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

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## WHAT MUST BE SHOWN TO SUPPORT UNJUST ENRICHMENT CLAIM?

## WHETHER D WAS "AWARE" OF P'S EFFORTS, WHICH BENEFITTED D IN REAL ESTATE TRANSACTION, DIVIDES COURT OF APPEALS

The doctrine of "unjust enrichment" has yet to find a secure command post in the law – a position from which judges can make good judgments and the unjustly enriched can be made to return their allegedly unjust riches.

Credit where credit is due, of course: the doctrine excels at describing emotion. It easily characterizes the feeling that comes over a couple, for example, when they see a neighbor with a new car, or his wife with new earrings. But in a legal context, and to solve a claim in litigation, "unjust enrichment" is always a tough call. In most situations in which it's interposed it comes off like something of an afterthought, a last desperate bite of an apple that has nothing left on it but the pits. In most cases of its attempted use, in other words, the doctrine fails.

The doctrine of unjust enrichment was described by the Court of Appeals in its *IDT Corp*. case, which we reported in Digest 592, as "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement". Complicated as the arrangements and background were in the *IDT* case, when the court finished digging through the facts it found that the parties had indeed "executed a valid and enforceable written contract", thus barring the application of the unjust enrichment doctrine.

When the doctrine makes an appearance, it's usually in a context in which other paths to recovery have been barred to the plaintiff for one reason or another, making it seem – when the court has found these other paths closed – that the plaintiff has interposed the unjust enrichment count as a kind of last gasp.

In *IDT* the ultimate issue was one of the statute of limitations. The time period applicable to the claim was the three years of paragraph 4 of CPLR 214 because the claim was found to be nothing more than an "injury to property" under that paragraph. The trouble was that the plaintiff had missed the three years and was now trying to squeeze the claim under paragraph 1 of CPLR 213, which allows six years and would have made the claim timely.

Paragraph 1 of CPLR 213 is the so-called "residual" provision that applies when "no limitation is specifically prescribed" by any other statute. It applies, for example, to claims in equity to which no other time-prescribing statute is otherwise applicable. A claim of injury to property is not an equitable one, however; it's a claim at law and supports only monetary relief. Hence the claim had only the three years of CPLR 214(4) and not the six years it would have enjoyed under CPLR 213(1) had it been able to qualify as an equity claim.

Plaintiff's last-resort injection of an unjust enrichment count in *IDT* was a kind of back-door attempt to enter in an "equity" costume. It didn't work.

Of course, endeavors to evade the statute of limitations are not the only contexts in which the unjust enrichment doctrine is found. A more recent case on the subject, which occasions this note, is *Georgia Malone & Company v. Rieder*, 19 N.Y.3d 511, 950 N.Y.S.2d 333, a 5-2 decision from the Court handed down on June 28, 2012.

P in *Georgia* was a company that acquired and put together data about real estate not yet on the market. This was for the use of P's clients, potential buyers in that market. One such client was C Company, with which P contracted to produce such materials, all in confidence, which P did. Using those materials, C made a contract to sell certain property, but the deal fell through.

According to P, R, also in the real estate business, bought those materials from C for $150,000. It then secured a new buyer for the property, resulting in a $500,000 commission for R. Arguing that allowing R to retain that money in these circumstances would be unfair, P sued to get it back, interposing against R the theory of unjust enrichment, and producing the *Georgia Malone* decision.

Many cases on the subject of unjust enrichment are cited by both sides in *Georgia* in opinions by Judge Graffeo for the majority and Chief Judge Lippman for the dissent. Digging through them to what seems to be the crux of their disagreement, the main issue appears to be one of awareness: was R aware that it was P who produced the materials that so contributed to R's profit?

While the Court's caselaw has made clear that there need not be an actual privity of contract between the parties to the unjust enrichment dispute, there does have to be what the majority in *Georgia* describes as "a relationship between the parties, or at least an awareness" by the defendant of the plaintiff's existence.

