New York State Law Digest

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

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**No. 620 August 2011**

## GETTING MORE THAN NEW YORK'S 9% STATUTORY INTEREST RATE BY STIPULATING TO HIGHER RATE IN CONTRACT

The interest presumably allowed by the CPLR on litigated obligations is the straight 9% provided for in CPLR 5004. When a contract obligation, most typically a loan, carries interest at a higher rate – which the law allows (as long as it doesn't exceed the applicable usury point) – the defaulting borrower may have an incentive to withhold payment as long as possible for the obvious reason that as of the moment of default the money will be held at the lower 9% rate rather than the higher contract rate bargained for. The reason is the general rule that as of the moment of default, the contract rate ceases and the statutory rate takes over.

But a lender can get around that, too. Caselaw has indicated that making the contract rate applicable "until the principal is paid" will supersede the CPLR 5004 9% rate and earn even post-judgment interest at the contract rather than the statutory rate.

That opportunity has been recognized for quite a while now, but reported cases have shown lenders forfeiting the chance by not using tight enough language in the contract. See, e.g., *Marine Mgmt., Inc. v. Seco Mgmt., Inc.*, 176 A.D.2d 252, 574 N.Y.S.2d 207 (2d Dep't 1991; 3-2 decision), aff'd 80 N.Y.2d 886, 587 N.Y.S.2d 900 (1992), and the discussion in the Commentary on McKinney's CPLR 5004.

If clearer authority is needed for the proposition that including the "until the principal is paid" clause in the contract will work the necessary magic for the lender, a recent Court of Appeals decision rings the bell. *NML Capital v. Republic of Argentina*, .... N.Y.3d ...., .... N.Y.S.2d ...., 2011 WL 2567294 (June 30, 2011), is the bell-ringer and it was Argentina that supplied the occasion.

Argentina has become something of a financial contortionist of recent, performing its maneuvers in a series of litigations, all evincing on the bottom line that while Argentina has been an enthusiastic borrower – of billions from worldwide lenders – it has not been an enthusiastic repayer.

The federal courts have been blessed with the major cases showing frustrated lenders trying to get their money back from the insolvent South American sovereign, including,

though not relevant here, issues of sovereignty itself. These include cases in which Argentina, after being cast in judgment under a contract waiver of the sovereignty defense, then asserted the defense again when defending a post-judgment enforcement suit. The caption of this note, which we have generalized into "getting" more than the 9% rate, would therefore, if applied to these Argentina cases, be better read as "Trying to Get".

The *NML* case, filled with the complications that are obligatory with these Argentine borrowings, shows "Floating Rate Accrual Notes (FRANS)" calling for interest-only payments twice a year, providing for huge increases in interest upon default, and with an acceleration clause to boot. When faced with some of these commitments in this suit by the various plaintiff companies, which lent to Argentina before or then bought up defaulted obligations after her collapse, Argentina went into its now traditional defense mode and interposed everything it could think of. And one must not underestimate Argentina's imagination in this sphere, nurtured by years of experienced evasion.

The holding against Argentina in *NML* was appealed to the Second Circuit, which found the issues governed by New York law and certified three questions to the New York Court of Appeals. (How came this case to be governed by New York law? That's the only easy question in the case: the loan contract stipulated to it.)

In an opinion by Judge Graffeo for a unanimous panel, the Court responds to the three questions.

The first question asks whether New York law really takes the clause "until the principal is paid" to mean that the higher contract rate rather than the lower statutory rate governs interest even after maturity? Yes it really does, the Court answers.

The second question refers to the acceleration clause – which the plaintiffs properly tripped in these cases – and asks whether the "until the principal is paid" clause also applies to require the higher contract rate to be paid on the whole principal, now moved up and made payable because of the acceleration. Yes it also applies to that, the Court answers.

The third question, which seems to us a bit redundant in view of the first two, asks whether the same conclusion applies to unpaid "post-maturity or post-acceleration interest". The Court says yes to that, too.

Argentina argued that what the plaintiffs were seeking was "interest on interest". Not so, says the Court, pointing out in effect that pre-default interest is just payment by the borrower for the use of the lender's money, while post-default interest is "for a different loss": the failure of the issuer to timely pay the pre-default interest – in other words, a penalty for defaulting on the other interest.

