

New York State Law Digest



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

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POST-JUDGMENT RATE OF INTEREST ON FEDERAL JUDGMENTS EVEN IN DIVERSITY OF CITIZENSHIP CASE, FEDERAL POST-JUDGMENT RATE IS HELD TO APPLY, THOUGH MUCH LOWER THAN STATE RATE

Under 28 U.S.C. § 1961(a), the federal rate of interest is computed pursuant to a formula that adopts Treasury yields. Because of recent market conditions, that rate is currently low. In *Cappiello v. ICD Publications*, 2012 WL 2051146 (EDNY, June 7, 2012), it came to only 0.25%, while the New York state rate of 9% is much higher. (The New York rate has remained a constant 9% for years under CPLR 5004, which has not been altered by the legislature to reflect market conditions.)

In *Cappiello*, a money action was commenced by P in New York Supreme Court and removed to federal court by D on the basis of the diversity of citizenship of the parties. P then prevailed on the merits in the federal court. Concededly, the pre-judgment interest applicable was the New York rate under the *Erie v. Tompkins* rule, because pre-judgment interest is deemed part of the substantive cause of action. The dispute in the case was over the applicable post-judgment rate.

The court in *Cappiello*, with many citations, holds that the federal rate applies; that *Erie* governs only substantive issues and post-judgment interest is just a procedural matter, where federal law continues to govern.

Several bouts with this issue are covered in Siegel's Practice Review (e.g., SPR 176:2 on Westlaw database SIEGELPR, treating the key Second Department *Hartman* case), and in Siegel, New York Practice 5th Ed. § 412, with concentration on the option some New York courts have recognized for the holder of a federal judgment: the judgment creditor can docket the federal judgment with a New York county clerk under CPLR 5018(b) and thereby convert it into a New York judgment for enforcement purposes. *Hartman* is the main authority for that, holding that a judgment creditor so doing is entitled to have the CPLR 9% rate applied to post-judgment interest even on the federal judgment.

There are several questions that we'd like to have answered, but they remain unsatisfactorily open. Shouldn't the nature of the underlying claim – was it a federal cause of action or one based on state law? – play the decisive role in determining whose law governs interest? In the present state of things, a federal judgment creditor concerned about post-judgment interest

should promptly invoke CPLR 5018(b) with a docketing and issue enforcement process to a sheriff, hoping thereby to get the 9% rate that state caselaw has invited. *Cappiello* indicates that can't happen.

Cappiello, a detailed and thoughtful treatment of the interest issue, concludes that the federal rate of interest still applies even after the CPLR 3018(b) docketing. But *Cappiello*, too, sidesteps what seems to us the basic *Erie v. Tompkins* issue. Why does a claim derived wholly from state law keep that identification throughout the federal litigation but then suddenly lose it when the claim goes to judgment? Passing the issue of post-judgment interest off as a mere "procedural" one – as federal caselaw does – seems to us to ignore the fundamental purpose of the *Erie* doctrine, which is to achieve the same substantive result in a federal court when its jurisdiction is based on diversity of citizenship as would be reached in a state court sitting next door.

If the court is correct in its statement that the federal rate at this juncture was 0.25%, while the New York rate was 9%, then look at the difference this would make if the judgment were outstanding for a couple of years – as can happen when delays are introduced by appeals, stays, technical adjustments, and the like. We can round off the final judgment in *Cappiello* to an even \$600,000, including costs and pre-judgment interest, to make the point.

If the judgment is unpaid for two years, interest for that period at 0.25% would be \$3000. (Check us on the arithmetic.) At 9% it would be \$108,000. (Check us out again.) We see the difference as \$105,000, and we're hard pressed to put it down as a mere difference in "procedure".

It might be argued that the plaintiff brought this loss on himself by suing in federal court. Bad argument, certainly in this case. The plaintiff here did not sue in federal court, but in state court, and it was the defendant who brought the case to the federal court through the removal process.

