

**COMMONWEALTH OF THE  
NORTHERN MARIANA  
ISLANDS**

**vs.**

**MICRONESIAN INSURANCE  
UNDERWRITERS, INC., et al.**

**Appellate No. 86-9035  
District Court NMI  
Appellate Division**

**Decided April 12, 1989**

**Affirming in part and reversing  
in part 2 CR 777 (CTC 1986)**

**1. Appeal and Error - Standard of  
Review - Summary Judgment**

The Appellate Division reviews the grant of summary judgment *de novo*.

**2. Civil Procedure - Summary  
Judgment - Standard**

A motion for summary judgment is proper when there is no genuine issue of material fact. Com.R.Civ.P. 56.

**3. Appeal and Error - Issues Not  
Presented Below**

Where Government raised the defense of estoppel for the first time on appeal, the Government waived the defense of estoppel.

**4. Appeal and Error - Issues Not  
Presented Below**

Generally, an appellate court may not take into consideration arguments raised for the first time on appeal, regardless of the standard of review.

**5. Civil Procedure - Summary  
Judgment - Affidavits**

The trial court did not err in relying on an affidavit containing hearsay statements in rendering its decision on a motion for summary judgment where the opposing party failed to raise any objection to the hearsay statements. Com.R.Civ.P. 56.

**6. Civil Procedure - Discovery -  
Depositions**

Testimony taken at depositions in separate civil proceedings are only admissible if the subject matter and the parties are identical.

**7. Civil Procedure - Summary  
Judgment - Particular Actions**

Where party opposing summary judgment motion possessed relevant information but chose not to file any affidavits or documentary evidence in opposition to the motion for summary judgment but relied on legal argument only, party opposing summary judgment did not satisfy the clear mandate of summary judgment rule. Com.Tr.C.R.Civ.P. 56.

**8. Banking - Code - Private Right  
of Action**

Where there was neither legislative history nor direct precedent to support the trial court's conclusion that a private right of action may be inferred under the banking law from the circumstances presented, court erred in creating a private right of action against the Government for violation of a banking regulation.

**9. Judgments - Interest**

An award of pre-judgment interest lies within the discretion of the trial court.

**10. Corporations - Officers and  
Directors - Liabilities**

Corporate regulation that holds breaching directors liable for stockholder losses does not allow for a reduction in directors' liability to the extent that liability runs to other directors. Corporate Regulation 2.7.

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3 IN THE DISTRICT COURT FOR THE  
4 NORTHERN MARIANA ISLANDS  
5 APPELLATE DIVISION

FILED  
Clerk  
District Court

6 APR 12 1969

7 GOVERNMENT OF THE NORTHERN MARIANA )  
8 ISLANDS, )

9 Plaintiff-Appellant, )

10 vs. )

11 MICRONESIAN INSURANCE )  
12 UNDERWRITERS, INC., )

13 Defendant-Appellee, )

14 vs. )

15 COMMONWEALTH BANK OF THE )  
16 NORTHERN MARIANAS, INC., )

Defendant-Cross-Appellant. )

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2 BEFORE: LAURETA<sup>\*</sup>, District Judge, DUENAS<sup>\*\*</sup>, Senior Judge, and  
3 TASHIMA<sup>\*\*\*</sup>, District Judge

4 DUENAS, Senior Judge:

5  
6 This matter comes before the Court on cross appeals by the  
7 Government of the Commonwealth of the Northern Mariana Islands  
8 (Government) and the Commonwealth Bank of the Northern Marianas,  
9 Inc.

10 Background

11 The Commonwealth Bank of the Northern Mariana Islands (Bank)  
12 was chartered in April, 1982, and began operations in early 1983.  
13 At no time did the Bank provide the Government with proof of its  
14 capitalization.

15 Thereafter the Government became a prospective depositor and  
16 requested that the Bank obtain a bond to insure a \$600,000  
17 deposit it intended to make. Bank directors and certain  
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19 \_\_\_\_\_  
20 \* The Honorable Alfred Laureta sat as the Presiding Judge over  
21 this appeal. His tenure as Chief Judge of the District Court for  
22 the Northern Mariana Islands terminated prior to the issuance of  
this Opinion.

