GIBSON DUNN

New York Court of Appeals Round-Up & Preview

December 2020

For nearly 200 years, the New York Court of Appeals has resolved issues of paramount significance for New York and the nation. As the state's court of last resort, its judges regularly issue landmark decisions on issues ranging from state common law to the United States Constitution. Moreover, the Court's location in the center of global commerce places it astride the corridors of power between New York City, Albany, and Washington.

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This year presented unique challenges for the Court, as New York was situated at the national epicenter of the COVID-19 pandemic. When the virus's effects took hold in March, the Court responded by limiting access to its courthouse. By the end of the month, the Governor issued an Executive Order suspending various litigation deadlines and issued a statewide work-from-home order. New York courts—led by Chief Judge Janet DiFiore—took measures to restrict the virus's spread. The Court closed its courthouse and elected not to hear oral argument during its remaining March, April, and May sessions. In late May, however, the Court began reopening, and it is now accepting in-person filings and hearing oral arguments with appropriate safety protocols.

Both the pace of decisions and new additions to the docket appear to have been reduced by approximately 20%. Nevertheless, the Court has continued resolving cases of exceptional importance, on a broad array of issues spanning from due process, freedom of speech, and arbitration, to class actions, statutes of limitations, consumer protection, administrative law, and employment law.

This year continued the Court's recent lack of unanimity, with judges issuing a large number of concurring and dissenting opinions. Moreover, Judge Leslie Stein announced that she will retire in June 2021, and Judge Eugene Fahey will reach his mandatory retirement age next year. Their replacement marks a potential shift for the Court, which has been perceived by some as ideologically moderate and growing increasingly conservative on certain issues in recent years, including law enforcement and business regulation.

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 cases of potentially broad significance that the Court will hear during the coming year. The cases are organized by subject.

Gibson Dunn named Appellate Firm of the Year

Gibson Dunn named Appellate Firm of the Year

Gibson Dunn ranked Top Tier in National Appellate Law and among The Elite for Litigation: General Commercial in New York

Gibson Dunn named Appellate Firm of the Year

I. Constitutional Law

In the past year, the Court decided several major cases involving issues of constitutional law such as a substantive due process challenge to economic regulation, several election law cases, and a First Amendment challenge to land use regulations limiting expression on real property.

a. Due Process

1. *Matter of Regina Metro. Co. v. New York State Div. of Hous. & Comm. Renewal*, 2020 N.Y. Slip Op. 02127 (Apr. 2, 2020)

The Court (per curiam, joined by DiFiore, C.J., and Stein, Garcia, and Feinman, J.J.), for the first time in its history struck down a remedial statute enacted by the Legislature on substantive due process grounds. The case arose from a lawsuit seeking rent overcharges for New York City apartments that were improperly removed from rent stabilization during the owners' receipt of certain tax benefits. While the matter was pending, the Legislature enacted sweeping changes to the Rent Stabilization Law, including an extension of the statute of limitations for tenants to bring claims against owners, a revised method for determining overcharges, and substantially expanded liability. Although the statute stated that it would apply to all "claims pending or filed on and after" the effective date of the new statute, the Court resolved the claims under pre-existing law because applying the amendments retroactively "would not comport with [the Court's] retroactivity jurisprudence or the requirements of due process."

The Court explained that in light of considerable reliance interests undermined by the new statute, the Legislature's use of broad language was insufficiently clear to demonstrate intent to revive time-barred claims, but it was sufficiently clear to reveal an intent for the statute to apply where the overcharge issue was unresolved at the time. The Court nevertheless concluded that the statute did not comport with due process because it expanded liability for periods well beyond what was previously provided, worked a "significant readjustment" to prior rent stabilization policy and substantive rights, and revealed no indication that the Legislature had "considered the harsh and destabilizing effect" of its provisions on settled expectations. The Court added that any concerns were further heightened because the new provisions affected contractual or property rights, where "predictability and stability are of prime importance." Judge Wilson (joined by Judges Rivera and Fahey) dissented, asserting that the majority was improperly usurping the Legislature's role in setting economic regulation.

Gibson Dunn named Litigation Department of the Year – General Litigation Winner

Gibson Dunn named to Appellate Hot List

Gibson Dunn named 2020 Litigation Department of the Year, an unprecedented fourth win

b. Election Law

1. ***Matter of Seawright v. Board of Elections in City of N.Y.*, 35 N.Y.3d 227 (May 21, 2020); *Matter of Mejia v. Board of Elections in City of N.Y.*, 35 N.Y.3d 1040 (May 21, 2020)**

   The Court (per curiam, joined by DiFiore, C.J., and Stein, Fahey, Garcia, and Feinman, J.J.) resolved a department split between the First and Third Departments, holding that an election candidate's belated filing of a cover sheet and certificate of acceptance relating to their candidacy during the pandemic constituted a fatal defect. The Court emphasized that the Election Law makes it "crystal clear" that the limitations for filing are mandatory and that the statute forecloses judicially-created exceptions, "however reasonable" they may be. The Court recognized that the pandemic presented "difficult and trying" times, but "consistent enforcement and strict adherence to legislative judgments should be reinforced—not undermined" under the circumstances. Judge Rivera dissented on the ground that the law "must give way to public health needs and the paramount right to ballot access" in the "unique situation where petitioner did not and could not comply with an accelerated filing timeline solely because she was following the government's" response and recommendations. Judge Wilson separately dissented, asserting that the Court should not have exercised discretion to hear these cases in order to announce "a never-again-to-be-cited rule," applicable only during this pandemic.

