

Banking Law § 673: Violations of Civil Banking Regulations Held to Constitute Criminal Misapplication of Bank Funds

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To the extent that the harsh consequences of contributory negligence are mitigated by New York's comparative negligence statute, the necessity for an independent consortium action is diminished, since preservation of the consortium spouse's suit no longer is a genuine concern. Hence, it is expected that other New York courts will follow the lead of the *Maidman* court and will apply comparative negligence principles to derivative loss of consortium claims.

William R. Moriarty

Banking Law § 673: Violations of civil banking regulations held to constitute criminal misapplication of bank funds

Section 673 of the New York Banking Law³⁴ provides that a bank officer who "abstracts or willfully misapplies" a bank's funds, property or credit is guilty of a felony.³⁵ Interpreting the predecessor statute,³⁶ the Court of Appeals has stated that a bank officer can be convicted of willful misapplication without a showing of an intent to injure or defraud.³⁷ Moreover, an officer who "knowingly" uses bank funds in a manner not authorized by law to benefit himself possesses a sufficiently criminal state of mind to be convicted under the provision.³⁸ Recently, in *People v. Kagan*,³⁹ the Appel-

have prolonged the harshness of the contributory negligence rule. THIRTEENTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1975), in TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE 232, 238-39 (1976).

³⁴ N.Y. BANKING LAW § 673 (McKinney 1971).

³⁵ Section 673 of the Banking Law provides:

Any officer, director, trustee, employee or agent of any corporation to which the banking law is applicable, or any employee or agent of any private banker, who abstracts or wilfully misapplies any of the money, funds or property of such corporation or private banker, or wilfully misapplies its or his credit, is guilty of a felony. Nothing in this section shall be deemed or construed to repeal, amend or impair any existing provision of law prescribing a punishment for any such offense.

Id.

³⁶ Section 673, enacted pursuant to ch. 1031, § 18 [1965] N.Y. Laws 1757, was originally part of the penal law. See ch. 185, § 11 [1939] N.Y. Laws 2281 (current version at N.Y. BANKING LAW § 673 (McKinney 1971)).

³⁷ *People v. Marcus*, 261 N.Y. 268, 278, 185 N.E. 97, 99 (1933); see *People v. Kresel*, 243 App. Div. 137, 141, 277 N.Y.S. 168, 174 (3rd Dep't 1935); *People v. Berardini*, 150 Misc. 311, 314, 269 N.Y.S. 381, 384 (N.Y.C. Gen. Sess. N.Y. County 1934). *Marcus* and *Kresel* arose out of the same factual situation.

³⁸ *People v. Marcus*, 261 N.Y. 268, 277-78, 185 N.E. 97, 98-99 (1933). In *Marcus*, two bank officers borrowed money from the bank in order to satisfy debts incurred by corporations which they controlled. *Id.* at 276, 185 N.E. at 97-98. Because the loan exceeded the

late Division, First Department, expanded the scope of criminal liability under New York banking law holding that a violation of section 673 occurs whenever a bank official uses bank funds in contravention of a civil banking provision, regardless of whether he intends to benefit from his actions.⁴⁰

The defendants in *Kagan*, officers and directors of the American Bank and Trust Company (ABT),⁴¹ allegedly extended the bank's credit and deposited the bank's funds in violation of three civil regulatory provisions.⁴² These transactions were carried out

statutory limitation on the amount that a bank could lend to a single entity, see Banking Law, ch. 369, § 108 [1914] N.Y. Laws 1293-94 (current version at N.Y. BANKING LAW § 103(1) (McKinney 1971)), these officers were convicted of misapplying bank funds under section 673's predecessor provision. See ch. 88, § 305 [1909] N.Y. Laws 2281 (current version at N.Y. BANKING LAW § 673 (McKinney 1971)). Interpreting this section, the Court of Appeals looked at the analogous federal misapplication statute which contained the words "with intent . . . to injure or defraud . . . such bank," see Act of Sept. 26, 1918, ch. 177, § 7, 40 Stat. 972 (1918) (current version at 18 U.S.C. § 656 (1976)), and reasoned that since these words were not contained in New York's misapplication statute, they were not intended to be read into it. 261 N.Y. at 277-78, 185 N.E. at 98. The Court concluded, therefore, that the statute made it illegal for a bank officer knowingly to use bank assets other than for "legitimate investment, even though he had no intention of cheating or defrauding anybody." *Id.* at 278, 185 N.E. at 98. In a dissenting opinion, Judge Lehman agreed that a corrupt motive was not required by the statute if an officer knowingly acted in violation of its terms, but he stated that the defendants must have believed that their acts were improper and illegal. *Id.* at 298-99, 185 N.E. at 106-07 (Lehman, J., dissenting). The defendants in *Marcus* apparently did not possess such a culpable intent since they relied on the advice of counsel who assured them that the transaction was legitimate. See *id.* at 299-300, 185 N.E. at 107 (Lehman, J., dissenting).

