THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY
DISPUTED CLAIMS DOCKET

In Re Liquidator Number:	**2009-HICIL-46**
Proof of Claim Number:	**CLMN380502-01**
Claimant Name:	**Mariana Lanc**
Claimant Number:	**145-0100-105**
Policy or Contract Number:	
Date of Loss:	

COMPENDIUM OF NON-NEW HAMPSHIRE AUTHORITIES CITED IN LIQUIDATOR'S SECTION 15 SUBMISSION

Authority **Tab**

LEXSEE 779 N.Y.S.2D 213

Aard-Vark Agency, Ltd., Appellant, v. Barnett Prager et al., Respondents.

2003-10770, Index No. 1462/03

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

8 A.D.3d 508; 779 N.Y.S.2d 213; 2004 N.Y. App. Div. LEXIS 8761

June 3, 2004, Argued
June 21, 2004, Decided

SUBSEQUENT HISTORY: [***1]
Later proceeding at *Aard-Vark Agency v. Prager*, 2004 N.Y. App. Div. LEXIS 16563 (N.Y. App. Div. 2d Dep't, June 24, 2004)

DISPOSITION: Order reversed in part.

HEADNOTES

Judgments--Res Judicata.--Motion to dismiss counterclaims on ground of res judicata granted since same claims were dismissed "with prejudice" in prior action brought by defendants against plaintiff--prior order also denied defendants leave to replead, "due to their failure to present good ground to support the causes of action," and they did not appeal--court intended dismissal to be on merits and to bring defendants' claims to final conclusion.

COUNSEL: Patterson, Belknap, Webb & Tyler, LLP, New York, N.Y. (Saul B. Shapiro and Ilene J. Strauss of counsel), for appellant.

Rex Whitehorn & Associates, P.C., Great Neck, N.Y., for respondents.

JUDGES: ANITA R. FLORIO, J.P., SANDRA L. TOWNES, STEPHEN G. CRANE, ROBERT A. LIFSON, JJ. FLORIO, J.P., TOWNES, CRANE and LIFSON, JJ., concur.

OPINION

[*508] [**213] In an action, inter alia, to recover damages for breach of an employment agreement, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Queens [*509] County (Weiss, J.), entered October 30, 2003, as denied that branch of its motion which was to dismiss the defendants' counterclaims pursuant to CPLR 3211 (a) (5) on the ground of res judicata.

Ordered that the order is reversed insofar as appealed from, on the law, with costs, that branch of the motion which was to dismiss the defendants' counterclaims on the ground of res judicata pursuant to CPLR 3211 (a) (5) is granted, and the defendants' counterclaims are dismissed.

The plaintiff moved, [***2] inter alia, to dismiss the defendants' counterclaims on the ground of res judicata since the same claims were dismissed "with prejudice" in a prior action brought by the defendants [**214] against the plaintiff. It is undisputed that the claims in the prior action are the same as those asserted herein as counterclaims. The Supreme Court denied that branch of the motion which was to dismiss the defendants' counterclaims, concluding that the prior order was not a dismissal "on the merits." We reverse.

In the case of *Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.* (93 N.Y.2d 375, 380, 712 N.E.2d

678, 690 N.Y.S.2d 512 [1999]), the Court of Appeals stated: "[T]he principle of res judicata [is] that 'once a claim is brought to *a final conclusion*, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' (*O'Brien v City of Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [emphasis supplied]). A dismissal 'with prejudice' generally signifies that the court intended to dismiss the action 'on the merits,' that is, to bring the action to a final conclusion against the plaintiff . . . We have used the words 'with prejudice' [***3] interchangeably with the phrase 'on the merits' to indicate the same preclusive effect."

Here, the prior order not only granted the motion to dismiss the defendants' claims for failure to state a cause of action "with prejudice," but it also denied them leave to replead, "due to their failure to present good ground to support the causes of action." The defendants did not appeal from the prior order. The quoted language of the Supreme Court from its prior order, coupled with its dismissal with prejudice, signifies that the Supreme Court intended the dismissal to be on the merits or, put differently, to bring the defendants' claims to a final conclusion (*see O'Brien v City of Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [1981]; *Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, *supra; Con-Solid Contr. Co. v Litwak Dev. Corp.*, 298 A.D.2d 544, 546, 748 N.Y.S.2d 788 [2002]; *Remeeder Hous. Dev. Fund Co. v Wallace*, 222 A.D.2d 426, 635 N.Y.S.2d 521 [1995]; *cf. Gallo v Teplitz Tri-State Recycling*, 254 A.D.2d 253, 678 N.Y.S.2d 140 [1998]). Accordingly, the Supreme Court improperly denied that [*510] branch of the plaintiff's motion which was to dismiss the defendants' counterclaims pursuant [***4] to CPLR 3211 (a) (5) on the ground of res judicata.

Florio, J.P., Townes, Crane and Lifson, JJ., concur.

LEXSEE 73 A.D.3D 36

In the Matter of the [*1] **Rehabilitation of FRONTIER INSURANCE COMPANY. ALKO CONSTRUCTION COMPANY AND DEVELOPMENT, INC., Respondent; FRONTIER INSURANCE COMPANY, Appellant.**

506641

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2010 NY Slip Op 2693; 73 A.D.3d 36; 897 N.Y.S.2d 764; 2010 N.Y. App. Div. LEXIS 2644

April 1, 2010, Decided
April 1, 2010, Entered

NOTICE:

THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTS.

COUNSEL: Lewis & Greer, P.C., Poughkeepsie (Anthony F. DeStefano of Mauro, Goldberg and Lilling, L.L.P., of counsel), for appellant.

Vedder Price, P.C., Chicago, Illinois (Michael J. Hutter of Powers & Santola, L.L.P., of counsel), for respondent.

JUDGES: Before: Cardona, P.J., Peters, Kavanagh, McCarthy and Egan Jr., JJ. Cardona, P.J., Kavanagh, McCarthy and Egan Jr., JJ., concur.

OPINION BY: Peters

OPINION

[**37] [***765] Peters, J.

Appeals (1) from an order of the Supreme Court (Platkin, J.), entered December 24, 2008 in Albany County, which, in a proceeding pursuant to Insurance Law article 74, among other things, denied respondent's motion to confirm the referee's report, and (2) from an order of said court, [***766] entered July 7, 2009 in Albany County, which denied respondent's motion to renew and/or reargue.

In 1999, petitioner, an Illinois corporation, was hired as the general contractor for the construction of a high-rise condominium complex in Chicago, Illinois. Petitioner engaged Chicago Concrete Contractors, Inc. as a subcontractor to provide concrete for the project with a contract price of $ 5,255,155. Pursuant to the terms of the subcontract, Chicago Concrete obtained payment and performance bonds from respondent in the full amount of the contract.

In January 2001, petitioner declared Chicago Concrete in default of its obligations under [*2] the subcontract and demanded that respondent, as surety, remedy the default with respect to payments and performance. Later that month, petitioner terminated Chicago Concrete from the project. In May 2001, petitioner commenced an action against respondent, Chicago Concrete and Chicago Concrete's individual

principals in the Circuit Court of Cook County, Illinois. As relevant here, the complaint alleged claims for breach of contract against Chicago Concrete and respondent and sought recovery against respondent on the bonds. Respondent filed an answer to the complaint on August 27, 2001. That same day, the New York Superintendent of Insurance commenced a proceeding in New York County for rehabilitation of respondent pursuant to Insurance Law article 74, and Supreme Court (Lehner, J.) issued a temporary [**38] rehabilitation order which, among other things, enjoined respondent and its agents "from the transaction of its business."

Petitioner was granted a default judgment against Chicago Concrete in the Illinois action after it failed to answer the complaint. A "prove up" hearing was thereafter held on the issue of damages sustained by petitioner as a result of Chicago Concrete's breach, at which neither Chicago Concrete nor respondent appeared. After receiving testimony from one witness, petitioner's chief financial officer, the court issued a judgment against Chicago Concrete in the amount of $ 3,831,590.52. Subsequently, the court granted respondent's motion to stay the Illinois action pending resolution of the New York rehabilitation proceedings.

Meanwhile, in October 2001, Supreme Court issued an order of rehabilitation which appointed the Superintendent as rehabilitator and directed him to take possession of respondent's property and conduct its business. The order further provided, in relevant part, that "[a]ll persons are enjoined and restrained from obtaining preferences, judgments, attachments or other liens or making any levy against [respondent's] assets or any part thereof."

In March 2003, petitioner submitted to respondent a claim against the bond seeking to collect the amount of the Illinois judgment based upon Chicago Concrete's default, which respondent denied. Pursuant to a court order approving an interim procedure for the adjudication of claims against respondent, petitioner's claim was then referred to the Superintendent who, in a 2005 notice of determination, recommended that the claim be disallowed because it was not covered by the bond and/or was not sufficiently documented. Petitioner objected and the matter was referred to a referee. Before the referee, petitioner made a motion in limine seeking a determination that the Illinois default judgment against Chicago Concrete was conclusive against respondent or, in the alternative, considered prima facie evidence of petitioner's damages. The referee denied the motion and, following an 11-day hearing, recommended that the Illinois [***767] default judgment against Chicago Concrete be deemed unenforceable against respondent and the denial of petitioner's claims against respondent on the bond.

Respondent thereafter moved to confirm the referee's report and petitioner cross-moved to reject it. Supreme Court (Platkin, J.) concluded that, under Illinois substantive law, the judgment obtained against Chicago Concrete was conclusive and binding [**39] against respondent. The court further held that the doctrine of collateral estoppel barred respondent from relitigating the issues of whether Chicago Concrete breached its contract and the extent of damages caused by the breach, since those issues were previously decided in the Illinois action. Supreme Court then found petitioner's total outstanding claim against respondent to be $ 3,258,362.38, representing the amount of damages awarded in the Illinois judgment less payments made by respondent to vendors and suppliers to whom Chicago Concrete owed money for materials used on the project. Finally, applying Illinois law, the court determined that petitioner was entitled to [*3] 5% prejudgment interest from January 1, 2007 until the date of entry of judgment against it. Respondent's subsequent motion to renew and reargue was denied by Supreme Court. Respondent now appeals from both orders.

Respondent asserts that Supreme Court misinterpreted Illinois law -- specifically *Grommes v St. Paul Trust Co*. (147 Ill 634, 35 NE 820 [1893]) and its progeny -- in finding that the Illinois default judgment entered against Chicago Concrete was conclusive against it. Respondent contends that, under Illinois law, a judgment on the bond must be entered against a surety before it can be held liable on the bond.

Grommes stands for the proposition that, where the terms of the bond do not obligate the surety to be responsible for the result of a suit against its principal, the surety must be provided with notice of the pendency of the proceedings against its principal and the opportunity to defend before it can be bound by a judgment against the principal (*Grommes v St. Paul Trust Co.*, 147 Ill at 646-647, 35 NE at 823; *see State Bank of Blue Is. v Benzing*, 383 Ill. 40, 55, 48 N.E.2d 333 [1943]; *Lesczauskis v Downs*, 286 Ill 281, 284-285, 121 NE 590,

591 [1918]). The *Grommes* principle, however, was later refined to require a judgment on the bond against the surety in order to insure "the surety of a hearing and an adjudication of the issues relevant to his liability on the bond" (*Westbrooks v Finley*, 11 Ill App 2d 428, 433, 138 NE2d 77, 79 [1st Dist 1956]). A more recent matter before the Illinois court, *Vee See Constr. Co., Inc. v Luckett* (102 Ill App 3d 444, 430 NE2d 91, 58 Ill. Dec. 149 [1st Dist 1981]), is particularly instructive. There, the plaintiff contractor commenced suit against its subcontractor and the surety, alleging that the subcontractor breached its contract and seeking liability on the bonds issued by the surety. Although both the surety and subcontractor appeared, only the surety filed an answer. The [**40] plaintiff then moved for a default judgment against the subcontractor and, following an inquest, a default judgment was entered against both the subcontractor and surety. Thereafter, the surety successfully moved to vacate the default judgment against it and a hearing was held on the issues of its liability under the bond and the amount of damages that it was obligated to pay. On appeal, the Illinois appellate court concluded that the plaintiff's default judgment against the subcontractor was not conclusive against the surety (*id*. at 447-448). In so doing, the court cited the principle in *Grommes*, adding, however, that "a judgment on the bond [***768] against the surety is a requirement to hold the surety liable. In the pending matter, [the surety] vacated the default judgment against itself and a subsequent hearing was held which determined [its] liability on the bond" (*id*. at 447).

Thus, we conclude that Illinois law requires a judgment on the bond itself before a surety can be held liable. At the very least, Illinois law requires that a surety be given an opportunity to defend itself *against the claim under the bond* before a judgment against its principal is held to be conclusive against it (*see United States ex rel. Frontier Constr., Inc. v Tri-State Mgt. Co.*, 262 F. Supp. 2d 893, 897 [2003] ["Illinois law stresses the importance of allowing a surety to present defenses to its own liability on a bond"]).

In the matter before us, it is undisputed that the issue of respondent's liability on the bond was not litigated and that petitioner's Illinois action against respondent on the bond has been stayed. Under these circumstances, the default judgment rendered against Chicago Concrete cannot be conclusive as to respondent's liability on the bond (*see Vee See Constr. Co., Inc. v Luckett*, 102 Ill App 3d at 447, 430 NE2d at 93; *Westbrooks v Finley*, 11 Ill App 2d at 432-433, 138 NE2d at 79; *see also* Illinois Jurisprudence, Commercial Law § 6:68 ["a judgment on the bond against the surety is a requirement to hold the surety liable"]; Illinois Jurisprudence, [*4] Commercial Law § 6:48 [because a surety's liability on a bond is of a contractual nature and, thus, may differ from the principal's liability, "the existence of liability on the part of the principal . . . does not automatically result in the surety's liability on that same debt; the surety's contract requirements must first be satisfied"]).

[**41] Nor is respondent barred, by principles of collateral estoppel, from litigating its liability on the bond [1]. The equitable doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 467 N.E.2d 487, 478 N.Y.S.2d 823 [1984]; *see Buechel v Bain*, 97 NY2d 295, 303-304, 766 N.E.2d 914, 740 N.Y.S.2d 252 [2001], *cert denied* 535 U.S. 1096, 122 S. Ct. 2293, 152 L. Ed. 2d 1051 [2002]; *Zinter Handling, Inc. v Britton*, 46 AD3d 998, 1000, 847 N.Y.S.2d 271 [2007]). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action," and where the party against whom estoppel is sought "had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349, 712 N.E.2d 647, 690 N.Y.S.2d 478 [1999]; *see Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 94 N.Y.2d 426, 432, 727 N.E.2d 543, 706 N.Y.S.2d 46 [2000]; *Marotta* [***769] *v Hoy*, 55 AD3d 1194, 1196, 866 N.Y.S.2d 415 [2008]). Significantly, only issues that are "actually litigated" in a prior action will be given collateral estoppel effect, and "[a]n issue is not actually litigated if, for example, there has been a default" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457, 482 N.E.2d 63, 492 N.Y.S.2d 584 [1985]; *see* Restatement [Second] of Judgments § 27, Comment e; *Matter of Halyalkar v Board of Regents of State of N.Y.*, 72 NY2d 261, 267-268, 527 N.E.2d 1222, 532 N.Y.S.2d 85 [1988]; *Pigliavento v Tyler Equip. Corp.*, 233 AD2d 810, 811, 650 N.Y.S.2d 414 [1996]).

1 Supreme Court properly found that the issue of whether the temporary rehabilitation order precluded respondent from defending pending litigation was raised and decided against it in

Matter of Frontier Ins. Co. (27 AD3d 274, 813 N.Y.S.2d 50 [2006], *lv denied* 7 N.Y.3d 713, 857 N.E.2d 1136, 824 N.Y.S.2d 605 [2006]) and, therefore, respondent is collaterally estopped from arguing otherwise. Unlike *Matter of Frontier Ins. Co*. (*supra*), however, no judgment has been entered against respondent on the bond and the action against it has been stayed. Thus, respondent is not claiming -- as it did in *Matter of Frontier Ins. Co*. (*supra*) -- that the judgment *against it* is unenforceable because it was prevented from presenting a defense; rather, respondent is arguing that the issue of *its liability has not yet been adjudicated*.

Here, there is no question that the issue of respondent's liability to petitioner on the bond -- the primary issue resolved by the referee -- was not previously litigated. It is true that respondent can only be liable under the bond in the event that Chicago Concrete defaulted in its obligations under the subcontract, and that Chicago Concrete was found in the Illinois action to have breached the subcontract. However, such issue was not "actually litigated" in the Illinois action because it was determined upon Chicago Concrete's default (*see Pigliavento v Tyler Equip. Corp*., 233 AD2d at 811; *S.D.I. Corp. v Fireman's Fund Ins. Cos*., 208 AD2d 706, 708-709, 617 N.Y.S.2d 790 [1994]; *see also Stumpf AG v Dynegy* [**42] *Inc*., 32 AD3d 232, 233, 820 N.Y.S.2d 24 [2006]; *Chambers v City of New York*, 309 AD2d 81, 85-86, 764 N.Y.S.2d 708 [2003]). Thus, it has no collateral estoppel effect (*see Watrous v Autera*, 284 AD2d 792, 793, 726 N.Y.S.2d 595 [2001]; *Pigliavento v Tyler Equip. Corp*., 233 AD2d at 811).

[*5] Nor was the issue as to the damages recoverable under the bond necessarily decided in the Illinois action. The "prove up" hearing in that case dealt with the issue of damages sustained by petitioner as a result of Chicago Concrete's breach of contract. In that action, under Illinois law, petitioner was able to seek both actual and consequential damages flowing from Chicago Concrete's breach of the subcontract (*see Midland Hotel Corp. v Reuben H. Donnelley Corp*., 118 Ill 2d 306, 318, 515 NE2d 61, 67, 113 Ill. Dec. 252 [1987]). However, as previously noted, "[t]he liability of a surety on a bond is of a contractual nature, and thus it may differ from the nature of the principal debtor's liability" (*Westbrooks v Finley*, 11 Ill App 2d at 432, 138 NE2d at 79; *see Wright v Loring*, 351 Ill 584, 588, 184 NE 865, 866 [1933] [finding that "the liability of a surety cannot be extended by mere implication nor imposed beyond the express terms of his contract"]). Here, the terms of the bonds at issue do not obligate respondent to be responsible for the result of a suit against Chicago Concrete; rather, the performance bond issued by respondent expressly limits its liability to "the reasonable cost of completing performance of the subcontract," after crediting the balance of the subcontract price [2]. Notably, the record strongly indicates -- and the referee ultimately found -- that a significant portion of the damages claimed by petitioner in the Illinois action constituted delay damages, such as lost profits, and damages sustained by the owner, which are not recoverable by petitioner under the terms of the bond (or, for that matter, under its contract with the owner). For these reasons, we further conclude that Supreme Court erred in [***770] finding that respondent was bound by the Illinois judgment under the principle of collateral estoppel.

2 Under the terms of the bond, the "balance of the subcontract price" means the "total amount payable by [petitioner] to [Chicago Concrete] under the subcontract and any amendments thereto, less the amounts . . . properly paid by [petitioner] under the subcontract."

We now turn to the referee's findings, which Supreme Court did not address, having concluded that petitioner's challenges to the referee's report had been rendered moot by its determination. Since Supreme Court is vested with discretion to "confirm or reject, in whole or in part, the . . . report of [the] referee" [**43] and may "make new findings with or without taking additional testimony" or "order a new trial or hearing" (CPLR 4403), we deem it prudent under the circumstances to remit the matter to Supreme Court to address the merits of petitioner's objections to the referee's report.

Respondent's remaining contentions are rendered academic in light of our determination.

Cardona, P.J., Kavanagh, McCarthy and Egan Jr., JJ., concur.

ORDERED that the order entered December 24, 2008 is reversed, on the law and the facts, without costs, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

ORDERED that the appeal from the order entered

July 7, 2009 is dismissed, as [*6] academic, without costs.

LEXSEE 827 N.E.2D 269

In the Matter of the Estate of Blanche D. Hunter, Deceased. Chase Manhattan Bank, as Trustee of the Trust Under Paragraph eighth (b) of the Will of Blanche D. Hunter, Deceased, for the Benefit of Pamela Townley Creighton, Respondent; Judith Chinello et al., as Administrators C.T.A. of the Estate of Pamela Townley Creighton, Deceased, et al., Appellants.

No. 35

COURT OF APPEALS OF NEW YORK

4 N.Y.3d 260; 827 N.E.2d 269; 794 N.Y.S.2d 286; 2005 N.Y. LEXIS 448

February 10, 2005, Argued
March 24, 2005, Decided

SUBSEQUENT HISTORY: Judgment entered by Matter of Hunter, 2010 N.Y. Misc. LEXIS 1559 (N.Y. Sur. Ct., Mar. 31, 2010)

PRIOR HISTORY: Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that Court, entered March 29, 2004. The Appellate Division modified, on the law, an order of the Surrogate's Court, Westchester County (Anthony A. Scarpino, Jr., S.; op 194 Misc. 2d 364, 753 N.Y.S.2d 675), which had, insofar as appealed from, denied those branches of petitioner's motion to dismiss certain objections in a proceeding to settle petitioner's first intermediate account as cotrustee of a testamentary trust. The modification consisted of (1) deleting the provisions of the Surrogate's Court order denying those branches of the petitioner's motion which were to dismiss objection 4, so much of objection 5 as charged the petitioner's predecessor-in-interest with failing to inform and advise the objectant of the risk of maintaining a concentration of Eastman Kodak Company stock in the estate, objection 8 (a) through (f), and so much of objection 8 (g) as charged the petitioner's predecessor-in-interest with failing "to undertake a formal analysis and establish an investment plan for the Article Eighth A" trust, and objection 9, and (2) substituting therefor provisions granting those branches of the motion. The Appellate Division affirmed the order as modified. The following question was certified by the Appellate Division: "Was the opinion and order of this court dated March 29, 2004, properly made?"
In re Hunter, 6 A.D.3d 117, 775 N.Y.S.2d 42, 2004 N.Y. App. Div. LEXIS 3552 (N.Y. App. Div. 2d Dep't, 2004)

DISPOSITION: Order of the appellate division affirmed; certified question answered in the affirmative.

