110 Street) and at the airports, and authorizes the mayor to issue up to 18,000 of these licenses. HAIL Act §§4(b-c), 5(a).

In addition to bringing street-hail service to the outer boroughs, the HAIL Act addresses the long-standing shortage of yellow taxis and, in particular, wheelchair-accessible taxis. The HAIL Act (1) requires that at least 20 percent of hail-licensed livery vehicles be wheelchair-accessible, and (2) authorizes the mayor to issue, and sell at public auction, 2,000 new yellow taxicab medallions, all of which are required to be wheelchair-accessible. HAIL Act §§5(b), 8. This legislation was enacted without a home rule message.

Three months after the state Legislature enacted the HAIL Act, several trade associations of the yellow taxi industry sued New York City and New York State, seeking to enjoin it. Among other claims, the plaintiffs asserted that the HAIL Act violates provisions of the New York State Constitution, chief among them the Home Rule Clause, Article IX, section 2(c), which, in substance, grants to local governments the power to enact local laws relating to their "property, affairs or government."1 After temporarily enjoining implementation of the HAIL Act, Justice Arthur Engoron of the Supreme Court, New York County, granted the plaintiffs' motions for summary judgment, denied the defendants' cross-motions, and declared the law unconstitutional. Taxicab Serv. Assn. v. State of N.Y., 2012 N.Y. Misc. LEXIS 4098, 2012 NY Slip Op 32221(U) (Sup. Ct., N.Y. Co., 2012).

After the parties agreed to address only the constitutionality of the HAIL Act, the New York State Court of Appeals accepted a direct appeal, under CPLR 5601(b). On June 6, 2013, the Court of Appeals, in an opinion by Judge Eugene F. Pigott, Jr., unanimously reversed Supreme Court, Greater N.Y. Taxi Assn. v. State of New York, 2013 N.Y. Lexis 1431, 2013 NY Slip Op 4044 (2013), and upheld the law.

Absent a home rule request from the municipality, the court explained, the Home Rule Clause generally bars the Legislature from passing laws that affect the "property, affairs, or government" of just one municipality. 2013 NY Slip Op 4044, at **5-**6. Under Court of Appeals precedent, however, a home rule request is unnecessary where the state possesses its own "'substantial interest' in the subject matter of the legislation and 'the [State] enactment…bear[s] a reasonable relationship to the legitimate, accompanying substantial State concern'." Id. at **6.

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Quoting from the HAIL Act's extensive legislative findings, the court held that the law involves a matter of substantial state interest: efficient transportation services for millions of disabled and non-disabled residents and visitors "in the State's largest City and international center of commerce." Id. at **7. The HAIL Act's substantive provisions, the court further held, bear a "reasonable relationship" to that substantial state interest. Id. at **8. Therefore, the court concluded, the legislation did not violate the Home Rule Clause. The court further rejected the plaintiffs' other constitutional arguments. Id. at **9-**10.

Indigent Legal Services Plan

In 1963, the U.S. Supreme Court held, in Gideon v. Wainwright, 372 U.S. 335 (1963), that the fundamental right to counsel in criminal cases creates an attendant obligation of the state to provide indigent defendants with representation.

Two years later, in response to Gideon, the New York State Legislature enacted article 18-B of the County Law (County Law §722 et seq.). Section 722 authorizes county governments and New York City to provide criminal defense and certain other legal representation to indigent persons through any of four means: (1) a public defender's office; (2) a private legal aid bureau or society; (3) counsel provided pursuant to a bar association plan; or (4) a combination of any of the first three options.

In 1965, the city implemented a combination plan, in accordance with option 4, with representation provided by the Legal Aid Society (option 2) and by counsel furnished pursuant to a plan of the New York County Lawyers' Association and the New York City Bar (option 3). Under the 1965 plan, the Legal Aid Society provided indigent representation, except when, due to a conflict of interest (common in criminal cases involving multiple defendants with potentially adverse interests), it could not represent one or more defendants. In that event, attorneys selected from so-called 18-B panels established pursuant to the bar association plan would provide representation.

