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

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LONGARM JURISDICTION

Foreign Bank's Use of Correspondent N.Y. Bank for Money Transfers That Aid Foreign Terrorist Acts Can Support N.Y. Jurisdiction

And the jurisdiction supported is over the bank itself, i.e., the substantive liability is being asserted against the bank itself for assisting a terrorist organization, in this case Hizballah in Lebanon.

The Court of Appeals 1984 *Banco Ambrosiano* decision that we treated in a lead note in Digest 295, on the broad subject of longarm jurisdiction, illustrates the "gap" between how far New York goes with quasi in rem as against in personam jurisdiction of nondomiciliaries. With quasi in rem jurisdiction the state goes the whole way; with personam jurisdiction it has self-imposed limits. When a given foreign defendant is beyond personam jurisdiction, but has property in New York subject to attachment, an imaginative plaintiff's lawyer may be able to spell out overall New York contacts which, while inadequate to support personam jurisdiction, may just make the grade on the quasi in rem side. The plaintiff in *Banco* accomplished just that.

The *Banco* case is among a number of others that get cited in the more recent *Licci v. Lebanese Canadian Bank*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2012 WL 5844997 (Nov. 20, 2012), in which imaginative lawyers are again at work, this time pulling for that extra step: outright personam jurisdiction of a foreign bank (the Lebanese Canadian Bank) on a claim that its activities aided terrorist activity (rocket attacks) that injured plaintiffs or their families in the Middle East. The activity relied on for jurisdiction is money laundering through a correspondent bank (American Express) in New York.

The case was initially brought in a federal district court in New York, which dismissed it for lack of personal jurisdiction, holding that the activities alleged in support of jurisdiction did not fit within the New York longarm statute, CPLR 302(a), which in paragraph 1 authorizes jurisdiction based upon a claim "arising from" a transaction of business in New York.

The plaintiffs labored to establish that this case was one "arising under" the statute, but failed to convince the district court, which dismissed it. The plaintiffs appealed to the Second Circuit. That court found ambiguity in New York law on attempted longarm jurisdiction in analogous

cases, and certified questions for the New York Court of Appeals to answer in *Licci*. One was whether

> a foreign bank's maintenance of a correspondent bank account at a financial institution in New York and use of that account to effect 'dozens' of wire transfers on behalf of a foreign client, constitute a 'transaction'

under the New York statute. Unable to answer the question under existing New York cases, the circuit turned to the New York Court of Appeals for guidance.

In an opinion by Judge Read stressing that use of the account in this case was not just sporadic or incidental, but regular, the Court holds that

> repeated use of the correspondent account shows not only transaction of business, but an articulable nexus or substantial relationship between the transaction and the alleged breaches of statutory duties.

The "duties" refers to those conventionally associated with tort law, and in this case as well to the federal Alien Tort Statute (28 U.S.C. § 1350) and others.

Note that while CPLR 302(a) has, in paragraphs 2 and 3, specific provisions for longarm jurisdiction in tort cases (both inapplicable here), paragraph 1 – which with its "transacts business" phrase would seem to embrace only commercial subject matter – has also been held to encompass tort actions if they can be shown to arise from such business transactions. (See Siegel, New York Practice 5th Ed. § 87.)

The ultimate recipient of the transferred funds in this case was alleged to be the Shahid Foundation, an arm of Hizballah and through which the financing of Hizballah terrorism is effected. These financing activities allegedly contributed to the bank's retention of Shahid as a customer, thus constituting "business" of the defendant under CPLR 302(a)(1); these activities put the defendant bank on the line as advancing Hizballah's terrorist enterprise.

The first certified question, answered yes, was whether the bank's acts "arise from" a transaction under CPLR 302(a)(1). The second was whether the plaintiffs' substantive claims also so arise. That's also answered yes.

The case goes into a number of other matters, but our task here was just to call attention to this often tried but seldom successful effort to reach foreign terrorist activities through the New York courts.