Maybe the lesson of the case is to a diversity defendant sued in state court. If he's planning to draw payment out as long as possible should the plaintiff prevail, he will – if he removes to federal court – be keeping the plaintiff's money after judgment at a rate of interest of only 0.25% instead of the state's 9%.

We wonder whether the 1938 *Erie* court, reconstituted for a short visit to resolve this question, would condone that.

The situation should be addressed and resolved in all particulars. First on the assumption that the claim is federal in nature. Second on the assumption that the claim is state-created. Then examination should be made into both pre- and post-judgment interest, with a fresh look at the statutes in point but with a firm and respectful reference to the *Erie* doctrine as well.

A better lesson, and so *Cappiello* suggests, is that all of these issues should be resolved for all junctures of the litigation, at least in contract cases, by the parties explicitly addressing the interest issue in their agreement.

Suppose in *Cappiello*, that the plaintiff, after the state docketing of the federal judgment, sought all enforcement in state court. If the post-judgment interest issue came before the state instead of the federal court, would the state court be required to follow *Cappiello*, or could it instead pursue its own path of applying New York law, as *Hartman* and like cases indicate?

COURT OF APPEALS DECISIONS

LEASE RENEWALS

Court Finds No Ground to Excuse Commercial Tenant's Failure to Give Required Notice of Renewal

In *Baygold Assocs., Inc. v. Congregation Yetev Lev of Monsey, Inc.*, 19 N.Y.3d 223, 947 N.Y.S.2d 794 (May 3, 2012; 4-2 decision), landlord L and tenant T contracted to lease premises used by T for a nursing home. That was in 1976. The term was 10 years with four additional 10-year renewal options available to T, provided T give L no fewer than 270 days notice before the expiration of each term, the notice to be "by certified mail with return receipt requested".

Renewals were made extending the lease until 2005. Renewal thereafter was the issue. T's attorney said he sent a timely renewal letter to cover the remaining two terms, but could produce no mail receipt or return card, as the contract required.

In 2007, L arranged to sell the property to D, the defendant here, whose attorney advised T that it would thenceforth treat T as a month-to-month tenant.

D is upheld; T's suit to declare the lease properly renewed fails.

In its 1977 decision in *J.N.A. Realty Corp. v. Cross Bay Chelsea*, 42 N.Y.2d 392, 397 N.Y.S.2d 958, the Court held that it would recognize several grounds on which a commercial tenant might be relieved of its failure to timely renew, but the majority in *Baygold*, in an opinion by Judge Pigott, finds none applicable here. One would be a showing that the tenant would suffer a serious loss, which could be established, for example, if T had made substantial improvements in anticipation of the lease's renewal. But whatever T did in that respect was done some 20 years earlier; more recent improvements were made by subtenants, not by T.

The dissent, written by Judge Smith, sees that as a distinction from the *J.N.A.* case, but one without a difference.

"JOINT" EMPLOYERS

General Contractor (G) Found Not Liable to Employees of Subcontractor (S) for Wages Unpaid by S

G might have had that liability if it qualified as a "joint" employer with S, but examining the factors that go into such a "joint" status the Court of Appeals, reversing the lower courts and the labor department, finds no "joint" status established on the record in *Ovadia v. Office of the Industrial Board of Appeals*, 19 N.Y.3d 138, 946 N.Y.S.2d 86 (May 1, 2012).

S had subcontracted with G to do the masonry work on a building G was under contract to build. Three months into the project, S – in essence one Bruton, its principal – walked off the job leaving S’s laborers unpaid or underpaid. Some of the workers, who spoke little English, went to G demanding to be paid. G talked to one of them, W. W testified that G told W “not to worry about it”, on which basis W then told his fellow workers to keep working and that G would pay them. Apparently on that representation, they went back to work for six days. A new masonry contractor and crew then took over.