After the Court of Appeals decided the *Marcus* case, the federal misapplication statute was amended, Title 18 United States Code Amendments of 1948, Pub. L. No. 80-772, § 641, 62 Stat. 729 (1948), and the words "with intent to injure or defraud" were deleted. See 18 U.S.C. § 656 (1976). The federal courts, however, have continued to require such an intent. See *United States v. Salinas*, 654 F.2d 319, 326-27 (5th Cir. 1981); *United States v. Riley*, 550 F.2d 233, 236 (5th Cir. 1977); *United States v. Docherty*, 468 F.2d 989, 994-95 (2d Cir. 1972); *United States v. Fortunato*, 402 F.2d 79, 80 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969). This appears to comport with congressional intent. See note 59 *infra*.

³⁹ 83 App. Div. 2d 517, 441 N.Y.S.2d 256 (1st Dep't 1981).

⁴⁰ *Id.* at 517-18, 441 N.Y.S.2d at 257.

⁴¹ *Id.* at 518, 441 N.Y.S.2d at 257 (Kupferman, J.P., dissenting). Defendant Saul Kagan was chairman of ABT's Executive Committee and supervisor of its International Division. *Id.* at 518-19, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). Defendant Jean Wolf headed ABT's International Division which was responsible for all foreign accounts. *Id.* at 518, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). Defendant Torleaf Benestad was the senior executive vice president of ABT and supervised the bank's treasury department. *Id.* at 519, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). Benestad pleaded guilty to three counts under section 673, but preserved for appeal the issue whether intent to defraud is required by the statute. *Id.* at 518, 441 N.Y.S.2d at 257 (Kupferman, J.P., dissenting).

⁴² *Id.* at 519, 441 N.Y.S.2d at 257-58 (Kupferman, J.P. dissenting); see N.Y. BANKING LAW §§ 103(1), (8), 106(1) (McKinney 1971).

between ABT and other banks controlled by an Argentinian banker who was seeking approval to purchase ABT.⁴³ Following the failure of ABT, an investigation revealed that the loans exceeded statutory limits⁴⁴ as well as the amount approved by ABT's board of directors.⁴⁵ Additionally, it was found that on three occasions the defendants violated state banking regulations by depositing funds for 1-day periods in a bank which had not been designated as a depository bank.⁴⁶ All of the money involved in these transactions was repaid with interest.⁴⁷ After a jury trial in Supreme Court, New York County, the defendants were convicted of

⁴³ 83 App. Div. 2d at 519, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). At the time of the alleged improper loans, David Graiver, an Argentinian who controlled several foreign banks was in the process of purchasing ABT. *Id.* at 518, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). He became a member of ABT's board of directors and of its executive and finance committees. *Id.*, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). The defendants allegedly made loans to Graiver and deposits to Banque Pour L'Amerique du Sud (BAS), a bank which Graiver controlled. *Id.* at 519, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting).

⁴⁴ *Id.* at 518, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). The banking law prohibits a bank from "lend[ing] to any person . . . an amount which will exceed ten percentum of the capital stock, surplus fund and undivided profits of such bank or trust company." N.Y. BANKING LAW § 103(1) (McKinney 1971). If the loan is secured, however, the bank may lend up to 25% of its assets. *Id.* § 103(1)(d)(2). Because ABT's loan to BAS was unsecured and exceeded the 10% maximum, a violation of section 103 was alleged. 83 App. Div. 2d at 519, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting).

⁴⁵ 83 App. Div. 2d at 519, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). The banking law provides that "[n]o bank or trust company shall . . . [l]end any sum of money to any executive officer of such bank or trust company unless . . . specifically approved in writing by a majority of the board of directors." N.Y. BANKING LAW § 103(8) (McKinney 1971). This requirement of prior approval also applies to loans made to director-controlled entities. *See generally* *People v. Knapp*, 206 N.Y. 373, 382-83, 99 N.E. 841, 844-45 (1912). Since Graiver became a director of ABT, *see* note 10 *supra*, while he controlled BAS, this approval was required. The ABT board granted BAS a line of credit of \$400,000 and later increased this amount to \$2.2 million. 83 App. Div. 2d at 518, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). It was determined, however, that this increased credit limit had been exceeded in violation of section 103(8). *Id.* at 519, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting).

