New Jersey Law Journal

SUPREME COURT YEAR IN REVIEW SEPTEMBER 3, 2007 189 N.J.L.J. 790

EMPLOYMENT LAW

CEPA Coverage Expanded

Independent contractors receive protection from retaliation

By Rosemary Alito

This year brought several important employment law opinions, explaining — and expanding — the group of workers protected under the Conscientious Employee Protection Act; defining the elements of proof of a claim of retaliation under the Law Against Discrimination in line with parallel federal law; clarifying and limiting the employer's obligation to reasonably accommodate a handicapped employee; and liberally interpreting the standards for certification of a state-wide wage and hour class action. With major decisions favoring both employers and employees, there was cause for joy (and displeasure) for lawyers on both sides of the aisle this year.

CEPA May Cover Independent Contractors

The Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -8, (CEPA) protects employees from retaliation for engaging in specified protected activity. It defines an employee as "any individual who performs services for or under the control and direction of an employer for wages or other remuneration." N.J.S.A. 34:19-2(b). The question of who falls within that definition has been a recurring issue for the Court. Last term, in *Feldman v. Hunterdon Radiological Associates*, 187 N.J. 228 (2006), the Court considered that question in the context of a physician who was also a shareholder/director of the medical group she sought to sue. In concluding that the plaintiff in that case was not an employee under CEPA, the Court endorsed the fact-specific and holistic test utilized by the United States Supreme Court in *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440 (2003). This year, the Court considered the question in the independent contractor versus employee context, and utilized another holistic, fact-specific test to make its determination — the test established for determining coverage under the Law Against Discrimination in *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998), *D'Annunzio v. Prudential Insurance Co.*, 192 N.J. 110 (2007), and *Stomel v. City of Camden*, 192 N.J. 137 (2007). In so doing, it expanded the scope of the law, potentially including professionals who traditionally might be considered independent contractors, but whose work has become integrated with the employer's business.

The plaintiff in *D'Annunzio* was engaged by Prudential as a medical director in its Personal Injury Protection (PIP) department. In accordance with Prudential's standard practice, D'Annunzio was designated and treated as an independent contractor. He was required to maintain an active private medical practice and to make certain that his hours billed to Prudential did not exceed 50 percent of his total practice. He executed a consultant agreement in the name of his own professional association, under which the PA was compensated on an hourly basis for up to 20 hours of work a week. He performed his work for Prudential on Prudential premises during designated hours. The consulting agreement specified that the PA was an independent contractor responsible for its own tax obligations. D'Annunzio asserted that although he had expected to be able to perform his professional responsibilities independently, he found that he could not; that Prudential sought to exercise substantial control over him. As the Supreme Court summarized it, "In addition to requiring D'Annunzio to record his billable hours on Prudential's time sheet forms, other accouterments of the job appeared to D'Annunzio to be designed to make him essentially a cog

Alito is a partner at Kirkpatrick & Lockhart Preston Gates Ellis of Newark and is the author of *New Jersey Employment Law* (2nd ed.) and *Employment Law for New Jersey Businesses*, both published by New Jersey Law Books. She is also the chair of the *New Jersey Law Journal* Editorial Board. Alito represented Resorts International in *Carmona v. Resorts International Hotel Inc.*, discussed in this article.

in the machinery of Prudential's PIP Department." After only a few months, D'Annunzio began to complain about perceived insurance violations and Prudential began to criticize his performance. His contract was terminated and he filed suit alleging that he was terminated because he had complained about lack of regulatory and contractual compliance, and that the termination was therefore in violation of CEPA.

The trial court, the Appellate Division and the Supreme Court all utilized the *Pukowsky* test; however, they reached different conclusions. The trial court found that D'Annunzio was an independent contractor. The Appellate Division reversed, holding that when the plaintiff is a professional, the degree of "control and direction" the putative employer exercises is more important than the presence or lack of financial arrangements indicative of a traditional employee. The Supreme Court affirmed 5 to 1, in a majority opinion by Justice Jaynee LaVecchia. Justice Roberto Rivera-Soto dissented.