Perhaps the intention was to assert jurisdiction directly over Shahid as well, but that would probably be futile in any event for want of New York assets directly owned by Shahid out of which a judgment might be satisfied locally. So getting at the bank instead, with local and hence leviable assets, is what the plaintiffs accomplish here – but even that comes with a big if:

If they prevail on the merits. All of this took place at the pleadings stage, with all of the plaintiffs' allegations of fact assumed to be true. Whether plaintiffs' mission succeeds will depend on how they do after the assumption is cancelled and the actual proof is required.

OTHER DECISIONS

CORPORATE SHARES TRANSACTION

Ambiguity in Meaning of "Transaction" Concerning Corporate Repurchase of Preferred Stock Bars Early Dismissal

Once again the rule that bars the granting of a motion to dismiss at the threshold if there is any ambiguity in the transaction involved that could uphold the complaint, comes to the fore to keep a case alive and require it to go forward to trial. And when there's a difference of opinion between appellate courts about whether there's an ambiguity, we meet an incidental rule which is itself never ambiguous: the rule that the highest court procedurally reachable is the one that determines whether an ambiguity prevails.

That proves to be the situation in *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Services, Inc.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2012 WL 5257469 (Oct. 25, 2012). Here, where the appellate division found no ambiguity and dismissed the action, the Court of Appeals finds one and reinstates it.

P owned thousands of shares of the preferred stock of D Corporation. The stock had no voting rights, but it recited a condition under which D would be required to repurchase the stock from P at $1000 a share. The condition was that a "fundamental change" occur in corporate status. It then lists "five scenarios" (as the Court of Appeals describes it) that would constitute so "fundamental" a change, only two of which are singled out as dispositive of the appeal. I.e., only two are needed to establish ambiguity.

Under these two, the "fundamental change" occurs when there's a transaction in which a person or group becomes owner of more than 50% of the voting common stock of D. An exception to this, however, is if D merges with another entity. But an exception to this exception is where, after the merger, D ends up as "the surviving entity".

The disputed agreement here involved the merger of defendant D with N Company and N's "wholly-owned subsidiary", S, a company created for the "sole purpose of facilitating [N's] acquisition" of defendant D. Once S acquired a majority of D's common stock, S would "merge" with D "and then cease to exist".

To P, this was the qualifying "fundamental change", and P demanded that D repurchase P's preferred shares at the agreed price of $1000 each. P brought this declaratory action to compel the repurchase. The appellate division regarded this as a single transaction in which D was the survivor, "triggering the exception" to the exception described above. It dismissed the action.

In an opinion by Judge Graffeo, the Court reverses and reinstates the complaint. It says that

> [b]ecause the use of the term 'transaction' is not defined in the preferred stock agreement, the precise meaning that the parties intended to ascribe to that terminology cannot be clearly discerned at this early point in the litigation.

The Court finds one ambiguity, for example, in resolving the phrase "the surviving entity". In order to require the repurchase of the preferred stock by D, does it mean that D has to be the sole survivor of the merger arrangement? Or is repurchase triggered as well if there's also another survivor, such as N Company was in *Whitebox*? Of such stuff was ambiguity made in this case.

We wouldn't have had to go even that far to find ambiguity. To us even the plaintiff's name was ambiguous.

INSURANCE ON "RESIDENCE PREMISES"

Ambiguity in Fire Insurance Policy Is Resolved Against Insurer, Barring Its Try for Summary Judgment

We just did a case – *Whitebox*, above – in which an ambiguity in an agreement was held to bar a pre-judgment motion to dismiss. The contract there involved a commercial and corporate subject matter. By coincidence, we now have another ambiguity issue, this one involving that champion of all ambiguity: the insurance contract.

