# New York State Law Digest

REPORTING IMPORTANT OPINIONS OF THE COURT OF APPEALS
AND IN SPECIAL SITUATIONS OF OTHER COURTS

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## COURT OF APPEALS REVERSES RULING THAT BROUGHT FORFEITURE OF $750,000 FOR WINNER'S FAILURE TO SUBMIT JUDGMENT FOR SIGNATURE WITHIN 60 DAYS AFTER DECISION

That's the *Farkas* case, which has been making noise in the court system for almost a year and a half, ever since it was handed down by the First Department on May 1, 2007. It involves Rule 202.48 of the Uniform Rules, which requires that when a decision contains a "submit" or "settle" direction, the winner must submit the order or judgment reflecting the victory within 60 days. Failure to do that constitutes an abandonment of the victory, unless the court finds "good cause" for excusing it. *Farkas* was the most extreme exercise of the rule reported so far.

The rule was a novelty in the Uniform Rules when they were first adopted in the 1980s. Before that there had been no time limit on how long a winner had to enter an order or judgment after the decision was handed down. The only incentive to act fast before then was that the loser's time to appeal would not start to run until the entry of the order or judgment and service of it on the loser with notice of entry. (That's still the case.) But now Rule 202.48 imposed the 60-day requirement for submission without regard to the appellate issue.

We discoursed at length on the new Rule in a lead note in the Digest (Issue 326) almost a quarter century ago, having anticipated that it was going to make trouble. (It took no genius to predict that.) And when delay can produce trouble, there will always be a coterie of lawyers to act as producers, to the chagrin of their clients and, sad to say, the entertainment of readers. Psychology calls it schadenfreude.

Cases evincing forfeitures caused by disregard of Rule 202.48 were not few. Even before the Digest turned exclusively to Court of Appeals decisions (which was in 1993) we reported several such cases from the lower courts, among them *Feldman* in Digest 382, *Aetna* in Digest 383, and *Alexander* in Digest 386. Then a Court of Appeals address to the rule in its 1996 *Funk* decision (Digest 445) took a more tolerant view of it, stressing that its 60-day restriction would not apply at all unless the decision explicitly calls for the submission or settlement of the order or judgment.

Cases on the rule, with bad news for the delayers, continued to appear; we wrote up a number of them in Siegel's Practice Review. *Lesnick v. Carvalho*, 299 A.D.2d 412, 749 N.Y.S.2d 56 (2d

Dep't 2002), noted in SPR 131:2 is an example, where a judgment debtor who got the judgment vacated lost out anyway for failure to get an order entered on the vacatur decision.

No case struck as deep as the *Farkas* case did, however, when it came down from the appellate division in the middle of last year (SPR 185, lead note). The court held that the $750,000 judgment must be forfeit because no good cause for the delay in submitting it for entry was shown. It was a 3-2 decision, however, with the dissent stressing the history of the litigation: a particularly bitter matrimonial dispute in which there had been several prior money judgments entered, apparently on time, all of which the defendant shamelessly, and so far successfully, evaded paying. The court was unanimous in labeling the defendant a contemptuous scoundrel, but the three-judge majority, "with reluctance" because it found the task "distasteful", nevertheless held for the defendant and barred the $750,000 judgment.

The dissent saw the delay in the entry explainable by the plaintiff's lawyers' focusing "on enforcement techniques that might actually give plaintiff some relief", in light of which the dissent considered it almost a futility for the plaintiff to be punctilious about the entry of this judgment when she had been unsuccessful for years in collecting on any of the others.

The Court of Appeals granted leave to appeal in the case on Jan. 10, 2008, and decided it – a reversal – less than a month ago in *Farkas v. Farkas,* .... N.Y.3d ...., .... N.Y.S.2d ...., 2008 WL 4657794 (Oct. 23, 2008; 5-2 decision). Several things had been appealed, but in the part of the case that denied the plaintiff the $750,000 judgment, the Court, in an opinion by Judge Read, held that the facts of the case made the motion for the $750,000 judgment unnecessary – in essence superfluous – because an earlier direction by the trial court explicitly allowed for it "without further order".

The two-judge dissent, written by Judge Pigott, would have affirmed the dismissal. And, ironically, on a legal ground which, had the Court adopted it, would have had longer-range impact on the application of the rule and made it less destructive of the dilatory party's claim.

