

NEW YORK COURT OF APPEALS ROUNDUP

LONG-ARM JURISDICTION OVER COPYRIGHT INFRINGEMENT VIA THE INTERNET

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APRIL 20, 2011

From time-to-time the Court of Appeals is called upon to apply principles developed decades or even centuries ago to issues presented by the era of electronic communications and commerce. The Court did just that in [*Penguin Group \(USA\) Inc. v. American Buddha*](#), applying long-arm jurisdiction to out-of-state conduct allegedly constituting infringement of copyrights held by a New York-based publisher. In another decision, the Court resolved whether any of the three "accident" endorsements to the insured's automobile insurance policy provided coverage for another's intentional tort. In a third decision we discuss this month, the Court clarified the pleading standards for claims under the Unjust Conviction and Imprisonment Act.

Infringement Jurisdiction

Penguin Group (USA) Inc. v. American Buddha came before the Court from the Second Circuit through the certification procedure. However, the Court of Appeals, in a decision by Judge Victoria A. Graffeo, declined to answer the broad question posed by the federal court – under New York's long-arm statute, where is the situs of the injury in a copyright infringement action – and instead addressed the reach of that statute in the circumstances of the case, namely alleged digital piracy. The Court held that, for purposes of CPLR 302(a)(3)(ii), where a defendant infringes on a copyright by publishing a protected work on the Internet, the situs of the injury is the copyright holder's principal place of business.

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Defendant American Buddha is a not-for-profit entity organized under the laws of Oregon with its principal place of business in Arizona. Its websites' servers are located in Oregon and Arizona. It was within those two states that the defendant uploaded onto the internet complete copies of four books, the copyrights for which are owned by Penguin Group. Defendant made the contents of the books available for download free-of-charge, while assuring its users that downloading the works did not constitute copyright infringement.

Penguin Group brought an infringement action in the U.S. District Court for the Southern District of New York. Although the claim arose under the federal Copyright Act, to assert personal jurisdiction over an out-of-state defendant in such an action, the plaintiff must satisfy the requirements of New York's long-arm statute, CPLR 302. Penguin Group relied upon Section 302(a)(3)(ii), which permits the exercise of jurisdiction over a non-domiciliary that commits a tortious act outside of the state that causes injury to a "person or property" within the state, if the non-domiciliary (a) expects or should reasonably expect the act to have in-state consequences and (b) derives substantial revenue from interstate or international commerce.

With respect to the in-state "person or property" aspect of determining the locus of the injury, the Court of Appeals reached its decision based upon the location of the copyright owner, i.e., the "person," as discussed below. It is interesting to note, however, the Court's statement that, in providing an answer to the Second Circuit, it was accepting the Second Circuit's characterization of the copyright as (1) having a physical location, despite the fact that it is intangible, and (2) in this case, being located in New York, where its owner is located.

While the case was in federal court, the District Court granted defendant's motion to dismiss for lack of jurisdiction. It applied New York authority holding that the in-state injury element of the long-arm statute cannot be predicated upon derivative economic injury felt in New York solely based upon the injured party's presence here. Defendant and amicus Public Citizen championed that argument. The Court of Appeals acknowledged the argument as compelling, but found more compelling the argument of Penguin Group and various publishing industry amici that a New York-based copyright holder sustains injury in New York when its property is uploaded onto the Internet.

The Court's unanimous decision rested on two factors. First, material uploaded onto the Internet is available to people everywhere, which distinguishes a case of this nature from the commercial cases in which injury is limited to the place(s) where the seller lost

business. The second factor critical to the result is the "unique bundle of rights granted to copyright owners." Infringement upon these rights, among other harms, can cause a "diminishment of the incentive to publish or write." As a result, the decision in *Penguin Group* cannot be broadly applied either to Internet-based torts that do not involve copyright infringement or to infringement by means other than Internet publication.

Uninsured Motorist Coverage

Neil Conrad Spicehandler was one of several people hit when Ronald Popadich drove his car onto a Manhattan sidewalk with the intent, as Mr. Popadich admitted, to kill pedestrians. After Mr. Spicehandler died of complications from his ensuing surgery, the administrator of his estate sought coverage under an automobile liability insurance policy that had been issued to him by State Farm. The insurer instituted [*State Farm Mutual Automobile Insurance Co. v. Langan*](#), seeking a declaration that it had no coverage obligation because Mr. Popadich's conduct was intentional and thus not an "accident."

In a 5-2 decision, the Court found coverage under each of three endorsements that involve "accidents," including under the policy's uninsured/underinsured motorist (UM) endorsement. In so doing, the Court joined a trend of states that have found UM coverage for victims of an uninsured motorist's intentional conduct.

The Supreme Court had granted summary judgment in favor of State Farm, finding no coverage under the UM endorsement or the personal injury protection and death, dismemberment and loss of sight endorsements (the "Other Endorsements"). The Appellate Division, Second Department, reversed the lower court's ruling with respect to the Other Endorsements, but affirmed with respect to the UM endorsement. The Court of Appeals majority overturned the UM portion of the Second Department's decision.