The majority in *Georgia* finds no allegation by P that R knew of P's involvement. The dissent disputes that, pointing to the documents themselves, which were all on P's letterhead, as P showed in an affidavit opposing R's motion to dismiss.

And on such a motion, the dissent stresses, all inferences to which the allegations lead must be resolved in favor of the plaintiff – the party against whom the dismissal motion is made. The dissent says that the majority violates this rule of construction by its intimation that R believes P had been compensated by C for its services and that R is a good-faith purchaser for value.

That, says the dissent, inappropriately draws inferences in favor of the defendants, and, it adds,

> [r]equiring a relationship of mutual dealing where the plaintiff confers a benefit on the unjustly enriched party treads too close to requiring privity,

a requirement that the Court disclaimed in two earlier cases, says the dissent, citing them.

The majority's position is that the relationship between P and R "is too attenuated because they simply had no dealings with each other".

With this "too attenuated" holding of the majority, and the dissent's rejoinder about this bringing the Court "too close" to a privity requirement, we have "too" seeds that are likely to garner a good deal of attention – and division – in future unjust enrichment cases in the state's courts.

The majority doesn't disagree with the dissent's finding that P has been unfairly treated here, but says that P's remedy lies against C and its principals, not against R. Those claims against C are still pending, the majority points out, so P "is not without recourse".

**OTHER DECISIONS**

*OWNERSHIP OF LAND BENEATH WATER*
**Conveyance of Land on Pond or Stream Includes Land Under It Unless Contrary Intent "Is Made Clear"**

That, holds a unanimous Court of Appeals in *Knapp v. Hughes*, .... N.Y.3d ...., .... N.Y.S.2d .... 2012 WL 4933274 (Oct. 18, 2012), "has long been established New York law" on the subject: that the conveyance includes land under the water from the shore line to the center of the pond or stream involved. The Court reaffirms that principle here.

While that's the denouement, simply stated, a reading of the opinion indicates that reaching it was not quite so simple. Most of the relevant cases reviewed by the Court are old – including, among others, entries from 1861, 1892, 1923, and 1930 – and their statements in point on the issue of underwater land ownership of inland bodies are often just "dictums", often "mistaken", and "not consistent".

The distillation that the Court now alights on in an opinion by Judge Smith is that

> [i]n the absence of an explicit reservation, a grant of land on the shore of a pond or stream will be held to include the adjoining underwater land, except in unusual cases where the nature of the grant itself shows a contrary intention.

To illustrate such an "unusual case", the Court cites its 1903 decision in *In re Brookfield*, 176 N.Y. 138, involving "a mill on a river near a pond". The mill's owner, wanting to build a dam that would "flood the pond's shore", included in the grant at issue only land "that will be overflowed ... in consequence of the erection of the dam". The Court finds that those terms in

*Brookfield* "strongly supported an inference that the grantor meant to transfer only shore, not underwater, land".

There was nothing to support a like inference in the facts of the present case, *Knapp*, which involved a 1973 conveyance by F, the owner of land on a pond, to defendants' predecessors. Nothing in those grants "shows an intention to withhold underwater lands". Hence, because the deeds "do not expressly exclude underwater lands, they must be read as conveying such land, to the center of the pond".

Thus the defendants prevail in this action brought by plaintiffs – apparently other owners of frontage – to enjoin the defendants "from interfering with or using the underwater property" including the "water thereon".

The result implements what the Court perceives to be the general understanding of buyers of inland waterfront property.

> It seems highly likely that most purchasers of waterfront property assume that they are acquiring not only the dry land, but the right to use the water also. Who would buy land on a pond or stream, if informed that he or she could only look at the water, not boat on it or fish or swim in it?

*<u>MORTGAGE RECORDING TAX</u>*
**Federal Credit Unions Are Subject to New York's Recording Tax**

The federal credit union is not the alter ego of the United States itself. If it were, it would be immune from all state taxes under the Supremacy Clause. The Court of Appeals finds in *Hudson Valley Federal Credit Union v. New York State Dep't of Taxation and Finance*, .... N.Y.3d ...., .... N.Y.S.2d .... 2012 WL 4932654 (Oct. 18, 2012; 5-1 decision), that "[f]ederal credit unions are private associations chartered under federal law" and, although regulated by a federal agency, "they are wholly owned, funded and managed by their members".