The Court began its analysis with a history of CEPA's enactment in the wake of the Supreme Court's opinion in *Pierce v. Ortho Pharmaceutical Corp.,* 84 N.J. 58 (1980). It noted that as a remedial statute, CEPA should be construed liberally. Although by its specific language it applies to "employees" only, the Court cited its decision in *Feldman* for the proposition that the absence of a statutory reference to independent contractors is not determinative, and that CEPA should not be limited to "traditional" employees. It is important to look to the goals of CEPA, the Court concluded, and to focus on the reality of the situation, not labels. Accordingly, the Court concluded (as it has in many different contexts in the past) that "employee" status means different things in different contexts. When the context is "social" legislation, three considerations "must come into play": 1) the extent of employer control over the worker; 2) the worker's economic dependence on the employer; and 3) the degree of functional integration of the employer's business with that of the worker. The way to address those considerations with regard to a "non-traditional work relationship," the Court continued, is by applying the 12 factors set forth in *Pukowsky*:

1) the employer's right to control the means and manner of the worker's performance;

(2) the kind of occupation — supervised or unsupervised;

(3) skill;

(4) who furnishes the equipment and the workplace;

(5) the length of time in which the individual has worked;

(6) the method of payment;

(7) the manner of termination of the work relationship;

(8) whether there is annual leave;

(9) whether the work is an integral part of the business of the "employer";

(10) whether the worker accrues retirement benefits;

(11) whether the "employer" pays Social Security taxes; and

(12) the intention of the parties.

In applying these factors to the professional employee, the Court discounted the importance of the employer's inability to control the manner in which professionals like doctors (and the lawyer in *Stomel*) actually perform their work. It seemed to replace it as the most important factor in determining employee status with the extent to which the professional's work is integrated into the employer's business. It did not explain specifically how that squares with the statutory definition of "employee" as an individual "who performs services for and under the control and direction of an employer." But it appears to have concluded that the statutory definition is simply inapt when a professional worker in involved. "An employer cannot be expected to exert control over the provision of specialized services that are beyond the employer's ability. Yet, the work must be an essential aspect of the employer's regular business." It then explained the factors that go into determining whether there is integration, never returning to the language of the statute it was applying.

Integration, now apparently the key factor at least where the plaintiff is a professional, depends on, inter alia: (1) whether the worker has become a "cog" in the business; (2) whether the work is continuous and directly required for the employer's business, as opposed to indirect and intermittent; (3) whether the professional is routinely and regularly available to perform the employer's work, as opposed to being available to the public on his own terms; (4) whether the professional is required to perform administrative or routine activities. If the answer to these questions is yes, then the worker is an employee for CEPA purposes under *D'Annunzio*. Applying that analysis to the facts before it, the court concluded that the Appellate Division had correctly reversed the summary judgment in Prudential's favor. Among other things, Prudential controlled his day-to-day activities "in minute detail"; his time spent there was continuous, week to week for a substantial period of time during the business day; and he performed many administrative tasks in accordance with Prudential protocols.

Justice Rivera-Soto dissented, based on the language of the statute. Because CEPA limits its protections to employees, the Court is compelled to so apply it, he wrote. He added that there is no need to engage in the *Pukowsky* analysis because "the requirement that a CEPA claimant be a defined 'employee' — as opposed to an 'independent contractor' — was imposed by the Legislature, not by judicial fiat." The Legislature is well of aware of the difference between an employee and an independent contractor, the dissent continued, as is demonstrated by a long list of instances where it has made that distinction or specifically included certain independent contractors within other definitions of employee. "The brute force of these disparate statutory provisions is clear" the dissent concluded, "the Legislature can and repeatedly does set forth when it wishes its reach to cover independent contractors and when it does not." In Justice Rivera-Soto's view, the majority's rule stretches the statutory definition to an unrecogniz-

able — "and ultimately meaningless" — shape. He would leave any extension of CEPA to the Legislature. Finally, the dissent noted how the majority decision permits D'Annunzio to reap the benefits of his contract with Prudential while disclaiming it in other aspects to his benefit. He formed a professional association, which contracted with Prudential, and paid himself as an employee of the PA to gain a tax advantage. "Yet, when it suits his purpose in seeking to invoke CEPA's protections, D'Annunzio readily renounces all that he bargained for in exchange for a chance at a recovery under CEPA."