This point requires reference to the Court's 2004 *Brill* decision, which we did in a lead note in Digest 534. *Brill* was a construction, and a strict one, of the time limit that CPLR 3212(a) imposes for the making of a motion for summary judgment. The case held that even if the merits show that summary judgment would have been granted if moved for timely, the untimeliness barred it and thus forced the case to go to trial.

*Brill* and several other key decisions from the Court of Appeals in recent years have evinced the Court's mounting impatience with procrastination, forming what we have characterized as a crusade against dilatory conduct in litigation. (See the lead notes in Digest 551, done in November 2005, and the more recent ones in Digests 585 [September 2008] and 586 [just last month in October 2008].)

The dissent in *Farkas* sees the denial of the $750,000 judgment by the appellate division as a by-product of the crusade. But it points out that in *Farkas* the rule in point – Rule 202.48 – was used to generate a huge substantive forfeiture, which was not a result that *Brill* called for. The result of a *Brill* application is that the late-moving party will not be allowed summary judgment;

that the case will merely have to go forward to trial; and that it is therefore still open, and perhaps even likely, that the party denied summary judgment for untimeliness will nevertheless end up with a victory on the merits.

Were that approach adopted by the majority in *Farkas*, Rule 202.48 would never result in a forfeiture, but only in a denial of the motion for summary judgment without prejudice – with leave, in effect, to move all over again.

That's an interesting suggestion, and seemingly accurate enough in its analysis of *Brill*. But *Brill* was only one marcher in the Court of Appeals anti-delay crusade. Others were the Court's 1999 *Kihl* decision (Digest 480), a dismissal for ignoring court-ordered discovery, and the 2005 *Slate* decision, a dismissal for delay in effecting service within the 120-day period that CPLR 306-b requires following the filing of an action. Dispositions under those cases do contemplate a dismissal, the first for nondisclosure and the second for lack of jurisdiction. Do those results square with the dissent's use of *Brill* in the *Farkas* decision?

We would leave the issue there, but for an amendment made earlier this year in CPLR 205(a), which we discussed in the lead note last month (Digest 586). CPLR 205(a) is the frequently invoked statute relied on by dismissed plaintiffs when the dismissal occurs after the expiration of the original statute of limitations. It gives the plaintiff a brand new six months for a new action.

The 2008 amendment addresses one of the often litigated exceptions contained in CPLR 205(a), the one in which the earlier dismissal amounts explicitly or in effect to a neglect to prosecute. A dismissal in that category does not get the CPLR 205(a) six months, and numerous are the cases that fell under that exception and died as a result. The amendment has a dramatic effect on this "neglect to prosecute" exception.

It provides that even if the earlier dismissal does by any standard amount to a neglect to prosecute, it will not be denied the six months of CPLR 205(a) unless the dismissing judge has made a record showing "a general pattern of delay" on the part of the plaintiff. Having noted that point last month, we won't rehash it. It's relevant here with *Farkas*, however, or in any event with the *Farkas* dissent, because while the *Brill* result does not produce a dismissal of the case, the *Kihl* and *Slate* cases do. How would dismissals under the latter two fare under the 2008 amendment?

The *Kihl* category is a dismissal for the plaintiff's disclosure failures, which is of course a kind of neglect to prosecute but would not now qualify as such under CPLR 205(a) unless the dismissing judge has documented a "general pattern of delay" in the dismissing order. If the judge has failed to do that, the plaintiff gets the CPLR 205(a) six months, i.e., the full gift of the amendment even if the act that grounded the dismissal was in a real sense a neglect to prosecute.

The plaintiff experiencing a *Slate*-type dismissal, on the other hand, will probably find no advantage whatever in the amendment. This is because there's another exception in CPLR 205(a), this one for a dismissal for lack of personal jurisdiction. A *Slate* dismissal would presumably fall under that category, to which the amendment would therefore not apply, being addressed solely to the "neglect to prosecute" exception.

One has the distinct impression that one will be writing on this subject often in future years, and the one about whom one will be writing is the one who fails to understand how risky it will always be to loiter in litigation.

## OTHER DECISIONS

*OFFICER'S DISCIPLINE*

**In Dispute Between Officer and Superior, Latter Has Standing to Contest Attorney Representing Officer When Same Attorney Previously Represented Superior in Same Dispute**

Falk (F), a lieutenant in the city of Rye's police department, and C, the underling, were at odds. C complained to the city manager that F was incompetent, falsely, said F, who consulted attorney L about it. F and L had a number or meetings and F allegedly shared a number of confidential documents with L. When F did prefer charges against C, and the matter came before the hearing officer, there was L, representing C.

