THE COMMERCIAL DIVISION LAW REPORT

A report on leading decisions issued by the Justices of the Commercial Division of the Supreme Court of the State of New York

Hon. Jonathan Lippman
Chief Judge of the State of New York

Hon. A. Gail Prudenti
Chief Administrative Judge of the State of New York

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Arbitration clause. Contract; breach. Plaintiff, a real estate broker, had an employment agreement with the corporate defendant that contained an arbitration clause. Plaintiff and the individual defendant had a partnership agreement to share commissions, which plaintiff alleged the individual defendant breached. After an internal dispute resolution proceeding, the corporate defendant rendered a decision dividing all plaintiff's and individual defendant's shared accounts, except for an insurance company account governed by a separate contract. Because the corporate defendant allegedly refused to remove the individual defendant from that account or disclose his dishonest actions, plaintiff resigned and lost the insurance company account and future commissions. Plaintiff sued the corporate defendant for constructive discharge, aiding and abetting breach of fiduciary duty, breach of the insurance company contract, breach of the employment agreement, breach of implied covenant of good faith and fair dealing, and an accounting. Plaintiff sued the individual defendant for breach of fiduciary duty and breach of the partnership agreement, and sued both defendants for tortious interference with business relationships and unjust enrichment. Defendants moved to dismiss or to compel binding arbitration under the employment agreement. The court determined the binding arbitration clause applied because the clause specified it was applicable post-termination, and plaintiff's allegations focused on brokerage commissions "central to the Employment Agreement and [plaintiff's] employment with [corporate defendant]." The court also found the arbitration clause applied to the tort claims because the claims were directly related to alleged lost commissions and plaintiff's employment dispute. Similarly, the court held the arbitration clause applied to claims arising out of the insurance company contract because the claims related to plaintiff's lost commissions and his employment dispute, even though the insurance contract did not have an arbitration clause. The court also held the individual defendant was allowed to invoke the arbitration clause, even though he was a non-signatory to the employment agreement, because its language called for arbitration of "claims involving co-employees," the individual defendant was a co-employee and an agent for the corporate defendant, and the claims were employment related. Additionally, the court denied defendants' request to dismiss any meritless claims and to send the remaining claims to arbitration, because this type of "partial dismissal" was not supported by the case law. The court did, however, reach the threshold issues of statute of limitations and res judicata. The court determined the claims were not barred by the one-year statute of limitations for the internal dispute resolution or by res judicata because plaintiff's allegations included events and

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conduct after the internal dispute resolution and not litigated in that process. The court granted the motion to compel arbitration and stayed the action. Zuckerman v. CB Richard Ellis Real Estate Services, LLC, Index No. 653232/2011, 5/3/13 (Kapnick, J.).

Attorney-client privilege; at issue waiver; fiduciary exception; conflict of interest; self-dealing. Movants, various lending entities and banks, supported by State Attorneys General of New York and Delaware, sought to compel discovery of certain of petitioner's attorney-client privileged communications and documents related to a proposed settlement and to compel the production of witnesses to testify as to this information. In seeking this disclosure, movants relied alternatively on the "at issue" waiver doctrine and the fiduciary exception to the attorney-client privilege. The court refused to compel discovery based on the "at issue" doctrine, finding that petitioner did not place its attorneys' legal advice or work product at issue by relying on the material to prove its case or selectively disclosing the advice or work product. Further, the court observed that movants had obtained sufficient non-privileged discovery to determine the issues in the case. As to the fiduciary exception, the court referenced a prior ruling in which it stated that the fiduciary exception may apply but found that movants had not demonstrated the requisite "good cause" for overcoming the privilege. Despite movants' argument that claims of self-dealing and conflict of interest required disclosure on a wide range of topics, the court restricted disclosure to three categories that directly correlated to these allegations: (1) the event of default and petitioner's decision to enter a forbearance agreement; (2) petitioner's decision not to notify certificate holders prior to settling; and (3) the broad release of claims petitioner sought for itself prior to reaching the settlement. According to the court, movants were directly affected by any decisions petitioner made on its attorney's advice; the communications related to prospective actions by petitioner, not advice on past actions; and the communications were both relevant and likely the only evidence available on the issues. The court, however, refused to compel the testimony of additional witnesses to testify on these issues. In re. Bank of New York Mellon, Index No. 651786/2011, 5/20/13 (Kapnick, J.).

Contract; breach. Fiduciary duty. Negligence. Unfair trade practices. Defendant bank acted as trustee for mortgage trusts in which plaintiff had invested. Each trust had a virtually identical Pooling and Servicing Agreement ("PSA") that governed the parties' relationship and duties. Following the subprime mortgage crisis, during which plaintiff lost a significant amount of its investment, plaintiff brought seven causes of action against defendant. Defendant moved to dismiss and further moved to stay the cause of action that sought an accounting. The court dismissed the breach of contract cause of action with leave to replead, noting the PSAs did not specify that defendant was responsible for the tasks it allegedly failed to perform, and therefore plaintiff failed to specify the contract provisions defendant had breached. The court dismissed the cause of action for failure of consideration and a return of plaintiff's initial investment, noting failure of consideration gives an aggrieved party the right to rescind a contract, but here the status quo could

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LAW REPORT Editors:
Kevin Egan, Esq.
Loren Schwartz

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Section Chair:
Tracee E. Davis, Esq.

