

A Non-Partisan Review of the \$353 Million Civil Judgment Against Donald Trump

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Is it possible to be objective when it comes to Donald Trump?

Let's find out.

By now everyone knows that in *People v. Trump et al*, a New York state trial court, the Honorable Arthur F. Engoron presiding, entered civil judgment against Trump (and co-defendants, collectively "Trump") for \$353.3 million plus interest upon finding, in a bench trial, that Trump serially submitted "blatantly false" financial asset valuations to the banks that financed the growth of Trump's real estate empire, whereby the court concluded that Trump fraudulently saved \$353.3 million in interest expenses in comparison to the interest rates the banks would have charged if Trump had valued his assets honestly. (NYCEF Doc. No. 1688 (2/16/2024), hereinafter "Opinion").

Applying a state consumer fraud law (New York's Executive Law §63(12)), the court entered judgment disgorging Trump of these "ill-gotten gains." This money, plus interest, must be paid to the State of New York unless Trump wins on appeal. The court also imposed



Photo: Seth Wenig/AP

Former President Donald Trump during his civil business fraud trial at New York Supreme Court in January.

injunctive relief to prevent Trump from continuing what the court determined to be his fraudulent business practices.

Partisan reactions to this judgment, from both sides of the aisle, have been loud and predictable but are irrelevant here. Trump's efforts to prevent the State from enforcing the judgment while he appeals have also generated attention, and just this week, the appellate

court gave Trump a procedural victory by slashing his required bond by over 60% (from over \$450 million to \$175 million).

As Trump gears up to appeal, we wish to objectively assess the potential issues and arguments. Caveat, this is a high-altitude review, as we have not reviewed the transcripts of the bench trial and cannot opine on whether particular issues have been preserved. We restrict ourselves to potential arguments on the merits, ignoring Trump's claims of judicial bias or prosecutorial misconduct, other than to note that such concerns are circular: Only if reviewing courts find serious error(s) with the results in the trial court are they likely to consider whether such errors were the result of bad motives.

Trump's central defense on the merits is that every loan was repaid, no banks complained, and indeed, the allegedly defrauded banks are supposedly eager to continue doing business with the Trump Organization.

Trump claims this mega judgment violates the Eighth Amendment's prohibition against "excessive fines." The Eighth Amendment's general test is whether the financial penalty is "grossly disproportional" to the gravity of the offense. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

The Supreme Court cautions that "judgments about the appropriate punishment belong in the first instance to the legislature" requiring an assessment of whether the judgment against Trump conforms to the intent of the New York legislature in enacting Executive Law §63(12), which provides in relevant part:

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the

attorney general may apply, in the name of the people of the state of New York, ... for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. ...

N.Y. Exec. Law §63(12) (McKinney).

The trial court in *People v. Trump* rejected Trump's "there were no victims" defense upon citing earlier New York cases that squarely hold:

[W]here, as here, there is a claim based on fraudulent activity, disgorgement may be available as an equitable remedy, *notwithstanding the absence of loss to individuals* or independent claims for restitution. Disgorgement is distinct from the remedy of restitution because it focuses on the gain to the wrongdoer as opposed to the loss to the victim. Thus, disgorgement aims to deter wrongdoing by preventing the wrongdoer from retaining ill-gotten gains from fraudulent conduct. Accordingly, *the remedy of disgorgement does not require a showing or allegation of direct losses to consumers or the public*; the source of the ill-gotten gains is "immaterial." (Opinion, pp. 81-82) (citations omitted) (emphasis added).

Consistent with this holding, the trial court correctly held that reliance by possible victims on a defendant's fraudulent activity is not required to prove a civil violation of this statute triggering the disgorgement of "ill-gotten gains" as a possible remedy to be invoked by the State. (Opinion, p. 75).

How then, might Trump or other defendants challenge a trial court's determination that they obtained "ill-gotten gains" by misrepresenting asset valuations to obtain credit on overly generous terms that an honest person could not have obtained? Two issues quickly emerge from the trial court's 92-page opinion: (1) intent to defraud, and (2) causation of injury:

1. Intent. At the risk of stating the obvious, anyone charged with fraud in representing the value of their assets should strive to present a good faith basis for the valuations they presented. The lengthy opinion in *People v. Trump* details many reasons why the court found that the Trump valuations were routinely inflated to the point the trial judge came to believe that Trump is "pathological." (Opinion, p. 87). However, the opinion does not discuss what, if any, evidence of good faith the defense attempted to present.

