MondayMonday

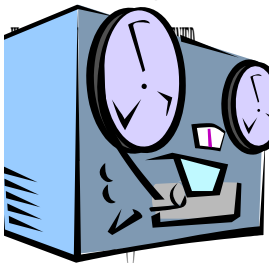
So Close, Yet So Far Away

October 21, 2013

Well, that was easy, wasn't it? One simple column in last week's *MondayMonday* and the entire government debt crisis is over. While we doubt that we really have such power, the truth is not as far away as you might think.

Since the beginning, Americans made it clear that we don't like to be screwed with, and least of all, by our own government. There has always been a high price to pay for not leaving Americans alone. We like to wake up in the morning, have breakfast (with eggs, like real men), go to work, come home, have dinner, play with the kids, cuddle the spouse and fall asleep to the 11:00 news. If that simple equation is altered, we get cranky; if it's challenged, we get mad.

Boy, were we mad. All of us. Right, left, middle, tea party, coffee klatch, cocktail party; you name it. Congress became nervous. Looking like a putz is the least thing an elected representative wants to be (you can be a putz as a legislator, so long as you keep it to yourself.) The nonsense compounded by a freshman senator from Texas was finally rejected, not out of strength, but out of fear. That fear is the only thing that made sense this week.



But remember this: Ted Cruz is no idiot. He's one of us; a smart, Harvard Law School *magna* who clerked for Rehnquist and argued 43 cases before the Supreme Court. As Prof. Alan Dershowitz said: "Cruz was off-the-charts brilliant." Forewarned is forearmed. Cruz is not going away.

We admit that we were truly fooled by Justice Saxe's opinion in *Strong v. City of New York*, 2013 NY Slip Op 06655 (1st Dep't 10/15/13). In our business, a signed opinion means that what follows is the jurist's best work and is written concerning an issue or point of law the judge feels strongly about. Coming from someone like Justice Saxe, it means that intelligent, well-reasoned judging is to follow. *Strong* is just that, until the punchline.

The case involves a City police vehicle which mounted the sidewalk, hitting five pedestrians. Even before joinder of issue, plaintiff's attorney was smart enough to move via OSC for an order requiring the City to turnover radio call recordings, which proved prescient when the City interposed an emergency operations defense. The problem is that the City had destroyed the tapes after 180 days in keeping with their regular procedure. In the motion court, the City was precluded from introducing testimony as to the contents of the audiotapes. On reargument, however, the court reneged, holding that plaintiff had failed to show that NYPD had been put on notice that the tapes were relevant prior to their destruction.

Justice Saxe's discussion of spoliation, its common-law sources in New York, and the need for its continued vitality is superb. Spoliation, simply put, "warrants the imposition of spoliation sanctions." Moreover, the City was surely on notice of the tapes' relevance when they were destroyed and had an obligation to protect them. Justice Saxe even finds New York's own sanction scheme so comprehensive that there is no need to turn to the federal model in the magnum opus of *Zublake* rulings in ESI cases. So, what happens next? Sanctions?

Nothing. Since the City's emergency operations defense can still be challenged by examining the officers and their superiors, no preclusion (except as to the contents of the lost recordings themselves) is necessary. An adverse inference charge, if any, is left to the trial court.

We are left wanting, having been teased with sound and fury.