Co-Editors for the Section:
Scott E. Kossove, Esq.
Daniel K. Wiig, Esq.

The following members of the Section contribute to the preparation of summaries:

Yael Barbibay, Mark Berman, Jeffrey Biel, Elyssa Cohen, Richard Cohen, Deborah Deitsch-Perez, June Diamont, Fiona Dutta, Clara Flebus, Derek Garman, Stephanie Gase, Rebecca Goldberg, Ian Goldrich, Jamie Gross, Francesca Harker, Michael Hensley, Karina Jockers, Jeff Leung, Joshua Margolin, Matthew Maron, Paul Marquez, Ira Matetsky, Rayna McKenzie, Andrew Mello, John Merino, Robert Nahoun, Adam Oppenheim, Robert Redis, Michael Richter, Elaine Sabino, Heath Szymczak, Michael Testa, David Thompson, Aaron Tierney, Shannon Wajer, Dale Worrall, Esq.s; Niicole Lam, Andrew Mello, Tarin Tomlinson and Pamela Weintraub

not be restored because defendant was the trustee, not the owner, of plaintiff's investment trusts. The court dismissed the breach of fiduciary duty cause of action because, under New York law, the rights and duties of a trustee under a corporate indenture are defined exclusively by the PSAs, and therefore a typical fiduciary relationship did not exist. The court also noted that no provision in the PSAs placed a fiduciary obligation on the trustee prior to an event of default, and plaintiff failed to allege specifically that defendant failed to avoid conflicts of interest or advanced its own interests at plaintiff's expense. The court did not dismiss plaintiff's cause of action for negligence, holding that an indenture trustee owes a duty to perform its ministerial functions with due care (inter alia, notifying plaintiff that it had failed to perform its duties as specified in the PSA and that a third party covered up these failures). A breach of this duty subjects the trustee to tort liability and creates an additional obligation outside the PSA. The court dismissed plaintiff's cause of action alleging defendant had engaged in unfair trade practices under the Connecticut Unfair Trade Practices Act ("CUPTA"). Noting that a CUPTA claim required more than just a simple contract breach, it found that defendant's actions did not rise to the level of a CUPTA violation. The court also dismissed plaintiff's cause of action for attorney's fees, stating that a prevailing party may not collect attorney's fees from the losing party unless the award was authorized by agreement, statute, or court rule, none of which applied. Lastly, the court granted defendant's motion to stay plaintiff's cause of action for an accounting pending the outcome of a concurrent proceeding because the proposed settlement for that proceeding would obviate the need for an accounting by releasing a number of claims arising under the PSAs, including those asserted by plaintiff in support of plaintiff's request. Knights of Columbus v. Bank of New York Mellon, Index No. 651442/2011, 4/26/13 (Kapnick, J.).

Contract; breach. Fraud. Summary judgment. Exculpation clause. Damages. Specific performance. Plaintiff lenders moved pursuant to CPLR §3212(e) for partial summary judgment on the first cause of action for breach of contract against first defendant. All parties were participants in third defendant, an arbitrage system that used low-interest loans issued by the plaintiffs to purchase and hold securities that would generate enough revenue to pay the interest on the plaintiffs' loans and retain the excess as profit. Third defendant executed an agreement that designated first defendant as its administrative agent. Pursuant to the administration agreement, first defendant agreed to identify and purchase securities that complied with the investment policy agreed upon by all parties. The investment policy contained restrictions on the individual securities that could be purchased and restrictions on the composition of the entire portfolio. In addition, the administration agreement identified the occurrence of amortization events that would allow the plaintiffs to terminate funding to third defendant immediately. First defendant was obligated to notify plaintiffs promptly of the occurrence of any amortization event. Third defendant also executed an investment advisory agreement with second defendant, which agreed to identify securities that conformed to the investment policy for third defendant's portfolio. Third defendant executed note purchase agreements with all plaintiffs. Plaintiffs were express third-party beneficiaries of the administration agreement and the advisory agreement (collectively the "transaction documents") and were entitled to enforce the agreements' provisions as if they were parties. First defendant was responsible for determining whether an amortization event had occurred or was likely to occur and to promptly notify each plaintiff. The plaintiffs alleged that first defendant breached its duty under the administration agreement by failing to notify them of four amortization events, causing them to continue performing under the administration agreement. First defendant argued that, notwithstanding its alleged failure to notify, it was exculpated from liability by a clause in the administration agreement that would exculpate defendants from liability for losses resulting from investments made by third defendant, except for a loss resulting from its gross negligence or willful misconduct. Plaintiffs argued that the exculpation clause did not apply because they were merely fulfilling their funding obligations. Plaintiffs contended that they were seeking to hold first defendant liable for its failure to perform its duties as administrative agent. The court held that many questions of fact had been raised with respect to the claims and defenses regarding the amortization events, which precluded summary disposition for any of the parties on those issues. The fraud claim, however, was dismissed with prejudice. The court held that the cause of action failed because the alleged misrepresentations were clearly not extraneous to the transaction documents because they were directly related to first and second defendants' obligations under those agreements. As such, the fraud cause of action was duplicative of a cause of action for breach of contract. The court further held that the plaintiffs had not asserted that the alleged breaches caused them any loss. They merely sought a return of their funds for what on the face of the allegations stated a breach of contract. Plaintiffs were not seeking damages for the loss in value of third defendant's portfolio. Rather they argued that they sought the return of the balance of the unpaid loans issued to third defendant after first defendant failed to notify them of the amortization events, which, they contended, released them from their obligation to continue to issue loans to third defendant. The defendants contended that absent an allegation of damages, plaintiffs had not alleged a cognizable theory that warranted a recovery. Based on this record, the court held that it was unable to determine what monetary injury plaintiffs had suffered. It found that the action for damages was, at best, premature and the complaint as drafted was subject to dismissal without prejudice to plaintiffs bringing a new action in the event they sustained damages. In addition, the court granted plaintiffs leave to replead to assert a cause of action for specific performance or other equitable relief. TSL (USA) Inc. v. Oppenheimer Funds, Inc., Index No. 600976/2010, 4/9/13 (Ramos, J).