The law is heavy with cases holding that an ambiguity in an insurance contract must be resolved against the insurer and in favor of coverage. *Dean v. Tower Insurance Co.*, 19 N.Y.3d 704, ... N.Y.S.2d ...., decided the same day as *Whitebox* (Oct. 25, 2012), follows that rule, finds an ambiguity in the insurance agreement before it, and resolves it against the insurer by denying it summary judgment when, after it disclaimed, the insureds brought a breach of contract claim.

It was a homeowners' policy. The ambiguity found in it concerned the construction of the phrase "residence premises". The plaintiffs bought the place and secured (and later even renewed) the insurance policy, but termites were found after the closing. The premises required much work. While the work was going on, plaintiffs remained in their prior residence, but plaintiff husband was doing work at the new premises regularly and often eating and napping there. Shortly after "renovations were substantially completed", notes Judge Ciparick in the opinion, a fire completely destroyed the house.

Insurer D disclaimed coverage because it said that on these facts this was not a "residence premises", but the contract did not define residence. Hence coverage was at least a possibility, precluding summary judgment at the threshold. The majority finds there are issues of fact to resolve before the matter can be determined.

This all seems so consistent with New York caselaw that it may come as a surprise that three judges, in an opinion by Judge Jones, dissented, finding no ambiguity. They were ready to give the insurer summary judgment.

The real issue on a scene like this is once again to determine whether there is an ambiguity present. If on a seven-judge court four judges see one, shouldn't that by itself go a long way towards convincing the other three that one exists?

A long way, maybe, but in *Dean* obviously not far enough.

The likely reason for the attempted exclusion here was the insurer's not unreasonable assumption that fire is more likely to be avoided if the premises are fully and regularly inhabited. And perhaps the insurer also suspected fraud of some kind, i.e., that the plaintiffs were not intending to move in themselves but to sell or rent, etc.

The majority noted the fraud possibility but found no need to pursue it. And if they did, that would only have buttressed the call for a trial: fraud issues are routinely subjective and seldom resolvable summarily.

ATTORNEY DISCIPLINE

Lawyer Must Supervise Staff Entrusted with Fiduciary Duties and Answer for Staff Defalcations That Hurt Client

And that is so even where, as here, in *Matter of Galasso*, 19 N.Y.3d 688, ... N.Y.S.2d .... (Oct. 23, 2012; per curiam opinion), the attorney is himself guilty of no criminal conduct.

An employee in his office was the guilty one, taking out of escrow and IOLA (Interest on Lawyer Account) accounts at the firm money belonging to clients and depositing it into other accounts, causing the clients great losses. The culprit employee in this case was the lawyer's brother.

If not for criminal proceedings, then at least for disciplinary proceedings, the lawyer is responsible for such an employee's acts. "Few, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds", the Court says, upholding nine out of the 10 charges brought against the lawyer by the local Grievance Committee. Most charges were based on his allowing his employee/brother "an unacceptable level of control" over firm accounts, and failing to exercise the requisite supervision of him.

"A discrepancy in an escrow account should, at a minimum, be alarming to a reasonably prudent attorney." Delegation to staff is not precluded, says the court, "but any delegation must be made with an appropriate degree of oversight", which was clearly lacking here. The Court stresses

> that it is the ethical responsibility of the attorney – not the bookkeeper, the office manager or the accountant – to safeguard client funds.

The Court points up that the lawyer here isn't being held for his brother's criminal acts, but for "his own breach of his fiduciary duty and failure to properly supervise his employee". On the facts of this case the lawyer is indeed his brother's keeper.

The one count of the 10 that the Court finds unsupported in the record is the charge that the lawyer failed "to fully and timely respond" to the disciplinary proceedings. The Court finds his participation timely and even "active".

The appellate division had suspended the attorney from practice for two years. Since that was based on all of the charges, including lack of cooperation, the striking of that charge alters the record such that the appellate division might deem a lesser penalty in order.

The case is remanded for the court to reconsider that.