The plaintiff in *Stomel* was the municipal public defender for the City of Camden for more than 17 years. He was terminated by Camden Mayor Milton Milan within days of a public corruption trial in which he testified on behalf of the government and implicated the mayor in unlawful activity. He filed suit, alleging he was terminated in violation of CEPA and in violation of his First Amendment rights under the United States Constitution. The Supreme Court agreed with the Appellate Division that the trial court should not have held as a matter of law that Stomel was not an employee under CEPA. It also held that the City could be held vicariously liable for a violation of his constitutional rights.

As in *D'Annunzio,* the Court's analysis on the CEPA issue focused on the extent to which Stomel's work as a public defender was integrated into the city's administration. Like the doctors in *D'Annunzio* and *Feldman,* Stomel exercised independent professional judgment for his clients, free from the city's supervision. But the Court discounted that in its analysis as part of being a professional, not particularly significant to the issue of employee status. Nor did the Court find it significant that Stomel had his own private law firm and performed his public defender work through the firm. What it did find significant was the extent to which Stomel's work was a regular and continuous function of the municipality; that he fulfilled the city's obligations under the municipal Public Defender Act; that he was paid a set monthly amount; that he could not select his clients on behalf of the city; and that payment to him was contingent on approval of his work by the city law department. In short, while *D'Annunzio* and *Stomel* confirm the applicability of *Pukowsky* to CEPA, they also establish that the emphasis of the *Pukowsky* factors in cases involving professionals will be decidedly different. Justice Rivera-Soto dissented to this portion of *Stomel* for the reasons he expressed in *D'Annunzio*.

New Position Not Required for Reasonable Accommodation

In *Raspa v. Office of Sheriff of Glouscester County*, 191 N.J. 323 (2007), the Court examined the extent of the employer's obligation to "reasonably accommodate" an employee under the handicap provisions of the LAD. Specifically, a 6-2 majority of the Court reached the common-sense conclusion that there is no reasonable accommodation obligation when the employee's disability renders him unable to perform essential job functions of the position in which he was employed. Justice Virginia Long's dissent, joined in by Justice James Zazzali, was focused more on the facts of the *Raspa* case specifically than on the rule of law established.

The plaintiff in *Raspa* worked as a county corrections officer. He developed health problems that led him to submit a doctor's note stating that he needed to "be in an environment with minimum to no contact with prison inmates to insure minimum risk [to the corrections officer]." For various periods over several years, he was placed on light duty, but no full-time corrections officer position existed that did not involve contact with inmates Pursuant to policy, employees with on-the-job injuries had priority for temporary light duty assignments. The county ultimately determined that it could not continue to extend light duty work to the plaintiff and processed his involuntary disability retirement. Raspa filed suit under the LAD, claiming the refusal to create a permanent light-duty job for him constituted discrimination on the basis of his disability. A jury returned a verdict in his favor and the Appellate Division affirmed.

In reversing, the majority started with the fundamentals of its early disability rulings in the 1980s. It reaffirmed the LAD's purpose that the handicapped should enjoy equal access to employment, subject only to limits that cannot be overcome. It also reiterated, however, that the LAD is not intended to create an obligation that employers hire workers who, for any reason, are ultimately unable to perform the job. "The LAD leaves the employer with the right to hire or not to hire employees who are unable to perform the job, either because they are generally unqualified or because they have a handicap that in fact impedes job performance." Thus, under the majority's analysis, the threshold question continues to be whether the "disability reasonably precludes performance of the particular employment." N.J.S.A. 10:5-4.1. Raspa admitted that contact with inmates was an essential function of the corrections officer job and that he was simply unable to perform any of the essential functions that involved contact with inmates. Because it was demonstrated that Raspa's disability prevented him from performing that job, the majority concluded that as a matter of law he was not qualified, and that the requested accommodation of providing him indefinite light duty with no inmate contact was not a "reasonable" accommodation under the LAD.

The majority rejected Raspa's contention that because he had been assigned to light duty during a three-year period, it would be reasonable for that arrangement to be continued indefinitely. It adopted the reasoning of the Appellate Division in *Jones v. Aluminum Shapes, Inc*., 339 N.J. Super. 412 (App. Div. 2001), and *Muller v. Exxon Research and Engineering Co*., 345 N.J. Super. 595 (App. Div. 2001), *certif. denied,* 172 N.J. 355 (2002), that "the LAD does not require that an employer create an indefinite light duty position for a permanently disabled employee if the employee's disability, absent a reasonable accommodation, renders him

otherwise unqualified for a full-time, full-duty position." Thus, the majority concluded that an employer may limit light duty assignments to employees who are temporarily disabled and need to bridge to regular duty. Creation of such temporary posts does not create an obligation under the LAD to make them available on a permanent basis.

