

To be Argued by:  
PHILIP ALLEN LACOVARA

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**New York Supreme Court**  
**Appellate Division – First Department**

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BLUEBIRD PARTNERS, L.P.,

*Plaintiff-Appellant-Cross-Respondent,*

– against –

FIRST FIDELITY BANK, N.A., NEW JERSEY,

*Defendant-Respondent-Cross-Appellant,*

MIDLANTIC NATIONAL BANK; UNITED JERSEY BANK;  
NATIONSBANK OF TENNESSEE, N.A.; CONSTELLATION BANK;  
CORESTATES NEW JERSEY NATIONAL BANK; WILENTZ,  
GOLDMAN & SPITZER, P.C. and KELLEY DRYE & WARREN,

*Defendants.*

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**REPLY BRIEF FOR DEFENDANT-RESPONDENT-  
CROSS-APPELLANT**

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## INTRODUCTION

Bluebird has chosen to couple a thin response to our arguments with a charge that First Fidelity is a “serial appellant” (BB Br. at 18)<sup>1</sup> whose claims of error – legitimate or not – are not properly before this Court. But this is the *first* appeal from the judgment against First Fidelity. It is the *first* opportunity for First Fidelity to challenge the trial errors that resulted in a massive verdict against it. No one disputes that this case has a long history, or that it has traveled to this Court several times on interlocutory review. But Bluebird should not be permitted to suggest that this appellate history is somehow the result of First Fidelity’s “selfish misuse of judicial time,” BB Br. at 18, especially given that more than half of the prior appeals were *Bluebird’s* challenges to adverse pre-trial rulings.

Six of the seven prior appeals in this case took place *before the trial*. The only appeal that came *after* the jury’s verdict was *Bluebird’s* appeal from Justice Gammerman’s grant of JNOV to First Fidelity. That appeal, in which First Fidelity was the Respondent, concerned a single issue – proximate cause. The errors First Fidelity has raised in *this* appeal – the only one following the entry of

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<sup>1</sup> Citations to “BB Br. \_\_” refer to Bluebird’s “Reply Brief for Plaintiff-Appellant-Cross-Respondent.” Citations to “FF Br. \_\_” refer to First Fidelity’s “Brief for Defendant-Respondent-Cross-Appellant. Citations to “FF Proc. Br. \_\_” refer to First Fidelity’s “Brief for Defendant-Appellant” in the companion “Procedural” appeal. As in First Fidelity’s opening brief, citations to A\_\_ refer to the Appellant’s Appendix, and citations to RA\_\_ refer to the Respondent’s Appendix.

judgment – were neither presented nor decided in the prior appeal. Indeed, those issues *could not* have been decided. Neither the “law of the case” nor any other rule of jurisdiction or equity prevents this Court from considering them.

**I. THE ISSUES RAISED IN FIRST FIDELITY’S OPENING BRIEF ARE PROPERLY BEFORE THIS COURT.**

**A. The “Law Of The Case” Doctrine Does Not Preclude Review of Our Arguments.**

“Law of the case,” a discretionary doctrine under which a court may choose not to reconsider issues that have clearly been presented and decided at an earlier stage of the same case, does not preclude this Court from considering any issue raised in this appeal. Contrary to Bluebird’s assertions, none of these issues was presented to this Court for review on any prior appeal, and none of this Court’s earlier opinions resolved them.

As Bluebird recognizes (BB Br. at 16), our opening brief very carefully separates those issues that have been decided against First Fidelity in prior appeals from those issues that have not. While we continue to believe (i) that G.O.L. § 13-107 is preempted by federal law; (ii) that that statute does not, in any case, apply to the securities held by Bluebird; and (iii) that Bluebird failed to present sufficient evidence of proximate cause to sustain the verdict (as the trial judge had found), we recognize that each of those issues was properly presented and clearly resolved in a prior appeal. We are preserving the issues for possible presentation to the

Court of Appeals. This Court may certainly re-examine those issues if it so chooses (see *People v. Evans*, 94 N.Y.2d 499, 503 (2000) (“[L]aw of the case is a judicially crafted policy that expresses the practice of courts \*\*\* [and is] not a limit to their power.”) (citation and quotation marks omitted)). Whether to revisit these three issues is purely a matter of this Court’s discretion.

By contrast, the issues we have briefed in this appeal have never been “properly raised” before this Court (*Gropper v. St. Luke’s Hosp. Ctr.*, 255 A.D.2d 123, 123 (1st Dep’t 1998)) or any other appellate tribunal, and they have not been decided against First Fidelity. Bluebird claims that this Court’s October 7, 2004, Decision somehow finally resolved issues it does not purport to resolve, that were not presented in that appeal, and that could not have been presented. As we discuss more fully in the companion “procedural” appeal, however, the October 7 Decision resolved *Bluebird’s* appeal from Justice Gammerman’s order setting aside the jury’s verdict and granting judgment to First Fidelity. The decretal language of this Court’s opinion is narrow, reversing the “judgment” in favor of First Fidelity and ordering denial of First Fidelity’s request for JNOV. The opinion does not purport to deny First Fidelity’s separate request for a new trial, which the trial court had found it unnecessary to address once the court decided to grant JNOV.

