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Ejusdem Generis: It is known by the company it keeps

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Despite its ancient origins, recent Commercial Division decisions illustrate how the flexible canon of ejusdem generis continues to shape the interpretation of modern contracts, as well as statutes, frequently serving as a limiting principle on a litigant's expansive interpretation of a contract's or statute's catch-all phrase. Thomas J. Hall and Judith A. Archer explore the term in this edition of their Commercial Division Update.

Ejusdem generis, or literally "of the same kind or class," is a long-standing principle of both contract and statutory interpretation. It provides that, where a general word or phrase follows a list of specific terms, the general word will be interpreted to include only items of a similar nature to the terms specified. Ejusdem generis, Black's Law Dictionary (11th ed. 2019); *see also People v. Illardo*, 48 N.Y.2d 408 (1979) ("In the vernacular, it is known by the company it keeps."). English courts have employed this interpretive canon since the 16th century, and New York courts have done so in the post-revolutionary period. *See Archbishop of Canterbury's Case*, 2 Co. Rep. 46a, 76 Eng. Rep. 519 (1596); *Neilson v. Columbian Ins. Co.*, 3 Cai. R. 108, n. b (N.Y. Sup. Ct. 1805).

As discussed below, even today ejusdem generis continues to fi nd purchase within theCommercial Division across a broad variety of both contractual and statutory settings.

General Standard

In more modern times, the New York Court of Appeals continues to embrace ejusdem generis, applying the principle to interpret both contracts and statutes. For example, in *Metropolitan Life Ins. Co. v. Noble Lowndes Intern.*, 84 N.Y.2d 430, 433 (1994), the Court of Appeals interpreted a contractual provision absolving the defendant from liability for consequential damages or "loss of profit, loss of business, or other financial loss resulting from [defendant's] performance or nonperformance," but excepting from this limitation any liability arising from "intentional misrepresentations, or damages arising out of defendant's willful acts or gross negligence." When the defendant intentionally halted performance of the contract, plaintiff brought suit seeking to recover consequential damages, arguing that defendant's "willful" nonperformance fell within the exception. The court applied ejusdem generis

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to determine the parties' intent, noting that "willful conduct" should be interpreted to refer to "conduct similar in nature to the 'intentional misrepresentation' and 'gross negligence'" enumerated in the exception. Therefore, the court held that the parties intended "willful conduct" to include only that which is "tortious in nature, i.e., wrongful conduct in which defendant willfully intends to inflict harm on plaintiff ."

Although in the contractual context ejusdem generis is employed as a useful means to determine the parties' intent, the Court of Appeals has also employed it as a tool of statutory interpretation. In *People v. Illardo*, 48 N.Y.2d 408 (1979), the court noted that "when foreseeable circumstances are too numerous or varied for particular enumeration, the Legislature, employing the familiar principles of 'Ejusdem generis' may permissibly rely on the courts to give content to the phrase." On that basis, the court employed the principle to hold that a statutory provision providing an affirmative defense for "persons or institutions having scientific, educational, governmental or *other similar justification*" to possess or view allegedly obscene material was not rendered unconstitutionally vague by the presence of the general phrase.

Commercial Division Application

Ejusdem generis remains alive and well in New York's Commercial Division courts, which have applied the principle across a broad array of contracts, often as a mechanism to reject a plaintiff 's overbroad interpretation of a contract provision's general or catch-all term. However, the Commercial Division's application of the principle also has extended to statutory interpretation.

A recent high-profile case, *Levy v. Zimmerman*, 72 Misc.3d 1213(A), (N.Y. Co. July 0, 2021), saw the Commercial Division employ ejusdem generis in the context of a contractual dispute regarding royalties from the sale of Bob Dylan's catalog of songs to Universal Music Group. In *Levy*, the Estate of Jacques Levy, who collaborated with Bob Dylan in the 1970s to write 10 songs including the well-known "Hurricane," brought suit against Dylan—real name Robert Zimmerman—Dylan's production company, and various Universal Music Group entities arguing that a 1975 agreement between plaintiff and Dylan entitled plaintiff to a portion of the proceeds from Dylan's sale of the catalog to Universal. The 1975 agreement provided for payment to plaintiff of "Thirty-five (35%) percent of any and all income earned … from mechanical rights [to reproduce songs on CDs and digital formats], electrical transcriptions [for use of a song for public broadcast such as radio], reproducing rights [for use in consumer products such as ring tones and music boxes], motion picture synchronization and television rights, and all other rights therein." Rejecting plaintiff 's argument that "any and all income" included the sale of the catalog, Justice Barry Ostrager of the New York County Commercial Division dismissed the complaint, relying in part on ejusdem generis to interpret the agreement to include payment only for licensing income rather than a copyright sale, since the list in the 1975 agreement referred only to "typical licensing rights."