A clarifying analogy occurs to us here. For diversity of citizenship jurisdiction in the federal courts, 28 U.S.C. § 1332 requires that more than $75,000 be in controversy,

"exclusive of interest". When a contract has stipulated to interest, however, and it has now accrued to more than $75,000 and hasn't been paid, and the plaintiff in a diversity of citizenship case sues for it, the claim lies; that interest is not the kind of interest that falls under the "exclusive of interest" clause in § 1332. It's interest that *is* the cause of action, while the interest that has to be paid after default is interest *on* the cause of action, and only the latter falls under the § 1332 exclusion.

A comparable what "is" the claim versus what's "on" the claim can also apply to the interest issues in the *NML* case. If that helps, then welcome to the analogy. If it doesn't, forget it.

Meanwhile, what are the main lessons that emerge from the *NML* decision? Two important ones.

The first is obvious. All lenders – or at least those who have significant bargaining power in the premises – should include the "until the principal is paid" (or equivalent) language in the clause stipulating the rate of interest in their contracts.

The second is even more obvious. Don't lend money to Argentina.

## OTHER DECISIONS

*NOT USING NAME ON LICENSE*

**Home Improvement Contractor Who Did the Work But Then Billed It in His Own Name While License Was in His Company's Name Is Not Barred from Recovery**

M was the contractor, and the company, Coastal Construction, belonged to him. He applied for and got the license in his company's name. He did the work for the defendants (D), but a dispute arose about payment and M sued. He did so in his own name, however, while a Westchester law requires suit to be brought in the name of the licensee. The law imposes penalties for violation, but forfeiture of the claim is not among them. The Court of Appeals had to decide whether the common law imposes such a forfeiture.

It does not, holds the Court in an opinion by Judge Smith in *Marraccini v. Ryan*, 17 N.Y.3d 83, 926 N.Y.S.2d 399 (June 2, 2011), denying D's motion for summary judgment.

It would be different, the Court says, if M had no license at all, but he had, albeit in the company name. It was "undisputed", however, that M and Coastal are not separate legal entities.

Even if the company was a distinct entity, i.e., a corporation, the reasoning of the Court might still be taken to indicate that there would not have to be a forfeiture, given that the mistake was "inadvertent and harmless" and that there was no indication of any intent to deceive.

The Court distinguishes its 1990 *B & F Building* decision (Digest 377) because in that case there was no license taken out at all. That factor invoked CPLR 3015(e), which explicitly bars a recovery by a contractor who was not licensed at the time it did the work for the consumer. (A forfeiture resulted there, which some deem draconian even in the face of the explicit CPLR 3015[e]. It's not relevant here in *Marraccini*, in any event.)

*NOTICE OF DEFECT*

**Absence of Notice of Ice Condition on Parking Lot Entitles Village to Reject Slip and Fall Claim**

Section 6-628 of the Village Law bars a claim against a village for an ice condition in certain places – including a "highway" – unless the village clerk has been given written notice of the condition. In *Groninger v. Village of Mamaroneck*, 17 N.Y.3d 125, .... N.Y.S.2d .... (June 2, 2011; 4-3 decision), in which such notice was not given, the place of the accident was a public parking lot. The issue whether a parking lot qualifies as a "highway" under the statute.

It does, holds a sharply divided Court of Appeals in a majority opinion by Judge Pigott, and because no notice of the condition – commonly known as a "notice of defect" – was given, the village gets summary judgment.

Section 50-e of the General Municipal Law, the well known notice-of-claim statute applicable to tort claims against municipalities, also figures here. While generally understood as a post-accident device to tell the municipality that an accident has happened and that a claim is being made, subdivision 4 of § 50-e also has something to say about the pre-accident notice-of-defect mechanism. In an effort to make its own notice of claim provision the exclusive notice requirement in municipal tort cases – see the Court's 1994 *Walker* decision (Digest 421) – it precludes the imposition of any other notice requirement, but it makes an exception, and recognizes such other notice requirement, if it pertains to an icy condition on, among other places, a "highway".

So for that statute, too, the issue is whether a parking lot may be deemed a "highway" so as permit the village to insist upon the notice-of-defect prerequisite. As the majority reads the *Walker* decision, a parking lot may be deemed a "highway", so summary judgment for the village is upheld on the § 50-e(4) point, too. Several other earlier cases are discussed and either applied or distinguished by the majority.