Contract; breach; indemnification. Fraudulent inducement. Attorney's fees. Motion to dismiss. Plaintiff, a monoline insurer, provided financial guaranty insurance for residential mortgage-backed securities transactions underwritten by defendant Bear Stearns. The transaction at issue involved the sale of home equity lines of credit by defendant EMC, a Bear Stearns affiliate. The transaction was effectuated through inter-locking agreements including a Mortgage Loan Purchase Agreement ("MLPA"), a Sale and Servicing Agreement ("SSA"), and an Insurance & Indemnity Agreement ("I&I"). Plaintiff was a direct party only to the I&I and was an express third-party beneficiary of the MLPA and SSA. Plaintiff alleged that Bear Stearns grossly misrepresented the risk of the underlying pooled loans, which failed miserably. Plaintiff asserted claims for breach of the I&I, fraudulent inducement, indemnification, reimbursement for certain payments made under its policy, and attorney's fees and costs against EMC. Plaintiff also asserted a claim against defendant JP Morgan Securities, as the successor to EMC, for successor liability. Defendants moved to dismiss plaintiff's breach of contract claims on the ground that the MLPA explicitly limited plaintiff to a repurchase protocol as the sole and exclusive remedy for alleged breaches of the loan warranties. In opposition, plaintiff maintained that it was suing for breach of the I&I, and thus was not bound by the repurchase protocol of the MLPA. The court held that the I&I, the only agreement to which plaintiff was a direct party, did not contain language limiting plaintiff's rights and remedies thereunder. The court further held that to import the sole and exclusive remedy provision of the MLPA into the I&I, where it has been specifically omitted, would be to distort the meaning of the parties' written agreement, which was complete, clear, and unambiguous on its face. Alternatively, defendants argued that plaintiff's claim for breach of contract must be dismissed because plaintiff was in default on its obligations under the I&I. The court, however, held that the obligations of EMC were absolute regardless of any default. Accordingly, defendants' motion to dismiss the cause of action for breach of contract was denied. Defendants also sought to dismiss plaintiff's causes of action for indemnification and reimbursement. The court dismissed the cause of action for contractual indemnification against EMC since the I&I plainly limited plaintiff's indemnity rights to losses that related to third-party claims only. Although plaintiff attempted to characterize its claim as arising out of third-party claims, it was plainly seeking coverage for its own losses that it was pursuing on its own behalf. However, the court held that plaintiff possessed the clear contractual right to reimbursement for its reasonable attorneys' fees and costs incurred in relation to its claim for breach of contract. Defendants maintained that plaintiff had failed to comply with the repurchase protocol, namely because it did not provide EMC with the requisite notice, which plaintiff disputed. The court held that determining whether plaintiff provided the requisite notice involved resolving questions of fact. Finally, defendants moved to dismiss the cause of action for successor liability asserted against the JP Morgan defendants. In light of the denial of the motion to dismiss the claims against Bear Stearns and EMC, the court denied this branch of the motion. Syncora Guarantee Inc. v. EMC Mortgage, LLC, Index No. 650420/12, 4/15/13 (Ramos, J.).

Deceptive charitable solicitations. Consumer protection; Executive Law; General Business Law. Plaintiff brought this action against defendants, including one not-for-profit charitable corporation and a for-profit fundraising organization, for perpetuating a "sham charity" that raised millions of dollars from public donations over many years, but diverted the funds to its fundraisers, officers, and directors. After several defendants consented to a judgment entered against them, plaintiff moved for summary judgment against those defendants charged with fundraising violations, seeking various forms of injunctive and monetary relief under Executive Law §§ 172(d)(2), 174(b) and 63(12), which prohibit fraudulent, deceptive and/or misleading charitable solicitations, and under General Business Law ("GBL") § 349, which prohibits deceptive business practices. These defendants moved for summary judgment, seeking to dismiss all claims against them. Plaintiff argued that defendants repeatedly provided false and misleading information in their solicitation materials and solicitation calls by claiming that they helped women survive by conducting breast cancer research and providing a mammography van when they knew that no research had been conducted and the van had been discontinued. Plaintiff also argued that defendants engaged in various fraudulent fundraising tactics to maximize donations collected. In support of their motion for summary judgment, defendants argued that some monies were utilized to fund research and to conduct mammographies, but denied that solicitors were told to engage in any improper conduct to pressure prospective donors. In opposition, plaintiff submitted proof that only 4.4% of over $9.9 million collected was used for education, mammograms, and scholarships. The court held that plaintiff was entitled to summary judgment, finding that: (1) defendants violated the Executive Law and GBL provisions by providing solicitation materials to consumers that were false, deceptive, and misleading; (2) defendants violated Executive Law § 174(b) by failing to disclose a broker's agreement between the two corporate defendants; and (3) defendants' repeated misleading and deceptive information was likely to mislead not only the unsophisticated consumer protected by the Executive Law, but also the average consumer within the purview of GBL § 349. Thus, the court granted the injunctive relief sought by: (1) prohibiting defendants from engaging in any future charitable solicitations for profit in the State of New York; (2) awarding plaintiff reimbursement of its litigation costs; and (3) cancelling the fundraising organization's registration with the Attorney General and mandating its dissolution. The court further held that restitution to those consumers who were the subject of the asserted fraud was warranted and ordered that the method and amount of restitution would be determined at an inquest, along with the costs incurred by the plaintiff in connection with this action. State of New York v. Coalition Against Breast Cancer, Index No. 20431/2011, 4/17/13 (Pines, J.).