In 2010, responding to the need for greater efficiency and cost savings in the administration of the program, the city modified its indigent criminal defense plan. The new plan, set forth in the rules of the Mayor's Office (43 Rules of the City of New York [RCNY] chapter 13) and Executive Order No. 136 of 2010, continues to be a combination plan, incorporating elements of the existing bar association plan together with representation by the Legal Aid Society and other institutional providers selected pursuant to a competitive procurement process.

However, the new plan relies more heavily on the services of institutional providers, which are called upon to handle cases either as the primary assigned provider, or as conflict counsel in the event the primary assigned provider has a conflict. Where no institutional provider is available to provide conflict counsel services, an attorney is assigned from an 18-B panel established pursuant to the bar association plan. By relying more heavily on institutional providers, and less on attorneys assigned in accordance with the bar association plan, the city's new plan contemplates economies of scale and increased accountability.

Several bar associations (not including the New York City Bar) commenced an Article 78 proceeding to block implementation of the new indigent defense plan as a violation of County Law section 722, arguing that the new plan is not a valid combination plan, since it has not been approved by any bar association. After the New York State Supreme Court and the Appellate Division, First Department, ruled in the city's favor, petitioners sought review by the Court of Appeals.

In a 4-3 decision, New York County Lawyers' Assn. v. Bloomberg, 19 N.Y.3d 712 (2012), the court rejected petitioners' argument, concluding that section 722 did not require bar association approval of the new plan because the bar associations had already approved, under the previous plan, the 18-B panels that were carried over into the new plan. To conclude otherwise, Judge Carmen Ciparick's majority opinion stated, "would be to allow the bar associations to unilaterally block the City from adopting a plan for conflict representation that includes institutional providers." Id. at 723. Accordingly, the court held that the city could proceed with the assignment of counsel, including conflict counsel, under the new plan.

As recently reported in the Law Journal, the city has begun to implement the new plan, assigning conflict counsel representation to the Legal Aid Society and other institutional providers (New York County Defender Services, Brooklyn Defender Services, the Bronx Defenders and Queens Law Associates) in all boroughs except Staten Island. It is anticipated that the change will reduce the cost to the city of the indigent defense program by about $6 million a year.

Crane Regulation

In one of the federal appellate cases discussed in the previous column, Steel Institute of New York v. City of New York, 2013 U.S. App. Lexis 9236 (2d Cir. 2013), the U.S. Court of Appeals for the Second Circuit rejected a federal preemption challenge to the city's regulation of construction cranes, concluding that the city may, under its police power,

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comprehensively regulate the design, construction and operation of cranes, derricks and other hoisting equipment within its borders. However, litigation in state courts relating to the city's crane regulations has established that this regulatory authority, which exists to protect the public safety in general, does not impose a special duty under tort law to protect particular individuals or entities.

In Matter of East 91st Street Crane Collapse Litigation, 103 A.D.3d 503 (1st Dept. 2013), a faulty weld on a crane at a Manhattan construction site caused the crane to collapse, killing two workers. Their estates brought wrongful death actions against the city and three companies involved in the construction project. Both the estates and the construction companies, which asserted cross-claims against the city for indemnification and contribution, alleged that the city had negligently approved the crane's use, thereby breaching a special duty to ensure the crane's safety on their behalf.

After the New York State Supreme Court dismissed the negligence claims and cross-claims against the city, the construction companies appealed to the Appellate Division, First Department. The Appellate Division affirmed the dismissal of the cross-claims, noting that a "municipality is not liable for negligent performance of a governmental function unless there exists a special duty to the injured party, as opposed to a general duty owed to the public." Here, the court held, there was no evidence indicating that the city had assumed an affirmative duty to the construction companies to ensure the crane's safety. Rather, in the court's view, "the City took steps to ensure the safety of the crane as an exercise of its duty to the general public." Id. at 504. Moreover, the court noted, the city had not "directed and controlled the subject crane" in the face of any "known, blatant, and dangerous safety violation." Id. Accordingly, the court concluded, the city owed no special duty to the construction companies to ensure the crane's safety, and was not liable for their damages.