Finally, the majority noted that in the case before it, the impact of the employer's decision had been mitigated by the provision of a disability retirement, and that Raspa had not claimed that the employer's decision to involuntarily retire him was motivated by ill-will or discriminatory animus.

The dissenting opinion by Justice Long, joined in by former Chief Justice James Zazzali, appears not to quarrel with the guiding legal principles endorsed by the majority. Rather, the dissent makes two points focused on the facts on the case. First, it states there was a question of fact whether inmate contact was an essential job function of a corrections officer and that it was therefore properly submitted to the jury. Second, it states that Raspa could have been given light duty on a continuing basis within the current structure of the department, and that the sheriff's contention that it would need to create a new position to do so was simply unavailing.

Class Action Certification

Placing significant reliance on the public policy of equalizing the power of hourly employees with small claims and a large and allegedly unlawful employer, the Court in *Iliadis v. Wal-Mart Stores, Inc*., 191 N.J. 88 (2007), reversed the courts below to certify a state-wide class of about 72,000 in a contract and wage and hour case against Wal-Mart.

Plaintiffs in *Iliadis* were past and present hourly employees of Wal-Mart who claimed that, in an effort to reduce costs, Wal-Mart systematically denied promised rest and meal breaks and failed to compensate them for time worked by forcing them to work through breaks, locking employees in stores after they had clocked out and coercing employees to work off the clock. They asserted a variety of breach of contract and quasi-contract claims, as well as violation of New Jersey's Wage and Hour Law. They sought to represent a class of all past and present hourly employees in New Jersey from May 1996 to the present. The proposed class included hourly employees at 45 Wal-Mart Stores, one Wal-Mart Supercenter and nine Sam's Clubs. There were about 85 hourly job classification at Wal-Mart and 100 hourly classifications at Sam's Club.

The trial court denied class certification, finding that although the plaintiffs had satisfied the requirements of Rule 4:32-1(a) (numerosity, commonality, typicality and adequacy of representation) they could not meet the requirements of Rule 4:32-1(b)(3). Specifically, the court found that plaintiffs failed to demonstrate that "questions of law or fact common to the members of the class predominate over any questions affecting only individual class members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In evaluating the three factors then set forth in the Rules for determining predominance and superiority, the trial court found that two of them were met by plaintiffs, but that the third factor, "the difficulties likely to be encountered in the management of a class action," precluded class certification. It found that common questions did not predominate over individual issues raised by Wal-Mart, and that use of plaintiffs' statistical evidence would deprive Wal-Mart of its substantive right to contest issues regarding individual employees. The trial court also found that proceeding in the Wage and Hour Division of the Department of Labor was a superior and virtually cost-free method for the class members to pursue their claims.

The Appellate Division affirmed, noting that it was satisfied that the trial court was correct that individual determinations would have to be made of circumstances under which a particular employee missed a break or worked off the clock.

The Supreme Court reversed 4-1, in an opinion by former Chief Justice Zazzali. Justice Rivera-Soto dissented and Justice Long did not participate. The majority forged its opinion from the ideal of the class action as an equalizer, speaking of its historic mission of taking care of the smaller guy and vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all. Accordingly, the majority found it appropriate to read the requirements of Rule 4:32-1 quite liberally. "This Court, therefore, has been hesitant to provide defendants procedural shelter through a restrictive reading of the class-action rule."

On the question of predominance, the court started with the basic principles that: 1) the number and significance of common questions must be considered; 2) the Court must determine whether the benefit of determination in a class action outweighs the problems of individual actions; and 3) there must be a common nucleus of operative facts; and 4) predominance does not require the absence of individual issues or that all issues be identical. It defined the core issue in the case as "whether Wal-Mart engaged in a systematic and widespread practice of disregarding its contractual, statutory, and regulatory obligations to hourly employees in this State by refusing to provide earned rest and meal breaks and by encouraging off-the-clock work." Having thus defined the core issue, the Court listed a number of similarly broad common issues that it found predominate, including whether Wal-Mart promoted uncompensated work and created an atmosphere where policies were ignored in an effort to reduce costs; Wal-Mart's actual or constructive knowledge of off-the-clock work; and Wal-Mart's control over its New Jersey stores. Although recognizing that resolution of these common issues would not resolve the litigation and that numerous individual issues would remain on both plaintiff's proof of liability and Wal-Mart's defenses, the majority nonetheless found the predominance requirement satisfied. It expressed confidence that counsel and the trial court "can resolve the practical

challenges presented by this litigation's individualized questions of law or fact." It rejected Wal-Mart's reliance on the fact that courts in other states had found similar claims not appropriate for class action treatment, a fact also noted in Justice Rivera-Soto's dissent.