The crux of the case is the period the workers labored before W’s visit to G, and for that period the Court has bad news for the workers. The indicia of “joint” employment such as would enable them to have G make good for what S owed them are found absent. The workers pointed, for example, to the facts that G provided the “work site” and furnished the materials used in their tasks, but the Court says these are “a common occurrence at construction sites” and “should not determine the nature of employment relationships”.

Citing several of its earlier decisions in an opinion by Judge Graffeo, the Court sees here

the typical contractor/subcontractor context [in which] a general contractor is not an employer of its subcontractors’ employees.

There was an unresolved issue, however, about whether G agreed to pay for the six days of labor the workers performed after the conversation took place between W and G. The case is remitted for findings on that, but G is off the hook for the prior work for which S failed to pay the laborers.

A hint that the Court was bothered by the workers being unpaid appears in a footnote in the case, in which the Court cites another route by which G could become obligated to pay workers at a construction site, citing Lien Law provisions. There is no indication the workers pursued that route, however. The Court recites as much but just leaves it there, and with a warning about a one-year time limit on pursuing such relief.

WORKERS’ COMPENSATION

Even if Awards to Individual Are for Several Separate Injuries, Cap of \$400 Weekly Applies

In *Schmidt v. Falls Dodge, Inc.*, 19 N.Y.3d 178, 947 N.Y.S.2d 376 (May 1, 2012; 5-2 decision), a worker in a collision repair shop suffered two on-the-job injuries in one year: a hip injury when he slipped on ice, and a lower back sprain. He left the job during the same year and then reported yet a third injury: a hearing loss traceable to noise at the shop. He sought workers’ compensation for all three.

For the first two, which were temporary conditions, the comp carrier was ordered to pay him a total of \$400 per week, which was the maximum allowable at the time under § 15(6) of the Workers’ Compensation Law.

In a separate proceeding, a compensation judge then upheld the hearing loss claim, finding it a “permanent partial disability”. That qualifies as a “schedule loss”, invoking the relevant item on the detailed schedule contained in § 15(3) of the law. Pursuant to that schedule, the judge found the claimant entitled to a certain number of weeks of benefits at the rate of \$400 per week, and also found that the awardable total was “currently” payable in full.

Considering the \$400 per week he was receiving for the other two injuries, that of course brought the total to more than the stated maximum. The question was whether the maximum applied in these circumstances. A majority of the Court, in an opinion by Judge Smith, holds that it does.

Several Third Department cases had gone the other way, holding that since a “schedule” award is not allocable to any particular period, it can’t be deemed to overlap the other awards that a claimant has received in a given case. Hence the worker can be paid the additional sum in that situation despite the total’s exceeding the statutory maximum.

The dissenters, in an opinion by Judge Ciparick, cite those earlier cases and would follow them, especially in view of a later amendment of the Workers’ Compensation Law in which the legislature gave no indication of an intent to overrule them. Quoting from the Court’s 1987 *Knight-Ridder* decision (Digest 335), the dissent explains that

the legislative history of a particular enactment must be reviewed in light of the existing decisional law which the Legislature is presumed to be familiar with and to the extent it left it unchanged, that it accepted.

The majority doesn’t read the amendment that way and holds the cases overruled, pointing also to “anomalous results” that could otherwise occur.

The resulting rule of law emerging from the *Schmidt* case is that

[a] claimant entitled to a schedule award that is to be paid periodically must wait until his other disability payments have ceased, or have dipped below the cap, to be paid his schedule award.

SUPERVISING THE DISABLED

Agencies Designated by State Commission to Provide Advocacy Services for the Disabled Have Same, But Not Greater, Access to Records That Commission Itself Has

At issue in *Albany Law School v. New York State Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d 106, 945 N.Y.S.2d 613 (April 26, 2012; 4-3 decision), were the record access procedures set up in the federal Developmental Disabilities Assistance and Bill of Rights Act.