Fraud; residential mortgage backed securities; fraudulent inducement; statute of limitations; notice by newspaper; scienter. Scienter; rogue trade as defense against. Plaintiffs sued a bank and its subsidiaries for fraud and fraudulent inducement after losing $150,000,000 invested in defendants' residential mortgage backed securities (RMBS). Plaintiffs alleged that defendants concealed the RMBS' true risk by misrepresenting the mortgage originators' underwriting standards, mortgage pool data, and credit ratings. Allegedly the non-party hired by defendant to conduct due diligence had found one-third of the original loans out of compliance with stated underwriting guidelines and/or supported by false appraisals; defendant neither disclosed this in its offering materials nor informed plaintiff. Instead, it bargained down the loans' purchase price for itself. Plaintiffs contended that defendant made millions of dollars in sales fees, and billions by shorting other RMBS through credit default swaps. Here, defendants moved to dismiss the complaint. Initially, defendants contended that the first plaintiff lacked standing to sue for losses allegedly suffered as assignee of other entities. However, the court explained that "all title, rights, and causes of action" is presumed to include the right to sue for fraud when, as here, the language is used by a defunct entity to assign rights under a contract. The court also declined to dismiss another plaintiff's claims on the basis of allegedly improper service. For two of first plaintiff's assignors, incorporated in Delaware and Germany, the statute of limitations was three years. Defendants argued that plaintiffs' notice of the fraud exceeded three years, dating to when the *New*

York Times and other major newspapers reported the falsity of the underlying loan data. But, as Judge Bransten has recently held, the court stated that news reports do not put a plaintiff on notice of a defendant's alleged intent to defraud. Moreover, it pointed out, the requirement that scienter must be pleaded with particularity protects defendants. Had plaintiffs sued defendants based merely on the news articles, the court would likely have dismissed the complaint. Turning to the alleged misrepresentations, the court referred to a Southern District, New York, decision, which held that the central issue in determining whether misrepresentations have been adequately pleaded is not whether the separate statements are literally true but whether, taken together and in context, they would have misled a reasonable investor. Here, plaintiffs properly alleged that the misrepresentations were the proximate cause of their losses because defendants allegedly gave ratings agencies false data to procure an investment grade rating, knowing they needed that rating to induce investors like plaintiff to invest. Without the misrepresentations, there would have been no suitably rated RMBS for plaintiffs to invest in and they would not have invested. The court was unmoved by defendant's arguments that it lacked scienter because of rogue trades. If so, if a bank's net position on a trade deviated from the trader's, the bank could not be sued for fraud because it supposedly stood to lose from the fraud alleged. This proposition ignores trading strategies like hedging. Further, as the crash approached and banks began to recognize problems in the housing market, they amassed short positions to minimize losses and even profit. That the bank stood to lose if the RMBS were bad investments did not establish that it did not act with scienter – the question at the time was not if a bank would sustain losses, but how great, and the measure often depended on what a bank could market to clients. The court determined that the allegations that defendant made false representations that outright contradicted the due diligence findings to induce plaintiffs to buy RMBS adequately stated a claim for fraud and fraudulent inducement. Plaintiffs also properly pleaded aiding and abetting fraud against defendant's subsidiaries because they described how each played a role in the RMBS lifecycle. The court dismissed a claim for negligent misrepresentation because there was no special relationship. Plaintiff's claims under the 1933 Act hinged on whether the sale of the RMBS was a "domestic transaction," and plaintiffs, all foreign companies, failed to allege facts sufficient to meet the standard set forth by the Second Circuit: that irrevocable liability was incurred, or title transferred, within the United States. These claims were dismissed without prejudice, with leave to replead after discovery. Phoenix Light SF Ltd. v Ace Securities Corp., Index No. 650422/2012, 4/24/13 (Kornreich, J.).