That was the final point made by the Court in its response to the plaintiff credit union's arguments. Earlier in the opinion, the Court considered and applied language in the Federal Credit Union Act, under which federal credit unions are formed. The FCUA provides that the unions' "property", "franchises", "capital", "reserves", "surpluses, and other funds, and their income shall be exempt from all taxation". The Court cites the omission of "mortgages" from the list as intending to allow the tax with respect to mortgages.

In an opinion written by Judge Graffeo, the Court points out that

> when Congress has intended to immunize 'mortgages' of federally chartered lending entities from state taxation, it has done so explicitly[,]

citing a number of such examples, including the National Housing Act and the National Consumer Cooperative Bank Act.

The absence of a given element when Congress has otherwise included it in "analogous" lists in other statutes "represents a strong indication", says the Court, of an intent to exclude it. If Congress intended to exempt the tax for credit unions, the immunity would have been stated in the FCUA, but instead, says the Court,

> although the FCUA contains an extensive list of exemptions relevant to federal credit unions, it makes no mention of mortgages or loans of any kind.

Judge Read, dissenting, sees in the FCUA only two "carve-outs" from the FCUA's exemption of the federal credit union from "all taxation" – one for real property and one for "tangible" personal property – neither one construable to include a mortgage recording tax.

The dissent also cites several federal district court decisions supporting its position. These the majority declines to follow, citing yet another federal district court decision going the other way, thus seeing at best in the federal cases a conflict on the matter.

*FIREFIGHTER'S DISCIPLINE*

**Letter Saying Dep't Finds Fireman Made Racial Slur at Colleague Can't Go Into His File Without Hearing**

The charge of the racial slur was found to violate the Fire Department's Code of Conduct and "Equal Employment Opportunity (EEO) Policy". To admit a letter containing such a charge into the fireman's file without giving him a hearing would amount to a denial of due process, holds the Court of Appeals. It could have a negative impact on his future possibilities. Hence the Court grants the fireman's Article 78 petition to annul the department's finding. *D'Angelo v. Scoppetta*, .... N.Y.3d ...., .... N.Y.S.2d .... 2012 WL 4932670 (Oct. 18, 2012; 6-1 decision).

The majority finds pretty clear sailing on the point, and would have had an even smoother sail were it not for the Court's earlier (1981) *Holt* decision (Digest 259), also by a divided Court. In *Holt*, the Court said it was okay to put into a teacher's file a letter criticizing the teacher for certain actions and asking that such actions not continue, identifying the teacher's conduct as "a relatively minor breach of school policy".

The majority in *D'Angelo* distinguishes *Holt* because, it says, the letter here "stands in contrast to the letters in *Holt*, which only reflect the views of a particular supervisor", while this letter was the product of a prolonged (two-year) department probe and the letter tells the petitioner "in no uncertain terms" that a thorough investigation reveals that he "exercised unprofessional conduct" and "made an offensive racial statement".

No action was taken against the petitioner. The letter was the only culmination, but it also required the petitioner "to participate in additional EEO training", which the Court, in an opinion by Judge Ciparick, finds to be "a form of discipline and not, as the Department contends, mere encouragement to comply with EEO policy". The Court also points out that the Department itself concedes that this breach of its "racial discrimination policy is serious misconduct that could negatively impact his eligibility for future promotion". All-in-all a set of consequences that should not be allowed to attach, says the majority, until the fireman has been accorded a full due process hearing.

Judge Smith, dissenting, sees *Holt* not as distinguishable, but in point. Laws governing civil servants, he observes, "often require a trial or hearing, with due process protections" before a "reprimand" may issue, but he has trouble allowing "reprimand" too broad an interpretation because "it could make the lives of public employers almost impossible":

> [t]hey would have to go through a proceeding before a neutral fact-finder, with witnesses and cross-examination, every time they wanted to say a harsh word to an employee.