Plaintiffs (Ps) are a law school and a corporation under contract with a state commission to provide “protection and advocacy” (P&A) services for individuals with developmental disabilities. They’re suing another state agency – presently known as the Office for People with

Developmental Disabilities (OPWDD) – to get the latter’s records relating to whether the individuals at issue were being denied “the opportunity to live in less restrictive settings” than their current ones, an opportunity Ps claimed New York’s Mental Hygiene Law called for.

The issue was whether the MHL must follow the access procedures set up in the federal statute. A divided Court of Appeals holds that they must, which means that the state, too, has to use the “balancing” test applicable under the federal act, balancing – as the Court describes it – “the purpose and objectives of P&A organizations with the privacy interests of individuals with developmental disabilities”. The state can’t disregard the balancing test, in other words, and come up with a broader access standard. The plaintiffs claimed otherwise. Unsuccessfully.

The Court finds in the federal statute four situations in which a P&A entity must be given access to the records. In emergencies, immediate access must be given. In nonemergencies, however, the statute contemplates a notice procedure to implement the “privacy” part of the federal balancing test, listing in a progression those to whom the notice must be given. Plaintiffs in *Albany* refused to obtain authorizations from any of the listed designees, citing state law and arguing that it required access “without notice or consent considerations”.

Their argument fails; in an opinion by Judge Graffeo, the Court finds “no indication that the New York Legislature intended to deviate from the federal scheme”.

An implementing federal regulation referred to a “legal representative” who at one point in the progression could be the person notified of the application for the records. At another point it referred to an “actively-involved” family member, posing the issue of whether under New York law the family member could qualify as a “legal representative” for the notice purpose. Observing that New York law authorizes such “actively-involved” family members “to make many of the most important personal decisions affecting the health and well-being of their developmentally disabled relative”, the Court finds that requiring the family member to be given notice of the access application is the sounder course to pursue.

In a dissenting opinion by Chief Judge Lippman, the minority does not see in the “as provided by federal law” clause in the federal statutes the restrictive limitation that the majority detects; it finds room to give state law some leeway, and finds in the New York statutes an intent by the legislature to give the P&A agencies “the same access as given to the Commission”.

FEDERAL PREEMPTION

Federal Law Regulating Air Carrier Prices, Routes, or Services, Preempts New York’s False Claims Act

There was a federal law/state law competition of a kind in the *Albany Law School* case, done just above. Here in *State of New York ex rel. Grupp v. DHL Express*, 19 N.Y.3d 278, 947 N.Y.S.2d 368 (April 26, 2012; 5-2 decision), there is an outright issue of federal preemption.

Plaintiffs here (we’ll use the singular P for them) were trying to bring a *qui tam* action on behalf of the state against an express company (D) under New York’s False Claims Act (State Finance

Law §§ 187 et seq.). P claimed among other things that D was charging the state for courier services based on more expensive air deliveries while just furnishing ground transport.

P, the owner of a trucking company, was a subcontractor of D. It brought the *qui tam* action against D under the FCA, seeking compensatory damages, treble damages, penalties, and costs. The claims were sustained at trial but reversed and dismissed by the appellate division as preempted by two federal acts: the Airline Deregulation Act (ADA) and the Federal Aviation Administration Authorization Act. Agreeing, the Court of Appeals affirms the appellate division.

The Court finds especially broad preemptive language in the federal statutes. The ADA, for example, says the states and their subdivisions “may not enact or enforce a law ... related to a price, route, or service of an air carrier”. In an opinion by Judge Jones, the Court finds that an application of the FCA in this case would amount to such an enforcement effort.

P argued that there was a “market participant doctrine” exception applicable here, but the argument fails. The doctrine, as described by the Court,

recognizes the important distinction between the actions of a state in its dual regulatory and proprietary capacities.

Were the state acting here solely in a proprietary capacity, the preemption charge might have been avoided, but the Court sees the FCA as an exercise of regulatory power as well, and “[i]n light of [this] regulatory effect, the market participant exception is rendered inapposite”. The aim of the FCA is not only to compensate the state for the damages D caused; it seeks also to “punish and consequently deter ... future conduct, thereby promoting a general policy”. That, holds the Court, was clearly a regulatory function and is therefore preempted here.

