GIBSON DUNN

New York Court of Appeals Round-Up & Preview

September 2019

The New York Court of Appeals Round-Up & Preview summarizes key opinions in civil cases issued by the Court over the past year and highlights a number of civil cases of potentially broad significance that the Court will hear during the coming year, beginning in September 2019. The cases are organized by subject.

I. Administrative and Constitutional Law

In the past year, the Court decided major cases involving issues of administrative and constitutional law, including a Privilege and Immunities Clause challenge to the CPLR's security provisions for nonresident litigants, a *Boreali* challenge to Department of Health restrictions on non-healthcare expenses by healthcare providers, and a decision delineating the scope of taxable real property under the Real Property Tax Law in the context of telecommunications equipment.

a. ***Clement v. Durban* (32 N.Y.3d 337; November 14, 2018)**

In a unanimous decision (Feinman, J.), the Court held that CPLR 8501(a) and 8503, New York's longstanding security provisions which treat resident and nonresident litigants differently, do not violate the Privileges and Immunities Clause of the United States Constitution. Plaintiff, a former New York resident who had relocated to Georgia, argued that CPLR 8501(a) and 8503, which required her to post a minimum of $500 security for costs in the event she lost the case, violated the Privileges and Immunities Clause. The Court explained that a two-step inquiry governs Privileges and Immunities Clause challenges to statutes providing for disparate treatment on the basis of residency: first, a court must decide whether the statute burdens privileges and immunities protected by the Clause; second, if a plaintiff's exercise of a fundamental right has been impaired, the burden shifts to the defendants, who must show that the restriction is closely related to the advancement of a substantial state interest. Applying that framework to plaintiff's challenge, the Court held the statutes "do not unduly burden nonresidents' fundamental right to access the courts because they impose marginal, recoverable security for costs on only those nonresident plaintiffs who do not qualify for poor persons' status" or for any other statutory exemption. Because plaintiff failed to make an initial showing that the security provisions impaired her fundamental right of access to the courts, the Court declined to decide whether those provisions were closely related to the advancement of a substantial state interest."

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Chambers USA 2019 ranked Gibson Dunn Tier 1 Nationwide for Appellate Law and among The Elite for Litigation: General Commercial in New York.

Benchmark Litigation named Gibson Dunn as 2019 Appellate Firm of the Year.

Law360 named Gibson Dunn a 2018 Practice Group of the Year for Appellate, marking the firm's "seventh appearance on *Law360*'s annual list of top appellate groups since 2011." The firm was recognized for having "won big at the U.S. Supreme Court" in multiple cases and for having "secured significant appellate wins . . . outside the high court."

b. ***Expressions Hair Design v. Schneiderman*** **(32 N.Y.3d 382; October 23, 2018)**

In a case presenting a question certified by the United States Court of Appeals for the Second Circuit, the majority (Fahey, J., joined by DiFiore, C.J., and Stein and Feinman, J.J.) held that a merchant complies with New York's General Business Law § 518—which provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means"—"if and only if the merchant posts the total-dollars-and-cents price charged to credit card users." Plaintiffs, five merchants, wished to employ a "single-sticker" regime in which cash prices would be listed in dollar and cents amounts and a surcharge for credit cards would be identified without separately listing the total credit card price. Plaintiffs filed suit in federal court, alleging that, *inter alia*, General Business Law § 518 violated their First Amendment rights. Neither plaintiffs nor defendants contended that the statute prohibited differential pricing. On appeal, the U.S. Supreme Court held that Section 518's prohibition of a single-sticker regime implicated the First Amendment and remanded to the United States Court of Appeals for the Second Circuit to decide which standard to apply in determining whether Section 518 constitutes an unconstitutional restraint on speech. The Second Circuit certified to the Court of Appeals the question of whether a merchant complies with Section 518 so long as the merchant posts the total-dollars-and-cents price. The majority answered that question in the affirmative and further clarified that Section 518 prohibits plaintiffs' proffered single-sticker scheme. In separate opinions, Judge Rivera concurred with the result; Judge Wilson concurred in part and dissented in part; and Judge Garcia dissented on the grounds that General Business Law § 518 is not a disclosure statute but rather a statute that prohibits merchants from imposing any credit card surcharge at all.