HEADNOTES

Judgments -- Res Judicata -- Dual Capacity Fiduciary -- Effect of Discharge of Future Liability

Inasmuch as the doctrine of res judicata was applicable to judicial proceedings settling an estate and a trust accounting, submitted by the bank that acted both as executor and as trustee, the beneficiary of a second testamentary trust managed by the bank was precluded from raising objections to the fiduciary's actions that could have been raised in prior proceedings. Objectants were precluded from litigating the claims involving the bank's failure, in its capacity as trustee of the second trust, to object to its own voluntary accountings as executor of decedent's estate or as trustee of the first trust. The bank complied with its obligation under SCPA 2210

(10) to notify the beneficiary of the 1977 proceeding to judicially settle the estate account, and in the 1981 accounting to settle the first trust, the bank served the beneficiary with process. The beneficiary failed to challenge the fiduciaries' management of estate assets in either proceeding. The claims objectants now seek to assert were discernible from the documents filed in the prior proceedings; thus, the beneficiary had a full and fair opportunity to raise objections relating to the bank's obligations as executor to diversify the trusts' stockholdings or timely fund the trusts, or as trustee of the first trust to diversify the trust assets--the crux of the present objections. However, the beneficiary's opportunities to raise objections regarding the estate and first trust accounts did not bar objectants from continuing to litigate their claims with respect to the bank's management of the second trust.

COUNSEL: *Williams & Williams*, Rochester (*Mitchell T. Williams* of counsel), for appellants. I. The objections under review are directed against the paragraph eighth (b) trustee, not against the executor or the paragraph eighth (a) trustee. (*Matter of Smather*, 309 N.Y. 487, 131 N.E.2d 896; *Meinhard v Salmon*, 249 N.Y. 458, 164 N.E. 545; *Matter of Parkinson*, 134 Misc. 2d 565, 511 N.Y.S.2d 539; *Matter of Menzie*, 54 Misc. 188, 105 N.Y.S. 925, 6 Mills 134; *Matter of Massimino*, 143 Misc. 119, 256 N.Y.S. 32; *Continental Ins. Co. v Colangione*, 94 A.D.2d 916, 463 N.Y.S.2d 619; *Julien J. Studley, Inc. v Lefrak*, 66 A.D.2d 208, 412 N.Y.S.2d 901; 48 N.Y.2d 954, 401 N.E.2d 187, 425 N.Y.S.2d 65; *Weiner v Greyhound Bus Lines*, 55 A.D.2d 189, 389 N.Y.S.2d 884; *Lipkind v Ward*, 256 A.D. 74, 8 N.Y.S.2d 832; *Palmer v Hussey*, 87 N.Y. 303; 119 U.S. 96, 7 S. Ct. 158, 30 L. Ed. 362.) II. The bank and the majority opinion of the Appellate Division render SCPA 2210 (7) meaningless. (*Matter of Parkinson*, 134 Misc. 2d 565, 511 N.Y.S.2d 539; *Matter of Ziegler*, 161 Misc. 2d 203, 613 N.Y.S.2d 316; *Fisher v Banta*, 66 N.Y. 468.) III. The majority opinion contains certain holdings which find no support in any statute or case law. (*Matter of Ziegler*, 161 Misc. 2d 203, 613 N.Y.S.2d 316; *O'Brien v City of Syracuse*, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687; *Matter of Reilly v Reid*, 45 N.Y.2d 24, 379 N.E.2d 172, 407 N.Y.S.2d 645; *Meinhard v Salmon*, 249 N.Y. 458, 164 N.E. 545; *Matter of Leland*, 219 N.Y. 387, 114 N.E. 854, 18 Mills 167; *Matter of Shaw*, 186 A.D.2d 809, 589 N.Y.S.2d 97; *Matter of Marsh*, 179 A.D.2d 578, 578 N.Y.S.2d 911.) IV. In the prior accounting proceedings Pamela Creighton did not have the opportunity to be heard on her present objections. (*Matter of Alker*, 20 A.D.2d 894, 248 N.Y.S.2d 993; *Matter of Long Is. Loan & Trust Co. [Garretson]*, 92 A.D. 1, 87 N.Y.S. 65; 179 N.Y. 520, 71 N.E. 1133; *Matter of Donner*, 82 N.Y.2d 574, 626 N.E.2d 922, 606 N.Y.S.2d 137; *Bank of N.Y. v New Jersey Tit. Guar. & Trust Co.*, 256 A.D. 609, 11 N.Y.S.2d 181; 257 A.D. 806, 12 N.Y.S.2d 364; *Matter of Brunner*, 49 Misc. 2d 139, 267 N.Y.S.2d 332; 26 A.D.2d 838, 274 N.Y.S.2d 414; *Matter of Connors*, 36 Misc. 2d 866, 232 N.Y.S.2d 567.) V. SCPA 2210 (10) does not protect the bank (as the paragraph eighth [b] trustee), for its failure to act with respect to either the 1977 or the 1981 accountings. (*Fisher v Banta*, 66 N.Y. 468; *Matter of Ziegler*, 157 Misc. 2d 423, 596 N.Y.S.2d 963.) VI. Neither the 1977 executorial nor the 1981 paragraph eighth (a) decree bars the paragraph eighth (b) objections pursuant to the doctrine of res judicata. (*Molino v County of Putnam*, 29 N.Y.2d 44, 272 N.E.2d 323, 323 N.Y.S.2d 817; *Matter of Juan C. v Cortines*, 89 N.Y.2d 659, 679 N.E.2d 1061, 657 N.Y.S.2d 581.) VII. The fact that the bank was acting in a dual capacity did not relieve it of its fiduciary duties as the paragraph eighth (b) trustee. (*Meinhard v Salmon*, 249 N.Y. 458, 164 N.E. 545; *Matter of Kistler*, 167 Misc. 528, 4 N.Y.S.2d 223; *Macy v Williams*, 55 Hun 489, 8 N.Y.S. 658; 125 N.Y. 767, 27 N.E. 409; *Bank of N.Y. v New Jersey Tit. Guar. & Trust Co.*, 256 A.D. 609, 11 N.Y.S.2d 181; 257 A.D. 806, 12 N.Y.S.2d 364; *Villard v Villard*, 219 N.Y. 482, 114 N.E. 789; *Matter of Chalmers*, 163 Misc. 142, 297 N.Y.S. 176; *Matter of Brunner*, 49 Misc. 2d 139, 267 N.Y.S.2d 332; 26 A.D.2d 838, 274 N.Y.S.2d 414.) VIII. Any attempt to graft an exculpatory provision on SCPA 2210 (10) where none exists should be rejected by this Court. (*New Amsterdam Cas. Co. v Stecker*, 3 N.Y.2d 1, 143 N.E.2d 357, 163 N.Y.S.2d 626; *Matter of Patrolmen's Benevolent Assn. of City of Buffalo v City of Buffalo*, 50 A.D.2d 101, 376 N.Y.S.2d 291; *Matter of Parkinson*, 134 Misc. 2d 565, 511 N.Y.S.2d 539; *Matter of Massimino*, 143 Misc. 119, 256 N.Y.S. 32.) IX. The Appellate Division dissent's adoption of the *Pepper* rule (*Pepper v Zions First Natl. Bank, N.A.*, 801 P.2d 144 [Utah 1990]) should be adopted by the Court of Appeals. (*Bank of N.Y. v New Jersey Tit. Guar. & Trust Co.*, 256 A.D. 609, 11 N.Y.S.2d 181; *Matter of Menzie*, 54 Misc. 188, 105 N.Y.S. 925, 6 Mills 134; *Matter of Chaves*, 143 Misc. 868, 257 N.Y.S. 641; *Rosner v Paley*, 116 Misc. 2d 454, 455 N.Y.S.2d 959; 99 A.D.2d 1018, 473 N.Y.S.2d 808; 65 N.Y.2d 736, 481 N.E.2d 553, 492 N.Y.S.2d 13; *Matter of Rothko*, 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449; *Matter of Connors*, 36 Misc. 2d 866, 232

N.Y.S.2d 567.) X. The bank has never adequately disclosed the violations of its fiduciary duties to the trust beneficiary. (*Matter of Seaman*, 275 A.D. 484, 90 N.Y.S.2d 336; 300 N.Y. 756, 92 N.E.2d 460; *Matter of Ziegler*, 161 Misc. 2d 203, 613 N.Y.S.2d 316; 213 A.D.2d 280, 623 N.Y.S.2d 589; 86 N.Y.2d 712, 659 N.E.2d 772, 635 N.Y.S.2d 949; *Matter of Rudin*, 292 A.D.2d 283, 739 N.Y.S.2d 154; *Matter of Zilkha*, 174 A.D.2d 331, 570 N.Y.S.2d 807.) XI. The Court of Appeals should reverse the order below.

Harris Beach LLP, Pittsford (*Paul J. Yesawich, III*, and *Gregory J. McDonald* of counsel), and *Ruskin Moscou Faltischek, P.C.*, Uniondale (*C. Raymond Radigan* of counsel), for respondent. I. The Second Department's holding is in accord with more than 125 years of New York decisional and statutory law. (*Fisher v Hubbell*, 65 Barb. 74, 1 Th. & C. 97, *affd sub nom. Fisher v Banta*, 66 N.Y. 468; *Mullane v Central Hanover Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865; *Pray v Hegeman*, 98 N.Y. 351; *Globe & Rutgers Fire Ins. Co. v Hines*, 273 F. 774; 257 U.S. 643, 42 S. Ct. 54, 66 L. Ed. 413; *Matter of Haigh*, 125 Misc. 365, 211 N.Y.S. 521; *Matter of Busto*, 173 Misc. 25, 19 N.Y.S.2d 4; 258 A.D. 980, 17 N.Y.S.2d 591; *Krimsky v Lombardi*, 78 Misc. 2d 685, 357 N.Y.S.2d 671; 51 A.D.2d 600, 377 N.Y.S.2d 785; *Matter of Zaharis*, 148 A.D.2d 868, 538 N.Y.S.2d 136, 539 N.Y.S.2d 136; *Matter of Weir*, 182 Misc. 845, 46 N.Y.S.2d 551.) II. Objectant's argument regarding SCPA 2210 (7) is meritless. (*Matter of Ziegler*, 157 Misc. 2d 423, 596 N.Y.S.2d 963.) III. Objectant's reliance on SCPA 1506 is misplaced and, in fact, confirms the Second Department's interpretation and application of SCPA 2210 (10). (*Fisher v Hubbell*, 65 Barb. 74, 1 Th. & C. 97, *affd sub nom. Fisher v Banta*, 66 N.Y. 468; *Matter of Menzie*, 54 Misc. 188, 105 N.Y.S. 925, 6 Mills 134; *Matter of Chaves*, 143 Misc. 868, 257 N.Y.S. 641; 239 A.D. 900, 265 N.Y.S. 932; *Matter of Massimino*, 143 Misc. 119, 256 N.Y.S. 32.) IV. The result under SCPA 2210 (10) is consistent with the doctrines of res judicata and collateral estoppel as the Second Department clearly stated. (*O'Brien v City of Syracuse*, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687; *Matter of Ziegler*, 161 Misc. 2d 203, 613 N.Y.S.2d 316; *Buechel v Bain*, 97 N.Y.2d 295, 766 N.E.2d 914, 740 N.Y.S.2d 252; 535 U.S. 1096, 122 S. Ct. 2293, 152 L. Ed. 2d 1051; *Schwartz v Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955; *Gramatan House Invs. Corp. v Lopez*, 46 N.Y.2d 481, 386 N.E.2d 1328, 414 N.Y.S.2d 308; *Matter of Chaves*, 143 Misc. 868, 257 N.Y.S. 641; *Matter of Massimino*, 143 Misc. 119, 256 N.Y.S. 32.) V. Objectant's remaining arguments are equally meritless and should be rejected by the Court. (*Matter of Connors*, 36 Misc. 2d 866, 232 N.Y.S.2d 567; *Matter of Brunner*, 49 Misc. 2d 139, 267 N.Y.S.2d 332; 26 A.D.2d 838, 274 N.Y.S.2d 414; *Matter of Donner*, 82 N.Y.2d 574, 626 N.E.2d 922, 606 N.Y.S.2d 137; *Matter of Chaves*, 143 Misc. 868, 257 N.Y.S. 641; 239 A.D. 900, 265 N.Y.S. 932; *Matter of Menzie*, 54 Misc. 188, 105 N.Y.S. 925, 6 Mills 134; *Matter of Ziegler*, 161 Misc. 2d 203, 613 N.Y.S.2d 316; *Matter of Chapin*, 171 Misc. 783, 14 N.Y.S.2d 91; *Matter of Van Deusen*, 24 Misc. 2d 611, 196 N.Y.S.2d 737; *Matter of Long Is. Loan & Trust Co. [Garretson]*, 92 A.D. 1, 87 N.Y.S. 65; 179 N.Y. 520, 71 N.E. 1133; *Matter of Alker*, 20 A.D.2d 894, 248 N.Y.S.2d 993.)

Eliot Spitzer, Attorney General, New York City (*Robert R. Molic* and *Gerald A. Rosenberg* of counsel), in his statutory capacity under EPTL 8-1.4.

Sidley Austin Brown & Wood LLP, New York City (*Eileen Caulfield Schwab*, *Roger J. Hawke*, *Darcy M. Katris* and *Kimberly A. Johns* of counsel), and *Roberta Kotkin* for New York Bankers Association, amicus curiae. I. The Appellate Division correctly held that appellant's objections are barred. II. The decision of the Appellate Division accords with precedent. III. SCPA 2210 (7) imposes no duty upon a successor fiduciary to object to the conduct of a predecessor fiduciary. (*Matter of Killan*, 172 N.Y. 547, 65 N.E. 561, 33 Civ. Proc. R. 241; *Matter of Altman*, 115 Misc. 476, 188 N.Y.S. 493.) IV. A successor fiduciary does not have a duty to object to its own conduct as predecessor. (*Bank of N.Y. v New Jersey Tit. Guar. & Trust Co.*, 256 A.D. 609, 11 N.Y.S.2d 181; *Villard v Villard*, 219 N.Y. 482, 114 N.E. 789; *Matter of Brunner*, 49 Misc. 2d 139, 267 N.Y.S.2d 332; 26 A.D.2d 838, 274 N.Y.S.2d 414; *Matter of Chalmers*, 163 Misc. 142, 297 N.Y.S. 176; *Matter of Kistler*, 167 Misc. 528, 4 N.Y.S.2d 223; *Meinhard v Salmon*, 249 N.Y. 458, 164 N.E. 545; *City Bank Farmers Trust Co. v Cannon*, 291 N.Y. 125, 51 N.E.2d 674; *Matter of Van Deusen*, 37 A.D.2d 131, 322 N.Y.S.2d 951.) V. *Pepper v Zions First Natl. Bank, N.A.* (801 P.2d 144 [Utah 1990]) does not apply. (*Matter of Chaves*, 143 Misc. 868, 257 N.Y.S. 641; 239 A.D. 900, 265 N.Y.S. 932; *Matter of Menzie*, 54 Misc. 188, 105 N.Y.S. 925, 6 Mills 134; *Matter of Alker*, 20 A.D.2d 894, 248 N.Y.S.2d 993; *Matter of Schmidt*, 163 Misc. 610, 297 N.Y.S. 327; *Matter of Ziegler*, 161 Misc. 2d 203, 613 N.Y.S.2d 316;

Matter of Chapin, 171 Misc. 783, 14 N.Y.S.2d 91.) VI. The purpose of SCPA 2210 (10) is to avoid placing a successor fiduciary in a position of divided loyalty. (*Matter of Parkinson*, 134 Misc. 2d 565, 511 N.Y.S.2d 539; *Fisher v Banta*, 66 N.Y. 468; *Matter of Ziegler*, 157 Misc. 2d 423, 596 N.Y.S.2d 963; *Matter of Massimino*, 143 Misc. 119, 256 N.Y.S. 32; *Matter of Hernandez v Barrios-Paoli*, 93 N.Y.2d 781, 720 N.E.2d 866, 698 N.Y.S.2d 590; *Matter of Stevens v Wing*, 293 A.D.2d 49, 741 N.Y.S.2d 4.)

JUDGES: Opinion by Judge Graffeo. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Read and R.S. Smith concur.

OPINION BY: GRAFFEO

OPINION

[*264] [***288] [**271] Graffeo, J.

In this case we are required to decide whether the doctrine of res judicata applies to judicial proceedings settling an estate and a trust accounting, submitted by a bank that acted both as executor and as trustee. Under the facts and circumstances presented here, we conclude that the beneficiary of a separate testamentary trust managed by the same bank is precluded from raising objections to the fiduciary's actions that could have been raised in prior proceedings.

I. Background

This case arises following more than 20 years of fiduciary involvement with the assets of the estate of Rochester resident [*265] Blanche Hunter, who died in 1972 leaving a gross estate in excess of $ 28 million. A substantial portion of Hunter's estate consisted of common stock of the Eastman Kodak Company. Paragraph eighth (a) of Hunter's will established a residuary trust for the benefit of her granddaughter Alice F. Creighton, and paragraph eighth (b) created a residuary trust for the benefit of another granddaughter, the objectant Pamela Townley Creighton. Both granddaughters were minors at the time of Hunter's death. Each trust was to be funded with one half of the residuary estate, and in the event either granddaughter died without issue or without having exercised the power of appointment, the balance of that trust would pour over into the other trust. Hunter's will designated Lincoln Rochester Trust Company, petitioner Chase Manhattan Bank's predecessor, as coexecutor of the estate with James W. Cook, a trust officer. Hunter also selected the Bank and Cook to serve as the cotrustees of Trusts A and B.

The will was admitted to probate in January 1973. In March, the Bank and Cook partially funded each of the granddaughters' trusts with a cash distribution of over $ 40,000 from the estate. Between 1973 and the conclusion of the estate's administration in 1977, the Bank and Cook periodically transferred Kodak stock to the trusts, so that each trust eventually held about 13,000 shares. From late 1972 to 1977 the price of Kodak stock apparently dropped from $ 148 to $ 70 per share, resulting in a decline in aggregate value of the trusts' stock of over $ 2 million.

As coexecutors of Hunter's estate, the Bank and Cook commenced a proceeding seeking judicial settlement of the estate account in 1976. Having been served with notification of the accounting, Pamela Creighton, the beneficiary of Trust B, appeared through counsel and filed objections to the amount of attorneys' fees sought by the Bank but raised no other concerns about the management of estate assets. Surrogate's Court settled the account in a 1977 decree, which provided that "the said Executors be and hereby are released from all further liability and [***289] [**272] responsibility as such Executors as to all matters embraced in their Account and this Decree."

Alice Creighton, the beneficiary of Trust A, died in 1980 without issue and never having exercised her power of appointment. Under the terms of Hunter's will, Alice's assets, including 13,000 shares of Kodak stock, were transferred to Pamela's trust--Trust B. In July 1981, the Bank and Cook sought to judicially settle their account as cotrustees of Trust A. The cotrustees [*266] again served the petition on Pamela. Rather than appearing in the proceeding, Pamela executed a waiver and did not file any objections to the account. In 1981, Surrogate's Court issued a decree settling the account and discharging the cotrustees "from all further liability and responsibility as such Trustees as to all matters embraced in their Account and this Decree."

After Cook died in 1996, the Bank initiated a judicial accounting of Trust B, covering the years 1973-1996. A Bank representative met with Pamela in California to deliver a copy of the account and to obtain a waiver of citation if she found the account satisfactory. Before

reviewing the account documents, Pamela signed the waiver. Upon obtaining the waiver, Surrogate's Court settled the account in 1998. Pamela later consulted an attorney and commenced a proceeding to withdraw her waiver and vacate the 1998 decree, seeking to file objections to the account. After conducting a fact-finding hearing, Surrogate's Court determined that "the waiver was not knowingly and intelligently given," set aside the waiver and vacated the decree (190 Misc. 2d 593, 600, 739 N.Y.S.2d 916 [2002]). The Bank did not appeal this decision.

Pamela then filed objections to the account of Trust B, including the claims now under review. As relevant here, her objections fell into three categories, but all pertain to the Bank's conduct in its capacity as trustee of Trust B. First, she claimed that the Bank acted improperly by failing to diversify the high concentration of Trust B assets in Kodak stock. Second, Pamela contended that the Bank breached its duty to challenge its actions as executor in failing to diversify the stockholdings in Hunter's estate and in not timely funding the trusts. Third, Pamela asserted that the Bank breached its duty to object to its actions as trustee of Trust A in failing to diversify the stockholdings of Trust A.

The Bank moved to dismiss the second and third categories of objections (i.e., allegations against the Bank, as trustee of Trust B, for its failure to object to the estate and Trust A accountings). The Bank argued that Pamela's failure to object in the 1977 and 1981 judicial accounting proceedings precluded these claims under the doctrine of res judicata.

Surrogate's Court denied the Bank's motion to dismiss the second and third categories of objections. The court rejected the Bank's argument that those objections were barred by res judicata, concluding that the Bank's "actions as cotrustee of the [*267] eighth (b) Trust were not subject to judicial scrutiny in either of those two proceedings" (194 Misc. 2d 364, 370, 753 N.Y.S.2d 675 [2002]).

Pamela Creighton died in 2002 and the administrators of her estate as well as the beneficiaries of her trust were substituted as the objectants. [1] Thereafter, the Appellate [***290] [**273] Division, with one Justice dissenting, modified the Surrogate's order, by granting the Bank's motion to dismiss the second and third categories of objections (6 A.D.3d 117, 775 N.Y.S.2d 42 [2d Dept 2004]). The majority held that Pamela's opportunity to raise objections to the Bank's alleged mismanagement as executor and trustee of Trust A in the 1977 and 1981 proceedings precluded her present objections to the Bank's failure as trustee of Trust B to contest the prior accountings under the doctrine of res judicata. The Appellate Division granted leave to appeal to this Court, certifying the following question: "Was the opinion and order of this court dated March 29, 2004, properly made?" We answer in the affirmative.

1 Judith Chinello and Stan Mandell, the administrators of Pamela's estate, as well as Margaret Hunter and Pomona College, the appointees of the trust corpus, are now the objectants. For purposes of this opinion, the term objectants refers to the substituted parties.

II. Surrogate's Court Procedure Act

Under article 22 of the Surrogate's Court Procedure Act, fiduciaries such as executors and trustees have an obligation to account for their actions. Executors ordinarily account at the conclusion of estate administration while trustees account "when the trust is terminated or when they cease to serve" (Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 2205, at 18). Although the SCPA does not require a fiduciary to give periodic or intermediate accountings, where trusts are managed over a lengthy period trustees often account periodically. [2]

2 Despite the fact that the SCPA does not require the preparation of periodic or intermediate accountings by trustees, one commentator has indicated that such accountings are customary every 10 years (*see* Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 2205, at 18).

A fiduciary may voluntarily proceed to obtain formal judicial settlement of an account under SCPA 2208. [3] Additionally, certain persons, including beneficiaries under a will or trust, [*268] may initiate a proceeding to compel a formal accounting (*see* SCPA 2205). The court may also compel a judicial accounting on its own initiative (*see* SCPA 2205).

3 A fiduciary may also account informally by obtaining receipts and releases from interested parties regarding the handling of the estate or trust (*see* 6 Warren's Heaton, Surrogates' Courts §

91.04 [3], at 91-17 [6th ed rev]; Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 2202, at 7). The SCPA permits a fiduciary to file and record the receipt and release agreements with Surrogate's Court (*see* SCPA 2202) and authorizes Surrogate's Court to issue a decree based on these filed agreements (*see* SCPA 2203).