Was Mr. Spicehandler the victim of an "accident"? The Court held that he was, in an opinion by Chief Judge Jonathan Lippman. Although not defined in the policy, the term has been defined in case law for purposes of automobile policies as an event typically involving violence or the application of external force that is "unexpected, unusual and unforeseen" from the perspective of the insured. There is no doubt that, from Mr. Spicehandler's viewpoint, the incident fell within that definition and, as a result, the Other Endorsements clearly provided coverage.

Application of the UM endorsement to this scenario was more complicated, however. State Farm, the Appellate Division and the dissenters in the Court of Appeals all relied

upon [McCarthy v. Motor Vehicle Accident Indemnification Corp.](#), 16 A.D.2d 35 (4th Dept. 1962), aff'd, 12 N.Y.2d 922 (1963). There, the plaintiff similarly was injured by another's intentional assault with a vehicle. She sought coverage under a Motor Vehicle Accident Indemnification Corporation Law endorsement, which provided coverage for injuries "caused by accident" that arose from the operation of an uninsured automobile. She was unsuccessful, however. The Court in *McCarthy* found that an MVAIC endorsement was intended to put a victim in the same position she would have been in had the uninsured or unidentified motorist carried insurance—not a better position—and the other motorist could not be insured for his own intentional misconduct.

The majority distinguished *McCarthy*. The MVAIC coverage there was funded by an assessment upon all insurance companies doing business in the state. The Appellate Division in *McCarthy*, affirmed by the Court of Appeals, found that payment out of the MVAIC fund would be inconsistent with the purposes for which it had been established. Here, by contrast, the UM coverage was paid for by Mr. Spicehandler through his premium payments. Further, the public policy against insuring a person for his own criminal acts was not implicated in this case.

Judge Robert S. Smith, joined by Judge Susan Phillips Read, dissented. Judge Smith's opinion argued that the purpose of UM coverage—as with MVAIC coverage—is to put the insured in the same position he would have been in had the other driver carried insurance. Such an analysis looks at the other driver as the insured, and even if Mr. Popadich had purchased an insurance policy, he would not be entitled to indemnification, as a matter of public policy.

Unjust Conviction

In [Warney v. State of New York](#), the Court clarified the unique pleading standards for a claim under the Court of Claims Act §8-b, the Unjust Conviction and Imprisonment Act. The applicable pleading standards are higher than in most civil cases, in keeping with the balance that the Legislature sought to strike between providing a remedy for those who were innocent yet unjustly imprisoned, and preventing the filing of frivolous claims that would overburden the justice system.

The background of the action is as follows. The Rochester police found a murder victim in his home. The following day, claimant Douglas Warney called the police and falsely accused his cousin of committing the crime. The police questioned Mr. Warney first in his home, and two days at the station house. Mr. Warney signed a lengthy and detailed confession. At trial, however, Mr. Warney testified that the confession was both coerced

and untrue. He was convicted of second-degree murder and spent the next nine years in prison. Subsequent tests of DNA found at the crime scene linked the murder to another man (not Mr. Warney's cousin), who confessed to the crime.

Mr. Warney filed a claim under the act. His pleading alleged that, prior to questioning him, the police were aware of his psychiatric problems and penchant for reporting false incidents. It also alleged that Mr. Warney was an eighth-grade dropout with an IQ of 68 who at the time was suffering from AIDS-related dementia, and that during the interrogation he made a request for counsel, which was denied. Finally, Mr. Warney alleged, his confession was the product of threats and verbal abuse from the police, who supplied details of the crime that had not been made public in order to make the confession seem credible.

While the Court of Claims dismissed the claim and the Appellate Division, Fourth Department, affirmed, the Court of Appeals held that Mr. Warney's pleading was sufficient to survive the state's motion to dismiss. Judge Carmen Beauchamp Ciparick's opinion for the Court found the Court of Claims' decision was based upon credibility determinations and fact-finding, both of which are inappropriate at the pleading stage.

The Legislature has imposed several hurdles for a claim under the act. First, the statute specifically provides that the claim must be accompanied by documentary evidence that (a) the claimant was convicted and imprisoned; (b) either the claimant was pardoned on grounds of innocence or the accusatory instrument against him was dismissed; and (c) his claim is not time-barred. Contrary to the government's position, the Court held that these are the only elements of the cause of action that must be supported by documentary evidence at the outset of the case.

Second, the pleading must state in "sufficient detail" facts permitting a court to find the claimant is likely to succeed in meeting his burden of establishing certain elements by clear and convincing evidence, including that he did not commit "any of the acts charged" and "did not by his own conduct cause or bring about his conviction." "Clear and convincing evidence" does not mean that the Court of Claims should make factual determinations, however. Rather, in ruling upon a motion to dismiss, the court should accept the facts alleged as true.

The Court also interpreted the requirement that the claimant did not bring about his own conviction, explaining that the proximate cause standard applies. Last, the Court stated that if a confession was coerced, it will not necessarily bar a claim.

Judge Smith, in a separate concurring opinion, emphasized that the cause of action created by the act is a limited one, and that it was the particular circumstances of this case that warranted the unusual result of allowing a claim under the act to proceed despite the fact the claimant had confessed to the crime for which he was imprisoned. The concurrence noted that the prosecutor's closing argument drew attention to the fact that Mr. Warney's confession contained several details of the murder that were never made public. It now appears that the police must have furnished these details to Mr. Warney. Judge Smith stated that these facts alone warranted denial of the motion to dismiss.

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