Bluebird's claim that "law of case" precludes review of First Fidelity's claims of trial error is based on the assertion that First Fidelity raised these issues in the October 2004 appeal and that this Court resolved them at that time. But First Fidelity was the *Respondent* in October 2004. Under the CPLR First Fidelity as respondent could only (i) defend the JNOV, and (ii) assert other grounds for affirmance of the judgment. CPLR § 5501(a)(1); *Bellevue So. Assocs. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 299 n.5 (1991) (holding that a respondent's alternative new-trial requests "go beyond affirmance of the judgment and cannot be awarded to a nonappealing party"); *Parochial Bus Sys., Inc. v. Bd. of Educ.*, 60 N.Y.2d 539, 545-46 (1983). It was not permitted to request the distinct, affirmative relief of a new trial. *Hecht v. City of New York*, 60 N.Y.2d 57 (1983).

For that reason (among others), First Fidelity's brief to this Court defending the JNOV did not present any trial error issues for review in this Court. First Fidelity's brief in that appeal asked this Court (as an alternative to affirmance) to *remand* the case to the trial court so that the IAS judge could consider the still-pending new trial motion that challenged the verdict based on a number of significant evidentiary and instructional errors. To demonstrate the validity of that request, First Fidelity provided a short summary of some of the errors raised in that motion. It did not ask this court to resolve those claims; the CPLR did not permit it to do so. Indeed, out of an abundance of caution, First Fidelity explicitly asked

for an opportunity “to fully brief” the issues in the event this Court wished to consider them “in the first instance.” FF Proc. Br. at 24. That opportunity never came; First Fidelity’s only discussion of these trial error issues was the summary provided in its Respondent’s brief.

“Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a ‘full and fair’ opportunity to litigate the initial determination.” *People v. Evans*, 94 N.Y.2d 499, 502 (2000) (citing *Arizona v. California*, 460 U.S. 605, 619 (1983); *People v. Guerra*, 65 N.Y.2d 60, 63 (1985); *Sales v. State Farm Fire & Cas. Co.*, 902 F.2d 933, 936 (11th Cir. 1990)); see also *Hass & Gottlieb v. Sook Hi Lee*, 11 A.D.3d 230, 231 (1st Dep’t 2004) (law of the case doctrine “presumes that the parties were afforded a full and fair opportunity to litigate the issue in the course of the earlier proceedings”); *Gee Tai Chong Realty Corp. v. GA Ins. Co.*, 283 A.D.2d 295 (1st Dep’t 2001) (same).

No such opportunity was presented here. First Fidelity had no reason to believe that this Court would decide to deny relief that it had no power to award, much less that it would do so without plenary briefing. Appropriately, First Fidelity discussed these issues in a summary fashion, devoting one or two sentences to each. The October 7 Decision did not purport to resolve the issues, but even if it had, the “law of the case” doctrine would not militate against re-

examination, because the prior appeal was anything but a “full and fair” opportunity for litigation.

**B. Even If It Applied, The “Law Of The Case” Doctrine Would Not Cover Most Of The Issues Raised In This Appeal.**

Even if this Court’s prior opinion *had* explicitly addressed and resolved certain new-trial issues, and even if those issues *were* properly before the Court at that time, and even if they *were* fully and fairly litigated in the prior appeal, “law of the case” would still be no bar to this Court’s consideration of most of the errors presented here. For example, First Fidelity’s brief in the October 2004 appeal did not so much as *mention* the trial court’s failure to instruct on the affirmative defense of consent. Even under Bluebird’s expansive reading of the prior decisions, there is no question that this issue has never before been raised or decided.

Moreover, several of the issues First Fidelity is raising on this appeal from the judgment against it involve instructional errors. The CPLR is very clear that this Court’s jurisdiction includes the power to consider instructional errors, even if those errors have been litigated in a prior interlocutory appeal. *Compare* CPLR §§ 5501(a)(1) and 5501(a)(2) (limiting appellate jurisdiction of certain interlocutory orders that have “previously been reviewed by the court to which the appeal is taken”) *with id.* at § 5501(a)(3) (omitting this restriction in the grant of jurisdiction to review instructional errors).