Judicial settlement serves the interests of both the fiduciary and the beneficiary in that it provides full disclosure of the fiduciary's financial transactions and, upon issuance of a decree, the fiduciary is released from liability for those transactions (*see* 6 Warren's Heaton, Surrogates' Courts § 91.02 [1], at 91-4 [6th ed rev]). Where a fiduciary commences a judicial accounting and accounts to a trustee, it is generally not necessary to serve process on the beneficiaries of that trust because the trustee represents the beneficiaries' interests (*see* SCPA 2210 [7]). But SCPA 2210 (10) provides an exception to this rule for a fiduciary who simultaneously fulfills more than one role:

> "[w]here an accounting fiduciary accounts to himself in a separate capacity as the fiduciary of a deceased beneficiary of the estate, or as trustee . . . process shall issue to all persons interested in the estate of the deceased beneficiary, . . . or the trust of which the accounting party is trustee."

Thus, under the statute, if the fiduciary seeking to account also serves as a trustee, [***291] [**274] the fiduciary must notify trust beneficiaries directly of any accounting proceeding. [4]

> 4 Notice to beneficiaries is not required by SCPA "where the accounting fiduciary has in said separate capacity one or more co-fiduciaries who are not his co-fiduciaries in his accounting capacity" (SCPA 2210 [10]). This provision is not applicable here.

Long before the enactment of SCPA 2210 (10), this Court addressed the significance of notification to beneficiaries in accounting proceedings involving multicapacity fiduciaries. In *Fisher v Banta* (66 N.Y. 468 [1876]), this Court held that, where a fiduciary seeks to account to itself in another capacity, an accounting decree will be conclusive only where persons ordinarily represented by the fiduciary in its alternate capacity "have been made parties to the accounting" (*id.* at 482). The *Fisher* multicapacity fiduciary rule was codified in SCPA 2210 (10), recognizing that an accounting fiduciary may not account to itself in a separate capacity absent the intervention of the beneficiaries. Thus, SCPA 2210 (10) performs a dual purpose: it requires multicapacity fiduciaries to give beneficiaries notice of [*269] the opportunity to raise objections to an accounting and, as a result of account settlement, fiduciaries obtain finality with respect to their actions.

III. Analysis

Objectants argue that the notice and opportunity to be heard provided in the 1977 and 1981 proceedings do not preclude the current objections because they concern only the Bank's conduct as trustee of Trust B and not its conduct as executor of Hunter's estate or as trustee of Trust A. [5] The Bank counters that objectants' claims are actually directed at its failure to diversify stockholdings and are in effect no different than the claims Pamela could have raised in the prior proceedings.

> 5 The Attorney General, appearing in this case as a necessary party under article 8 of the Estates, Powers and Trusts Law due to the charitable interests implicated by Pomona College's remainder beneficiary status in Trust B, generally agrees with objectants' position. The Attorney General contends that "an accounting multicapacity fiduciary should, where applicable, disclose to the beneficiaries to whom it is accounting to that it has a conflict because of its dual capacity and should explain the potential issues that might arise because of that conflict." While we concur that such a disclosure would be helpful, the SCPA contains no such requirement. The Attorney General also states that the Bank's 1977 and 1981 accounts are not models of clarity. Although these accounts could have set forth more clearly the information relating to the transfer and value of assets for the benefit of lay beneficiaries, we note that the accounts do contain the relevant information relating to the Kodak stock transactions.

Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving

the same subject matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again (*see O'Connell v Corcoran*, 1 N.Y.3d 179, 184-185, 802 N.E.2d 1071, 770 N.Y.S.2d 673 [2003]; *Gramatan Home Invs. Corp. v Lopez*, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 414 N.Y.S.2d 308 [1979]). Additionally, under New York's transactional analysis approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 445 N.Y.S.2d 687 [1981], citing *Matter of Reilly v Reid*, 45 N.Y.2d 24, 29-30, 379 N.E.2d 172, 407 N.Y.S.2d 645 [1978]). "*Res judicata* is designed [***292] [**275] to provide finality in the resolution of disputes," recognizing that "[c]onsiderations of judicial economy as well as [*270] fairness to the parties mandate, at some point, an end to litigation" (*Reilly*, 45 N.Y.2d at 28).

These principles apply with equal force to judicially settled accounting decrees. As a general rule, an accounting decree is conclusive and binding with respect to all issues raised and as against all persons over whom Surrogate's Court obtained jurisdiction (*see Pray v Hegeman*, 98 N.Y. 351, 358 [1885]; *Matter of Ziegler*, 161 Misc. 2d 203, 205, 613 N.Y.S.2d 316 [Sur Ct, NY County 1994], *affd* 213 A.D.2d 280, 623 N.Y.S.2d 589 [1995], *lv denied* 86 N.Y.2d 712, 659 N.E.2d 772, 635 N.Y.S.2d 949 [1995]). Indeed this principle is so well settled that the drafters of the SCPA determined that it was unnecessary to include former section 274 of the Surrogate's Court Act which had codified this rule, noting that it was " 'self-evident . . . that every decree whether upon an accounting or otherwise is binding upon all persons of whom jurisdiction was obtained' " (*Ziegler*, 161 Misc. 2d at 205, quoting Revisers' Notes, McKinney's Cons Laws of NY, Book 58A, SCPA 2226, at 292 [1967 ed]; *see also* Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 2227, at 269). In accord with res judicata, an accounting decree is therefore conclusive as to issues that were decided as well as those that could have been raised in the accounting (*see Matter of Roche*, 259 N.Y. 458, 461, 182 N.E. 82 [1932]; *Pray*, 98 N.Y. at 358).

Applying the foregoing principles to this case, we agree with the Appellate Division that objectants are precluded from litigating the claims involving the Bank's failure, in its capacity as trustee of Trust B, to object to its own voluntary accountings as executor of Hunter's estate or as trustee of Trust A. The Bank complied with its obligation under SCPA 2210 (10) to notify Pamela of the 1977 proceeding to judicially settle the estate account. Represented by counsel in that proceeding, Pamela appeared but objected only to the attorneys' fees, never challenging the fiduciaries' management of estate assets. Similarly, in the 1981 accounting to settle Alice's trust (Trust A), the Bank served Pamela with process but she chose to execute a waiver of citation and did not file any objections.

The claims objectants now seek to assert were discernible from the documents filed in these prior proceedings. The 1977 account disclosed the dates when the trusts were funded with Kodak stock and the decline in the value of the stock was apparent in the 1977 and 1981 accountings--indeed, objectants rely on those documents to support their present objections. Pamela therefore had a full and fair opportunity to raise objections [*271] relating to the Bank's obligations as executor to diversify the stock or timely fund the trusts, or as trustee of Trust A to diversify the trust assets--the crux of the present objections.

We are not persuaded by the distinction objectants attempt to draw between objections relating directly to the Bank's activities as executor and trustee of Trust A and the objections regarding the Bank's duties, as trustee of Trust B, to object to its own prior accountings on Pamela's behalf. There can be no doubt that under either formulation, the wrongful conduct objectants seek to redress pertains to the Bank's alleged mismanagement of the estate and Trust A. Moreover, adoption of this argument would negate a fundamental objective of SCPA 2210 (10)-- to ensure finality for multicapacity fiduciaries who comply with notice requirements. [***293] [**276] Nothing in the SCPA provides beneficiaries with a "second bite of the apple" where they have been afforded the opportunity to litigate the essence of their objections in a prior judicial settlement proceeding. [6] Put simply, "[i]f a fiduciary gives full disclosure in his accounting, to which the beneficiaries are parties ... they should have to object at that time or be barred from doing so after the settlement of the account" (Turano, 2003 Supp Practice Commentary, McKinney's

Cons Laws of NY, Book 58A, SCPA 1506, 2005 Pocket Part, at 66).

> 6 Under certain circumstances--for example, where a fiduciary procures a release waiving citation or a decree settling an account through fraud--a beneficiary may move to set aside the prior decree (*see Matter of Frutiger*, 29 N.Y.2d 143, 149-150, 272 N.E.2d 543, 324 N.Y.S.2d 36 [1971]; *Matter of Zahoudanis*, 289 A.D.2d 412, 734 N.Y.S.2d 891 [2d Dept 2001]).

Finally, we note that Pamela's opportunities to raise objections regarding the estate and Trust A accounts do not bar objectants from continuing to litigate their claims with respect to the Bank's management of Trust B (objections numbered 1, 2 and 3 in this proceeding).

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Read and R.S. Smith concur.

Order affirmed, etc.

LEXSEE 34 A.D.3D 742

[*1] **Lori Kalinka, Respondent, et al., Plaintiff, v Saint Francis Hospital et al., Appellants, et al., Defendant.**

2005-06768, (Index No. 1003/03)

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2006 NY Slip Op 8931; 34 A.D.3d 742; 827 N.Y.S.2d 75; 2006 N.Y. App. Div. LEXIS 14300

November 28, 2006, Decided

HEADNOTES

Judgments--Res Judicata

COUNSEL: Steinberg & Symer, LLP, Poughkeepsie, N.Y. (Ellen Fischer Bopp of counsel), for appellants Saint Francis Hospital and Michael Susco.

Kris T. Jackstadt, Albany, N.Y. (Murry S. Brower of counsel), for appellant Courtney A. Martin.

Goldstein & Metzger, LLP, Poughkeepsie, N.Y. (Paul J. Goldstein and Mark Metzger of counsel), for respondent.

JUDGES: THOMAS A. ADAMS, J.P., DAVID S. RITTER, WILLIAM F. MASTRO, ROBERT A. LIFSON, JJ. Adams, J.P., Ritter, Mastro and Lifson, JJ., concur.

OPINION

[**742] [***76] In an action to recover damages for personal injuries, etc., the defendants St. Francis Hospital and Michael Susco appeal, as limited by their notice of appeal and brief, from so much of an order of the Supreme Court, Dutchess County (Sproat, J.), dated June 9, 2005, as denied those branches of their cross motion [**743] which were for summary judgment dismissing the complaint insofar as asserted against them by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred by the doctrine of res judicata and for summary judgment dismissing the cross claims of the defendant T & C Seacrest Diner, Inc., doing business as Rolling Rock Bistro, for indemnification insofar asserted against them, and referred for a hearing that branch of their motion which was for summary judgment dismissing the complaint insofar as asserted against them by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as time-barred, and the defendant Courtney A. Martin appeals from so much of the same order as denied that branch of her motion which was for summary judgment dismissing the complaint insofar as asserted against her by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred [*2] by the doctrine of res judicata and referred for a hearing that branch of her motion which was for summary judgment dismissing the complaint insofar as asserted against her by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as time-barred.

Ordered that the appeal from so much of the order as denied those branches of the motions which were for summary judgment dismissing the complaint insofar as asserted against the appellants by the plaintiff Lori Kalinka, as guardian of the person and property of

George Kalinka, as time barred is dismissed; and it is further,

Ordered that the order is reversed insofar as reviewed, on the law, those branches of the cross motion which were for summary judgment dismissing the complaint insofar as asserted against the defendants St. Francis Hospital and Michael Susco by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred by the doctrine of res judicata and for summary judgment dismissing the cross claims of the defendant T & C Seacrest Diner, Inc., doing business as Rolling Rock Bistro, for indemnification insofar asserted against the defendants St. Francis Hospital and Michael Susco are granted and that branch of the motion which was for summary judgment dismissing the complaint insofar as asserted against the defendant Courtney A. Martin by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka, as barred by the doctrine of res judicata is granted.

Orderred that one bill of costs is awarded to the appellants appearing separately and filing separate briefs.

The Supreme Court erred in denying those branches of the [**744] cross motion of the defendants St. Francis Hospital and Michael Susco and the motion of the defendant Courtney A. Martin which were for summary dismissing the complaint insofar as asserted against them by the plaintiff Lori Kalinka, as guardian of the person and property of George Kalinka. By order dated August 23, 2000, the Supreme Court dismissed a prior action by George [***77] Kalinka as against those defendants for the same relief sought herein. The dismissal was upon the grant of an order of preclusion to each after the court determined that George Kalinka had willfully and contumaciously failed to comply with disclosure. Upon such facts, the dismissal of the prior action is properly given res judicata effect in this action (*see Maitland v Trojan Elec. & Mach. Co.,* 65 NY2d 614, 480 NE2d 736, 491 NYS2d 147 [1985]; *Strange v Montefiore Hosp. & Med. Ctr.*, 59 NY2d 737, 450 NE2d 235, 463 NYS2d 429 [1983]; *Barrett v Kasco Constr. Co.*, 56 NY2d 830, 438 NE2d 99, 452 NYS2d 566 [1982]; *Stray v Lutz,* 306 AD2d 836, 762 NYS2d 728 [2003]; *cf. Aguilar v Jacoby*, 34 AD3d 706, 827 NYS2d 77 [2006] [decided herewith]).

That branch of the cross motion of the defendants Saint Francis Hospital and Michael Susco which was for summary judgment dismissing cross claims of the defendant T & C Seacrest Diner, Inc., doing business as Rolling Rock Bistro, for indemnification insofar as asserted against them, which was unopposed, should have been granted (*see Golub v Sutton,* 281 AD2d 589, 723 NYS2d 59 [2001]).

The appeal from so much of the order as directed a hearing to determine those branches of the motions which were for summary judgment dismissing the complaint insofar as asserted against the appellants by Lori Kalinka, as guardian of the person and property of George Kalinka, as time barred must be dismissed, as that portion of the order is not appealable as of right (*see* CPLR 5701 [a] [2] [v]; *Berliner v Berliner*, 294 AD2d 524, 742 NYS2d 864 [2002]), and, in any event, the issue has been rendered academic in light of our determination.

Adams, J.P., Ritter, Mastro and Lifson, JJ., concur.

LEXSEE 480 N.E.2D 736

Bernard A. Maitland et al., Appellants, v. Trojan Electric & Machine Co., Inc., et al., Respondents

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

65 N.Y.2d 614; 480 N.E.2d 736; 491 N.Y.S.2d 147; 1985 N.Y. LEXIS 14694

May 7, 1985, Decided

PRIOR HISTORY: Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 11, 1984, which (1) reversed, on the law, an order of the Supreme Court at Special Term (Matthew F. Coppola, J.), entered in Dutchess County, denying defendants' motion to dismiss the complaint, (2) granted the motion, and (3) dismissed the complaint.

Maitland v Trojan Elec. & Mach. Co., 102 AD2d 845.

DISPOSITION: On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order reversed, with costs, and defendants' motion to dismiss the complaint denied in a memorandum.

HEADNOTES

Judgments -- Res Judicata -- Noncompliance with Disclosure Order

Dismissal of a cause of action prior to the close of proponent's evidence will not be deemed on the merits so as to preclude the commencement of a second action (CPLR 5013); therefore, where a plaintiff's noncompliance with a disclosure order did not result in a dismissal with prejudice, or an order of preclusion or summary judgment in favor of defendant so as to effectively close plaintiff's proof, dismissal resulting from the noncompliance was not a merits determination so as to bar commencement of a second action.

COUNSEL: *Michael A. Greco* for appellants.

Joel D. Hanig for respondents.

JUDGES: Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur.

OPINION

[*615] [**737] [***148] **OPINION OF THE COURT**

Memorandum.

The order of the Appellate Division should be reversed, with costs.

In this case, plaintiffs failed to comply with an order of the trial court to answer interrogatories within 30 days of the entry of its order. In response to plaintiffs' noncompliance, defendants sought an order vacating plaintiffs' note of issue and certificate of readiness, and an order imposing sanctions for neglecting to comply with the prior disclosure order. Special Term dismissed plaintiffs' cause of action, but did not indicate whether its order was on the merits. Plaintiffs subsequently commenced a second action alleging causes of action

identical to the first action. The second action was met with defendants' motion to dismiss based, *inter alia*, upon the doctrine of res judicata. Special Term denied the motion to dismiss. The Appellate Division reversed this judgment and granted defendant's motion to dismiss, holding the second claim to be precluded. Where, as here, a dismissal of a cause of action occurs prior to the close of proponent's evidence, the dismissal will not be deemed on the merits so as to preclude the commencement of a second action. (CPLR 5013.) This is not a case such as *Strange v Montefiore Hosp. & Med. Center* (59 NY2d 737) where plaintiff's second action constituted an attempt to circumvent an order of preclusion or summary judgment, the function of which is to effectively foreclose proponent's offer of proof. (*See also, Barrett v Kasco Constr. Co*., 56 NY2d 830.) Where a plaintiff's noncompliance with a disclosure order does not result in a dismissal with prejudice, or an order of [*616] preclusion or summary judgment in favor of defendant so as to effectively close plaintiff's proof, dismissal resulting from the noncompliance is not a merits determination so as to bar commencement of a second action.

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order reversed, with costs, and defendants' motion to dismiss the complaint denied in a memorandum.

LEXSEE 467 N.E.2D 487

Edward C. Ryan et al., Respondents, v. New York Telephone Company et al., Appellant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

62 N.Y.2d 494; 467 N.E.2d 487; 478 N.Y.S.2d 823; 1984 N.Y. LEXIS 4410

May 1, 1984, Argued
June 14, 1984, Decided

PRIOR HISTORY: Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered May 12, 1983, which affirmed an order of the Supreme Court at Special Term (Andrew R. Tyler, J.), entered in New York County, (1) granting a motion by plaintiffs for dismissal of defendants' affirmative defense of *res judicata* and collateral estoppel, and (2) denying a cross motion by defendants for partial summary judgment dismissing plaintiff's first, second, third, sixth and seventh causes of action. The following question was certified by the Appellate Division: "Was the order of the Supreme Court, as affirmed by this Court, properly made?"

Plaintiff, Edward Ryan, was discharged from his employ with defendant New York Telephone Company for theft of company property. Defendants Lauriano and Perrino, company security investigators, had observed Ryan removing what appeared to be company property from the workplace. They stopped him and called the police who arrested Ryan and charged him with petit larceny and criminal possession of stolen property. Following his discharge from work, Ryan applied for unemployment insurance benefits, but his application was rejected on the ground that the discharge was the result of his own misconduct. Ryan filed an appeal from that initial determination and a hearing was held before an Unemployment Insurance Administrative Law Judge. After considering the testimony of witnesses, including Ryan, who were examined and cross-examined extensively, the Administrative Law Judge disallowed benefits, finding, *inter alia*, that "claimant was seen * * * removing company property from the company premises" and holding that "[the] evidence * * * establishes that claimant lost his employment for [possessing] company property without authorization [and therefore] he lost his employment due to misconduct in connection therewith." This determination was subsequently affirmed by the Unemployment Insurance Appeal Board whose decision was, in turn, upheld by the Appellate Division. During the pendency of the foregoing administrative proceedings and judicial review, the criminal action resulted in an adjournment in contemplation of dismissal. Ultimately, it was restored to the Trial Calendar on the motion of the defendant and, on the People's motion, the charges were dismissed "in the interest of justice." Between the conclusion of the criminal proceedings and the Appellate Division's affirmance of the administrative determination thereafter, plaintiffs commenced this action asserting claims for false arrest, malicious prosecution, slander and wrongful discharge, and an additional claim for the resultant injuries to Ryan's wife. Defendants pleaded an affirmative defense of *res judicata* and collateral estoppel on the basis of the prior administrative determination denying Ryan's claim for unemployment benefits. When plaintiffs moved to dismiss the affirmative defense, defendants cross-moved to dismiss the first, second, third, sixth and seventh causes of action comprising claims for false arrest, malicious prosecution, slander and two

claims for wrongful discharge, respectively. Special Term granted plaintiffs' motion and the Appellate Division affirmed.

The Court of Appeals reversed the order of the Appellate Division, granted defendants' cross motion for partial summary judgment, denied plaintiffs' motion to strike the affirmative defense of *res judicata* and collateral estoppel, and answered the question certified in the negative, holding, in an opinion by Judge Jasen, that the doctrine of collateral estoppel precluded the action, since the requisite criteria for application of the doctrine, identicality and decisiveness of the issues and the opportunity for a full and fair hearing, have been satisfied.

Ryan v New York Tel. Co., 94 AD2d 646.

DISPOSITION: Order reversed, etc.

HEADNOTES

Judgments -- Collateral Estoppel

1. The doctrine of collateral estoppel precludes an action by plaintiff, who was discharged from his employment with defendant telephone company for theft of company property and against whom charges of petit larceny and criminal possession of stolen property were ultimately dismissed in the interest of justice, for false arrest, malicious prosecution, slander and wrongful discharge, where a determination of an Unemployment Insurance Administrative Law Judge, denying plaintiff's application for unemployment insurance benefits, that plaintiff was seen removing company property from the company premises and holding that the evidence established that plaintiff lost his employment for possessing company property without authorization, was affirmed by the Unemployment Insurance Appeal Board and upheld by the Appellate Division; the requisite criteria for application of the doctrine of collateral estoppel, the identicality and decisiveness of the issues and the opportunity for a full and fair hearing, have been satisfied. The administrative determination is dispositive of the presence of legal justification for the defendants' actions and, consequently, grounds for dismissal of the false arrest cause of action; the prior determination is decisive that defendants' investigators had probable cause to bring criminal charges against plaintiff, which necessitates dismissal of the malicious prosecution cause of action; the administrative findings establish the truth of the remarks alleged to be slanderous, and constitute a complete defense; and the administrative determination is dispositive of the fact that plaintiff's termination resulted from and was justified by his misconduct, and since justification is a defense to the tort of wrongful discharge, that determination constitutes a basis for dismissal of those causes of action as well.

Judgments -- Collateral Estoppel -- New Evidence

2. In an action for false arrest, malicious prosecution, slander and wrongful discharge brought by plaintiff, who was discharged from his employment with defendant telephone company for theft of company property and against whom charges of petit larceny and criminal possession of stolen property were ultimately dismissed in the interest of justice, which action is barred by the doctrine of collateral estoppel due to a determination of an Unemployment Insurance Administrative Law Judge, denying plaintiff's application for unemployment insurance benefits, that plaintiff was seen removing company property from the company premises and holding that the evidence established that plaintiff lost his employment for possessing company property without authorization, which determination was affirmed by the Unemployment Insurance Appeal Board and upheld by the Appellate Division, plaintiff may not claim that there is new evidence in the form of "receipts" showing that he had actually purchased some of the equipment; this allegedly new evidence was available during the pendency of the criminal proceedings and there was no explanation why they were neither presented nor even alluded to at the administrative hearing or at any proceeding in review or reconsideration thereof.