c. ***International Union of Painters & Allied Trades, District Council, No. 4 v. N.Y. State Department of Labor*** **(32 N.Y.3d 198; October 18, 2018)**

In a 6-1 decision (Fahey, J., joined by DiFiore, C.J., and Rivera, Stein, Wilson, and Feinman, J.J.), the Court upheld the Department of Labor's determination that Labor Law § 220(3-e) limits the payment of apprentice wages on public work projects to "apprentices who are performing tasks that are within the respective trade classifications of the approved apprenticeship programs in which they are enrolled." Several labor organizations that ran a glazier apprenticeship program challenged the agency's interpretation, which required the organizations to pay their apprentices prevailing wage rates for performing certain non-glazier tasks, such as ironworking. After finding that the text of the statute was ambiguous, the Court deferred to the agency's interpretation, reasoning that it aligned with the law's aim of preventing employers from "cutting standards of construction work by hiring an excessive number of unskilled employees, and [ensuring] that learning-level workers receive approved, supervised training." Judge Garcia dissented, arguing that the agency's interpretation conflicted with the statute's plain meaning.

The National Law Journal named Gibson Dunn to its 2018 Appellate Hot List, which recognized 22 firms that "won key matters before the U.S. Supreme Court and federal courts of appeal."

The American Lawyer named Gibson Dunn a Finalist in its 2018 Litigation Department of the Year competition, following the firm's unprecedented three wins in this biennial competition — as the 2010, 2012, and 2016 Litigation Department of the Year — and 2014 Finalist honors.

U.S. News – Best Lawyers® named Gibson Dunn the 2018 "Law Firm of the Year" for Appellate Practice in its "Best Law Firms" survey. Only one law firm is recognized in each national practice area.

d. ***LeadingAge N.Y., Inc. v. Shah* (32 N.Y.3d 249; October 18, 2018)**

The majority (DiFiore, C.J., joined by Steinman, Fahey, and Feinman, J.J.) upheld a Department of Health regulation restricting the use by certain health care providers of state funds for non-healthcare expenses and struck another regulation limiting certain executive compensation. The first regulation set a "hard cap" on the percentage of state funds that certain health care providers could use on administrative costs and executive compensation. The second regulation imposed a "soft cap," limiting executive compensation to $199,000 from all sources, including non-taxpayer funds. Applying the four-factor test set out in *Boreali v Axelrod*, 71 N.Y.2d 1 (1987), the Court upheld the hard cap, explaining that "[t]he legislature expressed a policy goal—that state health care funds should be expended in the most efficient and effective manner to maximize the quality and availability of public care—and the hard cap regulations, which focus exclusively on the appropriate use of state funds, are directly tied to that goal without improperly subverting it in favor of unrelated public policy interests." The Court also upheld the hard cap under arbitrary-and-capricious review. The Court struck down the soft cap on executive compensation, however, reasoning it violated the separation of powers doctrine because, unlike the hard cap, it "pursu[ed] a policy consideration—limited executive compensation—that is not clearly connected to the objectives outlined by the Legislature." Instead, the soft cap "represents a distinct 'value judgment,'" which pursued "the goal of limiting executive compensation as a matter of public policy" but was "not sufficiently tethered to the enabling legislation" identified by the agency. Judge Garcia concurred in part but would have struck down the hard cap on executive compensation as well, on the basis that it represented impermissible "social policymaking" by the agency not aligned with legislative goals. Judge Wilson, joined in part by Judge Rivera, would have upheld the soft cap, arguing that it promoted the same goals as the hard cap, as well as the legislative policy of "ensuring the State does business only with responsible contractors."

e. ***Save America's Clocks, Inc. v. City of New York* (33 N.Y.3d 198; March 28, 2019)**