Insurance; financial. Contract; interlocking agreements; breach of loan warranties; repurchase protocol as sole remedy. Mortgage loans; HELOCs. Contract; tortious interference; alter ego defense. Plaintiff insured residential mortgage-backed securities underwritten by one defendant. In a transaction effectuated by three interlocking agreements, second defendant, entity of the first, bought over 6,000 home equity lines of credit (HELOCS) to use as collateral for $337,000,000 in debt securities, then sold the HELOCS to another entity of first defendant. The interlocking agreements were a Mortgage Loan Purchase Agreement ("MLPA"), a Sale and Servicing Agreement ("SSA"), and an Insurance & Indemnity Agreement ("I&I") . Under the I&I, plaintiff issued an insurance policy in favor of note holders. Plaintiff was a third-party beneficiary under the MLPA and SSA. The two agreements also created a repurchase protocol by which plaintiff could compel second defendant to repurchase HELOCs that breached those two agreements' loan warranties and provided that the repurchase protocol was the "sole and exclusive" remedy for such breaches. The HELOCs began to go into default, and plaintiff re-underwrote approximately 900 of them. First defendant aggressively shorted financial insurers, including plaintiff, and banks with large exposure to the securities they insured, but nonetheless collapsed and was acquired by third defendant. Plaintiff demanded that second defendant repurchase loans that breached the loan warranties in the MLPA and SSA, but defendant refused and asserted the same repurchase demands against the loan originator. Plaintiff paid out large sums as a consequence of continuing loan default, and contended that its cumulative losses exceeded $75,000,000, including more than $43,000,000 in un-reimbursed claims payments. Plaintiff contended that first defendant had acquired loans it knew were defective, and that whistleblower testimony from former employees of a due-diligence firm hired to review the loans affirmed that loan quality had been disregarded. Plaintiff sued for breach of contract and other wrongs, and defendants moved for partial dismissal of the complaint. At oral argument, parties agreed to hold in abeyance the portion of defendants' motion that sought to dismiss a fraudulent inducement claim. In opposition to defendants' motion to dismiss breach of contract claims not arising strictly under the repurchase protocol, plaintiff argued that the MLPA's "sole remedy" language applied only to breaches of the loan warranties, whereas plaintiff's claims were based on second defendant's breach of "transaction warranties" plaintiff maintained gave it additional remedies under the I&I. The court held that the I&I could not be isolated, and that read together the three operative documents showed that the parties intended plaintiff's remedies for breach of the representations and warranties to be limited to the repurchase protocol. The "sole remedy" provision of the SSA and MLPA named plaintiff, as note insurer, and specifically stated that its "sole and exclusive remedy...respecting a breach of representations or warranties" was the repurchase protocol, and the I&I expressly stated that plaintiff's remedies insofar as any breach of the loan warranties was "limited to the remedy...in...the MLPA." The court distinguished a case, decided in the Southern District, that plaintiff cited to support its argument that its claims pertained to the "transaction" warranties. There, the MLPA named other parties but not the insurer, and the I&I, to which the insurer was a direct signatory, did not incorporate the limitations on remedies found in the MLPA. Moreover, that SSA contained a repurchase protocol it made exclusive to various parties but not the insurer. By contrast, the court said, plaintiff was among the list of parties whose remedies were limited to the repurchase protocol. Moreover, the alleged "transaction" warranties on which the additional breach claims were based overlapped with the loan warranties, which were subject to the repurchase protocol. The court therefore found that plaintiff was limited to the remedy of compelling second defendant to repurchase defective loans. Next, the court dismissed plaintiff's claim for indemnification against second defendant for breaches of the loan warranties, because the I&I limited plaintiff's indemnity rights to losses related solely to third-party claims, and plaintiff's was a classic first-party claim; it also ran afoul of the repurchase protocol. The court found, though, that the I&I agreement did allow plaintiff to recover attorneys' fees and costs incurred in relation to its initial demands under the repurchase protocol and its current claims for breach of the protocol. In regard to tortious interference with contract, plaintiff alleged that third defendant had forced second defendant to pursue a bad-faith litigation strategy of denying repurchase demands that second defendant itself believed valid. Defendants argued that, to the extent plaintiff claimed that third defendant was the alter ego of the first, a party cannot interfere with its own contract. Defendants also asserted that New York law allows interference in a related entity's contract, and that defendant's actions were financially motivated, so that plaintiff had to allege illegal means or malice. The court clarified that plaintiff was entitled to plead in the alternative, and that if third defendant were not an alter ego of its predecessor it was a stranger to the operative documents. Further, plaintiff did not have to allege improper means because the alleged interference was with an existing contract. The claim survived. Finally, in regard to the last breach claim, in which plaintiff alleged that second defendant transferred assets to the third defendant in violation of the I&I, plaintiff failed to allege actual, as opposed to potential, damages, and the claim was dismissed. <u>Assured Guaranty Corp. v. EMC Mortgage, LLC</u>, Index No. 650805/2012, 4/4/2013 (Ramos, J.).