Crimes -- Dismissal in Interest of Justice -- Effect on Related Administrative Determination

3. In an action for false arrest, malicious prosecution, slander and wrongful discharge brought by plaintiff, who was discharged from his employment with defendant telephone company for theft of company property and against whom charges of petit larceny and criminal possession of stolen property were ultimately dismissed in the interest of justice, which action is barred by the doctrine of collateral estoppel, the eventual dismissal of the criminal charges does not constitute an adjudication of the veracity of "receipts" showing that plaintiff had actually purchased some of the equipment or of plaintiff's innocence of the charges and, consequently, in no way

undermines the force and effect of a determination by an Unemployment Insurance Administrative Law Judge denying plaintiff benefits and holding that the evidence established that plaintiff lost his employment for possessing company property without authorization; a dismissal in the interest of justice leaves the question of guilty or innocence unanswered.

COUNSEL: *Saul Scheier, John M. Clark* and *Michael J. Toolan* for appellants. I. Plaintiff-respondent had a full and fair opportunity to litigate the issues in the unemployment insurance proceedings which are determinative of the first, second, third, sixth and seventh causes of action and summary judgment should have been granted to defendant. (*Schwartz v Public Administrator*, 24 NY2d 65; *Vavolizza v Krieger*, 39 AD2d 446; *Read v Sacco*, 49 AD2d 471; *Bernstein v Birch Wathen School*, 71 AD2d 129, 51 NY2d 932; *Drier v Randforce Amusement Corp*., 14 Misc 2d 362, 14 AD2d 772; *Matter of Evans v Monaghan*, 306 NY 312; *Ogino v Black*, 304 NY 872; *Gilberg v Barbieri*, 53 NY2d 285; *300 Gramatan Ave. Assn. v State Div. of Human Rights*, 45 NY2d 176.) II. The issues heard and decided in the prior administrative proceedings are decisive of the claims made in the first, second, third, sixth and seventh causes of action in the complaint under the principles of collateral estoppel or *res judicata*. (*Broughton v State of New York*, 37 NY2d 451; *White v Barry*, 288 NY 37; *Brandt v Winchell*, 283 App Div 338, 286 App Div 249, 3 NY2d 628; *Cartwright v Golub Corp*., 51 AD2d 407; *Advance Music Corp. v American Tobacco Co*., 296 NY 79.)

John J. Janiec for respondents. Special Term was correct in its determination that the principles of *res judicata* and collateral estoppel should not apply in this case since the totality of the situation dictates that it would be unfair to deny plaintiff his day in court. (*Bernstein v Birch Wathen School*, 71 AD2d 129, 51 NY2d 932; *Gilberg v Barbieri*, 53 NY2d 285; *Schwartz v Public Administrator*, 24 NY2d 65; *People v Berkowitz*, 50 NY2d 333; *Read v Sacco*, 49 AD2d 471; *Ordway v White*, 14 AD2d 498; *Royal Business Funds Corp. v Ehrlich*, 78 Misc 2d 305, 45 AD2d 823; *Howard v City of New York*, 38 AD2d 89; *Hunt v OSR Chems*., 85 AD2d 681; *Parklane Hosiery Co. v Shore*, 439 U.S. 22.)

JUDGES: Jasen, J. Chief Judge Cooke and Judges Jones, Wachtler, Meyer, Simons and Kaye concur.

OPINION BY: JASEN

OPINION

[*497] [**488] [***824] **OPINION OF THE COURT**

We are asked to decide whether the doctrine of collateral estoppel precludes this action by reason of a prior administrative determination rendered after a full hearing. While this court has previously outlined the requirements of collateral estoppel on recent occasions, this case presents us with some aspects we have not fully addressed before.

[**489] [***825] Plaintiff, Edward Ryan, was discharged from his employ with defendant New York Telephone Company for theft of company property. Defendants Lauriano and Perrino, company [*498] security investigators, had observed Ryan removing what appeared to be company property from the workplace. They stopped him and called the police who arrested Ryan and charged him with petit larceny and criminal possession of stolen property.

Following his discharge from work, Ryan applied for unemployment insurance benefits, but his application was rejected by a claims examiner of the Department of Labor on the ground that the discharge was the result of his own misconduct. Ryan filed an appeal from that initial determination and a hearing, transferred upon his request from a location near his home in New Jersey to New York, was held before an Unemployment Insurance Administrative Law Judge. Ryan was advised that he was entitled to have an attorney represent him at the hearing but, despite his having already retained counsel for the criminal proceedings on the afore-mentioned charges, he chose instead to appear with a union representative who was familiar with such administrative hearings. After considering the testimony of witnesses, including Ryan, who were examined and cross-examined extensively, the Administrative Law Judge sustained the ruling of the claims examiner and disallowed benefits, finding, *inter alia*, that "claimant was seen * * * removing company property from the company premises" and holding that "[the] evidence * * * establishes that claimant lost his employment for [possessing] company property without authorization [and therefore] he lost his employment due to misconduct in connection therewith." This determination was subsequently affirmed by the Unemployment Insurance Appeal Board whose decision

was, in turn, upheld by the Appellate Division.

During the pendency of the foregoing administrative proceedings and judicial review, the criminal action in which Ryan was represented by counsel resulted in an adjournment in contemplation of dismissal. Ultimately, it was restored to the Trial Calendar on the motion of the defendant and, on the People's motion, the charges were dismissed "in the interest of justice." (See CPL 210.40, subd 2; cf. CPL 170.55, subd 2.)

Between the conclusion of the criminal proceedings and the Appellate Division's affirmance of the administrative [*499] determination thereafter, plaintiffs commenced this action asserting claims for false arrest, malicious prosecution, slander and wrongful discharge, and an additional claim for the resultant injuries to Ryan's wife. Defendants pleaded an affirmative defense of *res judicata* and collateral estoppel on the basis of the prior administrative determination denying Ryan's claim for unemployment benefits. When plaintiffs moved to dismiss the affirmative defense, defendants cross-moved to dismiss the first, second, third, sixth and seventh causes of action comprising claims for false arrest, malicious prosecution, slander and two claims for wrongful discharge, respectively. Special Term granted plaintiffs' motion and dismissed the affirmative defense, finding that the "totality of the situation", including the prior forum, Ryan's lack of counsel and the availability of "new evidence", "dictates that it would be unfair to deny the plaintiff his day in court." A divided Appellate Division affirmed for the reasons stated at Special Term and granted leave to appeal to this court, certifying the following question: "Was the order of the Supreme Court, as affirmed by this Court, properly made? "We now reverse, grant defendants' cross motion to dismiss, and answer the certified question in the negative.

At the outset, it should be made clear that the doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies (*Matter of Evans v Monaghan*, 306 NY 312, 323-324; *Parklane Hosiery Co. v Shore*, 439 U.S. 322; see, also, Restatement, [**490] [***826] Judgments 2d, § 83), when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law. (*Matter of Venes v Community School Bd.*, 43 NY2d 520, 524; *United States v Utah Constr. Co* ., 384 U.S. 394, 422; see, also, 2 Davis, Administrative Law [3d ed], §§ 18.03, 18.08, 18.10; Restatement, Judgments 2d, § 83, subd [2], and Comment *b*.) "[Such] determinations, when final, become conclusive and binding on the courts." (*Bernstein v Birch Wathen School*, 71 AD2d 129, 132, affd 51 NY2d 932; see, also, *Matter of Newsday, Inc. v Ross*, 80 AD2d 1, 5.)

[*500] To be sure, it is a fundamental principle that "a judgment rendered jurisdictionally and unimpeached for fraud shall be conclusive, as to the questions litigated and decided, upon the parties thereto and their privies, whom the judgment, when used as evidence, relieves from the burden of otherwise proving, and bars from disproving, the facts therein determined." (*Fulton County Gas & Elec. Co. v Hudson Riv. Tel. Co.*, 200 NY 287, 296-297; see, also, *Hinchey v Sellers*, 7 NY2d 287; *Matter of New York State Labor Relations Bd. v Holland Laundry*, 294 NY 480; 46 Am Jur 2d, Judgments, § 415.) This rule of *res judicata* is founded upon the belief that "'it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between those parties, should be closed forever.'" (*Fish v Vanderlip*, 218 NY 29, 36-37, quoting Greenleaf's Evidence, §§ 522, 523; see, also, *Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304; *Hendrick v Biggar*, 209 NY 440.)

The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. (*Ripley v Storer*, 309 NY 506, 517; see, also, Restatement, Judgments 2d, § 27; 46 Am Jur 2d, Judgments, § 415; 9 Carmody-Wait 2d, NY Prac, Judgments, § 63:205.) We have recently reaffirmed that collateral estoppel allows "the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided." (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485.) What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding.

Of course, the issue must have been material to the first action or proceeding and essential to the decision rendered therein (*Silberstein v Silberstein*, 218 NY 525, 528; see, [*501] also, *Hinchey v Sellers, supra; Ripley v Storer, supra; Ward v Boyce*, 152 NY 191), and it must be the point actually to be determined in the second action or proceeding such that "a different judgment in the second would destroy or impair rights or interests established by the first" (*Schuylkill Fuel Corp. v Nieberg Realty Corp., supra*, at p 307 [Cardozo, Ch. J.]; see, also, *S. T. Grand, Inc. v City of New York*, 32 NY2d 300, 304-305).

In addition, where the party against whom collateral estoppel is asserted claims that he was not afforded a full and fair opportunity in the prior administrative proceeding to contest the decision now said to be controlling, he must be [**491] [***827] allowed to do so. A determination whether the first action or proceeding genuinely provided a full and fair opportunity requires consideration of "the 'realities of the [prior] litigation', including the context and other circumstances which * * * may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him". (*People v Plevy*, 52 NY2d 58, 65.) Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation. (*Gilberg v Barbieri*, 53 NY2d 285, 292; *Schwartz v Public Administrator*, 24 NY2d 65, 72.)

In the application of collateral estoppel with respect to administrative determinations, the burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in prior action or proceeding. (Cf. *Schwartz v Public Administrator, supra*, at p 73; see, also, *B. R. DeWitt, Inc. v Hall*, 19 NY2d 141; compare *Gramatan Home Investors Corp. v Lopez, supra*, at p 485.) As we said in *Schwartz*, "[this] apportionment of the burdens is both fair and necessary. Otherwise much of the value of collateral estoppel will be lost." (*Id.*, at p 73.) Indeed, this apportionment accords, on the one hand, with [*502] the burden generally imposed on the moving party to make a prima facie demonstration of entitlement to summary judgment (see, e.g., *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067), and, on the other hand, with the burden placed on the opposing party to establish the necessity for a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562) or on any party attempting to rebut the presumptive regularity of prior judicial and administrative proceedings (see 21 NY Jur, Evidence, §§ 106, 108; 10 Carmody-Wait 2d, NY Prac, §§ 70:346, 70:347; cf. *People v Harris*, 61 NY2d 9, 16.)

Applying the foregoing rules of law to this case demonstrates clearly that collateral estoppel bars plaintiffs from litigating the subject claims. A comparison of the material issues raised in this action with those resolved by the prior administrative determination, and an examination of the prior proceeding itself show that both requisite criteria, the identicality and decisiveness of the issues and the opportunity for a full and fair hearing have been satisfied.

The critical issue in the prior administrative proceeding was whether Ryan was discharged by reason of misconduct and, therefore, not entitled to unemployment benefits. The Administrative Law Judge's specific findings, essential to the disallowance of benefits to Ryan, was that the latter was guilty of unauthorized removal and possession of company property, and that he was discharged for that reason. That determination, affirmed by the Unemployment Insurance Appeal Board and ultimately by the Appellate Division, is conclusive between the parties in this action, and it is dispositive of the subject claims asserted by plaintiffs.

The first cause of action alleges false arrest resulting from the defendants' complaints against Ryan to the police. The lack of legal justification is an essential element of the tort of false arrest (*Broughton v State of New York*, 37 NY2d 451, 458; Prosser, Torts [4th ed], False Imprisonment, § 11; Restatement, Torts 2d, § 35), but the administrative determination of criminally chargeable misconduct is dispositive [**492] [***828] of the presence of such justification and, consequently, grounds for dismissal of the cause of action. Likewise, the second cause of action alleging malicious [*503] prosecution requires a lack of probable cause for instituting the criminal proceeding (*Broughton v State of New York, supra*, at p 457; Prosser, *op. cit.*, Malicious Prosecution, § 119; Restatement, Torts 2d, Malicious Prosecution, § 653), but the prior determination is

decisive that defendants' investigators actually witnessed Ryan removing the property and, therefore, had probable cause to bring charges against him. The third cause of action asserts a slanderous remark against Ryan to the effect that he "stole something" from his workplace. The Administrative Law Judge's findings that Ryan was seen "removing company property from the company premises" and that his taking was "without authorization" were the essential predicate to the determination rendered that he was discharged for misconduct. Those findings, therefore, are entitled to the same conclusive effect as the determination itself and, inasmuch as they establish the truth of the remarks alleged to be slanderous, they constitute a complete defense. (See *Crane v New York World Tel. Corp.*, 308 NY 470; 34 NY Jur, Libel and Slander, § 80; cf. *Gertz v Robert Welch, Inc.*, 418 U.S. 323, 339-340.) The sixth and seventh causes of action are grounded on allegations of wrongful discharge, but, again, the prior determination is dispositive of the fact that Ryan's termination from employment resulted from and was justified by his misconduct. Consequently, justification being a defense to the tort of wrongful discharge (see *Brandt v Winchell*, 3 NY2d 628, 633), the determination constitutes a basis for dismissal of those causes of action as well. It is clear, then, that the criterion of issue identicality and decisiveness is satisfied for each of the subject causes of action.

Additionally, the record shows that Ryan had a full and fair opportunity at the prior administrative proceeding to litigate the question of his misconduct, and plaintiffs have failed to demonstrate otherwise. Ryan did, in fact, litigate the issue, testifying himself and cross-examining defendants' witness through his union representative. The "realities of the prior litigation" are that it was a sufficiently extensive and fully adversarial hearing presided over by an Administrative Law Judge; that the hearing was initiated by Ryan himself to demonstrate his entitlement to [*504] unemployment benefits (cf. *Gilberg v Barbieri*, 53 NY2d, at p 293); and that he freely and knowingly chose not to appear with legal counsel but to be represented instead by a union official who was an experienced advocate in such hearings and whose competence and efforts on Ryan's behalf is demonstrated in the minutes of the proceedings. The record shows that the hearing was fair and that Ryan had a full opportunity to litigate the issue of his misconduct. The fact that the Administrative Law Judge ruled against Ryan is certainly not evidence of the contrary.

Further, the assertion that there is new evidence in the form of "receipts" showing that Ryan had actually purchased some of the equipment he has been accused of taking without authorization and, therefore, that the prior determination is not deserving of collateral estoppel effect is without merit. This allegedly new evidence was, as plaintiffs concede, in fact available to Ryan and his legal counsel during the pendency of the criminal proceedings, and plaintiffs provide no explanation why they were neither presented nor even alluded to at the administrative hearing or at any proceeding in review or reconsideration thereof. Plaintiffs merely argue in their complaint that "no one asked for them". As the dissenting Justice at the Appellate Division aptly observed, that assertion is "unimpressive" and, in any event, does not constitute a legally cognizable excuse. Having been afforded a full opportunity at the administrative hearing to present the "receipts", the failure to do [**493] [***829] so -- not only at that hearing but also at every related proceeding, both precedent and subsequent thereto -- does not somehow transform them into "new evidence" and is certainly not a basis for defeating the application of collateral estoppel. It is enough that the receipts were available.

Finally, the eventual dismissal of the criminal charges on the motion of the prosecutor "in the interest of justice" does not constitute an adjudication of the veracity of the receipts or of Ryan's innocence of the charges. Consequently, it in no way undermines the force and effect of the administrative determination. A dismissal "in the interest of justice" is neither an acquittal of the charges nor any determination of the merits. Rather, it leaves the [*505] question of guilt or innocence unanswered. (See *People v Clayton*, 41 AD2d 204, 206; cf. *Hollender v Trump Vil. Coop.*, 58 NY2d 420, 425; *People v Rickert*, 58 NY2d 122, 126.)

Thus, in view of plaintiffs' failure to demonstrate Ryan's lack of a full and fair opportunity to litigate his claim at the prior administrative hearing, and inasmuch as the issues in that proceeding and the causes of action here in question are identical and dispositive, the doctrine of collateral estoppel applies and precludes relitigation of the prior determination.

Accordingly, the order of the Appellate Division should be reversed, without costs, defendants' cross motion for partial summary judgment should be granted, and plaintiffs' motion to strike the affirmative defense of

res judicata and collateral estoppel denied. The certified question should be answered in the negative.

LEXSEE 894 N.E.2D 1

[*1] **In the Matter of THE PEOPLE OF THE STATE OF NEW YORK, by ELIOT SPITZER, as Attorney General, Respondent-Appellant, v APPLIED CARD SYSTEMS, INC., et al., Appellants-Respondents.**

No. 96

COURT OF APPEALS OF NEW YORK

2008 NY Slip Op 5780; 11 N.Y.3d 105; 894 N.E.2d 1; 863 N.Y.S.2d 615; 2008 N.Y. LEXIS 1829

April 29, 2008, Argued
June 26, 2008, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Cross Country Bank, Inc. v. New York*, 129 S Ct 999, 173 L Ed 2d 292, 2009 U.S. LEXIS 719 (U.S., 2009)

PRIOR HISTORY: Cross appeals, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 5, 2007. The Appellate Division modified, on the law and the facts, an order of the Supreme Court, Albany County (Thomas J. McNamara, J.), entered in a proceeding pursuant to Executive Law § 63 (12), which had partially granted petitioner's motion for restitution, penalties, and costs. The modification consisted of reversing so much of the order as had awarded restitution to consumers who enrolled in the Credit Account Protection program and whose accounts were re-aged. The Appellate Division affirmed the order as modified. The appeal brings up for review a prior nonfinal order of the Appellate Division, entered December 1, 2005 (27 AD3d 104, 805 NYS2d 175). The Appellate Division had affirmed an order and judgment of that Supreme Court (Joseph Cannizzaro, J.), which had permanently enjoined respondents from engaging in the fraudulent, deceptive, and unlawful acts and practices alleged in the verified petition, and held in abeyance petitioner's request for additional relief including, but not limited to, restitution, damages, disgorgement, statutory penalties and costs.
Matter of People v Applied Card Sys., Inc., 41 AD3d 4, 834 NYS2d 558, 2007 N.Y. App. Div. LEXIS 4151 (N.Y. App. Div. 3d Dep't, 2007), affirmed.

DISPOSITION: Order affirmed, without costs.

HEADNOTES

Statutes -- Federal Preemption -- Fraudulent and Deceptive Credit Card Solicitation Scheme

1. In a special proceeding initiated by the Attorney General alleging that defendants engaged in a fraudulent and deceptive credit card solicitation scheme, petitioner's claims for restitution, civil penalties and injunctive relief for violations of the Executive Law and Consumer Protection Act (*see* Executive Law § 63 [12]; General Business Law §§ 349, 350) were not preempted by the federal Truth-in-Lending Act (TILA). The express preemption provision contained in TILA preempts state laws "relating to the disclosure of information" in credit card applications and solicitations "subject to the requirements of section 1637 (c)," not laws that prevent fraud, deception and false advertising (15 USC § 1610 [e]). Although the petition made reference to the fact that many consumers were "unaware" of the manner in which certain credit terms were applied against their accounts,

petitioner took no issue with the substance or sufficiency of respondents' TILA disclosures and did not obtain any relief based upon consumers' purported lack of awareness. The mere fact that a complaint makes reference to certain matters that are preempted by a federal statute does not transform a state law action into one that is preempted under federal law. Nor does inclusion of the phrase "relating to" in 15 USC § 1610 (e) support preemption, as petitioner's claims did not relate to the disclosure of federally mandated information in credit card applications or solicitations, but rather to the inclusion in those materials of certain fraudulent and deceptive misinformation.

Judgments -- Res Judicata -- Privity -- Attorney General in Privity with Consumers Who Settled Class Action Suit

2. In a special proceeding initiated by the Attorney General alleging that respondents engaged in a fraudulent and deceptive credit card solicitation scheme and seeking restitution, civil penalties, and injunctive relief for violations of the Executive Law and Consumer Protection Act (*see* Executive Law § 63 [12]; General Business Law §§ 349, 350), petitioner was precluded under the doctrine of res judicata from recovering restitution on behalf of the consumers who were part of the settling class in a prior nationwide class action settlement agreement against respondents. Although petitioner's interest in seeking restitution on behalf of the settling consumers might have been broader than the consumers' individual pecuniary concerns, the consumers were entitled to only one opportunity to obtain make-whole relief, and to allow petitioner to seek additional restitution on their behalf would destroy or impair rights conclusively established in the class action. As one specific portion of the relief sought by petitioner was identical to that which the New York members of the settlement class had already pursued to a final and binding judgment, there was privity as to that measure of relief.

COUNSEL: *Arnold & Porter LLP*, New York City (*H. Peter Haveles, Jr.* of counsel) and *Howard N. Cayne*, Washington, D.C., for appellants-respondents. I. The Attorney General's claims are barred by the total preemption provisions of the Truth-in-Lending Act. (*California Fed. Sav. & Loan Assn. v Guerra*, 479 US 272, 107 S Ct 683, 93 L Ed 2d 613; *Rosario v Diagonal Realty, LLC*, 8 NY3d 755, 872 NE2d 860, 840 NYS2d 748; *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 115 S Ct 1671, 131 L Ed 2d 695; *Medtronic, Inc. v Lohr*, 518 US 470, 116 S Ct 2240, 135 L Ed 2d 700; *Schneidewind v ANR Pipeline Co.*, 485 US 293, 108 S Ct 1145, 99 L Ed 2d 316; *Northern Natural Gas Co. v Kansas Corporation Comm'n*, 372 US 84, 83 S Ct 646, 9 L Ed 2d 601; *Mississippi Power & Light Co. v Mississippi ex rel. Moore*, 487 US 354, 108 S Ct 2428, 101 L Ed 2d 322; *Construction Laborers v Curry*, 371 US 542, 83 S Ct 531, 9 L Ed 2d 514; *Cipollone v Liggett Group, Inc.*, 505 US 504, 112 S Ct 2608, 120 L Ed 2d 407; *City of New York v FCC*, 486 US 57, 108 S Ct 1637, 100 L Ed 2d 48.) II. Under sections 349 and 350 of the General Business Law truthful disclosures should not be found to be misleading and deceptive absent extrinsic evidence. (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 647 NE2d 741, 623 NYS2d 529; *Matter of State of New York v Colorado State Christian Coll. of Church of Inner Power*, 76 Misc 2d 50, 346 NYS2d 482; *State of New York v Feldman*, 210 F Supp 2d 294; *Johnson & Johnson * Merck Consumer Pharms. Co. v Smithkline Beecham Corp.*, 960 F2d 294; *Kraft, Inc. v Federal Trade Commn.*, 970 F2d 311; *Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 725 NE2d 598, 704 NYS2d 177; *Brenkus v Metropolitan Life Ins. Co.*, 309 AD2d 1260, 765 NYS2d 80; *Sims v First Consumers Natl. Bank*, 303 AD2d 288, 758 NYS2d 284; *Broder v MBNA Corp.*, 281 AD2d 369, 722 NYS2d 524; *People v General Elec. Co.*, 302 AD2d 314, 756 NYS2d 520.)