⁴⁶ 83 App. Div. 2d at 519, 441 N.Y.S.2d at 258 (Kupferman, J.P., dissenting). Section 106 provides that:

No bank or trust company shall deposit any of its funds with any other banking corporation or private banker in an amount exceeding ten percentum of the capital stock, surplus fund and undivided profits of such bank or trust company unless such banking corporation or banker has been designated as a depository . . . by a vote of a majority of the directors of the bank or trust company.

N.Y. BANKING LAW § 106(1) (McKinney 1971). Since BAS was not designated as a depository bank by ABT's board, it was found that the deposits of more than 10% of ABT's assets violated section 106. In each instance, the amount deposited was repaid the following business day. 83 App. Div. 2d at 519, 441 N.Y.S.2d at 259.

⁴⁷ 83 App. Div. 2d at 519, 441 N.Y.S.2d at 259 (Kupferman, J.P., dissenting).

a felony under section 673 by virtue of their use of bank funds in contravention of civil banking regulations.⁴⁸

On appeal, the Appellate Division, First Department, affirmed the convictions, holding that a bank official who knowingly uses funds in a manner inconsistent with banking regulations is guilty of a felony.⁴⁹ In a brief memorandum opinion,⁵⁰ the court stated that this conclusion was supported by the language of section 673 and by the Court of Appeals decision in *People v. Marcus*⁵¹ which had recognized that an intent to injure or defraud need not be established to sustain a conviction.⁵² Similarly, implying that an intent to benefit personally also is not required by the statute, the court noted that the existence of such a mental state is irrelevant.⁵³

In his dissent, Presiding Justice Kupferman stated that the majority had applied the civil banking regulations unconstitutionally since these sections gave no notice that violators might be subject to criminal sanctions.⁵⁴ The dissent maintained that New York should follow the federal court's view that an intent to defraud the bank is required to convict a defendant under the analogous federal misapplication statute.⁵⁵ Moreover, Presiding Justice Kupferman noted that the *Marcus* opinion addressed the issue of intent only in the context of misapplications motivated by a defendant's

⁴⁸ *Id.* at 517-18, 441 N.Y.S.2d at 256. The defendants were neither tried nor convicted of the alleged civil banking violations. *Id.* at 520, 441 N.Y.S.2d at 259 (Kupferman, J.P., dissenting).

⁴⁹ *Id.* at 517-18, 441 N.Y.S.2d at 257.

⁵⁰ The majority opinion was joined by Justices Birns, Sandler, Sullivan, and Carro. Presiding Justice Kupferman dissented.

⁵¹ 261 N.Y. 268, 278, 185 N.E. 97, 98 (1933).

⁵² 83 App. Div. 2d at 517, 441 N.Y.S.2d at 256-57; see *People v. Marcus*, 261 N.Y. 268, 278, 185 N.E. 97, 98 (1933); note 38 *supra*.

⁵³ 83 App. Div. 2d at 517, 441 N.Y.S.2d at 257. The court noted that "[i]f the intention to benefit personally were relevant, which it is not, the conclusion is inescapable that the defendants' actions" were motivated by self-interest. *Id.* at 517-18, 441 N.Y.S.2d at 257.

⁵⁴ *Id.* at 520, 441 N.Y.S.2d at 259-60 (Kupferman, J.P., dissenting). Presiding Justice Kupferman relied on United States Supreme Court precedent in stating that a "criminal statute [must] give 'a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute.'" *Id.*, 441 N.Y.S.2d at 259-60 (Kupferman, J.P., dissenting) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) and *United States v. Hariss*, 347 U.S. 612, 617 (1954)). He also noted that the Fifth Circuit recently had rejected an attempt to use civil violations to satisfy the federal misapplication statute. *Id.* at 520-21, 441 N.Y.S.2d at 260 (Kupferman, J.P., dissenting) (citing *United States v. Christo*, 614 F.2d 486, 490, 492 (5th Cir. 1980)).

⁵⁵ 83 App. Div. 2d at 520, 441 N.Y.S.2d at 260 (Kupferman, J.P., dissenting); see note 38 *supra*.