Hence the dissent would give "reprimand" here the similarly narrow construction *Holt* did.

In the face of the negative consequences it outlines as possibilities confronting the petitioner in *D'Angelo*, the majority rejects so narrow a construction.

<u>*OTB RETIREES*</u>

**Employees of Now Insolvent OTB Apparently Lose Their Retirement Benefits Because OTB Can't Pay, and City and State Have No Duty to Pick Up Tab**

New York City's Off-Track Betting system was implemented through a corporation created in 1970 by statute. It went on for years but then suffered money problems. It finally shut down on December 7, 2010, a day that will live in infamy, certainly for the corporation's employees, who lose their retirement benefits.

Implicated in their plight are the state constitution, state statutes, and the New York City Administrative Code, all reviewed by the Court of Appeals in *Roberts v. Paterson*, 19 N.Y.3d 524, 950 N.Y.S.2d 510 (June 28, 2012), and all leading to the bottom line that bars the employees from looking to the state or city to pay their retirement benefits, ostensibly as backers of OTB, or to OTB itself, which just didn't have the money.

Among the conclusions drawn from these provisions is that the city could not be turned to because under the program the city offered OTB employees, the city had to be reimbursed for anything paid out, and OTB's insolvency made reimbursement impossible. And when the employees turned to the state, they met the even bigger barrier of the state constitution. OTB is found to be a public corporation and Article X, § 5 of the state constitution says that

> [n]either the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by such a public corporation heretofore or hereafter created ....

The unions concerned, along with their officers and prospective OTB retirees, were the plaintiffs in the action, brought against the state, the governor, the city, and the mayor. Along the way they got a temporary restraining order to continue benefit payments, but when the hearing took place to convert the TRO into an outright preliminary injunction, the injunction was denied because the provisions noted above showed that the plaintiffs had no likelihood of success on the merits, one of the conditions for the issuance of such an injunction.

The plaintiffs put forth a number of theories in their unsuccessful campaign to “nullify [the finding of] OTB’s separate legal identity” – including theories of “joint employer”, fiduciary duty, and piercing the corporate veil – but the obstacles noted above were held to be “insuperable”.

The plaintiffs even tried an estoppel argument, relying on “statements attributed to former Governor Paterson”.  He’d said that the closure of OTB would, as the Court describes it in an opinion by Judge Read, “foist $600 million in pension obligations onto the State”.  But the estoppel, even if the common requirement of detrimental reliance could be shown (which it couldn’t), could not surmount the constitutional and statutory hurdles.

*RENT SUBSIDIES*

**Divided Court of Appeals Holds City Did Not Contract to Subsidize Rents of Homeless under “Advantage” Program**

The issue concerned housing for the homeless.  An earlier program called Housing Stability Plus (HSP) posed problems that were presumably to be remedied by a replacement program called Advantage New York, which, at least arguably, called for the city to reimburse landlords renting to needy tenants in the program.  But that was the issue: did the city and its agencies – collectively, the city – undertake so to subsidize the tenants?

In *Zheng v. City of New York*, 19 N.Y.3d 556, 950 N.Y.S.2d 301 (June 26, 2012; 4-3 decision), the Court holds by a bare majority that the city did not.  The Court sees the issue as strictly one of contract.  Applying rules of contract construction, most notably as presented in the Court’s 1977 opinion in *Brown Bros. Elect. Contr. v. Beam Constr. Corp.*, 41 N.Y.2d 397, 393 N.Y.S.2d 350, the majority, in an opinion by Judge Read, finds absent in the *Zheng* case a needed element under contract law.  Both lower courts, it says, found “that the City did not intend to enter into enforceable contracts ... and the record supports this affirmed finding of fact”.  Seeing the issue as one wholly of fact, it therefore finds itself constrained to affirm the lower courts’ findings – and dismiss the lawsuit.