Moreover, the court made an interesting finding that might bear on intent, *i.e.*, the court observed that in dealing with privately held entities such as the Trump Organization, lending banks typically apply a 50% "haircut" to whatever their borrower might claim to be the value of the assets being pledged as collateral. (Opinion, p.10).

If this is true, is it fraud, or smart negotiating, for a borrower to propose higher valuations in anticipation of the "haircut"? The world knows that Trump considers himself to be a negotiator extraordinaire, and one would have expected the defense to have developed this theme if possible.

2. Causation and Injury. Remedial consumer fraud statutes that eliminate the requirement of proving reliance are not uncommon, but typically a plaintiff must still prove that the defendant's fraudulent conduct was the cause

of their injury. See *Laub v. Faessel*, 297 A.D.2d 28, 31, 745 N.Y.S.2d 534, 536 (2002) ("To establish causation, plaintiff must show both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)"). See also, *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 30, 731 N.E.2d 608, 612–13 (2000) ("Reliance and causation are twin concepts, but they are not identical. In the context of fraud, they are often intertwined ... but there is a difference between reliance and causation, as [plaintiffs must prove] that defendant's material deception caused them to suffer [the claimed] loss. This allegation satisfies the causation requirement. Plaintiffs need not additionally allege that they would not otherwise have entered into the transaction.")

The requirement of proving loss causation, in addition to proving transaction causation based on reliance, is well-established in most states. See, *e.g.*, *Patriot Grp., LLC v. Hilco Fin., LLC*, 2018 IL App (1st) 170345-U, ¶ 30 (applying Illinois law). Arguably, the trial court in *People v. Trump* did not pay sufficient attention to causation issues.

The court concluded that Trump would have paid much more interest had he presented honest valuations, but from the opinion, it is not clear that any of the allegedly defrauded banks accepted Trump's inflated valuations as true *and* based their lending offers while acting under the influence of Trump's deception.

It arguably remains possible that (A) Trump serially inflated his asset valuations as the court concluded, but (B) the banks made attractive

interest rate offers to Trump with their eyes wide open, after conducting their own due diligence, because they wanted to do big deals with the Trump Organization.

If the latter is true, then causation of injury could be absent, and the conclusion that Trump derived “ill-gotten gains” from his fraudulent activity could be vulnerable. Or alternatively, the extent of injury to the allegedly defrauded banks could be open to debate.

3. The Disgorgement Damages and Other Relief

Trump’s invocation of the Eighth Amendment’s prohibition of excessive fines is no doubt prompted by the sticker shock of a judgment that will exceed \$450 million including interest coupled with harsh sanctions that will impede his continuing ability to do business New York, but the trial court had wide latitude in calculating the amount of the disgorgement damages, to where it is likely true that the appellate courts will be more concerned with questions of causation of injury than with the manner in which the trial court sought to measure the dollar amounts to be disgorged, which the trial judge determined based on expert opinions on valuation and lending.

Conclusion

There is wisdom in the old saying that “hard cases make bad law”—a phrase that appears to have entered our jurisprudence as early as 1837 in a domestic relations case in Dublin, Ireland. See *Hodgens v. Hodgens*, 4 Cl Fin. 323 (1837). Few would dispute that any case involving Donald Trump is a “hard case” immediately inflamed by partisan passion.

Depending of course on the extent the Trump legal team preserved their record, the appellate courts of New York will have an opportunity to clarify the requirements for proving intent, causation, and injury before disgorgement of funds to the state may be imposed as an economic remedy, over and above the various injunctive remedies imposed in *People v. Trump*.

The appellate process in New York should suffice to assure the public that justice was done, or to correct possible injustice. The assertion of Eighth Amendment constitutional arguments is understandable, and naturally Trump must preserve them, but the constitutional issues are premature until the state law issues are decided.

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