Insurance Law §§ 2118, 2130; Accounting; books and records. Fraud; General Business Law §§ 340, 349. Procedure; dismissal; CPLR 3211. Jurisdiction; long arm; CPLR 302. Plaintiff was a non-profit industry advisory association created by statute to facilitate and encourage compliance with the excess line insurance law (Insurance. Law § 2130). Plaintiff alleged that defendants, family-owned insurance-related businesses and individual family members, engaged in fraud to avoid paying tax premiums on various excess line insurance policies. Plaintiff also alleged that defendants' failure to pay certain stamping fees damaged plaintiff under the monopoly and consumer protection sections of the General Business Law (GBL §§ 340, 349). Plaintiff sought damages and an accounting of defendant companies' books and records. Defendants moved to dismiss the complaint and submitted a settlement agreement reached after the Department of Insurance reviewed one of defendants' insurance placement programs. Specifically, the agreement provided that defendants would pay a specified amount in premium taxes and penalties to the Department and that they would make timely payments of all excess line premiums in the future. One of the individual defendants separately moved to dismiss the complaint as against her, arguing that the court lacked personal jurisdiction because, while she is a member of some of the corporate defendants, she has no other connection with New York and has never sold insurance here. In opposition, plaintiff argued that the settlement agreement did not relieve defendants of their duties to plaintiff and that plaintiff had the right to pursue its own remedies. The court granted defendants' motions. Following a review of the relevant case law, the court reasoned that plaintiff's statutory authority to command and collect insurance premiums did not translate into the capacity to maintain an enforcement proceeding. Moreover, the court found compelling the absence in the statute of plaintiff's express authority to sue, which the legislature expressly reserved for the Superintendent of Insurance. The court went on to find that plaintiff had no express or implied private right of action under the Insurance Law because such a finding would be inconsistent with the legislative goal of plaintiff acting under the supervision of the Superintendent. The court also found that the complaint failed to state a cause of action. As to plaintiff's claims of fraud, the court found the complaint deficient in both the necessary elements of fraud and the required particularity of the allegations. Similarly, the court found the complaint devoid of the necessary elements of negligence. As to plaintiff's allegations under the GBL §§ 340 and 349, the court found that plaintiff lacked standing to bring such claims because it was not a member of the class of persons the statutes sought to protect. The court further found that plaintiff was not entitled to an accounting under Insurance Law § 2118 because the statute did not provide for this remedy and, in any event, the enforcement of such a remedy was reserved for the Superintendent of Insurance. The court found that it lacked personal jurisdiction over the individual defendant because there was no evidence that she was doing business in this state. Further, it declined to invoke long-arm jurisdiction over this defendant, a resident of Florida, on the basis of her ownership in her family's various corporate entities. Excess Line Association of New York v. Waldorf & Associates, Index No. 35107/2011, 5/3/13 (Emerson, J.).

Standing. Third-party beneficiary; aggrieved party. Tax certiorari proceedings. Motion to dismiss. Negligent misrepresentations. Taxpayer standing. Declaratory judgment. Injunction. In 1997, defendant power company acquired the electric transmission and distribution facilities of its predecessor company pursuant to a power supply agreement and a merger agreement. The merger agreement expressly stated that the two parties were the sole beneficiaries of the agreement; the power supply agreement contained no such language. Prior to the acquisition, defendant's chairman stated that both defendant and its predecessor would drop all tax certiorari proceedings against municipalities and school districts. Ten years later, defendant merged with another power company and, as part of that merger, agreed not to initiate any tax certiorari proceedings. Three years later, defendant commenced tax certiorari proceedings against plaintiff school district. The school district and its president filed suit for monetary, declaratory, and injunctive relief. Defendant moved to dismiss on the grounds that plaintiff lacked standing and were not intended third-party beneficiaries of the power supply agreement. The court explained that an intended third-party beneficiary of a contract may maintain an action to recover under the contract while an incidental beneficiary of the contract may not. It then found, on the current record, that plaintiffs raised an issue as to whether they were intended third-party beneficiaries of the agreement. Therefore, the court could not conclude as a matter of law that plaintiffs were merely incidental beneficiaries. As to standing, the court explained that it could not determine whether the school district plaintiff lacked standing until it determined whether the plaintiff was an intended third-party beneficiary. Therefore, it denied defendant's motion to dismiss as to the six causes of action asserted by the school district. The individual plaintiff argued that he had standing both as a third-party beneficiary and as a taxpayer. The court concluded, however, that the individual plaintiff was not an intended third-party beneficiary of the power supply contract and, as a taxpayer, did not suffer any damages distinct from any other taxpayer. Therefore, the court granted defendant's motion to dismiss as to the six causes of action asserted by the individual plaintiff. Finally, the court dismissed the last four causes of action, which were based on negligent misrepresentation. These causes of action required a special relationship between plaintiff and defendant, and the court found that only an ordinary business relationship existed between the parties. Board of Education of the Northport-East Northport Union Free School District v. Long Island Power Authority, Index No.15194/2011, 5/21/13 (Emerson,J).

