

May 12, 2020

## **NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT LIFTS MARCH 2020 SUSPENSION ORDER, REINSTATING KEY APPELLATE DEADLINES AND EFFECTIVELY REOPENING THE COURT FOR NEW APPEALS**

To Our Clients and Friends:

New York State’s Appellate Division, First Department handles over 3,000 appeals each year—more than the number of appeals pending in eight of the federal appellate courts in 2019. Its docket includes some of the most high-profile and significant commercial appeals in the State and the nation, as it reviews trial-level decisions issued by the Manhattan branch of the New York Supreme Court, Commercial Division.<sup>[1]</sup> The Appellate Division is often the final word in a given case; the only courts that can review its decisions—the New York Court of Appeals (New York’s high court) and the U.S. Supreme Court—control their own dockets and take relatively few cases for consideration.

On March 17, 2020, the First Department issued an order “suspend[ing] indefinitely and until further directive of the Court,” all perfection, filing, and other deadlines, except for matters that were already perfected for the May 2020 and June 2020 Terms of the First Department.<sup>[2]</sup> The order essentially closed the Court to new appeals and left the First Department’s Fall calendar in COVID-19-related limbo. But on May 8, 2020 the First Department rescinded the March 17, 2020 Order and reinstated “the deadlines for the remaining 2020 terms of the Court (September through December 2020 terms).”<sup>[3]</sup> The First Department is in all material respects now back open for business for new appeals.

The details of the May 8 Order are important for any party considering taking an appeal to the First Department. And virtually any trial court-level decision or order, even if interlocutory, can be appealed to the Appellate Division under New York’s unusually broad appealability rules. But failure to comply with the Court’s deadlines in some instances can result in a dismissal of the appeal.<sup>[4]</sup>

***First Department Filing Deadlines.*** Filing deadlines for appeals in the First Department are driven by the First Department’s Term calendar and rules for “perfecting” appeals. In general, an appeal is deemed “perfected” when the appellant’s brief, the record on appeal or the appendix, and the notice of argument are collectively filed with the First Department and served on the respondent.<sup>[5]</sup> The First Department’s rules provide that, except where the Court has directed that appeal be perfected by a particular time, an appeal must be perfected within six months from the date of the notice of appeal.<sup>[6]</sup> If an appellant fails to perfect the appeal within six months, or the deadline set forth in an applicable Court order, “the matter shall be deemed dismissed without further order.”<sup>[7]</sup> However, the appellant can decide when to perfect the appeal within the allotted six-month period.

The appellant must also perfect the appeal for a specific “Term” of the Court. The First Department has monthly Terms from January through June and September through December, in advance of which the Court accepts submissions at set deadlines.<sup>[8]</sup> Each Term in the calendar has a designated due date for the appellant to perfect the appeal, the respondent to serve and file the responding brief, and the appellant to serve and file the reply brief.<sup>[9]</sup> The “Term” of the Court for which an appeal is perfected determines the month in which the Court will hear oral argument in the case. Although appellants may perfect an appeal any day in which the Court is open, appellants frequently opt to perfect on the last filing day of a given Term, as this gives the appellant the maximum amount of time to work on opening papers while still being heard in the given Term, and doing so also gives respondent the fewest number of days to review the opening brief and file their responding brief.

***The March 17 & May 8 Orders and Perfection Deadlines.*** The First Department’s March 17, 2020 Order “suspended indefinitely” all perfection, filing, and other appeal deadlines “until further directive of the Court,” except for matters that were already perfected for the May 2020 and June 2020 Terms of the First Department, the perfection deadlines for which had already passed as of March 17.<sup>[10]</sup> That means that appellants considering filing any new appeals had no due dates to do so—effectively putting the First Department on a pandemic-induced pause.<sup>[11]</sup>

Now, by reinstating the “deadlines for the remaining 2020 terms,” the May 8 Order effectively reopens the Court for new appeals. Specifically, the perfection and filing deadlines for the upcoming September through December 2020 Terms, as set forth in the First Department’s calendar issued prior to the outbreak of COVID-19, are reinstated and will remain in effect.<sup>[12]</sup> Namely, if an appealing party wants its case to be heard in the September Term (the next available Term), it needs to perfect by July 13, 2020; if it wants to be heard in the October Term, it needs to perfect by August 10, 2020.<sup>[13]</sup> And importantly, the March 17 Order did not alter the pre-pandemic deadlines—essentially allowing the Court to return to its regular Fall schedule.