The action was brought by tenants deeming themselves, under the Advantage program, beneficiaries of the contract they claim was made between the city and the landlords, and in need of the city’s subsidy to avoid eviction.  They sought specific performance of the contract along with appropriate declaratory relief.  “Basically”, as the majority describes it,

> plaintiffs were looking for the City to subsidize their leases for a full two years, notwithstanding the loss in the interim of state and federal funding [which had terminated earlier].

All of the requested relief, which the dissent would have granted, is denied and the action dismissed.

The dissent, written by Chief Judge Lippman, does not see the issue of the contract making here as one of fact at all, but clearly a question of law that the Court can review. And the dissent does review it and, disagreeing with the lower courts as well as its colleagues in the majority, sees the city as having made a binding contract guaranteeing the landlords the subsidies claimed.

The word "guarantee" is in the picture, but also the subject of dispute between the two sides. The word appears in the course of the negotiations, but the majority sees it as only a passing phrase used in a caption in the relevant papers and in no way the specific assurance the dissent finds it to be. The dissent says the majority's reading would transmute "guaranteed" into "not guaranteed", "shall" into "may", and "will pay" into "may pay", a "strained interpretation [that] renders the City's own choice of words of no effect" and enables it to "renege on the very promises it used to induce [the landlords] ... to forgo profitable alternatives for the use of their property".

The dissent would have granted the plaintiffs the relief sought.

The majority, not insensitive to the plight of the plaintiffs, says that

> However much our sympathies may lie with plaintiffs, the fact remains that the courts below found, with record support, that the City made no contractual commitment to continue the Advantage program through expiration of plaintiffs' leases.

<u>*FIDUCIARY RELATIONSHIP LACKING*</u>

**Breach of Fiduciary Duty That Shareholders Might Assert Against Managers of Corporation Can't Support Claims of Mere Creditors**

And in *Oddo Asset Management v. Barclays Bank PLC*, 19 N.Y.3d 584, 950 N.Y.S.2d 325 (June 27, 2012), it appears that that was the essential problem with the plaintiffs' claims: the plaintiffs were creditors of the companies at issue, and despite the complications of the arrangements that led to the plaintiffs' losses, they had nothing more than creditor status when they brought suit.

The suit was for breach of fiduciary duty and tortious interference with contract against companies appointed as "collateral managers ... to oversee the assets" of yet other companies. These others were what the Court of Appeals describes as "SIV-Lites, a type of structured investment vehicle that borrowed money and raised equity to purchase asset-backed securities". The assets in this case were comprised primarily of "residential mortgage-backed securities" – and voila: disastrous losses and a hunger to get something back from somebody.

The case is yet another example of lenders suffering great losses because of the 2007-08 "collapse of the housing boom" (as the Court describes it), lenders grasping at every conceivable straw to try to recover their losses from some solvent source. They had failed to recognize the diminished economic standing of the companies involved.

Plaintiff "did not own shares or a fractional interest" in the SIV-Lites; "it was essentially a lender" and the situation one of debtor and creditor, a pairing that the Court once again warns has "no special relationship of confidence and trust" such as to trigger "fiduciary" obligations. A shareholder of the companies involved might have had such status vis-a-vis the managers of the company, but none of the facts alleged, holds the Court in an opinion by Chief Judge Lippman, suffice to show the plaintiff having a status “equivalent to a shareholder”.

Plaintiff claimed that Standard & Poor and Barclays had aided and abetted the breach of fiduciary duty claimed against the other corporations, but since no fiduciary duty was found, a claim based on encouraging and promoting it could not be sustained.

After detailing the complicated transactions in the case, and aligning their various elements, the Court steps back, takes a broader view of what it sees evidenced before them, and issues a little-disguised admonition:

In hindsight, it is apparent that a greater degree of vigilance was necessary from all concerned before soliciting funds for, committing funds to, and rating esoteric entities with little understood risks, such as the SIV-Lites – whose fate was dependent almost exclusively on sub-prime residential and commercial mortgage-backed securities.