## II. BLUEBIRD BARELY DISPUTES THAT THE VERDICT IS AGAINST THE WEIGHT OF THE EVIDENCE.

Bluebird offers almost no argument in response to our position that no fair interpretation of the evidence could lead to the conclusion that First Fidelity was acting “imprudently” when it failed to move to lift the stay. Instead, Bluebird criticizes First Fidelity for “repackag[ing]” (BB Br. at 28) its insufficiency arguments as a challenge to the weight of the evidence, as if such overlap between the two arguments were unusual or inappropriate. In fact, that is exactly what a “weight of the evidence” challenge is supposed to be. The question whether a jury verdict is against the *weight* of the evidence is a factual determination quite distinct from the question of whether a jury verdict, as a matter of law, is supported by legally sufficient evidence. *Cohen v. Hallmark Cards, Inc.*, 45 N.Y.2d 493, 498-99 (1978).

As the Court of Appeals has explained: “Although these two inquiries may appear somewhat related, they actually involve very different standards *and may well lead to disparate results.*” *Id.* at 498 (emphasis added). Even where the evidence may be technically sufficient to support a verdict, a court may still find that the verdict is against the “weight” of the evidence, if it believes that the jury’s interpretation of that evidence was not “fair.” *McDermott v. Coffee Beanery, Ltd.*, 9 A.D.3d 195, 206 (1st Dep’t 2004). Certainly, arguments that support a holding that the evidence was insufficient to support a given verdict will also support a

finding that the verdict is against the weight of the evidence. But it does not follow that, if the evidence is legally *sufficient* to support a verdict, the verdict should not be discarded anyway as against the weight of the evidence.

Nonetheless, Bluebird's response to our weight of the evidence challenge is little more than a claim that the evidence was sufficient to support the verdict. It does not matter that the evidence we cite in our opening brief was "disputed," or that the record contains "enough evidence to support the jury's verdict." BB Br. at 30.

The question for this Court (or more properly, for the trial court on the remand that we are seeking on the separate appeal from Justice Moskowitz's refusal to address the new trial motion) is whether the jury's interpretation of that "disputed" evidence was a "fair" one. Bluebird's own recitation of the evidence shows that it was not. Bluebird attempts (at 29) to show that the "undisputed" evidence demonstrated (1) that First Fidelity never moved to lift the stay; and (2) that this decision was the cause of Bluebird's purported losses. But those "undisputed" facts simply do not address the relevant issue: Was the failure to move for relief from the stay *imprudent*? Was it *unreasonable*?

The fair weight of the evidence showed that it was neither. First Fidelity had no reason to believe that failing to make a lift stay motion would result in harm to the bondholders; it had been told the opposite by its experienced bankruptcy

lawyers. And it had every reason to believe that *making* the motion *would* harm the bondholders. Indeed, this prediction was correct. At the conclusion of the bankruptcy, fully *one third* of the value of the collateral was eaten up by the huge costs of repossession, storage, and maintenance. (It is worth noting in this regard that Bluebird repeatedly asserts that the collateral was only worth “\$55 to \$60 million” at the end of the bankruptcy. BB Br. at 23, 26. Actually, it was worth almost \$90 million. As we explained in our opening brief, the bondholders received only \$60 million because there were *\$30 million in costs* associated with the repossession – just as First Fidelity anticipated there would be. See FF Br. at 30.)

Bluebird’s remaining arguments are little more than make-weight. It is simply irrelevant that this Court held, prior to the trial, that there was a “question of fact” whether the trustees should have “moved more quickly to protect their collateral.” BB Br. at 28. We do not dispute that the allegations in the complaint established such a factual question, or that Bluebird was permitted to adduce evidence of First Fidelity’s imprudence at trial. That has nothing to do, however, with whether the evidence Bluebird *did* present fairly supported a verdict against First Fidelity.

Finally, Bluebird asserts in a footnote that our discussion of *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1 (1st Dep’t 1995), “is misplaced

because plaintiff's claim is not based on a failure to predict a legal development on a highly complicated issue." BB Br. at 28 n.6. But that is exactly what this case is about. First Fidelity was found liable and is subject to a \$73 million judgment *solely* because the jury found that it should have known, in June 1991, that Judge Balick would hold that the Bankruptcy Code requires a creditor to file a Lift Stay motion in order to receive adequate protection payments. Bluebird's own expert witness testified that no court had ever, prior to 1993, recognized such a requirement. A581. First Fidelity's bankruptcy attorneys told the trustees that such a requirement did not exist. A725-26. Bluebird's own representative, Jack Mayer, testified that the issues surrounding the decision to file the motions for adequate protection and to lift the stay were "complicated and difficult." A572. If this case is not about the failure to predict a complicated legal development, what case is?

