

INTERVIEW: The Occupational Hazard of Lying

Reuvain Borchardt

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Walter Olson, a senior fellow in constitutional studies at the CATO Institute, discusses Donald Trump being found liable in the New York civil fraud case.

Trump (and his companies and several individual officers) were ordered to pay a total of \$464 million, including roughly \$100 million in interest, after Judge Arthur Engoron of Manhattan Supreme Court found him guilty of filing false financial statements to obtain favorable loans. Trump was also barred from doing business in New York for three years.

What law was Trump liable for?

New York has a law, known as Executive Law §63(12), which is stronger and goes further than the laws of most other states.

It gives the state Attorney General very broad powers to sue over what she finds to be a pattern or a systematic practice of business fraud. And in doing so, the AG doesn't have to prove a number of the elements that would otherwise be necessary in proving fraud in ordinary common-law fraud cases. And it gives the AG procedural advantages, and it's heard by a judge, not a jury.

All these things have been part of New York law for quite a long time and have been used against many other business defendants, but they give AG Letitia James more powerful weapons than other officials have. That's one of the reasons why in business journalism it's often said that the Attorney General of the State of New York is one of the most powerful officials in the United States, because New York has such strong laws allowing businesses to be sued on these grounds.

The reason is said by New Yorkers to be, "We are the center of the American business world, and we want to have an environment that is most discouraging of fraud, so that we have the most attractive marketplace."

What exactly was Trump found to have done? And how was this steep penalty calculated?

Trump was found to have committed fraud by the New York definition particularly against a number of banks. He obtained credit from the banks by systematically feeding them wrong numbers related to how creditworthy he was for the loans.

The main category of damages that accounted for most of the money was a legal term called "disgorgement": that you have to give up money that you have gotten by wrongful means — which includes the profits earned from a business deal that you were only able to complete

because of a loan you obtained at favorable rates due to your fraudulent representations about your finances.

And these penalties go to the government, even though you obtained the money fraudulently not from government but from banks. That's one of the unusual aspects of this law.

For example, Trump lied to get financing for a big hotel project in Washington, D.C. And so the judge said he has to give back all the money he made when he sold that hotel: a profit of \$126 million.

That's a very stiff penalty, and it doesn't relate to the amount of damage the banks may have suffered. It doesn't relate to much of anything except how much money Trump himself made — that's how “disgorgement” works. And that runs up to very high amounts of money.

The arguments that the pro-Trump people make are, this is the New York real estate game, everybody knows fudging numbers is rampant; the banks know it, their underwriters look into the details before they approve loans, and anyway, at the end of the day if Trump pays back all those loans, nobody gets hurt.

Firstly, even if some exaggeration is not unusual in New York real estate, the numbers here got everyone's attention, such as claiming the Trump Tower triplex was three times the square footage it actually was, and valuing rent-controlled property as if it were not rent-controlled, which could mean valuing it 80% more than it's actually worth.

These were the kinds of lies that just made people's jaws drop.

As for the banks' underwriters doing their due diligence: it's not a good defense to say that although I committed fraud, they should have caught it. And in particular, it's not a good defense when you're a privately held company. Publicly held companies have to make a lot more public disclosures, so there's a lot more for the banks to go check. But when you are a family-owned company, there isn't a lot of that stuff, and the companies are much more at the mercy of whatever information you gave them. There aren't as many ways for them to double-check on that, and Trump took advantage of that.

And you can't get off after committing fraud just because you didn't default. It's like the law against drunk driving: If you drive drunk, you engaged in dangerous behavior and have to pay the penalty, even if you made it home safely without crashing into anyone. The law is there to prevent the dangerous behavior before someone loses their life.

Likewise, the point of this law is to clean up systematic fraud before someone actually loses their money to the fraud.

If the businessman in question were not Donald Trump but some guy nobody ever heard of, would Tish James have brought this case and would Judge Engoron have ruled this way and with such a steep penalty?

These are interesting questions whose answers we can't know for sure.