Andrew M. Cuomo, Attorney General, New York City (*Michelle Aronowitz, Barbara D. Underwood* and *Diana R.H. Winters* of counsel), for respondent-appellant. I. As a disclosure law, the Truth-in-Lending Act does not preempt claims for deceptive practices under either state or federal law. (*Rosario v Diagonal Realty, LLC*, 8 NY3d 755, 872 NE2d 860, 840 NYS2d 748; *California Fed. Sav. & Loan Assn. v Guerra*, 479 US 272, 107 S Ct 683, 93 L Ed 2d 613; *Drattel v Toyota Motor Corp.*, 92 NY2d 35, 699 NE2d 376, 677 NYS2d 17; *Balbuena v IDR Realty LLC*, 6 NY3d 338, 845 NE2d 1246, 812 NYS2d 416; *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 115 S Ct 1671, 131 L Ed 2d 695; *Jones v Rath Packing Co.*, 430 US 519, 97 S Ct 1305, 51 L Ed 2d 604; *Rice v Santa Fe Elevator Corp.*, 331 US 218, 67 S Ct 1146, 91 L Ed 1447; *General Motors Corp. v Abrams*, 897 F2d 34; *Ford Motor Credit Co. v Milhollin*, 444 US 555, 100 S Ct 790, 63 L Ed 2d 22; *Matter of Gaines v New York State Div. of*

Hous. & Community Renewal, 90 NY2d 545, 686 NE2d 1343, 664 NYS2d 249.) II. Both the affirmed factual finding of deception and the unpreserved claim that extrinsic evidence is required are beyond the scope of this Court's review; in any event the challenges are without merit. (*Chambers v Old Stone Hill Rd. Assoc.,* 1 NY3d 424, 806 NE2d 979, 774 NYS2d 866; *Collucci v Collucci,* 58 NY2d 834, 446 NE2d 770, 460 NYS2d 14; *People v General Elec. Co.,* 302 AD2d 314, 756 NYS2d 520; *Matter of Lefkowitz v E.F.G. Baby Prods. Co.,* 40 AD2d 364, 340 NYS2d 39; *People v Volkswagen of Am.,* 47 AD2d 868, 366 NYS2d 157; *People v Network Assoc.,* 195 Misc. 2d 384, 758 NYS2d 466; *Zauderer v Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 US 626, 105 S Ct 2265, 85 L Ed 2d 652, 17 Ohio B 315; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 647 NE2d 741, 623 NYS2d 529; *Gaidon v Guardian Life Ins. Co. of Am.,* 94 NY2d 330, 725 NE2d 598, 704 NYS2d 177; *Broder v MBNA Corp.,* 281 AD2d 369, 722 NYS2d 524.) III. The Attorney General is not precluded from seeking restitution for New York consumers, when that remedy serves the public interest, by the settlement of a private class action in which the Attorney General did not participate. (*Gramatan Home Invs. Corp. v Lopez,* 46 NY2d 481, 386 NE2d 1328, 414 NYS2d 308; *Postal Telegraph Cable Co. v Newport,* 247 US 464, 38 S Ct 566, 62 L Ed 1215; *Watts v Swiss Bank Corp.,* 27 NY2d 270, 265 NE2d 739, 317 NYS2d 315; *Green v Santa Fe Indus.,* 70 NY2d 244, 514 NE2d 105, 519 NYS2d 793; *Richmond v United States,* 422 US 358, 95 S Ct 2296, 45 L Ed 2d 245; *Mississippi v Louisiana,* 506 US 73, 113 S Ct 549, 121 L Ed 2d 466; *Durfee v Duke,* 375 US 106, 84 S Ct 242, 11 L Ed 2d 186; *Sam Fox Publishing Co. v United States,* 366 US 683, 81 S Ct 1309, 6 L Ed 2d 604; *United States v Borden Co.,* 347 US 514, 74 S Ct 703, 98 L Ed 903; *EEOC v Waffle House, Inc.,* 534 US 279, 122 S Ct 754, 151 L Ed 2d 755.) IV. Consumers who enrolled in the Credit Account Protector program and those who participated in the re-aging process were injured by the companies' deception and should receive restitution. (*Federal Trade Commn. v Cyberspace.Com LLC,* 453 F3d 1196; *State of New York v Feldman,* 210 F Supp 2d 294; *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank,* 85 NY2d 20, 647 NE2d 741, 623 NYS2d 529; *Matter of State of New York v Colorado State Christian Coll. of Church of Inner Power,* 76 Misc 2d 50, 346 NYS2d 482; *Matter of People v Telehublink Corp.,* 301 AD2d 1006, 756 NYS2d 285; *Small v Lorillard Tobacco Co.,* 94 NY2d 43, 720 NE2d 892, 698 NYS2d 615; *Matter of People v Wilco Energy Corp.,* 284 AD2d 469, 728 NYS2d 471; *Exposition Press, Inc. v Federal Trade Commn.,* 295 F2d 869; *Resort Car Rental Sys., Inc. v Federal Trade Commn.,* 518 F2d 962; *Federal Trade Commn. v Freecom Communications, Inc.,* 401 F3d 1192.)

William H. Sorrell, Attorney General, Montpelier, Vermont (*Elliot Burg* of counsel), for Attorneys General of the States of Alaska and others, amici curiae. I. The lower court erred in holding that under the doctrine of res judicata, the New York Attorney General was barred by the *Allec v Cross Country Bank* settlement from seeking consumer restitution in this matter. (*Hansberry v Lee,* 311 US 32, 61 S Ct 115, 85 L Ed 22; *Richards v Jefferson County,* 517 US 793, 116 S Ct 1761, 135 L Ed 2d 76; *Chase Nat. Bank v Norwalk,* 291 US 431, 54 S Ct 475, 78 L Ed 894; *Martin v Wilks,* 490 US 755, 109 S Ct 2180, 104 L Ed 2d 835; *Firefighters v Cleveland,* 478 US 501, 106 S Ct 3063, 92 L Ed 2d 405; *Walker v Liggett Group, Inc.,* 982 F Supp 1208; *Algie v RCA Global Communications, Inc.,* 891 F Supp 839; *Equal Empl. Opportunity Commn. v Pemco Aeroplex, Inc.,* 383 F3d 1280; *Commodity Futures Trading Commn. v Commercial Hedge Servs., Inc.,* 422 F Supp 2d 1057; *Federal Trade Commn. v AmeriDebt, Inc.,* 343 F Supp 2d 451.) II. To apply res judicata to a state in these circumstances would exacerbate the problem of "class action abuse." (*Amchem Products, Inc. v Windsor,* 521 US 591, 117 S Ct 2231, 138 L Ed 2d 689; *United States v East Baton Rouge Parish School Bd.,* 594 F2d 56.)

JUDGES: Opinion by Judge Ciparick. Chief Judge Kaye and Judges Graffeo, Pigott and Jones concur. Judge Read dissents in an opinion. Judge Smith took no part.

OPINION BY: CIPARICK

OPINION

[***2] [**109] CIPARICK, J.

This appeal arises out of a special proceeding initiated by the Attorney General, seeking restitution, civil penalties, and injunctive relief for violations of New York's Executive Law and Consumer Protection Act (*see* Executive Law § 63 [12]; General Business Law §§ 349, 350). We are asked to determine whether the federal Truth-in-Lending Act (TILA) preempts [*2] these claims of a fraudulent and deceptive credit card solicitation scheme. We conclude that it does not. We hold, however,

that res judicata effect should be granted to a prior nationwide class action settlement agreement, thereby precluding the Attorney General from recovering certain restitution.

I.

Respondent Cross Country Bank (CCB) is a Delaware bank that, since 1997, has actively solicited consumers in the "subprime" credit market to apply for its credit cards. These consumers "generally would not qualify for credit under traditional underwriting guidelines and principles."[1] Certain of CCB's marketing materials claim that the company's "purpose is to help people establish good credit." Respondent Applied Card Systems (ACS) provided, as relevant here, debt collection services for CCB's credit card accounts.

1 CCB also solicits consumers who have yet to establish a credit history.

On March 28, 2003, the Attorney General filed a verified petition asserting that CCB's credit card solicitations and collections practices violated New York's Executive Law and Consumer Protection Act (*see* Executive Law § 63 [12] [fraud]; General Business Law §§ 349 [***3] [deceptive business practices], 350 [false advertising]). The gravamen of the petitioner's complaint [**110] was that CCB had misrepresented the credit limits that subprime consumers could obtain and that it failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit.

For example, in its mail solicitations CCB told consumers that they were "pre-approved" for a credit limit "up to" $ 2,500 or $ 1,000. These communications further clarified that the actually-approved credit limit could be substantially less, perhaps as low as $ 350.[2] CCB's solicitations also explained that upon approval consumers would incur a $ 100 "Account Origination Fee" and a $ 50 "Annual Fee." But CCB's explanation of the fact that those fees would be treated as charges that could greatly reduce the amount of credit initially available to consumers was oblique.[3] In some cases, the initial fees depleted consumers' credit limits by [*3] approximately 40% or more.

2 In some of its solicitations, CCB also explained that "historically," the average approved credit limit was $ 400.

3 For example, in one of its mail solicitations, CCB described the origination fee as a "one-time" charge. Further, near the bottom of the first page of CCB's "Credit Card Agreement," the company stated:

"**Our Charges**. You agree to pay us the following fees in connection with your Account. Such fees will be treated as Purchases on your Account ...

"**1. Annual Fee**. Your account is subject to an Annual Fee and it will be imposed when your Account is approved and in about the same Billing Cycle of each following year."

As relevant here, the verified petition also contained allegations of fraud and deception pertaining to CCB's marketing of "secured cards," the Credit Account Protector (CAP) insurance program, the Applied Advantage (AA) cardholder benefit program, and a debt collection device known as "re-aging." With respect to secured cards,[4] petitioner asserted that CCB's advertisement was deceptive because its banner touted "no late fees*" and "no collections calls*," but further clarified that such fees would be imposed and such calls made in certain instances. The marketing of CAP was fraudulent and deceptive, petitioner claimed, because the program was advertised as providing coverage in the event of "death, disability, unemployment, or family leave," but--as CCB clarified in an insert and subsequently-mailed certificate of coverage--only life and [**111] dismemberment benefits were available to New York consumers.[5] As for AA, petitioner asserted that CCB's practice of automatically enrolling consumers in the benefit program--at a cost of $ 34.95 per year--unless they expressly opted out of it was deceptive because the opt-out mechanism was confusing and misleading. Finally, petitioner alleged that ACS marketed re-aging as a means for severely delinquent cardholders to bring their accounts current through a series of payments, while failing to explain that over-the-limit fees would continue to accrue throughout the re-aging process and that both these fees and the previously imposed [***4] late fees would be due at the conclusion of the re-aging process.[6] [*4]

4 Such cards were "secured" by funds on deposit in savings accounts maintained by CCB. Secured cards' credit limits corresponded to the amount of funds on deposit in those accounts. According to

the verified petition, those limits were reduced by a $ 50 account origination fee and a $ 10 monthly maintenance fee. And, like its other credit cards, CCB's secured cards were subject to monthly $ 30 late and over-the-limit fees.

5 Petitioner further claimed that CCB's solicitations deceptively positioned the CAP authorization signature line in close proximity to the line that consumers were required to sign to accept CCB's credit card offer.

6 Re-aging refers to a federally-regulated process through which credit card companies enter into agreements with delinquent card holders to avoid "charging-off" such accounts due to persistent nonpayment (*see* 65 Fed Reg 36903, 36903 [2000]).

In addition to the alleged fraudulent and deceptive practices described above, the verified petition also set forth certain facts regarding respondents' late fees, finance charges, balance calculation method, and the lack of any "grace period" for consumer payments. Pursuant to TILA, these terms must be disclosed in all credit card solicitations. But petitioner claimed that many consumers were "unaware" of the manner in which charges and penalties based upon the terms were assessed to their accounts.[7] According to petitioner, these charges and penalties contributed to "trapp[ing] . . . unwary consumers" in a "vicious cycle of pyramiding debt."

7 With respect to CCB's secured card advertisement, petitioner asserted that the late and over-the-limit fee information was "buried" in the application and its terms and conditions chart.

On February 11, 2004, Supreme Court issued a decision and order that, in relevant part, held that petitioner was barred by res judicata from seeking restitution for pre-January 1, 2002 "front-end claims," or those concerning illegal conduct "at or near the inception of the cardholder relationship," on behalf of New York consumers who had opted to accept the benefits of a nationwide class action settlement with CCB.[8] The California Superior Court approved the settlement and dismissal of the action with prejudice on September 30, 2002 (*see Allec v Cross* [**112] *Country Bank*, No. 802894, final judgment and order of dismissal with prejudice [Sept. 30, 2002]).

8 Of the New York members of the *Allec* class, only 12 chose not to accept the settlement's benefits.

In their motion to reargue the February 11 order, respondents asserted that the credit card application and solicitation disclosure requirements set forth in TILA (*see* 15 USC § 1632 [c]; § 1637 [c], [e], [f]) and its accompanying regulation, Regulation Z (12 CFR Part 226), preempted petitioner's claims. Following oral argument, Supreme Court held that the claims were not preempted.

After issuing its preemption decision, the court proceeded to find "as a matter of law and fact" that CCB had "repeatedly and persistently" engaged in fraud, deception and false advertising in connection with its credit card solicitations, and that ACS's marketing of the re-aging process was similarly illegal. These rulings were based on the court's review of "volumes of evidentiary proof," including more than 100 pages of application and solicitation materials, more than 200 consumer complaints and affidavits, and the affidavits of former ACS collection employees.

[*5] On June 24, 2004, Supreme Court issued an order that, as relevant here, "permanently enjoined" respondents from engaging in future fraud, deception, and false advertising with respect to: credit limits, initially available credit, late fees and collection calls concerning secured credit card accounts, benefits available under CAP, and the benefits of account repayment plans, such as re-aging. Supreme Court also prohibited respondents from automatically enrolling consumers in AA without express authorization. The Appellate Division affirmed, rejecting respondents' preemption argument (*see* 27 AD3d 104, 109, 805 NYS2d 175 [2005]). On January 27, 2006, Supreme Court entered an order awarding the Attorney General approximately [***5] $ 1.3 million in restitution and damages, $ 7.9 million in penalties and $ 2,000 in costs. In part, restitution was based upon costs incurred by virtue of the origination and annual fees as well as certain late and over-the-limit fees.

The Appellate Division modified. Upholding Supreme Court's res judicata ruling, the court held that the "public interest does not justify giving the New York consumers bound by the *Allec* settlement two chances to receive make-whole relief" (41 AD3d 4, 8, 834 NYS2d 558 [2007] [internal quotation marks and brackets omitted]). As to respondents' appeal, the court held that Supreme Court's award of restitution for petitioner's CAP

and re-aging claims [**113] was improper. Finally, the court affirmed each of the penalties assessed.

This Court granted petitioner and respondents leave to appeal and we now affirm.

II.

Under the U.S. Constitution's Supremacy Clause (US Const, art VI, cl 2), the purpose of our preemption analysis is singular and straightforward. "[O]ur sole task is to ascertain the intent of Congress" (*California Fed. Sav. & Loan Assn v Guerra*, 479 US 272, 280, 107 S Ct 683, 93 L Ed 2d 613 [1987]; *Rosario v Diagonal Realty LLC*, 8 NY3d 755, 763, 872 NE2d 860, 840 NYS2d 748 [2007]; *see also Medtronic, Inc. v Lohr*, 518 US 470, 485, 116 S Ct 2240, 135 L Ed 2d 700 [1996] ["(T)he purpose of Congress is the ultimate touchstone in every pre-emption case" (internal quotation marks omitted)]). Preemption can arise by: (i) express statutory provision, (ii) implication, or (iii) an irreconcilable conflict between federal and state law (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 356, 845 NE2d 1246, 812 NYS2d 416 [2006]).

When dealing with an express preemption provision, as we do here, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption (*see Cipollone v Liggett Group*, 505 US 504, 517, 112 S Ct 2608, 120 L Ed 2d 407 [1992] plurality op] [statute's preemptive scope is "governed entirely" by its "express language"]). Instead, the resolution in this case turns solely upon proper statutory construction of TILA's credit card application and solicitation preemption provision (*see Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 NY2d 126, 131, 518 NE2d 920, 524 NYS2d 25 [1987]). In undertaking that task, we are guided by the "starting presumption that Congress does not intend to supplant state law" unless its intent to do so is "clear and manifest" (*New York State Conf. of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 654, 115 S Ct 1671, 131 L Ed 2d 695 [1995]; *Lohr*, 518 US at 485; *accord Balbuena*, 6 NY3d at 356).

[*6] The preemption provision at issue here was enacted as part of the Fair Credit and Charge Card Disclosure Act of 1988 (FCCCDA), which amended TILA.[9] It states:

> 9 Since its enactment in 1968, TILA has also contained another preemption provision (*see* 15 USC § 1610 [a] [1]). In contrast to 15 USC § 1610 (e), that provision preempts state laws "relating to the disclosure of information in connection with credit transactions" only to the extent of their inconsistency with TILA or Regulation Z (*see* 15 USC § 1610 [a] [1]; *see also* Clontzand Pannabecker, Truth-In-Lending Manual: Text and Forms 2.03 ¶ [4] [2007]).

"(e) Certain [***6] credit and charge card application and solicitation disclosure provisions

> " [**114] The provisions of subsection (c) of section 1632 of this title and subsections (c), (d), (e), and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637 (c) of this title or any renewal notice which is subject to the requirements of section 1637 (d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections" (15 USC § 1610 [e]).

[1] Respondents repeatedly assert that section 1610 (e) expressly preempts "any and every state law 'relating to the disclosure of information in any credit or charge card application or solicitation.' " Petitioner counters that its claims are not preempted because they do not relate to the disclosure of credit information, but rather to affirmative deception. Based upon the statutory text, legislative history, and administrative interpretation of section 1610 (e), we agree with petitioner.

Section 1610 (e) does not preempt every state law that could potentially touch upon any credit information that respondents might choose to include in their credit card applications and solicitations. Instead it preempts those state laws that relate to "disclosure of information" in credit card applications and solicitations "subject to the requirements of section 1637 (c)," not those that prevent fraud, deception and false advertising. Preemption is limited, then, to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively

disclose specific credit term information not embraced by TILA or Regulation Z (*see* 15 USC § 1610 [e]; 1637 § [c] [5] *see also* 54 Fed Reg 13855, 13863 ["State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted"]; 12 CFR Part 226, Supp I, 28 (d) (1) [eff Jan. 14, 2008] [explaining that state laws are preempted when they require the disclosure of credit terms]).

Neither aspect of such preemption is present in this case. This is because New [*7] York's Executive Law and Consumer Protection Act, collectively, do not require respondents to disclose [**115] anything. These statutes simply require that they refrain from fraud, deception, and false advertising when communicating with New York consumers.

The misleading statements in respondents' applications and solicitations regarding potential credit limits, initially available credit, secured card benefits, credit insurance coverage and re-aging benefits, and their deceptive automatic enrollment of consumers in the AA program do not constitute the disclosure of any information "which is subject to the requirements of 1637 (c)" (*see* 15 USC § 1610 [e]).[10] The only information in a [***7] credit card application or solicitation that must be disclosed pursuant to section 1637 (c) is that describing: (i) annual percentage rate, including whether such rate is variable, (ii) annual and other periodic fees, including, "membership fee[s] imposed for the issuance or availability of a credit card," (iii) minimum finance and transaction charges, (iv) grace period, (v) balance calculation method, (vi) cash advance fee, (vii) late fee, (viii) over-the-limit fee, and (ix) a statement that charges incurred are due when a periodic statement is received (*see* 15 USC § 1637 [c] [1] [A] [i] [I], [II]; [ii] [I]-[III]; [iii], [iv]; [B] [i]-[iii]; [4] [A] [iii]; 15 USC § 1637 [c] [2] [mandating, with certain exceptions, disclosure of information described in 1637 (c) (1) (A) in telephone solicitations]; 12 CFR § 226.5a [b]). Pursuant to 15 USC § 1637 (c) (5), however, the Federal Reserve Board of Governors (the Board) has authority to enact regulations requiring "the disclosure of information in addition to" that described in section 1637 (c).

> 10 Petitioner's claims also do not concern the tabular format of certain TILA disclosures, disclosures in renewal notices, disclosures of percentages used to determine fees, or the disclosure of the range of fees applicable in different states. Accordingly, these claims do not implicate section 1632 (c) or subsections (d), (e) or (f) of section 1637, which are referenced at the beginning of the preemption clause at issue here (*see* 15 USC § 1632 [c] [1] [requiring presentation of "the information described in paragraphs (1) (A), (3) (B) (i) (I), (4) (A), and (4) (C) (i) (I) ofsection 1637 (c)" to be set forth in a tabular format, commonly known as the "Schumer Box" after FCCCDA's House sponsor, then-Representative Charles Schumer (N.Y.)]; § 1637 [d] [1] [B] [requiring disclosure in renewal statement of "the information described in subsection (c) (1) (A) or (c) (4) (A)"]; 1637 [e] [requiring disclosure of percentage and amount used to determine "any fee required to be disclosed under subsection (c) or (d)"]; §1637 [f] [permitting disclosure of range of fees "required to be disclosed ... under (certain subparagraphs) of subsection (c)"]).

The verified petition does make reference to the fact that many consumers were "unaware" of the manner in which certain credit terms, including late and over-the-limit fees, balance [**116] calculation method, and the lack of any grace period, were applied against their accounts. But petitioner "take[s] no issue" with the substance or sufficiency of respondents' TILA disclosures [*8] and he has obtained no relief based upon consumers' purported lack of awareness. As we previously have held, the mere fact that a complaint makes reference to certain matters that are preempted by a federal statute does not "transform" a state law action into one that is preempted under federal law (*see Nealy v US Healthcare HMO*, 93 NY2d 209, 220-221, 711 NE2d 621, 689 NYS2d 406 [1999]).[11]

> 11 This case does not present the question whether a New York Executive Law or Consumer Protection Act claim seeking relief based upon specific 1637 (c) disclosures would be preempted. Accordingly, we offer no opinion upon the propriety of such a claim.

Respondents argue, however, that the statutory text compels us to conclude that section section 1610 (e) bars the Attorney General's claims. Their textual argument is based primarily upon the purportedly settled construction of the phrase "relating to" in U.S. Supreme Court precedent.