The majority also found that the class action was superior to other methods of resolution of the controversy. It found that because of the small value of each claim, disposition in the Wage and Hour Division of the Department of Labor was inferior. It expressed concern that some employees would lose their claims in that forum, since the statute of limitations on contract claims is six years and the statute of limitations on wage claims is two. And despite the availability of the DOL to process the employees' claims, it emphasized "the reality that if the proposed class is not certified, thousands of aggrieved employees will not seek redress for defendant's wrongdoing."

Finally, as to manageability, the majority found that denial of class certification on this basis is disfavored and should be the exception rather than the rule. While declining to address the specific concerns outlined by the trial court, the majority stated that it was satisfied that the likely management obstacles could be overcome and that class treatment should not be denied on the basis of vaguely perceived management problems. It cited two jury trials of other state-wide class actions against Wal-Mart as evidence of manageability. And it noted that the trial court could conduct the litigation as it deemed necessary, utilizing its "broad equitable power and sound discretion to manage the instant litigation and appropriately address the important concerns of both parties in respect of the permissible uses of statistical extrapolation, evidentiary redundancy, and any other procedural, administrative, and evidentiary issues that may arise." It concluded where it began, emphasizing the necessity of the class action device to equalize the power of the approximately 72,000 hourly employees and their allegedly abusive employer.

Justice Rivera-Soto, in dissent again, would have affirmed the trial court's determination that common questions did not predominate. He emphasized, as the Appellate Division did, that the standard of review of a trial court ruling on class certification is abuse of discretion. "There is simply nothing in the majority's decision that supports its conclusion that the trial judge abused her discretion in denying class action status to these plaintiffs. What the majority does do — and movingly so — is emote why, if it were a court of first instance, a case could be made for class action certification under the facts presented. However, the majority's disagreement with the trial judge's determination — as affirmed by the Appellate Division — simply does not and cannot rise to the level of an abuse of discretion." Rivera-Soto concluded that he agreed with the trial court, but that even if he did not, he could find no basis upon which to conclude that was an abuse of discretion.

Retaliation Claims Under the LAD

In *Carmona v. Resorts International Hotel, Inc*., 189 N.J. 354 (2007), the Court addressed a fundamental but unresolved issue regarding retaliation claims under the LAD; whether employees who make bad-faith or unreasonable internal complaints of discrimination may base claims of retaliation on those complaints. The Court held that they may not — an employee complaint is not protected activity under the LAD unless it is reasonable and made in good faith.

The plaintiff in *Carmona* claimed that he had been terminated from employment in retaliation for making a complaint of discrimination to Resorts' internal EEO office. Resorts denied that and contended that plaintiff was terminated for other conduct that had been the subject of an internal investigation and report. At trial, Resorts requested an instruction that as part of his retaliation claim plaintiff was required to prove that his initial complaint was reasonable and in good faith. The trial court denied that request. It also denied Resorts' request to enter into evidence its internal investigation, finding it to be 1) inadmissible hearsay; and 2) unreliable, because it was created on a computer and therefore subject to modification. In a per curiam opinion, the Appellate Division affirmed, stating that the requested instruction was not necessary. "In applying this requirement [of causation], and assuming, of course, a legitimate business reason for the employer's adverse action, we have no doubt that all reasonable juries will reject retaliation claims allegedly resulting from discrimination claims that were filed in bad faith without any factual basis."