“own self interest.”⁵⁶

Although *Marcus* appears at first glance to dispose of the issues involved in *Kagan*,⁵⁷ it is submitted that the appellate division failed to consider adequately the possibility that section 673 should apply only when the defendant has acted to benefit an entity other than the bank which he serves.⁵⁸ While the Court of Appeals in *Marcus* stated that an intent to defraud is not required for conviction under section 673,⁵⁹ it left open the possibility that a

⁵⁶ 83 App. Div. 2d at 521, 441 N.Y.S.2d at 260 (Kupferman, J.P., dissenting). Presiding Justice Kupferman suggested that *People v. Marcus*, 261 N.Y. 268, 185 N.E. 97 (1933), is distinguishable because the *Marcus* Court declared that a defendant's “good intentions” are irrelevant when bank funds have been used for the “benefit of other enterprises in which [he is] interested.” 83 App. Div. 2d at 521, 441 N.Y.S.2d at 260 (Kupferman, J.P., dissenting) (quoting 261 N.Y. at 278, 185 N.E. at 98). He reasoned, therefore, that since the *Kagan* defendants reaped no personal benefit from the transactions, the absence of an intent to defraud was relevant. 83 App. Div. 2d at 521, 441 N.Y.S.2d at 260 (Kupferman, J.P., dissenting).

⁵⁷ See *People v. Marcus*, 261 N.Y. 268, 277-79, 286-89, 185 N.E. 97, 98-99, 101-03 (1933); note 5 *supra*.

⁵⁸ The Court of Appeals in *Marcus* adopted the Supreme Judicial Court of Massachusetts' definition of “misapply” which is:

to use the funds of the bank in a manner or for a purpose not authorized by law, to divert the funds from a rightful or legitimate purpose to a wrongful or illegitimate purpose, to use the funds improperly

261 N.Y. at 278, 185 N.E. at 98-99 (quoting *Commonwealth v. Nichols*, 257 Mass. 289, 293, 153 N.E. 787, 790 (1926)). It is submitted that this definition contemplates something more than the mere use of funds in violation of a civil regulation. Indeed, in *Commonwealth v. Nichols*, 257 Mass. 289, 302, 153 N.E. 787, 791 (1926), the defendants were acting for their own benefit. Similarly, in *Marcus* and its progeny the defendants acted pursuant to the interests of an entity other than their bank. See *People v. Marcus*, 261 N.Y. 268, 278-79, 185 N.E. 97, 98-99 (1933); *People v. Kresel*, 243 App. Div. 137, 145-46, 277 N.Y.S. 168, 179 (3d Dep't 1935) (Hill, J.P., concurring); *People v. Berardini*, 150 Misc. 311, 316-17, 269 N.Y.S. 381, 387 (N.Y.C. Gen. Sess. N.Y. County 1934). In *Marcus* and *Kresel* the defendants used corporation funds to purchase stock to satisfy a debt incurred by their other business interests. 261 N.Y. at 276, 185 N.E. at 98. In *Berardini*, the defendants made an illegal loan to an Italian bank which they controlled. 150 Misc. at 316-17, 269 N.Y.S. at 386-87.

⁵⁹ See *People v. Marcus*, 261 N.Y. 268, 278, 185 N.E. 97, 98 (1933). Persuaded by the fact that the federal courts require a showing of intent to injure or defraud despite an amendment eliminating words to this effect in the federal statute, the dissent felt that the *Kagan* majority's interpretation of *Marcus* “cannot be good law.” See *People v. Kagan*, 83 App. Div. 2d 517, 521, 441 N.Y.S.2d 256, 260 (1st Dep't 1981) (Kupferman, J.P., dissenting). It is submitted, however, that this reasoning is questionable. There can be no question that the federal misapplication statute was intended to deal with crimes of specific intent. Its text is directed at a federal bank officer who “embezzles, abstracts, purloins or willfully misapplies” funds. 18 U.S.C. § 656 (1976). Moreover, the words “with intent to injure or defraud,” in fact, were contained in the original federal misapplication statute. See Act of Sept. 26, 1913, ch. 177, § 7, 40 Stat. 972 (1918) (current version at 18 U.S.C. § 656 (1976)). Although this phrase was removed in 1948, the legislators made clear that the elements of the crime should remain intact. “The revised section without changing in any way the

finding of willful misapplication may be unjustified when directors have acted for the benefit of the banking corporation.⁶⁰ It is suggested that the *Marcus* definition of "willful misapplication" should be viewed as the limit of this section's role in the regulatory scheme of the banking law. Indeed, the rejection of an intent-to-defraud mental state was a broad interpretation of the statute.⁶¹ The *Kagan* court, however, has broadened the *Marcus* definition of misapplication by indicating that a bank official will be guilty of a felony whenever he knowingly uses funds in violation of civil banking regulations.⁶²