### **III. FUNDAMENTAL FLAWS IN THE JURY INSTRUCTIONS NECESSITATE A NEW TRIAL.**

#### **A. The Trial Court Failed To Instruct The Jury On Key Principles Of Bankruptcy Law.**

Bluebird barely responds to our argument that the trial court abdicated its responsibility by refusing to instruct the jury on the key principles of bankruptcy law that should have guided its deliberations. Bluebird contends that the jury did not need to be instructed on "the confines of the Bankruptcy Code to assist it in

determining whether it was a prudent business decision to take a known risk by refusing to move to lift stay.” BB Br. at 31. That argument misses the point. First Fidelity’s decision was prudent if, at the time, a reasonable person would have concluded that the risks associated with making the lift stay motion (*i.e.*, the danger that the motion would be granted and the bondholders would be forced to repossess the collateral) outweighed the risks associated with *not* making the motion (*i.e.*, the danger that the adequate protection motion would be denied if it was not coupled with a lift stay motion). The state of the law – in particular, the question whether a lift stay motion was a legal prerequisite for a grant of adequate protection – was a crucial factor that the jury should have considered in assessing those risks. See FF Br. at 35-36.

Bluebird’s assertion that the state of the law was essentially irrelevant is surprising, in light of the fact that at trial it proposed the following jury instruction:

“[T]he factual issues that you will decide *require some understanding of a few principles of bankruptcy law*. \*\*\* That is, bankruptcy law is important in this case only to the extent that it helps you determine the ultimate issues, namely, whether each of the defendants acted or failed to act in accordance with the prudent person [standard] that I have described \*\*\*. \*\*\* [T]he law about whether a secured creditor seeking adequate protection for the market value decline of collateral resulting from the imposition of the automatic stay must move to lift the automatic stay had not definitely been decided by the courts. \*\*\* *You are entitled to take this uncertainty in the law into account when you decide whether the defendant banks acted as prudent persons in this case*. \*\*\* As I said a moment ago, the question you have to resolve is what a prudent person should have

done in the face of such uncertainty. \*\*\* ” A353-56 (emphasis added).

Bluebird also recognized that it was the trial court’s construction of the law – and not that of the experts, the lawyers, or the jurors themselves – that was binding: “[I]f anything I say about the law of bankruptcy conflicts with anything you have already heard about that law, either from the witnesses or the attorneys, you are to disregard what they said and rely instead on what I tell you. \*\*\* [I]t is not up to you as the jury to decide these questions of law.” A353.

Bluebird’s proposed charge also belies its appellate argument that there was no “dispute as to principles of superpriority,” and that “[t]he jury did not need instructions from the court” on this point. As we discussed in our opening brief (at 36-37), the experts disagreed vigorously on this point, although plaintiff’s expert ultimately conceded on cross-examination that First Fidelity’s position was correct. A580, 590. That about-face was hardly easy for the jury to follow, as even Bluebird understood: it asked the court to give a lengthy charge on the way in which a creditor can qualify for superpriority status. A357.

First Fidelity, for its part, requested an instruction that was remarkably similar to Bluebird’s as to (i) the state of the law on both of these issues and (ii) the relevance of the Bankruptcy Code to the questions before the jury. A380-84. Thus, the only person in the courtroom who did *not* believe that the jury should be instructed on the law was the judge. He was in error, as the Second Circuit’s

decision in *LNC Invs. v. First Fidelity Bank, N.A.*, 173 F.3d 454, 468 (2d Cir. 1999) demonstrates.<sup>2</sup> See FF Br. at 37-38. A new trial is the only appropriate remedy.

**B. The Breach Of Fiduciary Duty Charge Was Defective.**

**1. The Inadequate Charge Infected The Jury’s Verdicts On Both Claims.**

Bluebird contends that we “make[] no complaint about the charge on the negligence cause of action,” and that “even if the fiduciary duty charge were wholly defective, the negligence verdict would survive and the damages would be the same.” BB Br. at 32. That is wrong. Bluebird’s negligence claim, like its breach of fiduciary duty claim, hinged on a finding that First Fidelity breached its duty to act with reasonable prudence. Thus, the trial court specifically incorporated its breach of fiduciary duty instruction into its charge on the negligence claim:

“The plaintiff maintains as well, and these are Questions 5, 6 and 7, which in essence are very similar to Questions 2, 3, and 4 [the fiduciary duty questions], that there was negligence on the part of the bank. \*\*\* Again, the issue focuses on whether or not the failure, the decision was not an omission, it was really a conscious decision, the conscious decision, to not seek a lifting of the stay when the motion for adequate protection was initially filed, in 1991, constituted an

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<sup>2</sup> Bluebird’s attempt to distinguish *LNC* by claiming that “[h]ere, the bankruptcy experts agreed as to the law on superpriority” (BB Br. at 32 n.8) does not get it very far. First, there *was* a dispute about superpriority, at least initially. More importantly, there was a fierce dispute about *other* key principles of bankruptcy law, and the court *certainly* “le[ft] it to the jury to determine the state of the law.” *Id.*

action that a reasonably prudent person would not have taken under the circumstance.” A817-18.