F and the city wanted L disqualified for conflict of interest but the hearer said he had no jurisdiction to do that. Hence they started this action in supreme court for a judgment declaring L disqualified. The Court of Appeals says disqualification is appropriate. *Falk v. Chittenden*, 11 N.Y.3d 73, 862 N.Y.S.2d 839 (June 26, 2008).

Disciplinary Rule 5-108(A) requires one seeking to disqualify an opponent's lawyer to show a prior relationship with the attorney on substantially related matters, and that the interests of the attorney's "past and present clients are materially adverse". In an opinion by Judge Read, the Court finds these requirements met.

The issue came on for hearing in court on C's motion for summary judgment. As indicated, the Court of Appeals denies the motion, but does not grant summary judgment for the plaintiffs because they didn't ask for it with a cross-motion. Hence the case is just remanded for further proceedings.

That poses another interesting procedural issue, apparently not raised by the plaintiffs although it might arguably have made moot the requiring of a cross-motion: the general rule that in a declaratory action, the final judgment shall be for whichever party is entitled to it without regard to who sought it. (See Siegel, New York Practice 4th Ed. § 440.) Is the interposing of the cross-motion issue in *Falk* consistent with that?

*FOIL RE INSURANCE DATA*

**Insurers Face FOIL Disclosure for Failure to Show That Revelation of Their "Redlinings" Would Cause Them Competitive Disadvantage**

And the burden was the insurers' to show in order to bring themselves within the Freedom of Information Law exemption for data otherwise subject to FOIL disclosure.

The Court of Appeals defines "redlining" as an insurer's refusal to issue a policy based exclusively on "the geographic location of the risk". Suspecting such conduct, the Brooklyn borough president sought related reports on the subject from the insurance department, more specifically, reports of policy issuances (and refusals) of car insurance zip code by zip code. These are known as Regulation 90 reports. He brought this Article 78 proceeding when the department balked.

An insurance regulation makes such reports "public record", which places them in the FOIL container to make them subject prima facie to disclosure but then to subject them as well to the exemptions listed under the FOIL, more specifically in this case Public Officers Law § 87(2)(d), involving trade secrets. Insurers intervening in the case cited this exemption and each tried to show that disclosure would undermine its competitive position. They submitted evidence they thought showed this, but didn't convince the Court, which holds the exemption inapplicable and the material hence disclosable. *Markowitz v. Serio,* 11 N.Y.3d 43, 862 N.Y.S.2d 833 (June 26, 2008).

The insurers' evidence of competitive disadvantage "is theoretical at best", writes Judge Pigott in the opinion. "It has not been shown that zip code data, without more, would necessarily put the insurer at a competitive disadvantage."

In a concurrence, Judge Smith would not reach any FOIL issue at all, explaining why, but says that if he did he would uphold the insurers' position. He finds each of them to have made "a specific and persuasive showing of competitive injury", citing their specific illustrations of how and disagreeing with the Court's characterizing the insurers' contentions as merely "theoretical".

*CREDIT CARD FRAUD*

**Federal TILA Does Not Preempt State Laws Barring Deception in Communicating with New Yorkers**

Another case in which we have to take a mass of complicated facts, reduce them to conclusory facts, and succinctly report the judicial result of them.

The federal Truth-in-Lending Act (TILA, 15 USC §§ 1632 and 1637) and its accompanying regulations mandate the disclosure of certain data in all solicitations seeking applications for credit cards. New York's Consumer Protection Act (Executive Law § 63[12] and Gen.Bus.L. §§ 349 and 350), as the Court of Appeals describes it in *People (by the A.G.) v. Applied Card Systems*, 11 N.Y.3d 105, 863 N.Y.S.2d 615 (June 26, 2008; 5-1 decision), forbids lenders from engaging in "fraud, deception, and false advertising". In a proceeding brought by New York's Attorney General against a Delaware bank and its collection arm, the Court rejects the argument that the TILA disclosure provisions preempt these New York anti-fraud provisions. It sustains the proceeding.

TILA mandates certain disclosures; that's what the states can't interfere with. In an opinion by Judge Ciparick, the Court explains that preemption is therefore limited to state laws

> that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA ...