Notably, section 673 was promulgated to discourage bank officials from exposing depositors and investors to unreasonable risks of loss through misuse of bank funds.⁶³ It is suggested, however, that this result can be achieved without such severe consequences

meaning or substance of existing law, . . . combines related provisions largely rewritten in matters of style." REVISION OF TITLE 18 UNITED STATES CODE, H.R. No. 304, 80th Cong., 2d Sess. A59 (1947).

⁶⁰ See *People v. Marcus*, 261 N.Y. 268, 278, 185 N.E. 97, 98 (1933). The *Marcus* Court stated that:

[g]ood intentions do not justify the misapplication or misuse of corporate assets when the directors know that the use they are making of them is not for the benefit of the company, but for the use and benefit of other enterprises in which they are interested.

Id.; accord, *Commonwealth v. Nichols*, 257 Mass. 289, 302, 153 N.E. 787, 791 (1926). In *Nichols*, the defendant bank officer applied the bank's funds without securing proper collateral to satisfy a personal loan. *Id.* at 293-94, 153 N.E. at 788. The Supreme Judicial Court stated that the "offense was complete when he made and delivered the checks. . . . From the moment he delivered them . . . he was applying the bank's credit for his own purposes." *Id.* at 302, 153 N.E. at 791. *Kagan* appears to be the first case in New York or Massachusetts where a court has applied a misapplication statute when the officers arguably were acting in the best interests of the bank. Compare 83 App. Div. 2d at 518, 441 N.Y.S.2d at 257 (defendants acted for "their private interests") with *id.* at 520, 441 N.Y.S.2d at 259 (defendants "acted in good faith relying on long standing banking practices and policies") (Kupferman, J.P., dissenting).

⁶¹ A narrow interpretation of the term "willfully misapply" would be consistent with the general rule that criminal statutes should be strictly construed. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW § 10, at 72-74 (1972). This is especially true of felony statutes. See *id.* at 73.

⁶² 83 App. Div. 2d at 517-18, 441 N.Y.S.2d at 257.

⁶³ Cf. *People v. Knapp*, 206 N.Y. 373, 382-83, 99 N.E. 841, 845 (1912) (discussing objectives of New York Banking Law); Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STAN. L. REV. 687, 703-08, 726-29 (1980) (discussing objectives of federal banking regulations). The Court of Appeals stated in *Knapp* that "[t]he Banking Law should be construed in accordance with the obvious intention of the legislature so as . . . to prevent looseness in doing business. The prime object is to protect the public, including depositors . . ." 206 N.Y. at 382-83, 99 N.E. at 845; cf. *State v. Lindberg*, 125 Wash. 51, 64-65, 215 P. 41, 47 (1923) (Washington banking regulation "was intended to protect that part of the general public who make banks the depositories of their funds").

by looking to other applicable banking law provisions when a technical violation of the regulatory scheme is not the product of an officer's self interest.⁶⁴ Section 665, for example, makes it a misdemeanor for a bank officer to participate in the fraudulent insolvency of a bank or to violate any statute or duty for which no other penalty is provided.⁶⁵ Moreover, section 41 provides an administrative device for removing bank officers who violate any statute or regulation or who engage in "unauthorized or unsafe practices" after being admonished by the banking superintendent.⁶⁶ Both of these provisions, as well as the civil regulations pertaining to the use of bank funds,⁶⁷ are applied without regard to a bank officer's motives. It is submitted, therefore, that bank officers who have acted in good faith to further the bank's interests⁶⁸ should not be exposed to the severe felony sanctions of section 673.⁶⁹ It is suggested that the *Kagan* court's reading of the statute may not only produce unfair results,⁷⁰ but also may diminish a bank's effective-

⁶⁴ See, e.g., N.Y. BANKING LAW §§ 41-(1), 103(7), 665 (McKinney 1971).

⁶⁵ See N.Y. BANKING LAW § 665 (McKinney 1971). *But cf.* *People v. Colozzo*, 54 Misc.2d 687, 689-92, 283 N.Y.S.2d 409, 414-16 (Sup. Ct. Kings County 1967), *aff'd*, 32 App. Div. 2d 927, 303 N.Y.S.2d 348 (2d Dep't 1969) (court held that catch-all penal law provision similar to section 665 violated due process when applied to unconsolidated statute which did not provide its own penalty).