The Supreme Court reversed 7-1, with a majority opinion by Justice Rivera-Soto and a dissent by Justice John Wallace Jr. Looking to federal precedent under Title VII of the Civil Rights Act of 1964 for guidance as it has done in the past, the majority found it entirely consistent with the purposes of the LAD to require a retaliation plaintiff to demonstrate that his initial complaint was reasonable and in good faith. It also looked to two Third Circuit opinions applying such a requirement under the LAD. And it found that the absence of such a requirement could lead to abuse:

> Common sense tells us that the Legislature could not have intended that the LAD provide a safe harbor to one who files a baseless, meretricious complaint. It also tells us that the LAD cannot protect one who preemptively files a complaint solely in anticipation of an adverse employment action by the employer. The LAD was and is intended as a shield to protect employees from the wrongful acts of their employers, and not as a sword to be wielded by a savvy employee against his employer.

The Court also found error in the

trial court's exclusion of Resorts' investigative report. "We hold that, within the usual limits that govern the admissibility of evidence as a whole, an investigative report concerning an employee is admissible as nonhearsay statements whenever the employer's motivations are directly at issue. As a general proposition, '[w]here statements are offered, not for the truthfulness of their contents, but only to show that they were in fact made and that the listener took certain action as a result thereof, the statements are not deemed inadmissible hearsay." However, that did not end the Court's analysis. For the report to be admissible it must be relevant, and for it to be relevant, the employer must prove that it knew of the report's contents and acted based on the information contained therein. Finally, the Court rejected the trial court's conclusion that the report was not trustworthy because it was maintained on a computer and therefore capable of being modified. Business records that are electronically stored are not to be treated differently from those that are maintained in hard copy.

Justice Wallace filed a brief, two-paragraph dissent, disagreeing with the majority on both counts, essentially for the reasons given by the trial court.

Computer-Related Offenses

In *Fairway Dodge, LLC v. Decker Dodge*,191 N.J. 460 (2007), the Court considered the continuing problem of the disloyal employee, this time in the context of the Computer Related Offenses Act, N.J.S.A. 2A:38A-1, et seq. (the Computer Act). *Fairway* arose out the sale of Fairway Dodge, a family-owned and operated dealership. Some family members who worked at Fairway were opposed to the sale and engaged in a number of activities detrimental to the dealership both before and after they resigned to work for a competitor. Among other things, they entered Fairway's business premises after hours and attempted to make a backup tape of the dealership's computer system. They successfully copied onto a tape the customer and sales lists and the sales and service history of vehicles and automotive parts of Fairway. They later caused that information to be downloaded to the computer system of their new employer, Decker Dodge. Fairway filed suit against its former employees, Decker and the owners of Decker. It alleged, among other things, violation of the Computer Act.

The trial court granted plaintiff summary judgment on its Computer Act claims against the former employees who had been involved in improperly accessing Fairway's computer system and Decker Dodge. Its Computer Act claims against three individuals who did not personally participate in the improper accessing went to trial, the jury rendered a verdict in Fairway's favor and an appeal ensued.

Section three of the Computer Act provides, inter alia, that a person damaged by any of the actions described therein "may sue the *actor*" for compensatory and punitive damages, costs of investigation, attorney's fees and costs of suit. The acts prohibited are

> (a) The *purposeful or knowing,* and unauthorized altering, damaging, taking or destruction of any data, database, computer program, computer software or computer equipment existing internally or externally to a computer, computer system or computer network;
> (b) The *purposeful or knowing*, and unauthorized accessing or attempt to access any computer, computer system or computer network;
> (c) The purposeful or knowing, and unauthorized accessing or attempt to access any computer, computer system or computer network;
> (d) The purposeful or knowing, and unauthorized altering, accessing, tampering with, obtaining, intercepting, damaging or destroying of a financial instrument; or
> (e) The purposeful or knowing accessing and reckless altering, damaging, destroying or obtaining of any data, data base, computer, computer program, computer software, computer equipment, computer system or computer network.

Both the Appellate Division and the Supreme Court held that the individuals who were not aware of the improper access when it occurred could not be held liable under the Computer Act. However, they based their decisions on different reasons. The Appellate Division held that these individuals were not "actors" within the meaning of the Computer Act, because they had not been involved in the improper accessing of the computers system. The Appellate Division thus limited liability under the Computer Act, stating that the "only parties liable pursuant to the [Computer Act] are those actors that actually access, alter, damage, take or destroy computer information." (as quoted in the Supreme Court Opinion). The Supreme Court found it unnecessary to address that question, noting only that the Computer Act does not define "actor" and that there is no legislative history defining the term. It held instead that two individuals in question could not have purposefully or knowingly violated the Act, because they did not learn about the improper accessing until long after it had occurred. ■