A 4-2 majority (Garcia, J., joined by Stein, Fahey, and Feinman, J.J.) upheld New York City's Landmarks Preservation Commission's decision to approve the redevelopment of a landmarked clock tower under the Landmarks Preservation Law. The Court found that the Commission's issuance of a certificate of appropriateness permitting closure from public access and the electrification of the landmarked clock was not arbitrary and capricious, reasoning that it followed "an extensive deliberative process" with "a reasonable opportunity for the presentation of facts and the expression of views by those desiring to be heard." The Court determined that the agency's decision to prohibit the public from accessing the clock was consistent with the statute, as public access is jurisdictionally required for an initial landmark designation but is not an ongoing requirement. The electrification of the clock was likewise rational, as it would help preserve significant features and assure continued maintenance for the clock. The dissent (Rivera, J., joined by Wilson, J.) disagreed, believing that

barring public access to a landmark "annuls [the landmark's] designation and is inconsistent with the purpose of the Landmarks Preservation Law."

f. ***T-Mobile Northeast, LLC v. DeBellis* (32 N.Y.3d 594; December 13, 2018)**

In a unanimous decision (DiFiore, C.J.), the Court agreed with the City of Mount Vernon's tax authorities that certain cellular data transmission equipment mounted to buildings qualified as taxable real property under the Real Property Tax Law (RPTL). The Court first traced the evolution of the RPTL as applied to telecommunications equipment, explaining that the Legislature's 1987 amendments to the RPTL evinced an intent to "adopt[] clear distinctions based not on the owner" of the equipment (*e.g.*, a telephone company), but rather on the equipment's "type and use," such that "equipment of a type that comported with traditional conceptions of real property be taxable." The Court then held that each type of equipment at issue—"base transceiver stations; antennas; and coaxial, T-1, and fiber optic cables"—fit neatly within the definition of "real property" under RPTL § 102(12)(b). "Base transceiver stations," for instance, were "essentially cabinets that house cables and other electrical components and provide battery power," which "qualify as 'inclosures for electrical conductors'" under the statute. The Court further determined that the equipment did not fall within the "station connections" exception to Section 102(12)(i), as that exception's legislative history made clear that "station connection" is a term of art referring to "wiring physically connecting customer telephones to telephone poles." By contrast, the Court explained, the equipment at issue—"large outdoor installations including fiber optic cables and antennas"—was "precisely the type of property the Legislature intended to cover when it substantially revised the RPTL in 1987."

II. Jurisdiction and Civil Procedure

The Court also addressed several significant issues in the areas of jurisdiction and civil procedure in the past year, including the scope of writs of mandamus to compel agency action and whether complaints relate back to timely but invalid actions under CPLR 203(f).

a. ***Alliance to End Chickens as Kaporos v. N.Y.C. Police Dep't* (32 N.Y.3d 1091; November 14, 2018)**

The Court (per curiam, joined by DiFiore, C.J., and Rivera, Stein, Fahey, Garcia, and Wilson, J.J.,) held that a writ of mandamus was not the appropriate vehicle to compel enforcement of laws involving the exercise of discretion, and that the law at issue involved such discretion. Plaintiffs alleged that thousands of chickens were being killed during the religious practice of *kaporos*, performed in certain neighborhoods in Brooklyn prior to Yom Kippur. Plaintiffs sought to compel the New York City Police Department and the New York City Department of Health and Mental Hygiene to enforce, against the practitioners of the ritual, certain laws relating to the preservation of public health and prevention of animal cruelty. The Court explained that although the "extraordinary remedy" of mandamus may be an appropriate vehicle for

compelling performance of ministerial duties, it "will not be awarded to compel an act in respect to which a public officer may exercise judgment or discretion." And because the enforcement of public health and prevention of animal cruelty laws in the context of the *kaporos* ritual would necessarily involve some exercise of discretion, the Court held that mandamus was not an appropriate vehicle for compelling agency action.

b. ***Matter of New York City Asbestos Litigation*** **(33 N.Y.3d 20; February 21, 2019).**