⁶⁶ N.Y. BANKING LAW § 41(1) (McKinney 1971).

⁶⁷ E.g., N.Y. BANKING LAW §§ 103(1), (8), 106 (McKinney 1971). See notes 44-46 *supra*. Other civil banking regulations regarding the use of bank funds include section 110 of the banking law which requires every bank and trust company to create a surplus fund, from which no dividends or expenses may be paid, and section 103(7) of the banking law which prohibits lending money to enable a person to purchase stock in the bank unless the loan is based on security with a value of at least 15% more than the amount loaned. N.Y. BANKING LAW §§ 103(7), 110 (McKinney 1971).

⁶⁸ Notably, the dissent in *Kagan* indicated that the defendants acted within the scope of ABT's usual business practices and emphasized that "[b]y all indications, it appears these defendants did act in good faith." 83 App. Div. 2d at 520, 441 N.Y.S.2d at 259 (Kupferman, J.P., dissenting).

⁶⁹ N.Y. BANKING LAW § 673 (McKinney 1971). Felony offenses outside of the penal law are deemed to be class E felonies, N.Y. PENAL LAW § 55.10(2)(b) (McKinney 1975), and are punishable by up to 4 years imprisonment, *id.* § 70.00(2)(e).

⁷⁰ In *People v. Horvatt*, 237 App. Div. 289, 261 N.Y.S. 303 (3d Dep't 1932), the court voiced the concern that harsh results might follow from a broad construction of criminal conduct under the banking law:

while it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrong doing of bank officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty . . . criminal offenses under those statutes.

Id. at 292, 261 N.Y.S. at 307 (citations omitted).

ness as a lending institution.⁷¹ Thus, it is hoped that the judiciary will examine the *Kagan* court's decision and arrive at a more equitable interpretation of section 673.

John James Lynch

DEVELOPMENTS IN NEW YORK LAW

Economic loss due to defective product design held sufficient to state a cause of action in strict products liability against remote manufacturer

In the area of products liability, the requirement that the plaintiff have a direct contractual relationship with the manufacturer against whom it brings an action for damages traditionally had acted as a formidable barrier to the plaintiff's recovery.⁷² This privity requirement gradually has eroded, however, and is now dependent upon two variables: the type of harm the plaintiff has incurred and the theory upon which the plaintiff's cause of action is premised.⁷³ Thus, in New York, a plaintiff who seeks to redress

⁷¹ Based on the holding in *Kagan*, bank officials, fearing disproportionate felony sanctions, may be reluctant to lend money when there is a mere possibility that the amount lent may exceed a regulatory limit, even if the transaction would be in the bank's best interest and there is no risk of loss. See Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STAN. L. REV. 687, 696 (1980).

⁷² When there is a direct contractual relationship between the plaintiff and the defendant-manufacturer, the parties are said to be in "privity of contract." See R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 9 (1980); Comment, *Manufacturers' Liability to Remote Purchasers for "Economic Loss" Damages—Tort or Contract*, 114 U. PA. L. REV. 539, 545 (1966) [hereinafter cited as *Tort or Contract*]. This privity requirement once effectively barred plaintiffs from recovering damages against remote manufacturers. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 373, 161 A.2d 69, 77 (1960) (manufacturers were able to achieve a "large measure of immunity for themselves"); Howard & Watkins, *Strict Products Liability in New York and the Merging of Contract and Tort*, 42 ALB. L. REV. 603, 603-04 (1978). For illustrations of the types of cases which were barred by the requirement of privity, see *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 343, 80 N.E. 482, 482 (1907) (remote manufacturer "ordinarily is not responsible . . . to those who may receive injuries caused by [a product's] defective construction"; negligence action barred); *Turner v. Edison Storage Battery Co.*, 248 N.Y. 73, 74, 161 N.E. 423, 424 (1928) ("[t]here can be no warranty [either express or implied] where there is no privity of contract"); *Chysky v. Drake Bros. Co.*, 235 N.Y. 468, 472, 139 N.E. 576, 578 (1923) ("unless there be privity of contract, there can be no implied warranty").

⁷³ See generally Zammit, *Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases: What Result in New York?*, 20 N.Y.L.F. 81, 82, 87 (1974). The type of damages incurred by the plaintiff are characterized as economic or physical. *Id.* at 82. Economic damages include, *inter alia*, loss of bargain and cost of repairs. *Id.* Physical