Statute of Frauds. Contract; oral modification; documents establishing material terms; signed checks; documents prepared by plaintiff. Oral modification as separate contract. Defendant admission of oral modification. Quantum Meruit. Plaintiff sought to recover fees it allegedly earned in procuring an agreement that licensed defendant's name on a men's clothing line. Pursuant to the parties' memorandum of understanding ("MOU"), plaintiff would be defendant's exclusive agent for six months. After this, if there were no license, the parties' obligations ended, with one exception: plaintiff would receive a commission on any "acceptable license" for which it conducted significant negotiations, but which defendant did not enter into until up to three-months after the exclusive period. Plaintiff and defendant entered into a six-month extension of the MOU, extending the three-month "tail period" as well. Plaintiff contended that shortly before the tail period expired, the parties entered into a modification of the MOU. Defendant later entered into a licensing agreement and paid plaintiff quarterly royalties for two years, then ceased payment. Plaintiff sued for breach of contract and quantum meruit; defendant counterclaimed and sought return of the quarterly payments he allegedly had made in error. Here, defendant moved pursuant to CPLR 4401 for a directed verdict on plaintiff's breach claims and a declaratory judgment that the parties had no enforceable contract since the alleged modification did not meet the Statute of Frauds. New York's Statute of Frauds provides that every agreement constituting "a contract to pay...for services rendered in negotiating...a business opportunity" is void "unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged...” While noting the parties had an established contractual relationship, the court explained that an oral modification of a written agreement also needed to comply with the Statute and contain the material terms of the agreement. These may be established by a combination of signed and unsigned documents, but the documents must include at least one writing establishing the contractual relationship between the parties signed by the party to be charged. Moreover, the court stated, the Appellate Division, First Department, has cautioned against allowing an unsigned document prepared by the plaintiff to serve as part of the memorandum satisfying the Statute. Plaintiff submitted checks, invoices, and emails of draft agreements it had prepared. The court found that the checks, although signed by defendant, the party to be charged, did not indicate the agreement’s material terms. In addition, even if it disregarded the First Department’s caution and permitted plaintiff’s invoices and e-mailed draft agreements to serve as part of the requisite memorandum, the combined writings did not include all the material terms of the parties’ agreement. For one, the duration was missing even in writings drafted by plaintiff, and plaintiff’s contention that in the oral modification defendant waived the tail period required the assumption that the latter agreed to extend it indefinitely. Given that the MOU and its extension both included termination dates, duration was a material term here, and on its absence alone, the alleged modification did not meet the Statute of Frauds. Second, under the MOU and extension, plaintiff was entitled to its fee only if defendant entered into an “acceptable license” guaranteeing him $25,000,000 in fees. Plaintiff’s contention that defendant had waived that requirement was neither implied nor evidenced in a writing, and so the alleged modification did not meet the Statute on that basis, either. Taking the modification to be completely separate from the MOU and extension, and thus not subject to its requirements, it still did not meet the Statute because the checks, the only writing bearing defendant’s signature, did not establish the contractual licensing agent relationship nor the agreement’s material terms. The payments and invoices were insufficient to establish an equitable estoppel claim, and part performance did not apply. Turning to plaintiff’s argument that defendant admitted the existence of an oral modification, the court said that his admission would take the case out of the Statute only if he did not deny or dispute the essential terms. The court found that an email sent between defendant’s staff members addressing drafting a proposed agreement and mentioning royalties supported an inference of some agreement but, nevertheless, was not an admission of essential terms. The court granted defendant’s motion for directed verdict and dismissed the breach causes of action and claim for declaratory judgment that plaintiff was entitled to 10% of amounts plaintiff received from his licensee. However, the court preserved plaintiff’s claim for quantum meruit, stating that plaintiff might still recover the reasonable value of services rendered. <u>ALM Unltd., Inc. v. Trump</u>, 603491/2008, 4/22/13 (Bransten, J.).

Statutes of limitation; length and accrual for replevin, conversion, fraud, aiding and abetting, constructive fraud, breach of fiduciary duty, constructive trust, contract, unjust enrichment, good faith and fair dealing, tortious interference with contract, dissolution, accounting, corporate waste, declaratory relief, rescission, receivership, accounting attachment, and preliminary injunction. Continuing wrong doctrine; inquiry notice. Standing; dissolution; accounting; corporate waste. Justiciability; academic claims. Accounting; necessity for demand. Plaintiff brought an action against his putative joint venture partner, the partner’s corporate assignee, and the CEO and general counsel of the corporate assignee (the “venture defendants”), among others. The complaint, which asserted 38 causes of action, was based on defendants’ alleged failure to record patents jointly with plaintiff and the alleged failure to share trade secrets and technology allegedly developed using plaintiffs’ funds. According to plaintiff, one defendant filed the first patent in his own name in 1997 and told plaintiff that development efforts had failed. The venture defendants moved to dismiss. The court granted the motion to dismiss the replevin claim based on the three-year statute of limitations, which runs from the theft if the stolen object is in the possession of the thief, even if the owner was unaware of the theft when it occurred. Likewise the court found that plaintiff’s conversion claim was time-barred under the three-year statute of limitations, which ran from the time of conversion. The court also dismissed the plaintiff’s claims for fraud, aiding and abetting fraud, and constructive fraud as time-barred. It noted that the statute of limitations for fraud was six years from the time of the fraud or two years from when the fraud could, with reasonable diligence, have been discovered, except for the constructive fraud claim, for which the discovery rule did not apply. The plaintiff alleged that the fraud first occurred in 1997. Since patents were filed in defendant’s name between 1997 and 2001, articles that identified the defendant as the inventor were published about the technology in 2001, 2003 and 2004, and another defendant filed a 2002 infringement action on the same technology, the court found that sufficient publicly available information existed to put plaintiff on inquiry notice well before April 2009, more than two years before filing suit. As for the claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, the court noted that the applicable statute of limitations depended upon the remedy sought and whether the claim sounded in fraud. Although a claim for monetary relief generally has a three-year statute of limitations, because the claim sounded in fraud, the statute of limitations was six years, with a two-year discovery rule. The court therefore found the breach of fiduciary duty claims time-barred under the same analysis applied to the fraud claims. The court also dismissed the constructive trust claims as time-barred, noting that the constructive trust statute of limitations was six years, commencing upon the occurrence of the wrongful act giving rise to the duty of restitution. With respect to the wrongful acquisition of property, the statute of limitations ran from the wrongful acquisition. The court also dismissed the breach of contract and unjust enrichment claims as time-barred. It held that the six-year contract statute of limitations accrued at breach, even if damages occurred later, and that the six-year statute of limitations for unjust enrichment ran from the occurrence of the wrongful act giving rise to restitution. It also held that the continuing wrong doctrine did not save plaintiffs' claims because it applied only to a series of continuing wrongs, not the continuing effects of earlier unlawful conduct. The mere fact that damages continued to run through the time of filing did not convert discrete 1999-2000 acts into continuing wrongs for which claims could be made more than ten years later. The court held that plaintiffs' claim for tortious interference with contract was time-barred by the three-year statute of limitations applicable to actions to recover for injury to property. The court also dismissed the claims for dissolution of the corporate assignee and the joint venture, for an accounting, and for corporate waste as time-barred under the six-year statute of limitations in CPLR 213(1) and (7). Because the joint venture dissolved by operation of law when one defendant acquired patents for the allegedly shared technology in his own name, there was no justiciable controversy for dissolution, and the claim for an accounting was barred by the six-year statute of limitations. As for plaintiffs' efforts to dissolve the corporate assignee, demand an accounting, or seek redress for corporate waste, the court found plaintiff lacked standing because he was not an officer, shareholder, or director of the corporate assignee and any such claim needed to be brought as a shareholder derivative suit. Moreover, the court noted, the claim for an accounting was defective because the plaintiff had failed to demand an accounting before bringing suit. The court also dismissed as time-barred the plaintiffs' claims for declaratory relief because the claims were incidental to plaintiff's other time-barred causes of action, noting that statutes of limitation cannot be extended by denominating an action as one for declaratory relief when monetary damages are also sought. The individual plaintiff also sought to rescind a settlement he entered into with defendants on the ground of fraud and failure of consideration or, alternatively, for lack of mutual consent. Since defendants contended the settlement agreement was unenforceable, the court held there was no justiciable controversy regarding the settlement agreement because all sides sought to disregard it and dismissed the claims related to the settlement agreement as academic. The court dismissed the claims for appointment of a receiver, attachment, and a preliminary injunction on multiple grounds. First, the court found the claims were time-barred because the substantive claims on which they were based were time-barred. Additionally, the court ruled that the relief sought constituted provisional remedies and not causes of action. Moreover, the court found, since provisional remedies are devices for interim relief, they can only be applied when an action is pending. Thus, because the court dismissed all claims against defendants, there was no basis to obtain interim relief. In sum, the court dismissed all claims against the moving defendants. Doukas v. Ballard, Index No. 9267/2011, 5/1/13 (Emerson, J.).