A 4-3 majority of the Court (Wilson, J., joined by Rivera, Fahey, and Feinman, J.J.) held that a merchant marine could proceed with a Jones Act claim against his former employer for damages related to asbestos exposure, notwithstanding a release the marine had signed in an earlier settlement. Noting the heightened burden for proving the validity of a release in the admiralty context, the Court held that the release did "not unambiguously extinguish a future claim for mesothelioma [because it did] not mention mesothelioma" and because there was no other indication that the parties to the release had specifically considered mesothelioma. Under the factors set forth by the U.S. Supreme Court in *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), the majority found that material questions of fact remained as to whether the release extinguished the marine's claim. The dissent (Garcia, J., joined by DiFiore, C.J., and Stein, J.) disagreed with the majority's analysis of the *Garrett* factors, and asserted that the majority "sets a hopelessly high bar for defendants tasked with demonstrating the validity of a seaman's release."

c. ***U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*** **(33 N.Y.3d 72; February 19, 2019)**

In a unanimous decision (Rivera, J.), the Court held that dismissal for failure to comply with a residential mortgage-backed securities (RMBS) notification or sole remedy provision is a non-merits dismissal of a timely complaint under CPLR 205(a). CPLR 205(a) allows a follow-up action that would otherwise be time-barred to be filed within six months of a non-merits dismissal of a timely commenced action. An RMBS trustee brought suit against the sponsor and seller of loans contained in the trust, alleging violations of representations and warranties regarding the quality of the loans. The trial court dismissed that suit because the trustee had not complied with the governing agreement's "sole remedy provision," which required the trustee to notify the seller before bringing suit. The Court of Appeals reasoned that because notice and sole remedy requirements are procedural, rather than substantive, conditions precedent, the lower court's dismissal was not on the merits. The Court further held that the trustee's failure to comply with notice and cure or repurchase requirements prior to the expiration of the applicable statute of limitations did not foreclose its ability to re-file under CPLR 205(a). Therefore, a new filing under CPLR 205(a) was permissible.

d. ***U.S. Bank National Association v. DLJ Mortgage Capital, Inc.*** **(33 N.Y.3d 84; February 19, 2019)**

In a unanimous decision (Rivera, J.), the Court held that an untimely complaint could not relate back under CPLR 203(f) to a timely but invalid action arising out of a residential mortgage-backed securities (RMBS) transaction. A trustee for three RMBS trusts sued the seller and sponsor of loans contained in the trust, alleging breaches of the governing pooling and servicing agreement. The suit was brought outside the six-year limitations period set out in the agreement, but the plaintiff trustee argued that its complaint should relate back under CPLR 203(f) as an amendment to a complaint brought by an individual certificate holder within the six-year period. The Court rejected this argument, explaining that although CPLR 203(f) permits relation back to the date of original pleadings, this provision "applies only in those cases where a *valid* preexisting action has been filed" (emphasis added). Because the governing agreement allowed only the trustee—and not an individual certificate holder—to bring suit, the original action was invalid. As a result, the trustee's action could not relate back to the date of the certificate holder's complaint.

III. Contract Law

Over the past year, the Court of Appeals decided several cases involving significant issues of contract law. The Court reaffirmed New York's strong public policy favoring freedom of contract, but the Court also made clear that such freedom is not without limit.

a. ***159 MP corps., et al. v. Redbridge Bedford, LLC*****, 2019 WL 1995526 (May 7, 2019)**

In a 4-3 decision (DiFiore, C.J., joined by Stein, Garcia and Feinman, J.J.), the majority invoked New York's "strong public policy favoring freedom of contract" to hold that plaintiffs, commercial tenants, were bound by their agreement in a written lease to waive their right to seek a *Yellowstone* injunction. A *Yellowstone* injunction is a "'creative remedy' crafted by the lower courts to extend the notice and cure period for commercial tenants faced with lease termination." Plaintiffs had agreed in their written leases to waive their right to commence a declaratory judgment as to the terms of those leases. Upon receiving notices of default that provided a 15-day cure period, however, plaintiffs sought a declaratory judgment that they were not in default and a *Yellowstone* injunction preventing the defendant from terminating the leases or commencing summary proceedings. In response to defendants' cross-motion, which argued that the request for a *Yellowstone* injunction was barred by the leases' waiver provision, plaintiffs argued that the waiver clause was unenforceable because it violated public policy. The majority rejected that argument, holding that plaintiffs' "unambiguous[]" waiver of their right to seek a *Yellowstone* injunction was enforceable. The majority explained that only "a limited group of public policy interests has been identified as sufficiently fundamental to outweigh the public policy favoring freedom to contract," and

concluded that "the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation" is not "so weighty and fundamental" that it cannot be waived by sophisticated, counseled parties. In a lengthy dissent joined by Judges Rivera and Fahey, Judge Wilson asserted that "freedom of contract is not a limitless right," and that "[a] contractual provision that forecloses a party from timely knowing its contractual obligations—instead forcing parties to gamble on the contract's meaning—undermines the contract and with it, society's benefit from the freedom of contract," and should be unenforceable.