23 \*\* The Honorable Cristobal C. Duenas, Senior Judge, United  
24 States District Court for the District of Guam, sitting by  
designation.

25 \*\*\* The Honorable A. Wallace Tashima, District Judge, United  
26 States District Court for the Central District of California,  
sitting by designation.

1 incorporators arranged a meeting between Micronesian Insurance  
2 Underwriters, Inc. (MIU) Vice President and General Manager  
3 Ernest Milne and an attorney who drafted the bond. The  
4 incorporators assured Milne at the meeting that the Bank was  
5 adequately capitalized. In November 1983 the Government  
6 deposited \$600,000 with the Bank secured by a bond issued by MIU.

7 The Bank's initial failure to adequately capitalize,  
8 combined with subsequent financial problems, forced the Bank into  
9 receivership in May, 1984. The Government requested that MIU  
10 honor its bond obligation. MIU refused based on its belief that  
11 the Government had failed to enforce applicable banking  
12 regulations thereby exposing MIU to a greater risk than it had  
13 bargained for. MIU additionally maintained that the Government  
14 knew or should have known that the Bank was undercapitalized when  
15 it originally sought the bond from MIU and should have informed  
16 MIU of the Bank's financial condition.

17 The Government filed suit to compel MIU to honor the bond  
18 obligation. MIU answered and brought a third-party complaint  
19 against the Bank and its directors seeking indemnification. The  
20 Bank cross-claimed against the individual directors. The  
21 Government then amended its complaint to include the individual  
22 directors as defendants. The Bank amended its cross-complaint to  
23 add the Government as a defendant under a theory of negligence.

24 MIU brought a motion for summary judgment against the  
25 Government based on Section 124 of the Restatement of Securities.  
26 The trial court granted MIU's motion finding that the Government

1 withheld material information from MIU regarding the Bank's  
2 financial status when MIU issued the bond.

3       The remainder of the case proceeded to trial resulting in a  
4 finding by the trial court that the Director of Banking  
5 (Director) was negligent in failing to revoke the Bank's charter  
6 after the Bank failed to comply with applicable banking  
7 regulations. Finding a private right of action, the trial court  
8 held that the creditors were injured by the Government's failure  
9 to enforce its own regulations which were designed to protect  
10 creditors. The Government was found liable to the creditors in  
11 an amount in excess of \$190,000.

12       Following the trial, the Government moved for a new trial on  
13 the basis that the trial judge's impartiality and objectivity  
14 were impaired by his having supervised the receivership of the  
15 Bank while simultaneously acting as the trial judge. The  
16 Government's motion was denied.

17       The Government appeals the decision of the trial court  
18 granting MIU's motion for summary judgment; the finding that the  
19 Government negligently failed to enforce applicable banking  
20 regulations; the court's order permitting the Bank to offset  
21 remaining government deposits with the judgment against the  
22 Government; and the denial of its motion for a new trial.

23       The Bank appeals the trial court's denial of its request for  
24 pre-judgment interest and a ruling reducing the directors'  
25 liability.  
26

1 Banking Regulations

2 Prior to the enactment of new banking regulations in  
3 February 1984, Section 2.7 of Title 37, Trust Territory  
4 Regulations governed the capital necessary to engage in business  
5 and the liability of directors of such corporations. Section 2.7  
6 is set forth infra at page 12.

7 Regulations, which became effective on June 6, 1983, and  
8 which are found at 4 CMC §6201 et seq., were promulgated by the  
9 Director of Commerce and Labor pursuant to authority found in  
10 Public Law 108, Chapter 9 and Public Law 3-11, Section 503.  
11 These regulations sought to correct the omission in Section 2.7  
12 which allowed banks to open without any meaningful supervision  
13 and control and without adequate capitalization.

14 The Director interpreted the June 1983 banking regulations  
15 to allow existing banks 18 months from June 1983 in which to  
16 either obtain deposit insurance or the capital and paid-in  
17 surplus required by Section 6(b) of the regulations.