Our argument is that the trial court erred by failing to give the jury guidance as to the factors that it should have considered in assessing whether First Fidelity’s conduct had been reasonably prudent – the standard that applied to both the fiduciary duty claim and the negligence claim. The error infected the jury’s deliberations on both claims.

## **2. Advice of Counsel.**

Bluebird fails even to mention the long line of New York authority holding that a trustee’s reliance on the advice of counsel is, at minimum, a factor in assessing the prudence of the trustee’s decisionmaking. Nor does it discuss either *LNC* or this Court’s 1998 decision in this case, both of which make that point in the very context at issue here. See FF Br. at 39-41.

The arguments that Bluebird does make rest entirely on distortions of the record. First, Bluebird argues that First Fidelity “withdrew its request to instruct the jury on an advice of counsel defense because there was no evidence that any written advice had been given, as required by the indenture.” BB Br. at 32. What actually transpired was that First Fidelity initially requested the advice-of-counsel instruction based upon both (1) the common law; and (2) the indenture’s specific provision (section 9.03(c)) that the Collateral Trustee may rely on the “*written* advice of counsel.” RA147 (emphasis added). First Fidelity subsequently

abandoned only the second basis for an advice-of-counsel instruction, given the absence of evidence that any written (as distinguished from oral) advice had been given. See A750 (“Your Honor, we think there is an issue on the prudence question, but we’re not submitting the question of reliance under the indenture.”).

Indeed, Bluebird itself recognized that *oral* advice of counsel would justify an advice-of-counsel instruction in this case, in light of the common-law rule. Bluebird tendered its own instruction that would have informed the jury that reliance even on oral advice of counsel could establish First Fidelity’s prudence. See Plaintiff’s Request No. 9, at A345-48 (observing that “[o]ral advice is deemed to carry less weight than written advice \*\*\*,” but nowhere stating that oral advice is irrelevant). See also *LNC Invs., Inc. v. First Fidelity Bank*, No. 92 CIV. 7584 (CSH), 2000 WL 1211584, \*4 (S.D.N.Y. Aug. 24, 2000) (rejecting plaintiff’s argument that the identical indenture employed here bars consideration of oral advice).

Bluebird falsely asserts that “none of the trustees could remember any specific advice that they had received regarding the need to move to lift the stay, nor did defendant prove that such advice was ever given.” BB Br. at 32-33 The record cites provide no support for that false assertion.<sup>3</sup> As we noted in our

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<sup>3</sup> Bluebird provides citation to the testimony of Melissa Matthews, who testified (correctly) that she received no *written* advice from counsel (A470-71), and that the advice she did receive concerned “what actions we should be taking in the bankruptcy.”

opening brief, Melissa Matthews, the First Fidelity officer primarily responsible for the Continental and Eastern bankruptcies, testified as follows:

“Q. Did you get any advice from your lawyers with respect to whether, as Continental’s position, that you had to do those two things [*i.e.*, lift-stay and adequate protection] together was a viable position?

\* \* \*

“THE WITNESS: Yes.

“Q. What was the advice from your lawyers?

“A. They explained to me that it was not necessary to link the two \*\*\*.” A533.

Bluebird has flipped the relevant legal standard on its head. In order to be entitled to an instruction on advice of counsel, First Fidelity did not have to *prove* that such advice had been given or that it had relied on it. The standard is whether First Fidelity put forth enough evidence for a reasonable jury to find that First Fidelity’s lawyers had given the advice described in the testimony. It satisfied this threshold standard, as Bluebird itself recognized when it proposed its own version of an advice-of-counsel instruction. A345.

Finally, plaintiff contends that the advice of counsel was irrelevant, because “the evidence demonstrated that defendant decided not to move to lift stay because

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A464. Bluebird’s remaining citations are to the testimony of the series trustees’ officers and lawyers, and to the testimony of a First Fidelity employee who left the job mere weeks after the beginning of the Continental bankruptcy. That none of these individuals remember any specific legal advice is unsurprising: The relevant advice was given to First Fidelity, the collateral trustee, after Continental submitted its brief in late 1991.

the trustees did not want the planes back. That was a business decision, not a legal decision on which advice of counsel would be relevant.” BB Br. at 33. As we discussed in our opening brief (at 35) and above (at 10), however, the “business decision” at issue cannot be considered in a legal vacuum. It is plainly relevant whether First Fidelity legitimately believed that it could achieve adequate protection without risking a lift-stay motion. That was a legal question, as to which First Fidelity was entitled to rely on its lawyers’ advice. Surely Bluebird would not be arguing that the advice of counsel was irrelevant if First Fidelity’s counsel had advised that a lift-stay motion was *required* and First Fidelity had acted *contrary* to that advice.