b. ***Ajdler v. Province of Mendoza*** **(33 N.Y.3d 120; March 21, 2019)**

In a case presenting a question certified by the United States Court of Appeals for the Second Circuit, the Court held in a unanimous decision (Feinman, J.) that, "[p]ursuant to New York common law and the terms of the indenture, in the absence of a timely action to recover principal, a bondholder cannot enforce the conditional obligation to make post-maturity interest payments." Plaintiff, a beneficial owner of principal in bonds issued pursuant to an indenture, sued to collect his share of principal as well as accrued and unpaid interest payments to which he claimed to be entitled under the indenture. Defendant successfully moved to dismiss on the ground that plaintiff's claims, brought nine and a half years after the maturity date, were time-barred under the indenture's four-year prescription period, which barred claims for principal or interest unless made "within four years from the date on which such payment first became due." Plaintiff argued that the Court's holding in *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250 (2011) entitled him to collect, at a minimum, unpaid post-maturity interest payments. In *NML Capital*, the Court had held that when principal was not repaid on the maturity date, the bond issuer was obligated to make interest payments until the principal was actually repaid. The Court rejected plaintiff's argument, making clear that *NML Capital* "does not stand for the proposition that—in the absence of a timely claim for principal—a bondholder has a legally cognizable claim for unpaid post-maturity interest payments until principal is actually repaid." Instead, the Court reaffirmed its "long-standing view of interest as generally dependent on principal" to hold that, once a claim on the principal is time-barred, a suit to recover post-maturity interest is foreclosed.

c. ***Deutsche Bank Nat'l Tr. Co. v. Flagstar Capital Mkts.*** **(32 N.Y.3d 139; October 16, 2018)**

In a 4-2 decision (Fahey, J., joined by DiFiore, C.J., and Stein and Feinman, J.J.), the Court addressed the "subtle interplay that exists between the freedom to contract and New York public policy," and held that parties cannot by contract delay commencement of a statute of limitations. The Court reiterated the rule, announced in *ACE Sec. Corp., Home Equity Loan Trust, Series 2006-SL2 v. DB Structured Prods. Inc.*, 25 N.Y.3d 581 (2015), that a breach of representations and warranties in a residential mortgage-backed securities contract accrues when the contract is executed. The Court then held that, to the extent the parties intended to delay commencement of the statute of limitations via an "accrual

clause" in the contract—which purported to govern the point at which a cause of action relating to or arising out of the breach of any representations or warranties would accrue—"their attempt to do so was inconsistent with New York law and public policy." The Court acknowledged that "freedom of contract is an important public policy in New York," but concluded that "[w]hen the public policy favoring freedom to contract and the public policy prohibiting extensions of the limitations period before accrual of the cause of action come into conflict . . . the latter must prevail." The Court thus affirmed dismissal of the action as untimely. Judge Rivera dissented, on the ground that the accrual clause was a condition precedent to suit and consistent with public policies favoring freedom to contract and statutes of limitations. Judge Wilson concurred with Judge Rivera's dissent and argued further that the decision in *ACE* was itself a "mistake."