Successor liability; de facto merger; assumption of liabilities. Choice of law. Plaintiff alleged successor liability against defendant bank, which acquired financial institutions that allegedly fraudulently induced plaintiff. Defendant had agreed to merge the financial institutions into its wholly-owned subsidiary. Immediately after the merger closed, the acquired financial institutions sold assets to defendant's subsidiaries. A few months later, the same institutions sold substantially all of their remaining assets to defendant. Plaintiff claimed the merger and subsequent asset sales were part of a single plan to transition the acquired businesses into defendant. Defendant denied such an integrated plan. Plaintiff and defendant both moved for summary judgment. Successor liability may arise where there was a de facto merger, and the court applied New York law since no meaningful conflict existed with Delaware law, and applying the "interest analysis" favored New York as the jurisdiction with the greatest concern. Determination of a de facto merger involves four factors. As to the first factor, continuity of ownership, the court viewed the merger and subsequent asset sales together. Further, ownership continuity does not require a showing of fraudulent intent nor is it limited to asset sales in the form of stock-for-asset transactions. For those reasons, the court denied defendant's motion for summary judgment on the de facto merger claim. Also, fact issues precluded resolving this factor in favor of plaintiff. The second factor, prompt cessation of ordinary business and dissolution of the acquired corporation, may be satisfied if the acquired entity is shorn of its assets and cannot do business except through the alleged successor corporation. The third factor is continuity of management, personnel, physical location, assets, and general business operations. The fourth factor is the successor's assumption of liabilities needed for the continuation of the business of the acquired corporation. Fact issues precluded resolving the final three factors in either party's favor. Defendant also argued that the successor liability claim failed because it paid fair value in the two successive asset purchases. But whether fair value was paid has no bearing on whether transactions were in substance a merger because successor liability may also arise where a corporation agreed to assume its predecessor's liabilities. Contractual disclaimers of liability can be rebutted by a buyer's intent to pay the debts of the seller, such as admissions of liability by the buyer and the effect of the transfer upon creditors of the seller. Fact issues regarding such intent precluded summary judgment for either party. MBIA Ins. Corp. v. Countrywide Home Loans, Inc., Index No. 602825/2008, 04/29/13 (Bransten, J.).

The complete texts of decisions discussed in the *Law Report* are available by hyperlink on the website of the Commercial Division at www.nycourts.gov/comdiv (under the "Publications" section), and on the home page of the New York State Bar Association's Commercial and Federal Litigation Section at www.nysba.org (and following links). Members of the Commercial and Federal Litigation Section may sign up at the Section's home page to receive copies of the *Report* by e-mail automatically. The decisions as they appear on the home pages have not been edited and may differ from the final text published in the official reports by the State Reporter.

**** The decisions discussed have been posted in PDF format, but the reader should be aware that these PDF copies may not be exact images of the original signed text as filed in the County Clerk's Office.**