The cross-claimants have not sought leave to appeal the court's decision to the Court of Appeals. The city's appeal from the denial of its motion for summary judgment dismissing a separate claim against it by one of the estates, alleging that the city had control over the property in question and, as such, was obligated under the Labor Law to provide "proper protection" to workers on the site, is pending in the Appellate Division.

"Anti-Communist" Case Files

In the mid-20th century, especially in the 1940s and 50s, the New York City Board of Education, like many other governmental entities, conducted investigations of its employees suspected of being present or former members of the Communist Party. In conducting these investigations the board gave assurances to interviewees that their identities would be kept confidential.

The city's municipal archives, operated by the Department of Records and Information Services (DORIS), preserves and makes available city records for historical research. Its collection includes records relating to these investigations. Pursuant to rules adopted by DORIS, 49 RCNY §3-02, researchers were granted access to these records, either with personally identifying details redacted (unless permission is obtained from persons named or their heirs), or, if doing general research, upon certifying that the researcher will neither record nor publish names or personally identifying information from the records. Lisa Harbatkin, a researcher unwilling to accept this limitation, made a request, under the New York State Freedom of Information Law (FOIL), Public Officers Law §§84, for unrestricted access to the board's "anti-Communist" case files. After the city denied Harbatkin's FOIL request for unrestricted access, she challenged the denial in a CPLR Article 78 proceeding.

Citing the board's promises of confidentiality and the privacy interests of confidential informants, the New York State Supreme Court upheld the denial of Harbatkin's request. Unanimously affirming, the Appellate Division, First Department, agreed "that the privacy interests of the surviving subjects of the investigation and their relatives…outweigh [Harbatkin's] interest in being able to publish the names of teachers contained in the records." Matter of Harbatkin v. New York City Dept. of Records & Info. Servs., 84 A.D.3d 700 (1st Dept. 2011), modif'd, 19 N.Y.3d 373 (2012).

On appeal, the Court of Appeals modified the order. Matter of Harbatkin v. New York City Dept. of Records & Info. Servs., 19 N.Y.3d 373 (2012). To determine the applicability of FOIL's privacy exemption (Public Officers Law §§87[2][b] and 89[2][b]), the court "balanc[ed] the privacy interests at stake against the public interest in disclosure of the information." Applying this balancing test, the court reasoned that now, more than 50 years after the board's interviews occurred, disclosing the names of people mentioned during the interviews would not constitute an unwarranted invasion of their personal privacy. While recognizing that the disclosure may not be "completely harmless" to people named in the documents or members of their families, with the passage of years the "diminished claims of privacy" are outweighed by the interests of historians, who would "face a serious handicap if required to work with the redacted transcript." Id. at 380.

The court struck a different balance, however, regarding Harbatkin's request for unrestricted access to the names of interviewees. Citing the board's promise of confidentiality, the court upheld the denial of unrestricted access to their names,

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finding it "unacceptable for the government to break that promise, even after all these years." Id. The court thus allowed the city to redact the names and other identifying details of the interviewees who received assurances of confidentiality.

On Feb. 19, 2013, the U.S. Supreme Court denied Harbatkin's petition for a writ of certiorari, in which she argued that the city's regulation imposes unconstitutional conditions on access to information and the exercise of First Amendment rights. Harbatkin v. N. Y. City Dept. of Records & Info. Svs., 2013 U.S. Lexis 1101.

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Endnotes:

1. The challenge also alleged violation of the Double Enactment Clause, Article IX, section 2(b)(1), which requires the Legislature and Governor to resort to a special procedure when enacting any State law that "repeal[s], diminish[es], impair[s] or suspend[s]" a power of a local government; and the Exclusive Privileges Clause, Article III, section 17, which prevents the Legislature from passing any "private or local bill" that grants any "exclusive privilege, immunity or franchise" to "any private corporation, association or individual."