The three-judge dissent, written by Chief Judge Lippman, takes issue with the majority's treatment of several of these earlier cases. It sees a misapplication of the *Walker* case, for example – which involved a paddleball court, not a parking lot – by the majority's citing pre-*Walker* lower court cases deeming a parking lot a "highway" under § 50-e(4). The dissent sees *Walker* as establishing decisively that it is not a highway, declaring that

> [i]t is so obvious as hardly to merit serious discussion that a parking lot does not fulfill the same function as a "highway".

The dissent sees the majority as at root exercising a "judicial aversion to municipal liability".

*ELECTION LAW*

**Law Requiring Elected Town Justice to Reside in Particular Part of Town Does Not Deny Equal Protection If There's Rational Basis for It**

And there's rational basis for it in *Walsh v. Katz*, .... N.Y.3d ...., .... N.Y.S.2d ...., 2011 WL 2149528 (June 2, 2011), concludes the Court of Appeals.

The town is Southold in Suffolk County. The part of it involved is Fishers Island. The most recent census gave the town a population of 20,599, while it gave Fishers Island only 289, roughly only 1.5% of that.

The problem was that a special statute requires the town's periodic election of a justice of the peace for Fishers Island and requires (1) that the one elected reside on the island and (2) serve as a member of the town board as well. The statute was contested on constitutional (equal protection) grounds by X, who resided in the town but not on Fishers Island. His argument was that this gave Fishers Island disproportionate representation on the board.

In an opinion by Judge Jones, the Court of Appeals rejects the argument. The law doesn't give the Fishers Island residents their own personal board member. All board members are voted on by all town residents, including the protesting X, and at election time the one running for the Fishers Island justiceship need only be a town resident – not necessarily a resident of Fishers Island or a nearby island (an alternative under the statute) – as long as the candidate takes up residence on the island afterwards.

Recognizing that the islanders have no direct ferry service to the mainland, the statute imposes the residency requirement to assure Fishers Island residents meaningful membership on the board. That's a "rational basis" for a special requirement of this kind, finds the Court, and it meets the applicable test.

*PRODUCTS LIABILITY*

**Court Elaborates Parties' Burdens of Proof When D Moves for Summary Judgment in Design Defect Case**

RDL (a lye product) placed by P into the clogged drain of the restaurant he worked at "splashed back" at him and cost him an eye. One of the grounds of his claim against the maker was defective design, on which the maker, D, moved for summary judgment. The label on the product contained the appropriate warnings about the dangers of lye, but P could not read English; he said he just followed the procedures he'd seen others use. The lower courts granted D summary judgment, but the Court of Appeals reverses, holds the case unripe for it because D did not adequately discharge the burden of proof always

applicable on a motion for summary judgment. *Chow v. Reckitt & Colman, Inc.*, 17 N.Y.3d 29, 926 N.Y.S.2d 377 (May 10, 2011).

In an opinion by Chief Judge Lippman, the Court says that in a defective design case, a defendant moving for summary judgment

> must do more than state, in categorical language in an attorney's affirmation [as relied on by D in this case], that its product is inherently dangerous and that its dangers are well known. Rather ... [D] must demonstrate that its product is reasonably safe for its intended use; that is, the utility of the product outweighs its inherent danger.

The Court relies heavily on its 1983 *Voss* decision (Digest 282), which held that "[i]n order to establish a prima facie case in strict products liability for design defects" P has to show that D marketed a product "not reasonably safe and that the defective design was a substantial factor in causing" P's injury. *Voss* then added that the conclusion that the product is "not reasonably safe" depends on whether

> a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner.

A connected issue in *Voss* was whether it was feasible for D to design a safer product after an appropriate balancing of the risks vis-a-vis "the product's inherent usefulness at an acceptable cost". All of these issues are issues of fact for the jury, the Court concluded in *Voss*, and so the Court concludes here as well.

The reader's tendency is to look at the plaintiff's proof to see whether a claim was made out, but as Judge Smith points out in a two-judge concurrence, the decision in this case "is the result not of the merits of plaintiff's case, but of a feature of New York procedural law": that the summary judgment movant always has the burden of showing that there's no issue of fact in the case and therefore nothing to try. D didn't meet that burden, relying instead on an attorney's affirmation that "the product at issue ... cannot be designed differently without making it into an entirely different product".