IV. Torts

In the past year, the Court decided an important case concerning the exception to the general rule of strict products liability for design defects.

a. ***Fasolas v. Bobcat of New York, Inc.* (2019 N.Y. Slip Op. 03657; May 9, 2019)**

In a 6-1 decision (DiFiore, C.J., joined by Stein, Fahey, Garcia, Wilson, and Feinman, J.J.), the majority held that the exception to the general rule of strict products liability for design defects, applicable when a manufacturer offers a product with an optional safety device that the purchaser elects not to obtain, is not categorically unavailable to a manufacturer that sells its product to purchasers known to rent the product to the public. The majority relied on the exception set forth in *Scarangella v. Thomas Built Buses*, 93 N.Y.2d 655 (1999), which held that a manufacturer or seller is not strictly liable for a design defect based upon a claim that optional safety equipment should have been a standard feature when certain conditions are met. The majority concluded that such exception is not unavailable merely because a product comes into the injured end user's hands through the rental market, rather than through a purchase transaction. In a lengthy dissent, Judge Rivera argued that the majority's decision was inconsistent with "products liability public policy goals and the instrumentalist rationale of *Scarangella*."

V. Looking Ahead

We highlight below a number of civil cases the Court of Appeals will hear during the coming year, beginning in September 2019. We have selected cases that we believe may have broad importance and relevance to our clients.

1. **Jurisdiction and Civil Procedure**

   a. ***Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC* (156 A.D.3d 401 (1st Dep't 2017); APL-2018-00169; argument not yet scheduled)**

      The Court of Appeals granted leave to address whether the plaintiff-residence rule or a multi-factor test applies in deciding the state in which a claim brought by a trustee of a trust accrues under CPLR 202; whether a claim brought by a California-based trustee of a trust accrues in California under either of these tests; and whether the claim at issue is untimely under New York's and/or California's statute of limitations.

   b. ***Lubonty v. U.S. Bank Nat'l Ass'n* (159 A.D.3d 962 (2d Dep't 2018); APL-2018-00166; argument scheduled for October 17, 2019)**

      The Court granted leave to address whether, when foreclosure actions have been commenced prior to the defendant's bankruptcy filing, a plaintiff may commence a foreclosure action, thus tolling the running of the statute of limitations under CPLR 204(a).

   c. ***Salinas v. World Houseware Producing Co., Ltd.* (166 A.D.3d 493 (1st Dep't 2018); APL-2019-00051; argument not yet scheduled)**

      The Court granted leave to address whether a plaintiff may rely on an expert's affirmation to defeat summary judgment, where that affirmation directly contradicts the plaintiff's own testimony.

2. **Contract Law**

   a. ***CNH Diversified Opportunities Master Account, L.P. v. Cleveland Unlimited, Inc.* (162 A.D.3d 573 (1st Dep't 2018); APL-2019-00031; argument not yet scheduled)**

      The Court of Appeals granted leave to address the question of whether the issuer and a majority of group noteholders may terminate the payment rights "so long as such termination does not involve a formal amendment of the [i]ndenture," where that indenture provides that the bondholders' right to payment of principal and interest may not be "impaired or affected" without their consent.

3. **Torts**

a. ***Bill Birds, Inc. v. Stein Law Firm, P.C.* (164 A.D.3d 635 (2d Dep't 2018); APL-2019-00006; argument not yet scheduled)**

The Court of Appeals granted leave to address whether, if plaintiffs' cause of action under Judiciary Law § 487 was not adequately pled, plaintiffs' complaint could survive defendants' motion for summary judgment by relying on an unpled, separate cause of action under Judiciary Law § 487 allegedly supported by plaintiffs' submissions.

b. ***Haar v. Nationwide Mutual Fire Insurance Co.* (918 F.3d 231 (2d Cir. 2019); CTQ-2019-00001; argument scheduled for October 16, 2019)**

The Court of Appeals accepted the following certified question from the United States Court of Appeals for the Second Circuit: "Does New York Public Health Law Section 230(11)(b) create a private right of action for bad faith and malicious reporting to the Office of Professional Medical Conduct?"

c. ***Henry v. Hamilton Equities, Inc.* (161 A.D.3d 418 (1st Dep't 2018); APL-2018-00160; argument scheduled for September 10, 2019)**

The Court granted leave to determine whether, under the Court's decision in *Putnam v. Stout*, 38 N.Y.2d 607 (1976), an "out-of-possession" landowner may be held liable to third parties for dangerous conditions on its property when the owner agreed to maintain the property through a contract that was not between the owner and its lessee. The Court may also address the circumstances in which a landowner may be considered "out-of-possession" once it has undertaken a contractual, non-delegable obligation to maintain its property.