18 The trial court rejected the Director's interpretation and  
19 found, in relevant part, that Section 6(a) allowed existing banks  
20 18 months from June 6, 1983, to secure federal deposit insurance.  
21 Section 6(c) requires existing banks to supply proof of the  
22 minimum capitalization requirements or proof of Federal Deposit  
23 Insurance (FDIC) or Federal Savings and Loan Insurance coverage  
24 (FSLIC) within 120 days of June 6, 1983.

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1 Government argues that it may not be estopped under the same  
2 terms as other defendants.

3 MIU takes exception to the Government's interpretation of  
4 Section 124 as an estoppel theory. Citing David v. Griley, DCA  
5 No. 9018 (Sept. 11, 1987), MIU further argues that the  
6 Government's estoppel argument, raised for the first time on  
7 appeal, has been waived.

8 In David, the plaintiffs sued the CNMI alleging negligence  
9 by an independent contractor physician working at the government-  
10 run hospital. The CNMI prevailed on a motion for summary  
11 judgment on the theory of immunity found at 7 CMC §2202(a).

12 The David opinion focuses on the sovereign immunity of the  
13 CNMI. In footnote 2 of the opinion the Court notes that the  
14 Davids improperly raised estoppel as a defense for the first time  
15 on appeal. Despite MIU's contention, David does not reach the  
16 question whether an estoppel defense raised by the Government for  
17 the first time on appeal may properly be before the Court.

18 [3,4] However, the Court agrees that the Government has waived the  
19 defense of estoppel. The Government argues that the estoppel  
20 argument may be considered by this Court because we review the  
21 proceedings below de novo. Generally, an appellate court may not  
22 take into consideration arguments raised for the first time on  
23 appeal, regardless of the standard of review. Bolker v.  
24 Commissioner of Internal Revenue, 760 F.2d 1039 (9th Cir. 1985).  
25 The Government's interpretation of the scope of a de novo review  
26 is erroneous.



1  
2 Before reaching the merits of the grant of summary judgment  
3 we address certain procedural matters raised by the Government on  
4 appeal.

5 [5] First, in support of its motion for summary judgment MIU  
6 submitted the affidavit of Ernest Milne, which violated Rule  
7 56(e) of the Commonwealth Trial Court rules of Civil Procedure  
8 which mirrors Rule 56(e) of the Federal Rules of Civil  
9 Procedure.<sup>2</sup> The trial court correctly noted, however, that the  
10 Government failed to raise any objection to the hearsay  
11 statements contained therein. Once again, the Government may not  
12 complain on appeal about matters which should have been raised  
13 below. See, Faulkner v. Federation of Preschool & Comm. Educ.  
14 Ctrs. Inc., 564 F.2d 327 (9th Cir. 1977); In re Teltronics  
15 Services, Inc., 762 F.2d 185 (2nd Cir. 1985). The trial court  
16 did not err in relying on the unobjected to Milne affidavit in  
17 rendering its decision on the motion for summary judgment.

18 [6] Second, the Government objected to the use by the trial  
19 court of two depositions taken in the receivership proceeding, in  
20 which the Government was not a party. Testimony taken at  
21 depositions in separate civil proceedings are only admissible if  
22 the subject matter and the parties are identical. McKay v.  
23 American Potash & Chemical Co., 268 F.2d 512 (9th Cir. 1959).  
24 However, Hoover v. Switlick Parachute Co., 663 F.2d 964 (9th Cir.  
25 1981), suggests that, based on the objections raised below, the  
26 trial court could have admitted the depositions as affidavits.

1 Even if we find that the use of the two depositions was  
2 erroneous because the Government was neither a party to that  
3 proceeding nor did the Government have had a similar motive to  
4 cross-examine during those depositions the result would not have  
5 changed.<sup>3</sup>

6 [7] In rendering its decision the trial court took into  
7 consideration the fact that the Government possessed the  
8 information whether the Bank had filed proof of adequate  
9 capitalization. The court determined that it would have been  
10 simple for the Government to file an affidavit to that effect.  
11 Instead, the Government chose not to file any affidavits or  
12 documentary evidence in opposition to the motion for summary  
13 judgment. The court noted that rather than supply the court and  
14 the parties with this information for the summary judgment motion  
15 the Government suggested that MIU conduct discovery to find out  
16 if the Bank ever filed this information with the Government.