That the AG's complaint refers to "certain matters that are preempted by a federal statute does not 'transform' a state law action" into a federally preempted one. Citing its 1999 *Nealy* decision (Digest 473), involving a similar analysis that concluded against federal preemption, the Court explains that while there may be some "effect" of the state program on the federal scheme, the effect will not support a preemption conclusion if the effect is "too tenuous, remote, or peripheral". At worst, the claims here relate to the inclusion in the federally mandated materials of "fraudulent and deceptive misinformation". Nothing stops the AG, in other words, from pressing forth New York fraud claims that might be *based* on the disclosures that the federal law flushes out. The relief sought here "does not impose any additional disclosure requirements".

The dissent, by Judge Read, sees the federal legislation as occupying "the entire field of ... disclosures in credit or charge card applications", and as establishing a "singular *federal* mechanism" for oversight and enforcement, on which the AG's action, in the dissent's view, trespasses.

Part of the relief sought by the AG does get barred, however, because of the res judicata effect that has to be given to an earlier California class action: full faith and credit, more specifically, which is just interstate, mandatory (constitutionally required) res judicata.

New York consumers were among those notified of the California action and given the opportunity to opt out. Those who didn't opt out are bound by the later merits settlement approved by the California court. That concerned only restitution claims, however, and only those for "pre-January 1, 2002 'front-end claims'", i.e., those directed to illegal conduct at "the inception of the cardholder relationship".

So those are out, concludes the Court after wading through the res judicata doctrine with special reference to its application to class actions, but that still leaves much else on which the AG can succeed here, including restitution for the time periods not covered by the California settlement (and for all time periods for those New Yorkers who opted out of it); civil penalties and costs; and of course injunctive relief. And possibly even (put this down in boldface)

> disgorgement – an equitable remedy distinct from restitution – of profits that respondents derived from all New York consumers, whether within the [California] settlement class or not.

With that, it would seem that whatever limited denial of the AG's requested relief traces to the California settlement and its res judicata entitlement, it would be offset, and then some, by what might be a banquet. "Disgorgement ... of profits", indeed! That's something for all the lenders who thought they got something out of the California settlement to think about. (We suspect that the New York Attorney General may also be thinking about it.)

A more ebullient observer might see this as the Court's throwing the state not just a bone, but a potential feast.

*INDENTURE TRUSTEE'S LIABILITY*

**Negligence Survives as Basis for Trustee's Liability Even Though Breach of Contract Not Found**

In Digest 553 three years ago we did the Court of Appeals decision in the *AG Capital* case, in which the Court sustained a securities' writer's liability for a duty ordinarily assumed by the secured party's representative. It held that under industry custom the underwriter can assume that liability.

The Court now, in *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 11 N.Y.3d 146, .... N.Y.S.2d .... (June 25, 2008), relying on the facts as stated there (as do we in this digest), augments them "only to the extent necessary" to resolve another issue in the case.

Defendant State Street (D) served as the indenture trustee for L company (now bankrupt), which owned and operated cemeteries, in L's borrowings for its operations. L borrowed millions, and in each case issued debt securities for the loans, D administering them. Collateral securing the loans was held by B, with which a registration statement had to be filed for each new loan. D failed to file such statements, and when L went into bankruptcy, this meant the loss of the collateral for a number of the lenders – they're the plaintiffs here (collectively, P) – which resulted in their settling for millions less than they had expected.

The release executed in conjunction with that settlement is now at issue. Did it also release D from liability for its failure to effect the registrations? Plaintiffs claim it did not, and plead a number of causes of action, including breach of contract and negligence.

In an opinion by Judge Jones, the Court holds that while the release does protect D from the contract-based claims, it does not insulate D from the negligence claim. The release freed D of any claim of P that could entitle D to indemnification from L (the original borrower). (It was designed to protect L.) That in turn necessitated a look into the original loan transactions, each of which, in reciting the indemnification ground, *relieved* L of the indemnification obligation for conduct based on D's "negligence". Since L did not have to indemnify D for liabilities traceable to D's negligence, the release did not cover it and D could therefore not rely on it as a defense to P's action. The Court reinstates the negligence claim and remands it for trial.

*CLERGY LIABILITY*

**Failure to Show "Fiduciary Relationship" with Rabbi Bars Claim of Congregant for Rabbi's Alleged Seductions**

The state's so-called "heart balm" statute, § 80-a of the Civil Rights Law, long ago abolished the claims for (1) alienation of affections, (2) criminal conversation (a charming euphemism for an act that often involves no conversation at all), (3) seduction, and (4) breach of promise of marriage. These were all found to lead to constantly conflicting allegations virtually impossible to sustain or refute one way or the other, and consequently to generate endless opportunities for fraud. The legislature decided that there was nothing for it but to eliminate these things as actionable claims, and that it did.