The concurrence says that was not an evidentiary showing sufficient to earn D summary judgment, adding that D might have made out its case for summary judgment with a simple affidavit "from someone knowledgeable in the industry". D did not offer such proof, however, in affidavit or any other form.

Summary judgment may just be a hard nut to crack in a design defect case because it's so heavily fact dependent. The Court cites a list from its 1995 *Denny* decision (Digest 435), containing seven matters to be considered in balancing all relevant factors in a design defect case, including an inquiry into whether "the utility of the product did not outweigh the risk inherent in marketing it".

Practically speaking, in each bona fide defective-design case each side gets a go with its proof, the court enumerates all the factors needing consideration, and the ball passes to the jury with the court's thanks for the existence of the jury system. The test amounts to a jury's examining market factors in each case to find the point at which a product of value to the consumer loses its value because the price the manufacturer has to sell it for exceeds what a consumer can reasonably be expected to pay for it.

The motion for summary judgment can find little welcome on that scene.

*CONSEQUENCE OF HIPAA VIOLATION*

**City Health Agency's Failure to Notify Mental Patient That It Seeks His Medical Records to Set Up Outpatient Treatment Bars Use of Such Records**

No crime was involved in this case, *Matter of Miguel M.*, 17 N.Y.3d 37, 926 N.Y.S.2d 371 (May 10, 2011), where the Court of Appeals acknowledges that the rule might be otherwise if it were. This was just a proceeding to bar a city, through its health official, from using a patient's hospital records to help make a case for requiring the patient to accept "assisted outpatient treatment" (AOT) for mental problems. The patient had been hospitalized three times for such problems; the records of those visits were the records the city sought.

Under New York's Mental Hygiene Law § 9.60, known as Kendra's Law (named for a woman pushed off a subway platform by a maniac), such information is accessible unless preempted by federal law. The issue was whether there was federal preemption in this case. The Court holds there was.

The federal law involved was the Health Insurance Portability and Accountability Act (HIPAA), and more specifically the Privacy Rule adopted under it in Titles 160 and 164 of 45 CFR. HIPAA was discussed in depth in a consolidated opinion in a trio of 2007 Court of Appeals cases – perhaps best known by the name of one of them, *Arons v. Jutkowitz* – treated in our lead note in Issue 576.

The basic aim of HIPAA is to protect the privacy of individuals against the public revelation of their medical conditions. It has some exceptions, however. The issue here in *Miguel*, observes the Court in an opinion by Judge Smith, "comes down to whether the disclosure of Miguel's medical records was permitted by one of the exceptions". The Court's conclusion is that it was not.

One of the exceptions is where the public health is involved. The city argued that it was involved here, because *Miguel* might hurt someone, but the Court finds that "public health" was not meant in this "literal, but counterintuitive sense". What was meant under this exception was something like the avoidance of epidemics, as where Miguel was shown to be a kind of successor to Typhoid Mary. Not the case here.

Another recognized exception under HIPAA permits disclosure "for treatment activities of a health care provider". The city's argument that such treatment was the purpose here is also rejected by the Court as "literalistic". The Court finds that

> the thrust of the treatment exception is to facilitate the sharing of information among health care providers working together. We see no indication that ... [it was] meant to facilitate "treatment" administered by a volunteer "provider" over the patient's objection.

What the city could have done consistent with regulations, the Court suggests, was sought a court order on notice, or used a subpoena, which would also have generated notice. And it seems to the Court

> only fair, and no great burden on the public agencies charged with enforcing Kendra's Law, to give patients a chance to object before the records are delivered.

The Court stresses that the patient in this case "is not accused of any wrongdoing", and

> [w]e therefore hold that medical records obtained in violation of HIPAA or the Privacy Rule, and the information contained in those records, are not admissible in a proceeding to compel AOT.

The case came to the Court of Appeals after its issue had been mooted. (The trial court's direction that Miguel accept treatment was for a six-month period, which had already passed when the case reached the Court.) But this was another of those cases in which, in the language of the appellate division (with which the Court of Appeals agrees),

> the case presents a novel and substantial issue that is likely to recur and likely to evade review, and that therefore the exception to the rule against deciding moot disputes applies here.