17 The trial court was presented with evidence from MIU only.  
18 The Government's legal argument in opposition to the motion for  
19 summary judgment did not satisfy the clear mandate of Rule 56(e)  
20 which states in relevant part:

21 When a motion for summary judgment is made and  
22 supported as provided in this rule, an adverse  
23 party may not rest upon the mere allegations or  
24 denials of the adverse party's pleadings, but the  
25 adverse party's response, by affidavits or as  
26 otherwise provided in this rule, must set forth  
specific facts showing that there is a genuine  
issue for trial.

1           Anderson, supra and Celotex Corporation v. Catrett, 477 U.S.  
2 317, 106 S.Ct. 2548, 91 I.Ed.2d 265 (1986), make it clear that a  
3 party opposing a motion for summary judgment supported by  
4 affidavits cannot rest on its pleadings nor assert legal argument  
5 to defeat the motion.

6           The Government's opposition was based on legal argument. No  
7 evidence was presented to counter the evidence presented in  
8 support of the motion for summary judgment. The trial court's  
9 decision granting summary judgment in favor of MIU is affirmed.

10                           Bank v. Government

11           We review questions of law de novo. Prestin v. Mobil Oil  
12 Corp., 741 F.2d 268 (9th Cir. 1984). The Government was held  
13 liable to the Bank for failing to enforce the banking  
14 regulations. The lower court interpreted the banking regulations  
15 as creating a private right of action against the Government for  
16 failing to protect creditors from losses due to the Bank's gross  
17 mismanagement.

18           The receiver prevailed against the Government on a  
19 negligence theory for damages suffered by depositors as a result  
20 of the Director's failure to enforce the banking regulations.  
21 The trial court awarded damages against the Government from  
22 November 1, 1983, through May, 1984, on the basis that had the  
23 Director enforced the regulations he would have learned soon  
24 after October 6, 1983, that the Bank was undercapitalized.<sup>4</sup>

25           The trial court found that the Director had a duty to  
26 enforce the regulations and the director's own order of February

1 15, 1984, which, among other directives, mandated the Bank to  
2 undergo an immediate audit and to close on any day in which  
3 withdrawals exceeded \$5,000.

4 The court found that the Director breached his duty and that  
5 the creditors suffered damages as a proximate result of that  
6 breach. Citing Tcherepnin v. Franz, 570 F.2d 187 (7th Cir.  
7 1978), cert. denied, 439 U.S. 876 (1978), the trial court  
8 interpreted the 1983 regulations and the 1984 Banking Code as  
9 imposing a duty on the Director to enforce the regulations for  
10 the benefit of its depositors.

11 We disagree with the trial court's finding that the  
12 legislature intended a private right of action. In Cort v. Ash,  
13 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Court set  
14 forth a four-part test to determine whether the legislature  
15 intended to create a private right of action. Although the Cort  
16 test is directed primarily to federal claims, essentially the  
17 same test is applied by state courts. See e.g., Moradi-Shalal v.  
18 Fireman's Fund Ins. Co., 42 Cal.3d 287, 299-304 (1988).

19 [8] There is neither legislative history nor direct precedent to  
20 support the trial court's conclusion that a private right of  
21 action may be inferred from the circumstances presented here.  
22 Given the lack of any indication of legislative intent to create  
23 a private right of action against the Government for violation of  
24 a banking regulation, we follow Harmsen v. Smith, 586 F.2d 156  
25 (9th Cir. 1978), rather than Tcherepnin.

26



1 corporation, the incorporators and the directors  
2 thereof at the time the corporation commences to  
3 engage in business shall in their individual and  
4 private capacities be jointly and severally liable  
5 to the corporation and the stockholders and  
6 creditors thereof in the event of its bankruptcy  
7 or insolvency or in the event of its dissolution  
8 for any loss suffered by the corporation or its  
9 stockholders or creditors.

10 [9] An award of pre-judgment interest lies within the discretion  
11 of the trial court. See, Hemlani v. Villagomez, DCA No. 80-9004  
12 (1987).