### **3. Exculpatory Clause of the Indenture.**

Bluebird’s only argument concerning the indenture’s exculpatory clause is that “[t]hat provision could not have been clearer in the jury’s minds,” because counsel for both parties referred to it in their closing arguments. BB Br. at 33. In the absence of clairvoyance, however, it is impossible to know what the jury understood after having heard several days’ worth of complicated and technical evidence. Bluebird does not dispute that the instruction requested by First Fidelity correctly stated the law and was supported by the evidence. Under New York law, a party is entitled to a proposed instruction that meets both of those criteria, even if the other side believes that the jury might have absorbed the concept in the absence

of an instruction. *Kalam v. K-Metal Fabrications, Inc.*, 286 A.D.2d 603, 604 (1st Dep't 2001); *Hagglund v. Erie R. Co.*, 210 N.Y. 46 (1913); *see also People v. Cleveland*, 122 A.D.2d 536, 537 (4th Dep't 1986) (“Inasmuch as the request was a correct statement of the law and supported by the evidence, defendant was entitled to the jury instruction pertaining to his defense.”).

**C. The Champerty Charge Misstated The Law In Two Respects.**

**1. The Relevant Intent Was That Of Bluebird, Not Its Transferors.**

We explained in our opening brief that the trial court erred when it instructed the jury that, in considering whether Bluebird’s claims were barred by the champerty statute, it should focus not on the intent of Bluebird itself, but rather on the intent of the parties who had transferred the securities to Bluebird in 1994. In support of that argument, we explained that at an earlier stage of this very case, the Court of Appeals stated that *Bluebird* was the party whose intent was relevant to the champerty defense. FF Br. at 45. In response, plaintiff contends that the Court of Appeals was focused on Bluebird’s intent at that stage because “that appeal involved only second series certificates and Bluebird was the only entity that purchased second series certificates.” BB Br. at 35-36. But Second Series certificates were likewise at issue here, along with First Series certificates, and yet the court instructed the jury to consider only Gabriel’s intent.

Nor would there be any principled reason for the jury to focus on Gabriel's intent even as to the First Series certificates. The only argument offered by Bluebird on this point is that "the First Series bonds were transferred from the Gabriel entities to plaintiff for the administrative convenience of managing the bonds and bringing this litigation in the name of one plaintiff." BB Br. at 36. But plaintiff should not be permitted to have it both ways. As we noted in our opening brief (at 46), the trial court blocked defense counsel's efforts to inquire into the composition and management of those entities, on the ground that their identity was "irrelevant" to Bluebird's intent in acquiring its certificates. It was unfair to preclude questioning on Gabriel's identity (and then its intent) but then to hold that Gabriel's state of mind, and not Bluebird's, was the correct issue for purposes of champerty.

Moreover, the statute itself is clear. Judicial Law § 489 mentions only the plaintiff: the "person or co-partnership" who "bring[s] an action or proceeding." It says nothing about the parties who transfer securities to that "person or co-partnership," regardless of whether that transfer was made for "administrative convenience" or for some other purpose. The intent of the party who brought this action was undisputed: Jack Mayer admitted that the sole purpose for forming Bluebird and for taking an assignment of the certificates was to initiate litigation.

Accordingly, First Fidelity is entitled to judgment – or, at a minimum, a new trial in which a properly instructed jury will consider its defense of champerty.

## 2. “Sole” And “Primary” Are Not Synonymous.

The Court of Appeals specifically held in 2000 that “the words sole and primary are not synonymous generally or in law,” and that the test for champerty is whether the intent to sue was “*at least \*\*\* the primary purpose for*, if not the sole motivation behind, entering into the transaction.” 94 N.Y.2d at 736 (emphasis added). Bluebird asks this Court to ignore that unambiguous holding. Bluebird focuses instead on the Court of Appeals’ use of the phrase “the purpose” rather than “a purpose” elsewhere in its opinion: “The trial court properly construed the Court of Appeals decision as requiring an instruction that defendant must establish that plaintiff acquired the bonds for the sole purpose – *i.e.*, for *the* purpose – of suing on the bonds.” BB Br. at 35 (emphasis in original).

Bluebird’s argument is creative, but it cannot get around the clear language of the Court of Appeals’ decision: the Court expressly distinguished between “sole” purpose – which is “*the* purpose” in Bluebird’s argument – and “primary” purpose. In carefully drawing the contrast, the Court of Appeals established that the champerty statute bars a claim even if the intent to bring a lawsuit is merely the “primary” reason for taking an assignment, but not the only one. The term “primary” means that there may be additional, or secondary, reasons in the

background, but their presence will not satisfy the statute and allow the assignee to bring a lawsuit, if a jury finds that bringing suit was the “primary” reason for taking the assignment.