While the First Department has reinstated its calendar for the remainder of the year, the requirement that parties file hard copy briefs, records, and appendices with the Court “continues to be suspended until further directive of this Court.”<sup>[14]</sup>

Finally, due to the pandemic, oral argument for the May and June Terms was conducted via videoconference technology. The Court has not yet provided information on the format for oral argument for the September through December 2020 Terms. We anticipate that the Court will issue further orders in the coming months providing that information to litigants.

Gibson Dunn is monitoring the situation with respect to the First Department and is available to assist with any questions.

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[1] Appellate Division, First Judicial Department, Supreme Court of the State of New York, <http://www.courts.state.ny.us/courts/ad1/> (last visited May 12, 2020); *see also* Table B—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2019), Admin. Office of the U.S. Courts,

<https://www.uscourts.gov/statistics/table/b/federal-judicial-caseload-statistics/2019/03/31> (last visited May 12, 2020).

[2] Order In the Matter of the Temporary Suspension of Perfection, Filing and other Deadlines During Public Health Emergency, N.Y. App. Div. 1st Dep't (Mar. 17, 2020), <http://www.courts.state.ny.us/courts/ad1/PDFs/Temporary%20Suspension%20Order.pdf> [hereinafter March 17 Order].

[3] Order In the Matter of the Rescission of Temporary Suspension Order, N.Y. App. Div. 1st Dep't (May 8, 2020), <https://www.nycourts.gov/courts/AD1/PDFs/RescissionOrder.pdf> [hereinafter May 8 Order].

[4] 22 N.Y.C.R.R. 1250.10(a). The May 8 Order also sets a new deadline for filing responding and reply papers to motions that were returnable between March 16, 2020 and May 4, 2020, as discussed in more detail below.

[5] 22 N.Y.C.R.R. 1250.9(a).

[6] 22 N.Y.C.R.R. 1250.9(a), 1250.10(a).

[7] 22 N.Y.C.R.R. 1250.10(a).

[8] 2020 Calendar, New York Supreme Court, Appellate Division – First Department, <https://www.nycourts.gov/courts/AD1/2020calendars.shtml> (last visited May 12, 2020) [hereinafter 2020 Calendar].

[9] *Id.*

[10] March 17 Order, *supra* note 2.

[11] Per the March 17 Order, appellants were still permitted to file opening papers initiating a new appeal, should they choose to do so, but those appeals would not be calendared and respondents' deadlines for filing opposition papers would not be triggered.

[12] May 8 Order, *supra* note 3.

[13] 2020 Calendar, *supra* note 8.

[14] May 8 Order, *supra* note 3. The May 8 Order also set a new deadline for the filing of responding and reply papers on motions that were returnable between March 16, 2020 and May 4, 2020. Motions in the appellate division include anything from motions to stay trial court proceedings pending appeal and motions for preferences (i.e., an expedited appeal). Generally, a motion is “returnable” on the date that the motion will be heard by the Court. The moving party may choose the specific return date, but motions should generally be made returnable at 10:00 a.m. on any Monday in which the Court is open. 22 N.Y.C.R.R. 1250.4(a)(1); CPLR 2214(b). The deadlines for responding papers and reply

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papers, if any, are determined based on the return date. 22 N.Y.C.R.R. 1250.4(a)(4), (5); CPLR 2214(b). The March 17 Order suspended all filing deadlines indefinitely, including the deadlines to file responding papers and reply papers to motions. The May 8 Order reinstates applicable filing deadlines, and states that for motions that were made returnable between March 16, 2020 and May 4, 2020, the responding and reply papers must be filed by May 22, 2020.



*Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's **Coronavirus (COVID-19) Response Team**, or the following authors:*

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