ENVIRONMENTAL IMPACT STATEMENTS

Court Requires Developer to Supplement Its EIS to Describe Post-Cleanup Monitoring Measures Needed to Continue to Protect Against Contaminants

In its 1986 *Jackson* decision (Digest 320), the Court of Appeals, reviewing the State Environmental Quality Review Act (SEQRA) (codified in § 8-0101 of the Environmental Conservation Law), described it as "an attempt to strike a balance between social and economic goals and concerns about the environment". In that case it found the balance to favor upholding the plan of the Urban Development Corporation to redevelop the Times Square area in New York City. The Court went down the lists of objecting groups and found that the UDC had given adequate consideration to all of the objections.

Now, in *Bronx Committee for Toxic Free Schools v. New York City Constr. Authority*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2012 WL 5199403 (Oct. 23, 2012), the Court is cast in a similar role to resolve environmental impact issues relating to a public authority's construction of public schools on a "significantly contaminated" site in the Bronx. The site had been a railroad yard. The authority was the respondent in an Article 78 proceeding brought by a public interest group contending that the authority had not completely fulfilled statutory obligations imposed on it to assure the cleanup of the site and the maintenance of a clean site subsequently.

More specifically, the objection was that the authority had not shown what steps it would take to keep the site contaminant-free after initial cleanup. The authority had furnished an EIS showing cleanup steps needed to bring about initial compliance, but the petitioners wanted it to furnish a supplemental EIS describing the steps that it proposed to assure continued compliance afterwards: "long-term maintenance and monitoring of the controls ... used to prevent or mitigate environmental harm", as the Court describes it.

The Court's opening statement acknowledges the deference due to the agency in these EIS cases. The agency has "broad discretion in deciding what to include and what to omit" from an EIS, says the Court, but it nevertheless grants the petitioners' request here to have the agency file a supplemental EIS describing the "remedial measures". Interestingly, the Court upholds the petitioners' contention that the description is "essential" to understanding the environmental impact, not so much because the petitioners showed that it was essential, but because the authority failed to show that it wasn't.

The authority also participated in a separate statutory project called the "Brownfield Cleanup Program" (ECL § 27-1401 et seq.), which offers state inducements for environmental cleanup. This participation entailed its own set of requirements. With demands from that source as well as from SEQRA, the authority had several sets of marching orders but appeared to be in step with all of them. The only step the Court singles out for criticism (and correction), in any event, is the failure to show protective steps needed to keep the premises contamination-free in the future. As the Court structured it in an opinion by Judge Smith, the problem was that "[n]either the draft nor the final version of the EIS described the long-term maintenance and monitoring procedures to be used".

REVIEWING NON-FINAL ORDERS ON APPEAL FROM FINAL JUDGMENT

Court of Appeals Takes More Generous View of "Necessarily Affects" Language In Statute

The statute is CPLR 5501(a)(1). It provides that an appeal from a final judgment also brings up for review any disposition made along the way – but only if it "necessarily affects" the final judgment. That pesky phrase has earned a gluttonous share of attention from bench and bar over the years.

What does it take to be able to say that the disposition "necessarily affects" the final judgment? One test, which we have described as "not perfect but helpful" (see Siegel, New York Practice 5th Ed. § 530), is to ask whether, assuming that the nonfinal order or judgment is erroneous, its reversal would also require a reversal of the judgment. If it would, it's reviewable; if not, and the judgment or order can stand despite it, it's not reviewable.

In *Siegmund Strauss, Inc. v. East 149th Realty Corp.*, ... N.Y.3d ...., ... N.Y.S.2d ...., 2012 WL 5199393 (Oct. 23, 2012), that test is rejected as too narrow. Generally speaking, that's a welcome development for lawyers on the losing side of the disposition. Lawyers bent on getting it overturned but not sure whether the "necessarily affects" rule would support its review on an appeal from a later final judgment, must take the immediate appeal; they can't safely rely on any kind of serene assumption that if they lose on final judgment and appeal it, review of the interlocutory disposition can be included.