Equally unfounded is Bluebird’s assertion that the Court of Appeals categorically held that “where an investor purchases heavily-discounted bonds with the belief that they are undervalued, especially because litigation may be necessary to enforce them, champerty does not apply.” BB Br. at 34-35. If the Court of Appeals had so concluded, it would have held that First Fidelity had no champerty defense in this case as a matter of law. Instead, it held that “the question remains whether it was Bluebird’s asserted business purpose or the admitted consideration of the lawsuit that constituted the primary purpose of the second series certificates. \*\*\* [T]his matter cannot be summarily resolved at this procedural juncture on this issue presented.” 94 N.Y.2d at 739.

The question of Bluebird’s intent was one for the jury. It should have gone to the jury with an instruction that reflected the Court of Appeals’ articulation of the legal standard.

**D. The Trial Court Failed To Charge On Consent And Ratification.**

Bluebird offers no record citation for its assertion that the trial court’s failure to charge on the affirmative defense of consent and ratification was “one of the

various trial errors that defendant raised and this Court rejected last October.” BB Br. at 36. The absence of a citation is unsurprising: the assertion is not true.

Bluebird’s substantive response fares no better. First, it asserts that G.O.L. § 13-107 permits a plaintiff to sue, even if it knew that the claim existed at the time it purchased the securities. That is irrelevant: Bluebird’s claim is not barred because it *knew* of the alleged breach; the claim is barred because the party from whom Bluebird acquired the certificates (and whose litigation burdens it inherited, see N.Y. G.O.L. § 13-105) *consented* to the conduct constituting the alleged breach and *ratified* the Trustee’s decision. Gabriel did so (through Mayer and its counsel) by sitting at the table, remaining silent while the trustees considered their options, and participating in the ongoing decision not to file a lift stay motion. FF Br. at 48-52.

This is not a situation in which a party purchases securities knowing that at some point in the past, a third party engaged in conduct that gave rise to a claim on the part of the security-holder. Here, the omission that created the claim was an ongoing one, and Bluebird ratified it by participating in it without challenging it. It is irrelevant that Bluebird did not “have the ability to direct defendant to do anything,” BB Br. at 37, a power that may be required for a showing of waiver or estoppel but is irrelevant to the defenses of consent and ratification. The point is that Bluebird *affirmatively acquiesced* in the decision that it now challenges when

it could have objected at the time and perhaps altered the trustees' evaluation of the risks.

Bluebird finds “puzzling” our reliance on *LNC*, in which the Second Circuit held that “the Trustees *may be able to establish \*\*\* ratification[]* or other similar affirmative defenses based on evidence other than or in conjunction with the Bondholders' knowledge of the Trustees' failure to make the Motion.” 173 F.3d at 464 (emphasis added). Our position is hardly confusing; as we pointed out in our opening brief (at 51), First Fidelity presented *ample* evidence other than the bondholders' knowledge: Jack Mayer's consistent and informed – by the advice of two law firms – participation in the trustees' decision-making processes.

#### **IV. THE DAMAGES AWARD CANNOT STAND.**

##### **A. Bluebird Sidesteps Our Argument That Its Proof Of Damages Was Impermissibly Speculative.**

Bluebird claimed at trial (with the court's approval) that, if not for First Fidelity's purported breach, the bondholders would have been paid the *full face value* of bonds they held in a bankrupt company, because the trust would have recovered the full amount of the decline in the collateral. We explained in our opening brief (at 56-59) that this theory was unduly speculative.

Bluebird's theory that it would have received full payment on its bonds depends on the jury's acceptance of a long series of unproven (and unprovable) hypothetical assertions. Bluebird would have received the full value of the

collateral decline only if the (pro-debtor) Bankruptcy Court judge had (i) granted the adequate protection motion; (ii) granted a hypothetical request for superpriority; and (iii) calculated the superpriority claim in the same manner as plaintiff's experts. The theory also depends on Continental's hypothetical ability to pay a massive adequate-protection award after reorganization, despite its own lawyers' argument that it would have been unable to do so. These leaps of logic and fact are at least as speculative as those the Court of Appeals has held insufficient, in other cases, to support the proper calculation of damages.

This is why it was so prejudicial that the court excluded testimony regarding the actual prices of Bluebird's bonds. The market value of the bonds – before and after First Fidelity's purported misdeeds – was information the jury needed in order to estimate what Bluebird's predecessors would have received at the conclusion of the bankruptcy, absent any breach of duty. Bluebird breezes past this argument, asserting without explanation that “[t]he trial court properly held that the trading price of the bonds is irrelevant and the damages are the difference between what the bondholders received in bankruptcy and what they would have received \*\*\*.” BB Br. at 24. That begs the question. We *agree* that the proper measure of damages is the difference between Bluebird's actual recovery and its potential recovery; we simply argue that bond prices, rather than collateral value

decline, are more accurate predictors of Bluebird's potential recovery. At the least, First Fidelity was entitled to present evidence to support that argument.