The two-judge dissent, in an opinion by Judge Pigott, points out that P in this case “sought not to regulate shipping rates, but to address a very narrow instance of alleged fraudulent overcharging of the State”. The dissent sees in that no evidence of any “regulatory impulse” in the statute as invoked by P in this case.

**PHYSICIAN-PATIENT PRIVILEGE
“COUNTERVAILING” LEGISLATIVE POLICIES OFFSET DOCTOR-PATIENT
PRIVILEGE AND REQUIRE HOSPITAL TO PRODUCE RECORDS OF INMATE
WHO DIED THERE**

The decedent had been an inmate in a city institution and had been transferred to the hospital, where he died. The New York State Commission of Correction sought his hospital records with a subpoena duces tecum, which the hospital moved to quash on the grounds of the physician--patient privilege conferred by CPLR 4504(a).

The Court acknowledges that the privilege may be interposed by a hospital on a patient’s behalf, but it holds the privilege inapplicable here, superseded by the policies underlying the commission’s and its review board’s investigative powers under the state constitution and state

statutes. Correction Law § 47(1)(a), for example, places first among the board's duties the "[i]nvestigat[ion] and review [of] the cause and circumstances surrounding the death of any inmate".

On that basis, the lower courts' quashing of the subpoena is reversed and the disclosure of the records is ordered. *New York City Health and Hospitals Corp. v. New York State Commission of Correction*, 19 N.Y.3d 239, 946 N.Y.S.2d 547 (May 8, 2012).

In *Matter of Grand Jury Investigation of Onondaga County*, 59 N.Y.2d 130, 463 N.Y.S.2d 758 (1983), the Court did quash a grand jury subpoena that had been served on a hospital. It had been issued in that case to help identify a criminal assailant who might have himself been injured and sought medical treatment. The subpoena specified "all medical records pertaining to treatment of any person with stab wounds ... caused by a knife" during the period in question. The Court concluded that compliance here might require the hospital to divulge information protected by the physician-patient privilege, held that impermissible, and on that basis quashed the subpoena.

In its later (2002) *Grand Jury (New York County)* decision (Digest 515) involving a similar endeavor, the Court took note of the purposes of the privilege, found the *Onondaga* case right on point again, and again quashed the subpoena.

Both cases are distinguished by the Court, and the subpoena sustained, in the present case.

In an opinion by Chief Judge Lippman, the Court says the commission "is constitutionally charged with the oversight of all correctional facilities" in the state. Within the commission is its Medical Review Board, staffed in part by physicians. Investigation into the "death of any inmate of a correctional facility" is among its prime functions, and the board is required in general to report to the commission with such recommended changes as it deems "necessary and proper to improve the quality and availability of ... medical care", citing Correction Law § 47(1)(e).

The Court notes that when the inmate here was transferred to the hospital, it was into a "nonprison unit". Apparently on that ground the hospital argued that the commission "had no special entitlement to his records" and that the situation was therefore governed by the privilege statute, CPLR 4504.

The purpose of the doctor-patient privilege, explains the Court, is to encourage "uninhibited and candid communication between patients and medical professionals" and to protect the patient's "reasonable privacy expectations". When these policies

will not be advanced by the privilege's assertion and there are countervailing legislatively sanctioned policies and practices militating in favor of disclosure, exceptions to the privilege ... may be implied.

An exception is implied here, but with the reminder that this does not establish any categorical or "general public interest exception" to the privilege. Only "a specific, narrow exception", such as the present case involves, will justify supersession of the privilege rule.

The hospital also argued that the federal Health Insurance Portability and Accountability Act (HIPAA) applied to protect privacy here, but the Court notes and applies the exception that HIPAA makes for subpoenas issued by “an administrative body”. The present subpoena “falls comfortably within” that description, the Court finds.