The U.S. Supreme Court's interpretation of the phrase "relating to" does not help respondents. When construing other statutes, the Court has concluded that the phrase has a meaning that "express[es] a broad pre-emptive purpose" (*see Morales v Trans World Airlines, Inc.*, 504 US 374, 383, 112 S Ct 2031, 119 L Ed 2d 157 [1992]; *accord Rowe v N.H. Motor Transp. Assn.*, 552 US , 128 S Ct 989, 994, 169 L Ed 2d 933 [2008]). It has been defined as "having a connection with, or reference to" the subject matter set forth in a particular preemption clause (*see Morales*, 504 US at 384). But the Court has made clear that the scope of its interpretation of "relating to" is subject to some limitation. This is because "[i]f "relate to" were taken to extend to the furthest stretch of indeterminancy, then for all practical purposes pre-emption would never run its course" ([***8] *Travelers*, 514 US at 655). Thus, the U.S. Supreme Court has "cautioned against an 'uncritical literalism' that would make pre-emption turn on 'infinite connections' " (*Egelhoff v Egelhoff*, 532 US 141, 147, 121 S Ct 1322, 149 L Ed 2d 264 [2001], quoting *Travelers*, 514 US at 656).

We applied these principles in *Nealy* to conclude that even when a complaint refers to matters preempted under federal law, no preemption occurs if the effect of the relief sought upon the federal scheme is " 'too tenuous, remote, or peripheral' " (*Nealy*, 93 NY2d at 220, quoting *Shaw v Delta Air Lines, Inc.*, 463 US 85, 100, 103 S Ct 2890, 77 L Ed 2d 490 n 21 [1983]). We hold this rule of limitation to be applicable here. Quite simply, petitioner's claims do not relate [**117] to the disclosure of federally-mandated information in credit card applications or solicitations. Instead, they relate to the inclusion in those materials of certain fraudulent and deceptive misinformation--none of which is even addressed by the federal disclosure scheme.

The preemption clause at issue here is very different from that in *Morales*, a case that respondents' textual argument hinges upon. There, the Airline Deregulation Act of 1978 (ADA) preempted "any law 'relating to rates, routes, or services' of any air carrier" (*Morales*, 504 US at 378-379 quoting 49 USC Appendix § 1305 [a] [1] [now codified at 49 USC § 41713]). Based on the comprehensive preemptive intent [*9] evidenced in this provision, the Court had little trouble concluding that a set of purportedly enforceable guidelines adopted by the National Association of Attorneys General, which described in excruciating detail the "content and format" of airline advertising, frequent flyer programs, and passenger compensation policies, was preempted (*see Morales*, 504 US at 379, 388, 390-414; *see also Am. Airlines v Wolens*, 513 US 219, 227-228, 115 S Ct 817, 130 L Ed 2d 715 [1995] [preemptive provision in ADA bars claims under Illinois's Consumer Fraud and Deceptive Business Practices Act]; *Air Transp. Assoc. of Am., Inc. v Cuomo*, 520 F3d 218, 223 [2d Cir 2008] [ADA preempts New York's Passenger Bill of Rights because that statute requires airlines to provide certain amenities to travelers and therefore relates to "the service of an air carrier"]). But the reach of section 1610 (e) is not as expansive as that of the ADA preemption provision at issue in *Morales*.

Section 1610 (e) preempts only those state laws that relate to the format, content, manner, or substance of the TILA-required disclosures. Thus, there is no preemption here because neither petitioner's claims nor the relief he was granted below have any effect upon those disclosures (*see Nealy*, 93 NY2d at 220 [no preemption where "(p)laintiff's claims do not bind an employee plan to any particular choice of benefits, do not dictate the administration of such a plan and do not interfere with a uniform administrative scheme"]; *see also Harvey v Members Empls. Trust for Retail Outlets*, 96 NY2d 99, 106, 748 NE2d 1061, 725 NYS2d 265 [2001] [state insurance law and regulation relate to an Employee Retirement Income Security Act (ERISA) plan because they "impose a basic benefit structure"]). To the contrary, Supreme Court's affirmed orders did not mandate any alteration of or addition to the required section 1637 (c) [***9] disclosures. Rather, its injunction simply prevents respondents from affirmatively misrepresenting [**118] the nature of credit terms that, at present, are not even subject to regulation under TILA or Regulation Z. Indeed, petitioner's entitlement to the relief granted below exists wholly apart from respondents' section 1637 (c) disclosure obligations; it is based upon "a more general obligation--the duty not to deceive" (*see Cipollone*, 505 US at 528-529 [plurality op]).

But respondents maintain that Congress's intent to create a uniform system of disclosure in credit card applications and solicitations militates in favor of preemption. We again emphasize, however, that petitioner's success in this case does not force respondents to make any alterations to their section 1637 (c) disclosures or to affirmatively disclose any additional credit terms. This is dispositive. In any event, the sort of

"indirect economic influence" upon respondents' solicitations practices resulting from the relief accorded below is not sufficient to overcome the presumption against preemption of state law (*see Travelers*, 514 US at 664 [although ERISA contains a broad, "relating to," preemption clause New York law imposing surcharges on all insurers was not preempted because the law "d(id) not impose (a) . . . substantive coverage requirement"]; *accord Nealy*, 93 NY2d at 220).

We acknowledge that the U.S. Supreme Court recently reiterated that state tort judgments impose substantive requirements that "can be . . . a potent method of governing [*10] conduct and controlling policy" (*see Riegel v Medtronic, Inc.*, 552 U.S. , , 128 S Ct 999, 1008, 169 L Ed 2d 892 [2008] [internal quotation marks omitted]). But *Riegel* is not controlling here for two reasons. First, the Medical Device Amendments preemption provision at issue there is substantively different from 15 USC § 1610 (e). It preempted "state requirements 'different from, or in addition to, any requirement applicable . . . to [a medical] device' under federal law" (*see* 552 US at , 128 S Ct at 1006, quoting 21 USC § 360k [a] [1]). The scope of section 1610 (e) preemption is, however, expressly limited to state laws relating to the disclosures specifically required under section 1637 (c), it does not extend to the additional state requirement that respondent must refrain from fraud and deception when making statements about credit terms that are not even within the scope of TILA or Regulation Z.

Second, unlike the tort law claims in *Riegel*, the Attorney General's success in this action will not "disrupt[] the federal scheme" of disclosure mandated under TILA (*see* 128 S Ct at 1008). Petitioner has not sought relief based upon [**119] the TILA-required disclosures. Nor has he sought to alter the format, content, or manner of those disclosures. The relief granted below does not impose any additional disclosure requirements upon respondents, it merely precludes them from making fraudulent and deceptive statements regarding certain credit terms (*compare Riegel*, 552 US at , 128 S Ct at 1008 [state tort law claim preempted because Food and Drug Administration's (FDA) exacting standards for premarket approval of medical devices would be disrupted by judgment "that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved"]).

Respondents' disruption argument assumes that Congress intended the TILA disclosures to provide consumers' sole protection against credit card companies' fraudulent and deceptive marketing practices. But the qualified nature of the preemption provision's text belies that sweeping assertion, as does the statute's legislative history.

The FCCCDA's House Conference Report states that section 1610 (e) preempts "State credit and charge card disclosure laws" (*see* HR Conf Rep 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 [***10] US Code Cong & Admin News, at 3951, 3960). An example of such a law is California's Areias Credit Card Full Disclosure Act of 1986, which contains application and solicitation disclosure requirements very similar to TILA's (*see* Cal Civ Code §§ 1748.10-1748.12; Furletti, Comment, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 Temp L Rev 425, 451 451 n 233 [2004]; *see also* Wis Stat Ann § 422.308 [1] [a] [requiring that "every application for (an) open-end credit plan" shall set forth certain specific information, including "(t)he annual percentage rate"]).[12] Although the Senate's [*11] version of FCCCDA would have saved provisions of such state laws that required disclosure of information in addition to that set forth in section 1637 (c) from preemption if they were reenacted within two years of the Act's passage (*see* S Rep 100-259, 100th Cong, 1st Sess, at 9-10, reprinted in 1988 US Code Cong & Admin News, at 3936, 3945-3946), the Senate compromised and "recede[d]" to the House [**120] version, which "preempted the provisions of all state laws *with respect to the disclosures mandated under its bill*" (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 21, reprinted in 1988 US Code Cong & Admin News, at 3960 [emphasis added]; *see also* Gelb and Cubita, *Credit Card Application and Solicitation Disclosure Legislation: An Alternative to the Rate Ceiling Approach*, 43 Bus Law 1557, 1564 [1988]). The Attorney General's claims in this case do not affect any of the mandated disclosures ultimately codified by the FCCCDA nor do they require respondents to make any additional affirmative disclosures regarding their credit products. Thus, this case does not concern the sort of credit card disclosure laws preempted under TILA.

12 Like TILA, these state credit card application and solicitation laws mandated disclosure of only "selected costs associated with credit cards" (*see*

Gelb and Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus Law 941, 941 n 1 [1989] quoting 1986 Cal Stat, ch 1397, §1 [a], reprinted in Cal Civ Code § 1748.10 Historical and Statutory Notes [West]).

Congress also made clear that, even when enforcing the TILA disclosure requirements, states could use their unfair and deceptive trade practices acts to "requir[e] or obtain[] the requirements of a specific disclosure beyond those specified in Section [1637] (c) in the settlement or adjudication of a specific case or cases" (*see* HR Conf Rep 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 US Code Cong & Admin News, at 3960).[13] In sum, the legislative record shows that Congress only intended FCCCDA to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts.

13 The Conference Report's approval of the prospect of settlements and adjudications by which state agencies would gain the right to demand disclosures beyond those required under section 1637 (c) stands in marked contrast to the dissent's claim that Congress "wanted to cut off and fully supplant" all state regulation of credit card applications and solicitations (*see* dissenting op at 138).

Even more significantly, the Senate Banking Committee Report states that TILA does not preempt "the use of State mini-Federal Trade Commission [FTC] statutes to address unfair or deceptive acts or practices" (*see* S Rep 100-259, 100th Cong, 1st Sess, at 9, reprinted in 1988 US Code Cong & Admin News, at 3945). General Business Law §§ 349 and 350 comprise, of course, just such a "mini-FTC" act (*see* [***11] *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26, 647 NE2d 741, 623 NYS2d 529 [1995]; [*12] *Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 323-324, 774 NE2d 1190, 746 NYS2d 858 [2002]). The Senate Report's understanding of TILA's disclosure requirements is reflected in the Official Staff Interpretations of the Federal Reserve Board of Governors, the agency charged by statute with administering TILA (*see* 12 CFR Part 226, Supp I, ¶ 28 [d] [3] [eff Jan. 14, 2008] ["(S)tate laws prohibiting unfair or deceptive acts or practices concerning [**121] credit and charge card applications, solicitations and renewals are not preempted"]; 54 Fed Reg 13855, 13864 [1989] ["(A)ny prohibitions against unfair and deceptive acts or practices (such as state 'mini-FTC acts') . . . are not preempted"]). That interpretation is entitled to great deference (*see Ford Motor Credit Co. v Milhollin*, 444 US 555, 565, 100 S Ct 790, 63 L Ed 2d 22 [1980] ["(D)eference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive"]).[14] [*13]

14 That the Board has recently proposed certain amendments to Regulation Z that would require credit card issuers to disclose in their applications or solicitations the effect of "fees or a security deposit" upon an applicant's credit limit, if such fees "are 25 percent or more of the minimum credit limit offered for the account" (*see* 72 Fed Reg 32948, 32954 [June 14, 2007]; *see also* 73 Fed Reg 28866, 28890 [May 19, 2008] [proposing disclosure of effect of fees or security deposit in "initial disclosure," or account-opening, statements]) does not alter our conclusion. After all, "[t]he proposal of regulations is not synonymous with [their] adoption" (*see State by Malone v Burlington N., Inc.*, 311 Minn 89, 92, 247 NW2d 54, 55 [Minn 1976]).

Moreover, the Board, the Office of Thrift Supervision, and the National Credit Union Administration, pursuant to their authority under the Federal Trade Commission Act, have also recently proposed Regulation AA, a provision of which would prohibit charging fees and security deposits that constitute a majority of a consumer's credit limit during the first 12 months of the account and would also require credit issuers to spread the cost of fees totaling more than 25% of a consumer's credit limit equally over the course of the year (*see* 73 Fed Reg 28904, 28923-28925 [May 19, 2008]). The agencies' rationale for adopting proposed Regulation AA is that the practice of charging fees that quickly deplete a new customer's credit limit "appears to be an unfair act or practice" under the Federal Trade Commission Act, the very statute General Business Law §§ 349 and 350 were modeled upon (*id.* at 28924). And to support their conclusion that consumers "may lack the information

> necessary to avoid harm" from this practice, the agencies cite to the Appellate Division's initial decision in the instant case (*see id.* at 28924 [quoting Appellate Division's conclusion (*see* 27 AD3d at 108) that CCB's post-2001 solicitations " 'did not represent an accurate estimation of a consumer's credit limit' "]). Thus, from these recent regulatory proposals, we can infer that TILA and Regulation Z have not previously embraced the regulation of credit limit practices that were determined to be deceptive below.

Therefore, we hold that petitioner's Executive Law and Consumer Protection Act claims are not preempted by TILA or Regulation Z.

III.

We turn next to the res judicata effect of the *Allec* settlement upon a portion of the Attorney General's claims for restitution. Pursuant to California's procedural rules (Cal Rules Ct rule 3.769 [f] [**122]), New York consumers were provided with notice of the settlement and the opportunity to "opt-in" to a nationwide settlement class. In exchange for certain payments or account credits, consumers who opted-in:

> "forever released and discharged [respondents] from any claims . . . of any nature . . . that [they] have had in the past, or now have against [respondents], [***12] which relate to the solicitation or origination of the cardholder relationship, the 'pre-approval' of persons being solicited for CCB credit cards, the Initial Credit Card Fees, the assignment of credit limits and/or the Disclosure Claims; and all claims set forth in the [*Allec*] Action."

The California court approved the settlement. And the parties do not dispute that the *Allec* action was dismissed with prejudice, thereby "forever barr[ing]" all settlement class members from prosecuting the released claims against respondents. Under California law, such a finally-approved settlement is entitled to res judicata effect (*see e.g. Johnson v Am. Airlines, Inc.*, 157 Cal App 3d 427, 431, 203 Cal Rptr 638, 640 [1984]; *see also* Moore and Thomas, Cal Civ Prac Procedure §32:17 [2008 ed] ["A judgment rendered in a proper class action is res judicata as to the claims of every member of the class although they are not formal parties to the suit"]).[15]

15 The California court's September 30 order states that "[a]s of Final Approval, the Action is . . . dismissed with prejudice." No order granting final approval (*see* Cal Rules Ct rule 3.769 [h] [providing for entry of judgment "after the final approval hearing"]), however, appears in the record. Nevertheless, neither party disputes Supreme Court's statement that "there is no question that the *Allec* class action was dismissed with prejudice on the merits" pursuant to the *Allec* settlement.

In New York, res judicata, or claim preclusion, bars successive litigation based upon the "same transaction or series of connected transactions" (*see* Siegel, NY Prac § 447 [4th ed]) if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485, 386 NE2d 1328, 414 NYS2d 308 [1979]; Weinstein-Korn-Miller, NY Civ Prac P 5011.08 [2d ed]). Here, the parties' dispute focuses solely upon the second prong of the res judicata test, privity.

[2] [*14] The Attorney General argues that he is not in privity with members of the *Allec* settlement class because his interest in [**123] seeking restitution on those consumers' behalf is far broader than their individual pecuniary concerns. Rather, he seeks restitution as a means of deterring future fraud, deception, and false advertising and restoring the public's trust in the consumer credit marketplace. Amici, the Attorneys General of 30 states, agree with that view and urge us to consider the problem of "class action abuse," which, they say, has led to collusive and undervalued settlements such as that entered in *Allec*. Respondents counter by invoking our traditional solicitude towards settlement agreements, urging us to permit the *Allec* settlement class members only one opportunity to obtain make-whole relief. We agree with respondents.

Our precedents have repeatedly explained that privity is not susceptible to a hard-and-fast definition (*see Watts v Swiss Bank Corp.*, 27 NY2d 270, 277, 265 NE2d 739, 317 NYS2d 315 [1970] ["(T)he term privity does not have a technical and well-defined meaning"]; *Gramatan*, 46 NY2d at 485 ["(P)rivity is an amorphous term not susceptible to ease of application"]; *Buechel v Bain*, 97 NY2d 295, 304-305, 766 NE2d 914, 740

NYS2d 252 [2001] ["(P)rivity is ' "an amorphous concept" ' "]). Although we have provided examples of cases in which privity is present (*see Green v Santa Fe Indus.*, 70 NY2d 244, 253, 514 NE2d 105, 519 NYS2d 793 [1987]; *see also Buechel*, 97 NY2d at 305), none of [***13] those are applicable here. Ultimately, we must determine whether the severe consequences of preclusion flowing from a finding of privity strike a fair result under the circumstances (*see Buechel*, 97 NY2d at 304-305). This inquiry is, of course, informed by reference to the policies that res judicata is designed to protect (*see Reilly v Reid*, 45 NY2d 24, 28, 379 NE2d 172, 407 NYS2d 645 [1978]).

It is a " 'familiar doctrine' " that a class action judgment is binding upon class members who were adequately represented in the action (*see Richards v Jefferson County, Alabama*, 517 U.S. 793, 800, 116 S Ct 1761, 135 L Ed 2d 76 [1996], quoting *Hansberry v Lee*, 311 US 32, 42, 61 S Ct 115, 85 L Ed 22 [1940]; *see also Taylor v Sturgell*, 552 U.S. , , 128 S Ct 2161, 2172, 171 L Ed 2d 155, 2008 U.S. LEXIS 4885, *27 [June 12, 2008] ["Representative suits with preclusive effect on nonparties include properly conducted class actions"]; Restatement [Second] of Judgments § 41 [1] [e] and Comment *e* [in properly authorized class actions "persons within the class are bound by a judgment for or against the representative"]; 18-131 Moore's Federal Practice - Civil § 131.40 [3] [e] [iii] ["All class members will be bound, under (res judicata), by a final judgment in a class action, including a judgment following settlement, assuming the action met the necessary procedural due process prerequisites"]). The adequacy of representation in the *Allec* action [**124] is not at issue here (*see* Restatement [Second] of Judgments § 42 [1] [d]-[e]).

The Attorney General argues, however, that his interest in protecting the public was not represented at all in the *Allec* case. Indeed, he points out that he was not provided with notice of the settlement or an opportunity to object to it. Nevertheless, one specific portion of the relief petitioner seeks here--restitution for pre-January 1, 2002 claims--is identical to that which the New York members of the *Allec* settlement class have already pursued to a final and [*15] binding judgment. As to that measure of relief alone, we hold that there is privity.[16]

16 Our holding is in accord with the U.S. Supreme Court's recent rejection of "virtual representation" as a basis for claim preclusion under federal common law (*see Taylor*, 552 US at ___, 128 S Ct at 2178). With respect to petitioner's claim for restitution, the members of the *Allec* settlement class, on whose behalf the Attorney General sues, have already had their "day in court" (*see* 552 US at ___, ___, 128 S Ct at 2171, 2175). Moreover, there is no dispute that the settlement class members' interests were adequately represented in the California court, where they were afforded "the procedural safeguards" codified in California's procedural rules governing class actions (*see* 552 US at ___, 128 S Ct at 2176). Furthermore, our holding today does not authorize " '*de facto* class actions,' " rather we give effect to the results obtained in an actually-litigated class action (*see* 552 US at ___, 128 S Ct at 2176, quoting *Tice v American Airlines, Inc.*, 162 F3d 966, 973 [7th Cir 1998]). Finally, our conclusion does not result in the proliferation of an amorphous balancing test, requiring the evaluation of myriad case-specific factors (*see* 552 US at ___, 128 S Ct at 2176). Instead, we look simply to the judgment approving a class action settlement and the nature of the claims released therein to determine the extent to which petitioner's claim for restitution is precluded.

Our conclusion is supported by a core principle of res judicata, a party's right to rely upon the finality of the results of previous litigation (*see New York State Labor Relations Bd. v. Holland Laundry, Inc.*, 294 NY 480, 493, 63 NE2d 68 [1945] ["(T)he public tranquillity demands that, having been once . . . tried, all litigation of (a) question, and between (the) parties, should be closed forever"]; *Reilly*, 45 NY2d at 28 ["*Res judicata* is designed [***14] to provide finality in the resolution of disputes"]; *cf. Olympic Tower Assocs. v City of New York*, 81 NY2d 961, 962-963, 615 NE2d 219, 598 NYS2d 762 [1993] [settlement agreements entitled to res judicata effect]; Siegel, NY Prac § 444 [4th ed] [judgments entered pursuant to settlement are entitled to res judicata effect]). A similar respect for finality has informed our longstanding rule that--absent exceptional circumstances such as duress, illegality, fraud, or mutual mistake (*see Mangini v McClurg*, 24 NY2d 556, 563, [**125] 249 NE2d 386, 301 NYS2d 508 [1969])--a settlement must be enforced according to its terms (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383, 624 NE2d 995, 604 NYS2d 900 [1993]).

Permitting the Attorney General to seek additional restitution on behalf of the *Allec* settlement class members would undoubtedly "destroy or impair rights" conclusively established in the *Allec* case (*see Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 307, 165 NE 456 [1929] Cardozo, Ch.J.]). Indeed, the Attorney General has asserted that restitution is about making consumers whole. The problem here is that the *Allec* settlement class members have already compromised their entitlement to a full measure of make-whole relief in a proper judicial forum (*cf. EEOC v Waffle House*, 534 US 279, 297, 122 S Ct 754, 151 L Ed 2d 755 [2002] ["(I)t 'goes without saying that the courts can and should preclude double recovery by an [*16] individual' "]). Although we recognize the importance of permitting petitioner to seek restitution to deter Executive Law and Consumer Protection Act violations, we cannot allow him to do so at the expense of undermining a validly-entered judgment of a sister state, which it is our constitutional duty to protect (US Const, art IV, § 1; 28 USC § 1738; *O'Connell v Corcoran*, 1 NY3d 179, 184, 802 NE2d 1071, 770 NYS2d 673 [2003]; *cf. Matsushita Elec Industrial Co. v Epstein*, 516 US 367, 374, 116 S Ct 873, 134 L Ed 2d 6 [1996] ["(A) judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit"]).