Bluebird responds by emphasizing (at 22-24) an irrelevant fact we do not dispute: that the value of the collateral really did decline by millions of dollars. That sidesteps the point. We agree that the value of the collateral declined precipitously over the course of Continental's bankruptcy.<sup>4</sup> Instead, we argue that it was unduly speculative to conclude that none of that decline would have had any effect on Bluebird's recovery, if only the lift stay motion had been filed in 1991. Bluebird does not address this argument.

**B. The Damages Period Was Excessive.**

The jury was allowed to calculate damages based on the collateral decline that purportedly occurred *after* the lift stay motion was *actually* made in August 1992. Even Bluebird's theory of damages cannot support such an award. To defend it, Bluebird argues that Judge Balick was wrong when she found that there was no collateral decline after August 1992. See BB Br. at 27 (“[T]hat court merely said that the expert testimony then did not demonstrate any decline post-August 1992, but the Blue Books that were placed in evidence did demonstrate

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<sup>4</sup> We do point out that Bluebird's characterization of the evidence on this point is incorrect. The bondholders did not receive “collateral worth approximately \$55 million” at the end of the bankruptcy. BB Br. at 23. They received a *net* payment of approximately \$55 million after liquidating collateral worth almost \$90 million. The huge shortfall represented the costs to the trust of repossession and maintenance. As we have explained, this is exactly what First Fidelity feared would happen.

such decline.”). Whether Judge Balick was right or wrong is beside the point. The fact is, Judge Balick *found*, based on the evidence she examined, that the collateral did not decline after August 1992. *That* is why she denied adequate protection for that period, not because First Fidelity or anyone else had failed to make a lift stay motion. The record cannot support an award against First Fidelity that compensates Bluebird for losses caused by Judge Balick’s purported factual errors.

**C. Bluebird Mischaracterizes The Record Regarding NationsBank.**

Finally, Bluebird misstates the record when it claims that First Fidelity never asked the Court to include NationsBank on the verdict sheet. It did (*see* A398), as did Bluebird (A350). As for whether First Fidelity submitted evidence that NationsBank was negligent or breached its fiduciary duty, there was no need to do so. *Bluebird* argued throughout the trial that the continuing decision not to move to lift the stay caused its losses. That argument applies to NationsBank at least as much as it applies to First Fidelity. First Fidelity was under no obligation to accuse the other trustees of negligence.

**V. THE AWARD OF PRE-JUDGMENT INTEREST WAS IMPROPER.**

Bluebird is correct that we do not dispute its abstract right to recover interest, if it has truly proven its damages and if an interest award is fairly calculable. The problem is that interest cannot be calculated with any degree of

certainty, because no one has any idea when Bluebird's purported injury actually occurred.

Bluebird's discussion of this issue truncates the relevant statute. CPLR § 5001(b) states, in relevant part, that

“Interest shall be computed from the earliest ascertainable date the cause of action existed, *except that interest upon damages incurred thereafter shall be computed from the date incurred.*” *Id.* (emphasis added).

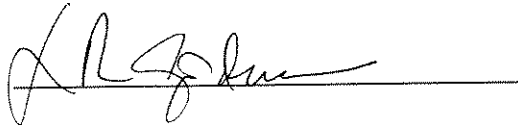
Contrary to Bluebird's assertion, the court does not simply “look[] to the date the cause of action accrued.” BB Br. at 12. It does so only where the plaintiff has proven that its damages were incurred on or before that date. It is hornbook law that there is no cause of action for a tort until there is wrongful conduct *and measurable damage*. Here, Bluebird (or its predecessors) would not have received any money on April 27, 1993, the date Bluebird asserts its cause of action accrued. Continental's Plan of Reorganization did not obligate the airline to pay any claims until all appeals were resolved. It also did not obligate Continental to pay any *interest* on such claims. (See FF Br. at 68.) That is what distinguishes this case from the malpractice cases discussed in Bluebird's brief. Whether or not the plaintiffs in those cases would have had to litigate appeals in order to vindicate their rights, they would have eventually been paid post-judgment interest from the date of the original verdict.

No one knows when Bluebird would have gotten money from Continental's bankruptcy estate, even if First Fidelity had made the lift-stay motion at the beginning of the bankruptcy. Two things are clear: Continental would not and could not have paid the money in April 1993, and the bankruptcy plan barred accrual of interest during the pendency of appeals. If Bluebird is granted interest dating from April 1993, it will reap an enormous windfall that was not available to Continental's other creditors. At the least, this means that the interest award in this case is far too high. Especially because Bluebird, and not First Fidelity, profited handsomely from this transaction, a reversal or reduction of the interest award is warranted.

CONCLUSION

The judgment of the trial court should be reversed and the case dismissed or remanded for a new trial.

Dated: New York, New York  
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## Printing Specifications Statement

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