Cases in the courts indicate that when these things – perhaps most notably seduction – are alleged against a cleric, the plaintiff often seeks to circumvent the heart balm statute by alleging a special “fiduciary relationship” between herself and the cleric, hoping thereby to get the court to find it an exception.

Such an effort failed in the Court’s 2005 *Wende* decision (Digest 545), where the Court found no actionable claim against a pastor for having sex with a woman while she and her husband were in process of seeking counseling from him.

An additional claim made there was one for clergy malpractice, which failed because the Court found that it “would improperly require courts to examine ecclesiastical doctrine”. Yet another was that the pastor with his sexual conduct violated a “fiduciary duty” he had to the plaintiff. The Court didn’t close the door entirely to that possibility, but found no fiduciary duty breached in *Wende*.

With the door still open, the plaintiff in the more recent case of *Marmelstein v. Kehillat New Hempstead: the Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15, 862 N.Y.S.2d 311 (June 25, 2008), tries to slip through it with a fiduciary claim based on the defendant rabbi’s conduct, but it doesn’t work. The allegations were that the plaintiff and the rabbi had sex over a period of more than three years after she went to him for counseling on, among other things, how to find a husband “and have children”. (Need the lesson have been that graphic?) The claims all fell before the heart balm barrier, but with a special Court of Appeals address to the “fiduciary” claim.

Two “essential elements” of the “fiduciary” claim are “de facto control and dominance” adequate to “distinguish a viable claim of breach of fiduciary duty from nonactionable seductive conduct”. Judge Graffeo writes for the Court that

> [a]llegations that give rise to only a general clergy-congregant relationship that includes aspects of counseling do not generally impose a fiduciary obligation upon a cleric. ... [T]he complaint [must show] that the congregant became uniquely vulnerable and incapable of self-protection.

This complaint did not show that, rules the Court. It showed only that the plaintiff was “deceived”, and deception is a major element in virtually all of the insulated heart balm quartet. A cleric, in other words, is just as entitled as anyone else is to the shelter of the heart balm statute.

<u>*NYSE CHIEF’S COMPENSATION*</u>

**AG’s Action to Get Back Some of Stock Exchange Chief’s Outlandish Compensation Fails; “Business Judgment Rule” Governs**

And the courts are required to defer to it unless outright unlawfulness is shown, and it wasn't shown here. Greed and unlawfulness are not synonyms, much as a dazzled public might wish they were.

While boundless rapacity may infuriate many and even bring some tongue clicking to the securities industry itself, where economic gluttony has, at least until recently, become something of a tradition, it is not per se actionable at the public's behest. Hence an action by the New York Attorney General against the now infamous Richard Grasso, former Chief of the New York Stock Exchange, and the chair of the committee that approved his astonishing compensation package, fails. To make the conduct, and perhaps excessive awards, actionable, rules the Court of Appeals, the legislature has required a showing of unlawfulness, and none was shown in this case. *People (by the A.G.) v. Grasso*, 11 N.Y.3d 64, 862 N.Y.S.2d 828 (June 25, 2008).

"[M]ost relevant to the issue before us", writes Chief Judge Kaye for a unanimous Court, is that the legislature, under the Not-for-Profit Corporation Law, "has provided directors and officers with the protections of the business judgment rule" applicable to ordinary corporations, as long as they act in good faith. That's found to be the case here, horrific as their judgments may be in the public eye. The rule, which includes a provision (N-PCL § 717[b]) that those acting in good faith "shall have no liability by reason of being ... directors or officers of the corporation", was enacted to encourage service on not-for-profit boards. While perhaps aimed more at smaller companies in narrower areas, it sweeps in the Stock Exchange as well and is here found to insulate both Grasso and his committee overseers. The statutory claims included in the complaint fail.

So do the nonstatutory (common law) claims. The Court says that

> [a]lthough the Executive must have flexibility in enforcing statutes, it must do so while maintaining the integrity of calculated legislative policy judgments. That balance falters where, as here, the Executive seeks to create a remedial device incompatible with the particular statute it enforces.

The Court sees no "fault-based elements" in the claims pleaded. Mere unreasonableness, as these money packages may manifest, is not unlawfulness, nor ultra vires under the N-PCL.