Our holding does not, however, substantially prejudice the public interest served by the Attorney General in pursuing this action. Indeed, respect for the finality of the *Allec* settlement still permits the Attorney General to seek restitution on behalf of those not bound by the settlement and for the time periods not embraced therein. In addition, the claims for injunctive relief, civil penalties, and costs remain undisturbed. And, as Supreme Court noted, the Attorney General might be able to obtain disgorgement--an equitable remedy distinct from restitution--of profits that respondents derived from all New York consumers, whether within the *Allec* settlement class or not (*see* 41 AD3d at 8 n 2; *cf. Securities & Exch. Commn. v Fischbach Corp.*, 133 F3d 170, 175 [2d Cir 1997] ["As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits"]; *accord Official Comm. of* [**126] *Unsecured Creditors of WorldCom, Inc. v Securities & Exch. Commn.*, 467 F3d 73, 81 [2d Cir 2006]). [17]

17 Although the Attorney General sought disgorgement as an alternative measure of relief in this case, Supreme Court did not grant that relief and--in the present posture--it would be inappropriate for us to do so.

We have considered petitioner's arguments regarding the Appellate Division's reversal of those portions of Supreme Court's January 27 order awarding restitution for damages allegedly incurred through consumers' participation in the CAP and re-aging programs and we find those arguments meritless. In addition, respondents' argument that extrinsic evidence of consumer deception is required to establish petitioner's Consumer Protection Act claims is unpreserved for our review.

Accordingly, the order of the Appellate Division should be affirmed without costs.

DISSENT BY: READ

DISSENT

READ, J. (Dissenting):

The federal Truth-in-Lending Act (TILA) preempts the Attorney General's bid to impose disclosure requirements on Cross Country Bank's (CCB) credit card solicitations in the guise of this proceeding seeking injunctive relief, restitution and penalties pursuant to Executive Law § 63 (12) (fraud), General Business Law §§ 349 (deceptive business practices), and 350 (false advertising). The majority reaches the opposite conclusion by dint of [*17] misreading TILA's special preemption rule for credit or charge card applications or solicitations. I respectfully dissent.

I.

Section 1610 (e) of TILA states as follows:

> "Certain credit and charge card application and solicitation disclosure provisions
>
> "The provisions of subsection (c) of section 1632 [governing the form or manner of disclosure] and subsections (c), (d), (e), and (f) of section 1637 [governing the content or substance of disclosure] shall supersede any provision of the law of any State relating to the disclosure of

> information in any credit or charge card application or solicitation which is subject to the requirements of section 1637 (c) or any renewal notice which is subject to the requirements of section 1637 (d), [**127] except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections."

The majority reads the clause "which is subject to the requirements of section 1637 (c)" to modify "information." Accordingly, the majority reasons, "[t]he scope of section 1610 (e) preemption is . . . *expressly limited* to state laws relating to the disclosures *specifically required* under section 1637 (c)" (majority op at 118 [emphases added]). The majority therefore concludes that "there is no preemption here because neither CCB's claims nor the relief it was granted below have any effect upon these disclosures" (majority op at 117). That is, because there is no conflict between TILA's disclosure requirements and New York's consumer protection laws, CCB may (and indeed must) devise a solicitation complying with both federal and state law.

But the majority's reading of the statutory text is not correct. It completely

> "disregards -- indeed, is precisely contrary to -- the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, . . . construing a statute in accord with the rule is quite sensible as a matter of grammar" (*Barnhart v Thomas*, 540 US 20, 26, 124 S Ct 376, 157 L Ed 2d 333 [2003] [quotation marks omitted]; *see also* 2A Singer and Singer, *Statutes and Statutory Construction* § 47:33, at 487 [7th ed 2007] ["Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent"]).

[***16] Here, the limiting clause "which is subject to the requirements of section 1637 (c)" immediately [*18] follows and therefore modifies "any credit or charge card application or solicitation," *not* "information."

The Federal Reserve Board, which implements section 1610 (e) through its Regulation Z (12 CFR Part 226), disagrees with the majority's textual analysis: the Board's expression of TILA's special preemption rule is completely at odds with the majority's apparent view that the clause "which is subject to the requirements of section 1637 (c)" modifies "information" rather than "application or solicitation." In its [**128] discussion of section 1610 (e), the Board took the position that "[s]tate laws relating to the disclosure of credit information in credit or charge card applications and solicitations subject to the requirements of [15 USC § 1637 (c)]) . . . are preempted" (54 Fed Reg 13855, 13855-13856 [Apr 6, 1989]). Accordingly, 12 CFR 226.28 (d) states as follows:

> "(d) Special rule for credit and charge cards. State law requirements relating to the disclosure of credit information in *any credit or charge card application or solicitation that is subject to the requirements of [15 USC § 1637 (c)]* (§ 226.5a of the regulation) . . . are preempted. State laws relating to the enforcement of [15 USC § 1637 (c)] . . . are not preempted" (emphasis added).

Concomitantly, the Board has defined those credit or charge card applications or solicitations that *are* subject to the requirements of section 1637 (c) (credit or charge accounts used primarily by consumers to purchase goods and services), and those that *are not* (applications or solicitations to open overdraft lines of credit tied to asset accounts accessible by use of a debit card; open-end lines of credit accessed solely by account numbers; home equity lines of credit that may be accessed by the use of a credit or charge card and are subject to the Home Equity Loan Consumer Protection Act of 1988 amendments to TILA; applications and solicitations to add a credit or charge card to an existing open-end plan) (54 Fed Reg at 13856).

According to the Board, then, TILA supplants State law "requirements" that "relat[e] to the disclosure of credit information" in certain credit or charge card applications or solicitations (i.e., those that the Board has

determined to be subject to the requirements of 15 USC § 1637 [c]) (*id.* at 13855); thus, preemption is not limited to "state laws relating to the disclosures specifically required under section 1637 (c)" (majority op at 118). The Board's view in this regard is entirely consonant with the statute's text, and with Congress' purpose in adopting a special preemption rule in the first place.

At the time TILA was enacted in 1968, "consumer credit [was] preponderantly small and local in both its nature and operation . . . [T]here [was] no national market for consumer credit . . . outside [a consumer's] town or city, although there [**129] [was] some mail order business . . . But generally, the market for consumer credit [was] fairly restricted" (Miller and Rohner, *In Search of a Uniform Policy--State and Federal Sources of Consumer Financial* [*19] *Services Law*, 37 Bus Law 1415, 1415-1416 [1982] [footnotes and quotation marks omitted]). In deference to these state interests, TILA preserved state jurisdiction to regulate disclosures in consumer credit transactions, including so-called "traditional" credit or charge card accounts used primarily by consumers to purchase goods and services.

Specifically, section 1610 (a) (1) of TILA stated that its provisions did not "annul, [***17] alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency." "Since the statute and the legislative history provided [the Board] with little guidance on how to implement the preemption scheme, the [Board] had substantial leeway in deciding how and when state laws would be preempted" (Tidwell, *Preemption of State Disclosures by the Truth in Lending Act: The Continuing Quest for a Workable Formula*, 40 Bus Law 933, 935-936 [1984-1985] [discussing in detail the Board's interpretation and implementation of TILA preemption from 1969 until the mid-1980s]).

In section 226.6 (b) of the original Regulation Z, the Board counseled that a state law was "inconsistent" with TILA or Regulation Z

> "to the extent that it required disclosures or actions 'different' from the requirements of the regulation with respect to form, content, terminology, or time of delivery; disclosure of the amount of the finance charge determined in any manner other than that prescribed by the regulation; and disclosure of the APR determined in any manner other than that prescribed in the regulation" (Tidwell at 936).

In addition, section 226.6 (a) of the original Regulation Z "provided that no other information could be placed with the federal disclosures if it would tend to detract from [them] or mislead or confuse the consumer" (Tidwell at 936).

It was generally left up to creditors to decide whether a state law was inconsistent, although the Board issued a number of interpretive letters. A creditor was, in fact, permitted to make [**130] an inconsistent state law disclosure so long as it was placed on a separate piece of paper from the TILA disclosures, or below a clearly marked line on the same statement containing the TILA disclosures (12 CFR former 226.6 [c]; Tidwell at 936-937). The Board cautioned creditors "that when making a determination of what information would not mislead, confuse, or detract from the required disclosures, they should be ready to justify their determinations before their enforcement agency and the courts" (*id.* at 938).

"The gist of the policy toward preemption of state laws during the 1970s" has been summarized as follows: [*20]

> "State-required disclosures were rarely, if ever, fully preempted in the sense that the creditor was forbidden to use them in contract documents. Instead, *creditors remained subject to any state disclosure law that called for more detailed or different information,* and creditors were always free to make state-required disclosures, either below a demarcation line or as permissible 'additional information' interspersed among the TIL disclosures . . . If a creditor decided to make his own preemption determinations, he ran the risk that a state court might deem the disclosure necessary for contract validity. Therefore, not assuming the risk was considered prudent" (*id.* at 941 [emphasis added]).

Not surprisingly, lengthy, complex and confusing credit

forms proliferated.

Nonetheless, when Congress passed the Truth in Lending Simplification and Reform Act (Pub L 96-221) in 1980, it only tweaked TILA's preemption provision: the inconsistency standard remained in section 1610 (a) (1), although the Board was now mandated to determine if a state law requirement was inconsistent upon the request of a creditor, state or interested party. Moreover, a state law disclosure requirement could no longer appear in [***18] consumer credit contract documents once the Board decided it was inconsistent. [1]

> 1 Interestingly, the TIL Simplification and Reform Act also amended TILA preemption so as generally to permit a creditor, state or interested party to petition the Board to determine whether a state-required disclosure was so similar to the disclosure mandated by TILA that creditors in that state could comply with the state law in lieu of making TILA disclosure (*see* 15 USC § 1610 [a] [2]).

When it revised Regulation Z in 1981 to bring it in line with the TIL Simplification and Reform Act, the Board framed the [**131] preemption standard very narrowly so as to displace little state law. That is, a state law was now inconsistent only if it

> "require[d] a creditor to make disclosures or take actions that *contradict[ed]* the requirements of the federal law. A state law [was] contradictory if it require[d] the use of the same term to represent a different amount or a different meaning than the federal law, or if it require[d] the use of a term different from that required in the federal law to describe the same item" (12 CFR former 226.28 [a] [1]; as amended at 46 Fed Reg 20848, 20906 [Apr 7, 1981]) [emphasis added]).

In short, "[t]he 'contradictory' standard" in Regulation Z

> "simply remove[d] many state disclosure provisions . . . from the scope of preemption and concomitantly allow[ed] compliance with state law in borderline [*21] situations. Allowing creditors to comply with state disclosure requirements until the [Board] ma[de] a preemption determination remove[d] any fear of creditor violation of the TILA by making these required [state] disclosures" (Tidwell at 944).

Congress next revisited TILA in a major way in 1988, when it enacted the Fair Credit and Charge Card Disclosure Act (FCCCDA) (Pub L 100-583). By 1988, the credit card business was a large, nationwide industry, not "preponderantly small and local in both its nature and operation," as had been the case in 1968 when TILA was enacted. In addition, beginning in 1986 with Wisconsin's enactment of a disclosure statute, state legislation in this area was burgeoning: by the time the FCCCDA was adopted, "at least 11 states and Suffolk County in New York had enacted new cost of credit legislation designed to foster price competition among card issuers" (Gelb and Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus Law 941, 941 n 1 [1989]). So this time, Congress tackled preemption head on, devising a "special" rule for disclosure of credit information in credit or charge card applications or solicitations, which "depart[ed] radically from" the inconsistency standard, "the approach which Congress historically [had] adopted in the credit disclosure area" (Gelb and Cubita at 955).

The FCCCDA dictated what credit information had to be disclosed (15 USC § 1637 [c], [e], [f]), and the manner of its [**132] disclosure (15 USC 1632 [c]) in credit or charge card applications or solicitations. To ensure that the marketplace did not outpace its detailed mandates, Congress in section 1637 (c) (5) provided as follows:

"Regulatory authority of the Board

> "The Board may, by regulation, require the disclosure of information *in addition to* that otherwise required by this subsection . . . , and *modify any disclosure of information required by* this subsection . . . , in any application to open a credit card account for any person under an open end consumer credit plan or any application to open a charge card account for any person, or a solicitation to [***19] open any such account without requiring

> an application, if the Board determines that such action is necessary to carry out the purpose of, or prevent evasions of, any paragraph of this subsection" (emphasis added).

Section 1610 (e), as previously discussed, then specified that the provisions of sections 1632 (c) (governing the form or manner of disclosure) and 1637 (c),(e) and (f) (governing the content or substance of disclosure) "supersede[d] any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject [*22] to the requirements of section 1637 (c)" except to enforce TILA and Regulation Z.

Congress thus occupied the entire field of cost-of-credit disclosures in credit or charge card applications or solicitations: it set out comprehensive requirements and established a singular *federal* mechanism (the Board) to add to or modify these requirements to keep abreast of developments in the consumer credit or charge card business. A state may enforce TILA's disclosure provisions, and surely a state may bring consumer complaints to the Board's attention and advocate revisions to Regulation Z. The language of section 1610 (e) and the structure of TILA's regulatory scheme after Congress' adoption of the FCCCDA, however, belie any notion that a state may use its consumer protection laws to impose additional or different cost-of-credit disclosure on a creditor. The majority's contrary statutory interpretation produces a patchwork scheme whereby each state may effect different or additional credit disclosure requirements unless and until the Board acts pursuant to section 1637 (c) (5) to regulate the form or substance of [**133] disclosure of the same item of credit information, which would perforce then become "information . . . which is subject to section 1637 (c)."[2] This, of course, completely undermines the uniformity of the federal regime that Congress devised to govern a nationwide industry. Moreover, it leaves no room for the possibility that the Board may have policy reasons *not* to mandate a particular disclosure that a state considers to be warranted (*see Arkansas Elec. Cooperative Corp. v Arkansas Pub. Serv. Comm'n.*, 461 US 375, 384, 103 S Ct 1905, 76 L Ed 2d 1 [1983] [Under the Supremacy Clause, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate"]).

> 2 At least I assume that the majority would, at a minimum, acknowledge that if the Board, for example, ultimately amends Regulation Z to require disclosure of the effect of fees or a security deposit upon an applicant's credit limits in credit card applications (*see* majority op at 121, n 14), the State could no longer challenge the form or substance of the disclosure of credit limits via a lawsuit grounded in State consumer protection laws. That is, when my colleagues state that "[t]he scope of section 1610 (e) preemption is . . . expressly limited to state laws relating to the disclosures specifically required under section 1637 (c)" (majority op at 118), I assume they must intend "disclosures specifically required under section 1637 (c)" to include any additional or modified disclosures required in Regulation Z by the Board pursuant to its section 1637 (c) (5) authority. If not, the injury to the federal regime would be even more severe.

As the discussion of the evolution of TILA preemption illustrates, before Congress adopted the special preemption rule, states supplemented federal credit disclosure requirements with regularity. If Congress had wanted this state of affairs to continue, there would have been no need for it to supplant the inconsistency/contradictory standard in [*23] section 1610 (a)(1) [***20] (as interpreted by the Board in Regulation Z) with the special preemption rule in section 1610 (e). By reading the special preemption rule as it does, the majority has undone Congress' handiwork: the majority has effectively reinstated the inconsistency/contradictory standard for disclosures in credit or charge card applications or solicitations. While the majority cloaks its interpretation of section 1610 (e) in the garb of the presumption against preemption of state law (majority op at 118), the presumption does not empower a state court to circumvent Congress' will as expressed in non-ambiguous statutory language ("In all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the* [**134] *clear and manifest purpose of Congress," [Medtronic, Inc. v Lohr,* 518 US 470, 485, 116 S Ct 2240, 135 L Ed 2d 700 (1996) (emphasis supplied, internal quotation marks and citations omitted)]).

II.

In this litigation, the Attorney General has taken the position--approved by the majority--that

> *"the overall impression* of CCB's representations regarding its credit cards, taken as a whole, was fraudulent and misleading to the average consumer. The flaw in these representations was not that they failed to provide the disclosures required by TILA, but rather that they affirmatively misled consumers and thus violated New York's consumer protection laws. *Because the petition alleges affirmative deception rather than inadequate disclosure, the claim is not preempted by TILA"* (appellate brief at 3[emphases added]).

In sum, the Attorney General argued that whether or not CCB's solicitations comported with TILA or Regulation Z was basically irrelevant because he was only suing to enforce state laws prohibiting unfair or deceptive acts or practices, and TILA does not preempt these state laws. He stressed that he did not seek or obtain "an order requiring that anything actually be disclosed, but rather requested and received an order enjoining [CCB] from misrepresenting credit terms."

The foundation for the Attorney General's analytical edifice is the Board's discussion of the scope of section 1610 (e) when it revised Regulation Z to implement the FCCCDA. In fact, the Attorney General argues that the Board "directly answer[ed] the question posed in this case by declaring that 'prohibitions against unfair and deceptive acts or practices (such as "mini-FTC acts") also are not preempted,' " quoting the Board's commentary accompanying the final version of section 226.28(d) of Regulation Z (54 Fed Reg at 13864; *see also* majority op at 121).

First, the statement that the Attorney General seizes upon is both truncated and taken out of context. The paragraph in which it appears reads in its entirety as follows: [*24]

> "In addition, state laws regulating the substance of transactions subject to section 127 (c) [15 USC § 1637 (c) [applications and solicitations)] or (d) [15 USC § 1637 (d) [**135] (renewal notice)] are not preempted, nor are state laws preempted that regulate the form or content of the disclosure of information that is unrelated to the scope and content of information required to be disclosed section 127 (c) or (d). Thus, for example, the following types of state laws are not preempted: laws requiring [***21] card issuers to offer a grace period [3] or prohibiting certain fees in credit or charge card transactions; laws such as retail installment sales acts and plain language [*25] laws [4], unless they regulate the disclosure of credit term information in credit and charge card applications, solicitations or renewal notices; laws requiring notice of a consumer's rights under the antidiscrimination or similar laws; and laws notifying consumers about credit information available form state authorities. *Finally, state laws regarding the enforcement of the requirements of section 127(c) or (d) or of any prohibitions against unfair and deceptive acts or practices (such as state 'mini-FTC acts') also are not preempted"* (54 Fed Reg at 13863-13864 [emphasis added]).

This last sentence accords with the House Conference Report for the FCCCDA, which also discussed the use of mini-FTC statutes *solely* in the context of enforcing TILA and Regulation Z [*26] (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 21-22, reprinted in 1988 US Code Cong & Admin News, at 3951, 3960; [5] *see also* 12 CFR part 226, Supp I at 577 [2008 ed]; Gelb and Cubita, *Implementation of the Fair Credit and Charge Card Disclosure Act of 1988: The Regulatory Response*, 44 Bus Law 1427, 1437 [1989] ["(T)he supplementary information accompanying the final regulation indicates that (section 1610 [e]) would not preempt state laws concerning the substance of credit card arrangements [6] or the form and content of disclosures that are unrelated to the scope and content of the [**136] federal application, solicitation, and renewal disclosures" and, "(b)y way of illustration," offers examples]).

3 *See e.g.* Personal Property Law § 413 (3) (c)

(ii).

4 *See e.g.* General Obligations Law § 5-702.

5 Here, the Attorney General concededly did not bring this lawsuit to enforce TILA or Regulation Z; therefore, the comment in the House Conference Report to the effect that disclosures beyond those specified in section 1637 (c) might be required or obtained in the settlement or adjudication of such a lawsuit is beside the point here (*see* majority op at 120).

6 For example, section 1610 (e) would not have prevented the Attorney General from challenging CCB's *practice* of charging fees and security deposits that constitute a majority of a consumer's credit limit for the first 12 months of the account (*see* majority op at 121 n 14 [discussing proposed Regulation AA, which would regulate this practice under the Federal Trade Commission Act because it "appears to be an unfair act or practice" (73 Fed Reg 28904, 28923 [May 19, 2008])]).

What is notably missing from the Board's discussion is any suggestion whatsoever that state mini-FTC laws might--after enactment of the FCCCDA with its special preemption rule--remain available as a mechanism to impose disclosure requirements on creditors over and above those mandated by TILA and Regulation Z. Indeed, the Board emphasized that

> "[s]tate laws relating to *the terms of credit* required to be disclosed or *the manner* in which such terms must be disclosed are preempted as to any credit or charge card application or solicitation that is subject to [15 USC § 1637 [c]) . . . The preemption of such provisions of state law is *total*, and differs from other provisions of the TILA which generally preempt only inconsistent state laws" (54 Fed Reg at 13863 [emphases added]).

This position is in tune with the text of section 1610 (e) and the history of the special [***22] preemption rule; it is reflected in the broad wording chosen by the Board to implement section 1610 (e)--i.e., "[s]tate law requirements relating to the disclosure of credit information." (12 CFR 226.28 [d]).

Finally, the Attorney General (and the majority) cannot evade preemption by portraying this enforcement action as a suit to enjoin a misleading and fraudulent "overall [*27] impression" rather than "inadequate disclosure." The only way for CCB to dispel the complained-about "overall impression"--the only way for CCB to comply with Supreme Court's injunction [7]--is to revise and alter the form and content of its solicitations; i.e., to make different and/or additional disclosures (*compare* majority op at 118 ["We again emphasize . . . that (the Attorney General's) success in this case does not force (CCB) . . . to affirmatively disclose any additional credit terms"]). Neither the Attorney General nor the majority explains how else CCB may eliminate the alleged misrepresentations from its solicitations.

7 In relevant part, the injunction enjoins CCB "from engaging in the fraudulent, deceptive and unlawful acts and practices alleged in the Verified Petition" by "misrepresenting" certain credit information.

[**137] III.

Just a few months ago, the United States Supreme Court handed down *Riegel v Medtronic, Inc.* (552 US ___, 128 S Ct 999, 169 L. Ed. 2d 892 [2008]). Riegel sued Medtronic for damages, alleging that a catheter marketed by the company was "designed, labeled and manufactured in a manner that violated New York common law, and that these defects caused [him] to suffer severe and permanent injuries" (522 US at ___, 128 S Ct at 1005). The type of catheter implicated in Riegel's injuries had received premarket approval from the Food and Drug Administration (FDA) under a federal safety oversight regime created by the Medical Device Amendments of 1976 (MDA). The MDA includes a preemption provision; specifically, 21 USC § 360k (a) provides that a state shall not

> "establish or continue in effect with respect to a device . . . any requirement--
>
> "(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and
>
> "(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [relevant federal law]."

The issue in *Riegel* was whether the FDA's approval of the catheter precluded the New York common-law tort suit. The Supreme Court (affirming the United States Court of Appeals for the Second Circuit) decided that the MDA preempted Riegel's civil suit, reasoning that "[a]bsent other indication, [Congress'] reference to a State's 'requirements' includes its common-law duties," and these "requirements" were "different from, or in addition to" the federal ones (552 US at ___, 128 S Ct at 1008). Further, the Court remarked that section 360k did "not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations" because in such a case the state duties would " 'parallel' rather than add to, federal requirements" (552 US at ___, 128 S Ct at 1011).