It all depends on a phrase – the "necessarily affects" phrase of CPLR 5501(a)(1). Because of its plasticity, lawyers don't trust it. Hence they often appeal the nonfinal disposition immediately, just to be sure it's preserved for appellate review.

Parenthetically, to add to the tension, the lawyer must also be sure that the appeal of the nonfinal matter is then perfected before final judgment is entered in the case because, under the key 1976 decision of the Court of Appeals in *Matter of Aho* (see Siegel, id., § 532), the mere entry of the final judgment terminates the pending appeal from the earlier order.

This is seldom a problem in federal practice, where, unlike New York practice, the general rule is that interlocutory appeals are not allowed. (See 28 U.S.C. § 1291 and 1292.) Hence a federal appellate court, on an appeal from a final judgment, reviews just about everything decided along the way. Happy news?

Maybe on one front, but federal practice has its own thorns. Precluding immediate appeal from a nonfinal order, which is later found – on appeal from the final judgment – to be in error and to require reversal and a new trial, can mean fortunes in lost time, money, and energy when that long-delayed review now acts the villain by wiping out the entire trial stage of the action – maybe years of effort and expense.

The New York practice of allowing appeals from just about all interlocutory dispositions – while perhaps unique in the nation and often criticized – at least helps avoid the prospect of an expensive trial going completely to waste because an incidental point, maybe involving only a procedural matter, involves a key one and generates a reversal of everything. An example would be an interlocutory order denying disclosure of an item later found fundamental to the loser's case.

Neither of these conflicting antipodes offers secure sailing to the practicing lawyer. Perhaps a tacit acknowledgment of this dilemma underlies the *Siegmund* decision, relaxing some of the perceived stricture that has been built around the "necessarily affects" clause in CPLR 5501(a)(1).

The plaintiff in *Siegmund* wanted a declaration that it was the lawful tenant of certain Manhattan premises as a result of a corporate merger agreement with defendants. The defendants counterclaimed against plaintiff and impleaded plaintiff's principals. During the action the court made an order dismissing those claims, which the defendant did not appeal, but after a bench trial in which the court rendered final judgment for the plaintiff, the defendants did appeal the judgment. The issue was whether, on that appeal, the court could also review the earlier orders dismissing the counterclaim and third-party claims.

On a technical application of the "necessarily affects" standard, the court could not, because the main finding of the judgment – that plaintiff was entitled to possession of the premises – would have remained standing even if the now reviewed earlier orders were reversed. Making that technical application – i.e., a strict application of "necessarily affects" – the appellate division refused the review.

In an opinion by Judge Jones, the Court of Appeals reverses, taking the view that the earlier disposition, since made pursuant to CPLR 3211(a)(7), meant that the dismissal of the counterclaims and third-party claims was for failure to state a cause of action. This "necessarily removed that legal issue from the case ... [because] there was no further opportunity during the litigation to raise the question" and for that reason the order "necessarily affected the final judgment".

But can't that standard support the post-judgment review of any legal issue resolved along the way with a court order?

Treatment of *Siegmund* can be found in the Thomas F. Gleason column in the N.Y. Law Journal of November 19, 2012, "Dangerous Interactions: Interlocutory Appeals and Judgments". The column points up the difficulties the "necessarily affects" standard poses for practicing lawyers.

What should a lawyer in that situation do? Maybe this: gauge how important it is to preserve appellate review of the disposition if you should lose on final judgment. If it's all that important and you can't be absolutely certain that the "necessarily affects" standard will enable you to secure that review later, then exploit the New York option of taking an immediate appeal from the order now.

And be sure – because of the *Aho* case – that you can get that appeal disposed of before final judgment is rendered in the action. And how can you be sure of that when you don't control the appellate calendar?

What's your pleasure, a rock or a hard place?