Ejusdem generis has also been applied in confirming an arbitration award entered into pursuant to a stock-purchase agreement's dispute resolution mechanism. In *Edgewater Growth Capital Partners, L.P. v. Greenstar N. Am. Holds.*, 44 Misc.3d 1215(A), at *7 (N.Y. Co. Jan. 2, 2013), the court interpreted the dispute resolution provision enumerating factors to be considered in calculating damages: "(i) the impact of delays in terms of lost earnings, (ii) changes in pricing, (iii) changes in tonnage, (iv) related costs to the Company under the arrangement, and (v) *any other matters* that could adversely impact the value of the business contemplated by the Letter of Intent." Justice Eileen Bransten of the New York County Commercial Division rejected plaintiff 's argument that the arbitration panel failed to consider certain external factors in calculating damages and confirmed the award, applying ejusdem generis and holding that, since it was preceded by specific provisions all relating to the Letter of Intent, the phrase "any other matters" could not be used to "bring in an entirely new class of data."

Similarly, in *Zacharius v. Kensington Pub.*, 42 Misc.3d 1208(A), at *5 (N.Y. Co. Jan. 6, 2014), the Commercial Division employed ejusdem generis in deciding a dispute over whether a certain transaction terminated a voting agreement amongst a

corporation's shareholders. The disputed provision provided that the agreement would terminate on, inter alia, the closing of "any transaction or series of transactions (including, without limitation, any reorganization, merger or consolidation)" that effectively resulted in the previously-existing shareholders no longer holding a majority share. Justice Bransten applied ejusdem generis to hold that the generic term "transaction" was intended to refer only to transactions similar in nature to the specifically listed terms, "reorganization, merger, or consolidation," and since the transaction at issue was insufficiently similar, the voting agreement was not terminated.

The Commercial Division has even applied the principle outside the usual context of a specifically enumerated list. In *Volpe v. Interpublic Grp. of Cos*., No. 652308/2012, 2013 N.Y. Misc. LEXIS 3431, at *2-6 (N.Y. Co. Aug. 2, 2013), a former employee of an advertising company brought a breach of contract action alleging that, after he presented his employer with an opportunity to purchase shares of Facebook, he was entitled to the $380 million yielded from his employer's later sale of that stock under his employment agreement and an alleged oral agreement. As one basis of recovery, the plaintiff-employee argued that a provision of the employment agreement making plaintiff "eligible to participate in such other employee benefits as are available from time to time" permitted recovery of the $380 million. Justice Bransten applied ejusdem generis and compared this provision to the other employee benefit provisions within the same article of the employment agreement, noting that they "all relate to relatively modest benefits, such as a general allowance of $72,000, an automobile stipend of $12,000 and a financial planning allowance of $2,500." Therefore, the court held that the generic term "other employee benefits" was meant to extend only to benefits of a similar scale. Since Plaintiff's allegation was "different from the balance of [the article] … by such an order of magnitude that it strains the credulity of this Court," the court rejected plaintiff 's claim on this ground.

The Commercial Division's application of ejusdem generis is not confined to contractual interpretation and, interestingly, has even been applied on the court's own volition rather than the urging of either party. *Board of Mgrs. of 184 Thompson St. Condominium v. 184 Thompson St. Owner*, No. 103991/2011, 2018 N.Y. Misc. LEXIS 3806, at *12 (N.Y. Co. Sept. 7, 2018), concerned, in part, a challenge to the reserve set by the sponsor of the conversion of an apartment building from rental units to condominiums, and whether the defendant-sponsor permissibly decreased the reserve by taking credits for certain capital replacements. Capital Replacements are defined under New York City Administrative Code §26-702(c) as the"building-wide replacement of a major component of any of the following systems: (1) elevator; (2) heating, ventilation and air conditioning; (3) plumbing; (4) wiring; (5) window; or, a major structural replacement to the building …." Plaintiff challenged the sponsor's inclusion of 156 sliding glass doors as capital replacements, and although "not discussed by either party," Justice Bransten noted the court found "very helpful" the canons of statutory interpretation ejusdem generis and noscitur a sociis, a related principle "whereby the meaning of a word in a provision may be ascertained by a consideration of the company in which it is found and the meaning of the words which are associated with it." With these canons as a backdrop, the court noted (1) that the statute lists major components of any building, (2) that unlike the typical instance where there were more windows than doors in a building, in this instance there were more doors than windows, and that (3) since the glass doors provided access to light and fresh air, the doors served a similar function to windows. Given the similarity of the sliding glass doors to the enumerated items, the court held that they were permissibly taken as capital replacements under the statute.

Conclusion

Despite its ancient origins, recent Commercial Division decisions illustrate how the flexible canon of ejusdem generis continues to shape the interpretation of modern contracts, as well as statutes, frequently serving as a limiting principle on a litigant's expansive interpretation of a contract's or statute's catch-all phrase. Prudence dictates that parties should be mindful of this principle whenever they encounter such a general term, whether they are drafting contracts or litigating them.

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