[*28] This is an even clearer case for preemption than *Riegel*. In *Riegel*, the preemption provision did not explicitly mention civil tort liability. Here, there can be no doubt that the Attorney General's claims under the Executive Law and the General Business Law are made under a "provision of the law of [the] State [**138] relating to the [***23] disclosure of information" in solicitations governed by TILA (15 USC § 1610 [e]); or, as articulated by the Board, are "[s]tate law requirements relating to the disclosure of credit information" (12 CFR 226.28 [d]). As the Supreme Court has observed, "[t]he ordinary meaning of [the phrase 'relating to'] is a broad one--to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with--and the words thus express a broad preemptive purpose" (*Morales v Trans World Airlines Inc.*, 504 US 374, 383, 112 S Ct 2031, 119 L Ed 2d 157 [1992] [quotation marks and citation omitted]). The majority avoids this evident conclusion only by resorting to its faulty analysis that the "scope of section 1610 (e) preemption is . . . expressly limited to state laws relating to disclosures specifically required under 1637(c)" (majority op at 118).

The majority also concludes that the MDA's preemption provision is broader than section 1610 (e) because the former displaces those state requirements that are "different from, or in addition to" federal law. Yet again, the majority relies on its erroneous reading of section 1610 (e) to "expressly limit[]" preemption "to state laws relating to the disclosures specifically required under section 1637 (c)" (majority op at 118). In fact (and as discussed previously), the wording of section 1610 (e) illustrates its preemption of the entire field of disclosure of cost-of-credit information in credit or charge card solicitations. Indeed (as discussed previously), under the formerly applicable inconsistency/contradictory standard, states were empowered to enforce state law disclosure requirements that differed from or added to the requirements established for credit or charge card solicitations by Congress in TILA. Congress fashioned the "special" preemption rule in section 1610 (e) precisely because it wanted to cut off and fully supplant supplemental state regulation in this area: only the Board may add to or modify TILA's statutory disclosure requirements.

Finally (again as discussed previously), the relief that the Attorney General sought (and has obtained) inevitably calls for CCB to alter the format and content of the disclosures in its credit or charge card solicitations of consumers *in New York*, thus "disrupt[ing] the federal scheme" envisaged and designed by Congress to "enhance credit shopping" by requiring "more detailed and uniform" disclosure of credit information to consumers nationwide (*see Riegel*, 552 US at ___, 128 S Ct at 1008) to " enchane credit shopping" by requiring "more detailed and uniform" disclosure of credit information to consumer nationwide (54 Fed Reg at 13855; *compare* majority op at 118).

[**139] IV.

The majority's desire to maximize our State's regulatory reach in the area of consumer protection is unsurprising. And the Board has arguably been slow to appreciate the value to consumers of at least certain of the specific disclosures at issue in this case (*see* 72 Fed Reg 32948 [June 14, 2007] [proposal by the Board to amend Regulation Z following a comprehensive review of TILA's rules for open-end (revolving) credit that is not home-secured]). [*29] But State pride and good intentions are not enough to justify this lawsuit. To borrow words from the Second Circuit's decision in a recent preemption case, "[i]f New York's view regarding the scope of its regulatory authority carried the day, another state could be free to enact" its own laws or bring its own lawsuits to supplement or modify the credit disclosures required by TILA and Regulation Z, thus "unraveling the centralized federal framework" in this area ([***24] *Air Transp. Assn. of Am. v Cuomo*, 520 F3d 218, 225 [2d Cir 2008] [determining that federal law preempts New York State's Passenger Bill of Rights (General Business Law 251-g [1])]). In enacting section

1610 (e), Congress essentially decided that the benefits from a uniform, nationwide regime for disclosure under the aegis of the Board outweighed any loss of protection to consumers under state law. The Supremacy Clause permits Congress to make this judgment, and we are bound to honor it. Accordingly, I respectfully dissent.

Chief Judge KAYE and Judges GRAFFEO, PIGOTT and JONES concur with Judge CIPARICK; Judge READ dissents in an separate opinion; Judge SMITH took no part

Order affirmed, without costs.

LEXSEE 72 A.D.3D 835

[*1] **In the Matter of Yellow Cab of Newburgh, Inc., petitioner/plaintiff, G & C Transportation, Inc., appellant, v Westchester County, et al., respondents. (Index No. 11918/09)**

2009-08514

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2010 NY Slip Op 3138; 72 A.D.3d 835; 898 N.Y.S.2d 659; 2010 N.Y. App. Div. LEXIS 3044

April 13, 2010, Decided

COUNSEL: Bruce M. Stern, Newburgh, N.Y., for appellant.

Robert F. Meehan, County Attorney, White Plains, N.Y. (Stacey Dolgin-Kmetz and Martin G. Gleeson of counsel), for respondents.

JUDGES: JOSEPH COVELLO, J.P., ANITA R. FLORIO, RANDALL T. ENG, CHERYL E. CHAMBERS, JJ. COVELLO, J.P., FLORIO, ENG and CHAMBERS, JJ., concur.

OPINION

[***660] [**835] DECISION & ORDER

In a hybrid proceeding pursuant to CPLR article 78 to review two determinations of the Westchester County Taxi and Limousine Commission, both dated January 28, 2009, that G & C Transportation, Inc., violated sections 400.10 and 400.11 of the Rules and Regulations of the Westchester County Taxi and Limousine Commission, and action, inter alia, for a judgment declaring, in effect, that Westchester County is without authority to regulate livery and/or taxicab services not operating wholly within Westchester County, and that sections 400.10 and 400.11 of the Rules and Regulations of the Westchester County Taxi and Limousine Commission are invalid, G & C Transportation, Inc., appeals, as limited by its brief, from so much of an order and judgment (one paper) of the Supreme Court, Westchester County (Cacace, J.), entered August 18, 2009, which, in effect, granted that branch of the respondents/defendants' motion which was pursuant to CPLR 3211(a) to dismiss the petition/complaint insofar as asserted by it, and is in favor of the respondents/defendants and against it dismissing the proceeding.

[**836] ORDERED that the order and judgment is modified, on the law, by adding a provision thereto in favor of the respondents and against the appellant dismissing the action insofar as asserted by the appellant; as so modified, the order and judgment is affirmed, with costs to the respondents.

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an

issue that was clearly raised in a prior action or proceeding and decided against that party (*see Buechel v Bain*, 97 NY2d 295, 303, 766 N.E.2d 914, 740 N.Y.S.2d 252, *cert denied* 535 U.S. 1096, 122 S. Ct. 2293, 152 L. Ed. 2d 1051; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349, 712 N.E.2d 647, 690 N.Y.S.2d 478; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 467 N.E.2d 487, 478 N.Y.S.2d 823). In order to invoke the doctrine, the identical issue must necessarily have been decided in the prior action or proceeding and be decisive [***661] of the present action or proceeding, and the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (*see Buechel v Bain*, 97 NY2d at 303-304; *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349; *D'Arata v New York Cent. Mut.* [*2] *Fire Ins. Co.*, 76 NY2d 659, 664, 564 N.E.2d 634, 563 N.Y.S.2d 24).

Westchester County and the Westchester County Taxi and Limousine Commission (hereinafter the TLC) met their burden of demonstrating that the issues raised in the instant proceeding and action were necessarily decided in a prior hybrid proceeding and action commenced by the appellant (*see Matter of G & C Transportation, Inc. v Westchester County*, Sup Ct, Westchester County, Sept. 3, 2008, Cacace, J., Index No. 11106/08). The appellant failed to sustain its burden of demonstrating that it lacked a full and fair opportunity to contest those issues in that hybrid proceeding and action (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d at 664). Accordingly, the Supreme Court properly granted that branch of the motion of the County and the TLC which was pursuant to CPLR 3211(a)(5) to dismiss the petition/complaint insofar as asserted by the appellant.

In light of this determination, the appellant's remaining contentions have been rendered academic.

COVELLO, J.P., FLORIO, ENG and CHAMBERS, JJ., concur.

LEXSEE 712 N.E.2D 678

Yonkers Contracting Company, Inc., Appellant, v. Port Authority Trans-Hudson Corporation, Respondent.

No. 63

COURT OF APPEALS OF NEW YORK

93 N.Y.2d 375; 712 N.E.2d 678; 690 N.Y.S.2d 512; 1999 N.Y. LEXIS 1136

March 23, 1999, Argued
May 11, 1999, Decided

PRIOR HISTORY: Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 9, 1998, which affirmed an order of the Supreme Court (Joan B. Lefkowitz, J.), entered in Westchester County, insofar as it dismissed the complaint with prejudice.

Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp., 248 AD2d 463, affirmed.

DISPOSITION: Order affirmed, with costs.

HEADNOTES

Public Authorities - Claims against Public Authorities - Condition Precedent

1. The requirement of McKinney's Unconsolidated Laws of New York § 7107 (L 1950, ch 301, § 7) that actions against the Port Authority of New York and New Jersey be commenced within one year of accrual may not be overcome pursuant to CPLR 205 (a) because the action was commenced within six months of the final dismissal of a previous action involving the identical claim. The toll of CPLR 205 (a), which may extend a Statute of Limitations, cannot obviate the requirements of a statutory condition precedent to suit. A Statute of Limitations merely suspends the remedy provided by a right of action, but a statutory time restriction on commencement of suit conditions the existence of a right of action, thereby creating a substantive limitation on the right. The requirement to bring an action within one year under Unconsolidated Laws § 7107 is such a condition precedent to suit. The State's waiver of sovereign immunity from suits against the Port Authority expressly incorporated a requirement of timely suit as an integral part of its waiver. Where a statute both creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause and is so incorporated with the remedy given as to make it an integral part of it and the condition precedent to the maintenance of the action at all.

Limitation of Actions - Commencement of Action after Termination of Prior Action - Termination by Final Judgment upon Merits

2. Where plaintiff's prior action was dismissed "with prejudice" for failure to satisfy a condition precedent to suit, CPLR 205 (a), which provides a six-month toll of the Statute of Limitations for a new action where a prior action involving the identical claim was terminated in a manner other than by, *inter alia*, a "final judgment upon the merits," is inapplicable to plaintiff's new action notwithstanding the absence of an adjudication on the merits of the claim in the prior action. The proviso in CPLR 205 (a) that the toll is inapplicable when the prior action was dismissed on the merits is essentially a corollary of the principle of res judicata that once a claim is brought to a final conclusion, all other claims arising

out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. A dismissal "with prejudice" generally signifies that the court intended to dismiss the action "on the merits," that is, to bring the action to a final conclusion against the plaintiff. Here, in the first action, plaintiff sought a de novo adjudication of its breach of contract claims, ignoring a "conclusive, final and binding" determination of the claims rendered pursuant to the contract's dispute resolution clause, and defendant warned plaintiff that it would move to dismiss if plaintiff declined to amend the complaint to request instead the limited, available judicial review of that determination. In dismissing the complaint with prejudice, the Appellate Division essentially held plaintiff to its tactical abandonment of any challenge to the merits of the determination and therefore was warranted in bringing the litigation between the parties to a conclusive ending. Thus, the Court of Appeals affirmance of the Appellate Division's order dismissing the complaint with prejudice is best viewed as "a final judgment upon the merits" preventing tolling under CPLR 205 (a).

COUNSEL: *Eisland, Selby & Berman, L. L. P.*, New York City (*Evan M. Eisland* and *Ralph Berman* of counsel), and *Berman, Paley, Goldstein & Kannry, L. L. P. (Alvin Goldstein* of counsel), for appellant. I. The Court below's blanket holding that CPLR 205 (a) is not available to a plaintiff whose timely action against a public authority has been dismissed is erroneous. (*Dreger v New York State Thruway Auth.*, 81 NY2d 721; *Gaines v City of New York*, 215 NY 533; *Fleming v Long Is. R. R.*, 72 NY2d 998; *Carrick v Central Gen. Hosp.*, 51 NY2d 242.) II. The Court below's holding is inconsistent with the decisions upon which it relies. (*Savino v Demiglia*, 133 AD2d 389; *Balzano v Port of N. Y. Auth.*, 23 AD2d 573, 16 NY2d 481.) III. Plaintiff is entitled to a decision on the merits of its claims against defendant. (*Lumbermens Mut. Cas. Co. v Port Auth.*, 137 AD2d 796; *Gaines v City of New York*, 215 NY 533.)

Anne M. Tannenbaum, New York City, *Milton H. Pachter* and *Arthur P. Berg* for respondent. I. CPLR 205 (a) by its terms does not apply to save plaintiff's second complaint. (*Berman v Szpilzinger*, 200 AD2d 367; *Maitland v Trojan Elec. & Mach. Co.*, 65 NY2d 614; *Westinghouse Elec. Corp. v New York City Tr. Auth.*, 82 NY2d 47; *Strange v Montefiore Hosp. & Med. Ctr.*, 59 NY2d 737; *Barrett v Kasco Constr. Co.*, 56 NY2d 830; *Lipin v Bender*, 216 AD2d 131, 87 NY2d 911, 88 NY2d 866; *Leeds v Sturm, Ruger & Co.*, 101 AD2d 881; *Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556; *Gaines v City of New York*, 215 NY 533; *Parochial Bus Sys. v Board of Educ.*, 60 NY2d 539.) II. CPLR 205 (a) does not serve to toll jurisdictional conditions precedent to suit. (*Trippe v Port of N. Y. Auth.*, 14 NY2d 119; *Balzano v Port of N. Y. Auth.*, 23 AD2d 573, 16 NY2d 481; *Kaplan v Uribe*, 286 App Div 156; *Savino v Demeglia*, 133 AD2d 389; *Lewis v State of New York*, 69 Misc 2d 1031; *Seguritan v Northwest Airlines*, 86 AD2d 658, 57 NY2d 767; *Dreger v New York State Thruway Auth.*, 81 NY2d 721; *Lyons v Port Auth.*, 228 AD2d 250; *Lumbermens Mut. Cas. Co. v Port Auth.*, 137 AD2d 795; *Extebank v Finkelstein*, 188 AD2d 513.)

JUDGES: Chief Judge Kaye and Judges Bellacosa, Smith, Ciparick and Wesley concur; Judge Rosenblatt taking no part.

OPINION BY: LEVINE

OPINION

[*377] [**679] [***514] Levine, J.

Plaintiff appeals from an order of the Appellate Division affirming the dismissal of this action against defendant, a wholly-owned [**680] subsidiary of the Port Authority of New York and New Jersey (Port Authority) because the action was not filed within the time constraints for commencement of suits against the Port Authority (*see*, McKinney's Uncons Laws of NY § 7107 [L 1950, ch 301, § 7]). The sole issue is whether section 7107's requirement that actions be commenced within one year of accrual may be overcome pursuant to CPLR 205 (a) because the action was commenced within six months of the final dismissal of a previous action involving the identical claim.

The parties agree that the instant action is based upon the same series of transactions and occurrences giving rise to a disputed claim for damages by plaintiff as general contractor on a construction project of defendant Port Authority, undertaken between 1988 and 1990 (*see, Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 208 AD2d 63, *affd* 87 NY2d 927). The previous action, commenced in 1990, was undisputably timely. It was dismissed because plaintiff failed to comply with a condition precedent in the construction contract's alternative dispute resolution provision requiring it to plead that it had [*378] submitted the disputed claim to

the project's Chief Engineer for resolution before instituting litigation (208 AD2d, at 65). In response to the motion to dismiss, plaintiff asserted only that the alternative dispute resolution provision was void as against public policy. The Appellate Division rejected plaintiff's public policy contention, granted defendant's motion and dismissed the complaint "with prejudice" (*id.*, at 66-68).

This second action was commenced on August 1, 1996, less than six months after our decision on February 8, 1996, affirming the dismissal of the first case, but more than one year after the cause of action accrued. This time, plaintiff complied with the requirement to allege submission of the controversy to the Chief Engineer, but plaintiff now challenges the Chief Engineer's decision as infected by fraud or bad faith. Defendant moved to dismiss the present action on the ground that it was commenced well beyond the one-year requirement of section 7107. Both Supreme Court and the Appellate Division (248 AD2d 463) held that the toll of CPLR 205 (a), which may extend a Statute of Limitations, could not obviate the requirements of a statutory condition precedent to suit. We agree and also hold that this second action should be dismissed because the first one was dismissed "upon the merits" (CPLR 205 [a]). Therefore, we affirm.

Case law distinguishes between a Statute of Limitations and a statutory time restriction on commencement of suit. The former merely suspends the remedy provided by a right of action, but the latter *conditions* the existence of a right of action, thereby creating a substantive limitation [***515] on the right (*see, Tanges v Heidelberg N. Am.,* 93 NY2d 48, 55; *Romano v Romano,* 19 NY2d 444, 447). Both CPLR 205 (a) and its equivalent predecessor statutes have been held to be inapplicable when the statutory time bar to the commencement of the second action falls into the latter category, as a condition precedent (*Glamm v City of Amsterdam,* 67 AD2d 1056, 1057, *affd for reasons stated below* 49 NY2d 714 [" CPLR 205 does not apply to conditions precedent"]; *Hill v Board of Supervisors,* 119 NY 344, 347 [Code of Civil Procedure § 405 not applicable where new action did not comply with a "condition precedent"]; *see also, Bernardez v Federal Deposit Ins. Corp.*, 104 AD2d 309, 310, *affd for reasons stated below* 64 NY2d 943; *Carr v Yokohama Specie Bank,* 272 App Div 64, *affd* 297 NY 674).

The requirement to bring an action within one year under Unconsolidated Laws § 7107 is such a condition precedent to suit, which cannot be tolled under CPLR 205 (a). At common [*379] law, plaintiff would not have had a cause of action because the Port Authority enjoyed sovereign immunity (*Trippe v Port of N. Y. Auth.,* 14 NY2d 119, 123). In a single enactment, the State not only consented to suits against Port Authority but also expressly [**681] incorporated within the act a requirement of timely suit as an integral part of its waiver of sovereign immunity (L 1950, ch 301 [McKinney's Uncons Laws of NY §§ 7101-7112]). Where a statute both "creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause" (*Romano v Romano, supra,* 19 NY2d, at 447). In such situations, "the limitation of time is so incorporated with the remedy given as to make it an integral part of it, and the condition precedent to the maintenance of the action at all" (*Hill v Board of Supervisors, supra,* 119 NY, at 347).

The legislative intent to condition the waiver of sovereign immunity with respect to the Port Authority on timely suit could not be more clear. Unconsolidated Laws § 7107 unambiguously allows an action against the Port Authority only "*upon the condition* that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year" (McKinney's Uncons Laws of NY § 7107 [emphasis supplied]). Thus, CPLR 205 (a) is inapplicable because, here, the "right to seek relief is specifically conditioned upon compliance with a particular time requirement rather than, or in addition to, a Statute of Limitations" (*Matter of Morris Investors v Commissioner of Fin. of City of N. Y.,* 69 NY2d 933, 936).

Plaintiff's reliance upon *Fleming v Long Is. R. R.* (72 NY2d 998) and *Dreger v New York State Thruway Auth.* (81 NY2d 721) is misplaced. Those cases addressed only the issue of whether the dismissed, initial action was "timely commenced" for purposes of obtaining the benefit of the CPLR 205 (a) toll for a later, otherwise untimely suit. In both *Fleming* and *Dreger,* the time bars governing the claims were concededly Statutes of Limitation, not conditions precedent, as here. Therefore, in those cases there was no impediment to the application of CPLR 205 (a) to toll the Statutes of Limitation. Contrastingly here, the statutory time limit on bringing suit, as demonstrated, is itself a condition precedent to the existence of the right of action, not merely a Statute of

Limitations. That distinction is fatal to plaintiff's invocation of CPLR 205 (a).

CPLR 205 (a) would not in any event serve to save plaintiff's action here because the statute expressly excludes [*380] the availability of the toll where the first action was dismissed by "a final judgment upon the merits." Plaintiff contends that despite the fact that the judgment dismissing [***516] its earlier action for the same relief specified that it was "with prejudice," the prior action was not terminated "upon the merits" because there was no adjudication of the merits of its breach of contract claim. Plaintiff misconstrues the meaning of the words "final judgment upon the merits" in CPLR 205 (a). The proviso in CPLR 205 (a) that the toll is inapplicable when the prior action was dismissed on the merits is essentially a corollary of the principle of res judicata that "once a claim is brought to *a final conclusion*, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [emphasis supplied]). A dismissal "with prejudice" generally signifies that the court intended to dismiss the action "on the merits," that is, to bring the action to a final conclusion against the plaintiff (Restatement of Judgments § 53, comment *c;* Restatement [Second] of Judgments § 20, comment *d;* 27 CJS, Dismissal & Nonsuit, § 73). We have used the words "with prejudice" interchangeably with the phrase "on the merits" to indicate the same preclusive effect (*Bray v Cox*, 38 NY2d 350, 353, 355; *Headley v Noto,* 22 NY2d 1, 4).

Our conclusion that the Appellate Division's dismissal of plaintiff's first action "with prejudice" was intended to be "upon the merits," as a final disposition of plaintiff's claim, is entirely consistent with the Appellate Division's rationale for dismissing the case. In the first action, plaintiff sought a de novo adjudication of its breach of contract claims, ignoring the fact that the Chief Engineer had already made a detailed determination which, [**682] pursuant to the parties' contract, was "conclusive, final and binding" on the parties (*Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp., supra,* 208 AD2d, at 64-65, *affd* 87 NY2d 927). Defendant warned plaintiff that it would move to dismiss if plaintiff declined to amend the complaint to request instead the limited, available judicial review of the Chief Engineer's decision (*id.,* at 65-66). Thus, "Yonkers adopted a calculated and tactical stance ... to escape the bargained-for dispute resolution clause and to avoid any challenge to the Chief Engineer's actions, while invoking its policy argument [that the alternative dispute resolution provision was void]" (*id.,* at 66). In dismissing the complaint with prejudice, the Appellate Division essentially held plaintiff to its tactical [*381] abandonment of any challenge to the merits of the Chief Engineer's determination and therefore was warranted in bringing the litigation between the parties to a conclusive ending. * Thus, "our affirmance of the Appellate Division's order dismissing the complaint with prejudice" (*id.,* 87 NY2d, at 930) is best viewed as "a final judgment upon the merits" preventing tolling under CPLR 205 (a) (*cf., Maitland v Trojan Elec. & Mach. Co.,* 65 NY2d 614, 615-616 [where there is no "dismissal with prejudice," the "dismissal ... is not a merits determination"]).

* Barring a plaintiff's second action where the first action was dismissed based upon insufficiency of the complaint is justified by the ease with which an initial pleading can be amended (Restatement [Second] of Judgments § 19, comment *d*). Thus, plaintiff does not and could not contend that the Appellate Division lacked the power to dismiss the first action on the merits.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Bellacosa, Smith, Ciparick and Wesley concur; Judge Rosenblatt taking no part.

Order affirmed, with costs.