They are valid questions to ask, particularly in the case of James. I thought she exercised terrible judgment when she named Donald Trump in her campaign literature, saying she was specifically going to go after him. That doesn't mean the case is invalid, but prosecutors should not be doing that, in my view.

With respect to Judge Engoron, it's harder to know. He was subjected to incredible misconduct by Trump, who was going after Engoron's court employees by name, saying terrible things about them, behaving as very few criminal defendants ever do in terms of expressing contempt for the court and even putting the court in some danger, arguably, by the atmosphere of death threats and so forth.

In an ideal world, maybe the judge should set those things aside when issuing a verdict and penalty. But it's also very typical in the history of our courts, and I think courts almost everywhere, that if you keep on expressing contempt for the court, the court will tend to give you a sentence on the big side instead of the small side. And you can see that play out in this case in a couple of different areas. Engoron found that Trump and a bunch of the other defendants had lied and lied and lied in various areas of testimony. And so he did what judges are generally entitled to do, which is to say, your credibility is so totally shot that on these other issues, where I don't know for sure that you're lying, I'm just going to assume that the witness who argued the opposite side has more credibility than you.

That may have hurt Trump on a bunch of different issues where it wasn't clear that the Trump people were telling lies but where their word was simply discredited down to zero.

There are other ways that Trump's conduct may have hurt him.

Judges often have discretion on timing of things and different procedures like the issue with the bond he has to post in order to appeal. He has discretion on whether to be lenient or tough on issues like that. And he has taken a pretty hard line against Trump on some of those things.

If it weren't Donald Trump and were just some businessman named Joe Schmo, the first thing we'd say is, "Why is Joe Schmo inviting the worst possible outcome by saying these terrible things on Truth Social about the judge — doesn't he realize that judges tend to become very punitive if you do that?"

Trump thinks he's the only person who can behave this way and get away with it, because he's Trump. Well, there's a flip side to that, and Engoron has in many ways lowered the boom in the damage calculation.

But Engoron did not take up James' invitation to prevent Trump from doing business in New York. He could have yanked their license completely and said the Trump Organization cannot do business in New York. I thought that that demand went too far; James did not have good reason to ask for that, the so-called corporate death penalty. So Engoron didn't do everything that he might have. But on things like calculating the amounts of money, he came down hard. Whether that would have happened if Trump had behaved himself as a litigant, there's no way I can know.

But he was banned from doing business in New York for three years.

But he can, in the meantime, for example, hand the business over to Ivanka Trump for her to run it.

Had James gotten her way and had the Trump Organization been completely banned from doing business in New York, he couldn't hand it over to his daughter to run; he would have to just wind down the business.

That would have gone beyond what has been done in past cases in New York, even egregious cases.

So Trump got hit hard by the judge's decision, it was a lot of money, but to what extent he has himself to blame, to what extent his plight would be different if he were anonymous and had never entered politics, reasonable minds can differ, and it's hard to know what people's thinking is.

So Trump has to put up a bond in order to appeal. How does that work?

Trump has the right to appeal, but unless he can post a bond, during the appeal he is still subject to paying the money. In other words, the sheriff can come and seize one of his office buildings or one of his projects, saying, "The New York Attorney General has a claim against you, and we're attaching this." Once that sort of thing happens, it tends to destabilize a business because that's a default event for the financing of the business and things like that.

So if he doesn't post the bond for the amount that he owes, he's still allowed to appeal, but in the meantime, his business empire is in much more danger.

What do you think *will* happen, and what do you think *should* happen, on the appeal?

My conclusion is that it's hard to see that the judge committed any outright legal errors as far as finding Trump liable when he shouldn't have been found liable. In a case like this, the biggest hope for the defendant on appeal is the numbers. The appellate court might say, "Proper discretion by the judge should have resulted in smaller numbers." There would still be some fines, they might even be large fines, but they wouldn't be as big as this. I think that's Trump's best case for getting some portion of a win on appeal.

I don't think he's likely to get the thing reversed and be found not to have violated the law. But I do think that his chances on examining the amount would be his best shot and I think that's also his most reasonable shot, because it's the area where if I were the judge, I would have considered making the numbers quite a bit lower than Engoron did.