13 The trial court ruled that the directors were liable for the  
14 losses suffered by the creditors. The receiver requested, but  
15 was denied, pre-judgment interest running from the filing of the  
16 receivership proceeding until the judgment. The trial court  
17 reasoned that the losses suffered by the creditors from the date  
18 of the filing of the receivership were losses attributed to the  
19 receivership proceeding, not losses incurred as a result of any  
20 action or inaction of the directors.

21 The Bank argues that the pre-judgment interest sought is not  
22 contingent upon events that transpired during the receivership,  
23 but rather stems from the loss occasioned as the result of the  
24 depositors being denied the use of their money during the  
25 receivership. The Bank takes exception to the trial court's  
26 assumption that the pre-judgment interest sought was interest due  
on deposits on account during the receivership proceeding.

The trial court found certain directors liable under Section  
2.7 for the losses to the corporation, shareholders, creditors  
and depositors as of April 27, 1984, the effective closing date

1 of the Bank. As of that date the losses of the Bank were found  
2 to be \$489,625.

3 The trial court declined to award an additional \$342,133,07  
4 for pre-judgment interest computed on depositors' losses from the  
5 date of the receivership, May 1, 1984, to the date of judgment,  
6 reasoning that liability for interest payments on depositor  
7 accounts was assumed by the receiver when he took control of the  
8 bank. Interest owed on accounts after the filing of the  
9 receivership proceeding was held not to be a "loss" within the  
10 meaning of Section 2.7 for which directors and incorporators may  
11 be liable.

12 The trial court misconstrued the nature of the pre-judgment  
13 interest claim asserted by the receiver, which was a claim to  
14 recover interest for the use of the depositors' money in order  
15 that they may be made whole.

16 We reverse the denial of pre-judgment interest. On remand  
17 the trial court should reconsider, in his discretion, an award of  
18 pre-judgment issue based on the nature of the pre-judgment  
19 interest sought.

20 [10] The Bank also appeals the trial court's finding that Section  
21 2.7 allows for the reduction in directors' liability to the  
22 extent that liability runs to other directors. The trial court  
23 found that the total loss suffered by the Bank as a result of the  
24 directors' mismanagement was \$489,625. The trial court reasoned,  
25 however, that assessing this amount against the directors would  
26 ultimately benefit derelict directors because \$203,500 of the


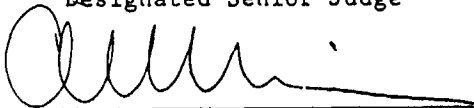
1 total loss was owed to directors as shareholders. The court thus  
2 reduced the director's Section 2.7 liability by \$203,500.

3 The court's attempt to avoid improper enrichment of one  
4 co-defendant/director at the expense of the other misconstrues  
5 the clear and unambiguous language of Section 2.7, which holds  
6 breaching directors liable for stockholder losses. The trial  
7 court was compelled to apply the plain meaning of Section 2.7.  
8 Caminetti v. Untied States, 242 U.S. 470, 37 S.Ct. 192; 61  
9 L.Ed.2d 442 (1917); Paul v. Andrus, et al., 639 F.2d 507 (9th  
10 Cir. 1980).

11 The trial court should not have reduced the directors'  
12 liability by \$203,500. We reverse the trial court's ruling on  
13 this issue and remand the case for a finding consistent with the  
14 Court's holding herein.

15 This matter is affirmed in part and reversed in part and  
16 remanded for proceedings consistent herewith.

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CRISTOBAL C. DUENAS  
Designated Senior Judge  
  
A. WALLACE TASHIMA  
Designated District Judge



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FOOTNOTES

1/ Absent written or customary law to the contrary the Restatements of Law are applicable in the Commonwealth of the Northern Mariana Islands. 7 CMC §3401.

Section 124 of the Restatement of Securities provides as follows:

Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.

2/ The Government failed to file any affidavits or other documents in opposition to the motion for summary judgment.

3/ No claim or defense on the bond was made in the receivership proceeding.

4/ The court found that the regulations were effective June 6, 1983. The proof of capitalization requirement was tolled for 120 days to October 6, 1983.

5/ We note that the trial court may have improperly denied the Government's motion for a new trial based on the dual role of the trial judge. See, In re Manoa Finance Co., 781 F.2d 1370, 1373 (9th Cir. 1986).