2. ***Matter of Ferreyra v. Arroyo*, 35 N.Y.3d 127 (May 21, 2020)**

   The Court (per curiam, joined by Rivera, Fahey, Garcia and Wilson, J.J.) held that a designating petition was invalid because it was permeated by fraud as a matter of law. The Court acknowledged that the bar for establishing fraud is high but explained that the undisputed facts concerning backdated signatures made it "one of those rare instances in which the designating petition is so 'permeated' by fraud 'as a whole' as to call for its invalidation." In a dissent by Judge Stein (joined by DiFiore, C.J., and Feinman, J.) three judges disagreed, arguing that the majority applied "an amorphous standard" and "erroneously interject[ed] itself into a factual determination reserved for the courts below."

c. First Amendment

1. ***Town of Delaware v. Leifer*, 34 N.Y.3d 234 (Nov. 21, 2019)**

   In a unanimous decision (DiFiore, C.J.), the Court held that Zoning Laws precluding a landowner from holding a three-day festival on his property to celebrate a Jewish holiday did not unconstitutionally restrict his First Amendment rights. The owner of rural property argued that the town's restriction on "theaters" impermissibly restricted certain modes of expression at his festival such as widespread camping and music. The Court

explained, however, that the Zoning Law was subject to intermediate scrutiny because its restrictions were content-neutral, and that its provisions were not "substantially broader than necessary" to further the significant government interest of preserving agricultural uses on such property because they permitted theaters in other places and allowed for other more limited forms of expression on his property. The Court further found that the Zoning Law provisions were not void for vagueness because they "clearly" listed authorized uses and prohibited any use not specifically permitted by the statute.

II. Administrative Law

The Court resolved several significant administrative law cases of both procedural and substantive import, including rulings clarifying the necessary deference to agency policymaking and upholding and vacating several determinations. The Court continued to generally defer to substantive agency rulings—though sometimes over strong dissents—but expressed no hesitation regarding vacatur of administrative rulings when they are based on misconstructions of statutory provisions.

a. Substantive Issues

1. *Matter of Adirondack Wild: Friends of Forest Preserve v. New York State Dep't of Env. Conserv.*, 34 N.Y.3d 184 (Oct. 22, 2019)

In a 4-3 decision (DiFiore, C.J., joined by Stein, Garcia and Feinman, J.J.), the majority held that the Department of Environmental Conservation ("DEC") had not exceeded its authority under the Recreational Rivers System Act by approving seasonal snowmobile use on an existing roadway in the State's Adirondack Forest Preserve. After conducting an in-depth review of statutory interpretation tools, the Court found that the determination had not violated controlling motor vehicle use restrictions in the Adirondack Park State Land Master Plan or the statute. The Court also found that DEC had acted rationally by approving snowmobile use because it had considered detailed reports about prior land use in the area. In a dissenting opinion, Judge Fahey found it "bewildering" that the DEC concluded that the motor vehicle uses would not be expanded after the road opened to the public. Judge Wilson, joined by Judge Rivera, wrote in a separate dissent that the legislative history, as well as the history of the Adirondack Park itself, makes clear that DEC was barred from permitting snowmobiles to operate on the road.

2. *Matter of Nat'l Fuel Gas Supply Corp. v. Schueckler*, 35 N.Y.3d 297 (June 25, 2020)

In a 4-2 decision (Stein, J., joined by DiFiore, C.J., and Wilson and Feinman, J.J.), the Court held that a petitioner seeking to condemn property through eminent domain to build a pipeline need not comply with hearing

requirements set forth in Eminent Domain Procedure Law ("EDPL") 206(A) so long as the petitioner holds a valid certificate of public convenience or necessity from the Federal Energy Regulatory Commission ("FERC"), because the FERC's certificate qualifies as an agency's public use determination under the EDPL. The Court came to this conclusion despite a refusal by DEC to grant a water quality certification under the Clean Water Act because the latter certification was only a condition precedent for construction of the pipeline, not eminent domain proceedings. Two dissenting judges (Rivera, J., joined by Fahey, J.) argued that the majority's ruling will be problematic because, among other things, it allows the property interest of a lone individual to be "extinguished in furtherance of private economic interests that may never be realized" by final construction.

b. Procedural Issues

1. *Matter of Leggio v. Devine*, 34 N.Y.3d 448 (Feb. 13, 2020)

In a unanimous decision (Wilson, J.), the Court confirmed a determination by the Office of Temporary and Disability Assistance ("OTDA") that child support paid directly to a parent is parental income rather than child income, and thus "household" income for purposes of deciding eligibility for federal Supplemental Nutrition Assistance Program ("SNAP") benefits. The Court explained that this was neither a question of "pure statutory interpretation" nor an issue requiring "specialized knowledge" that warranted special deference. It was therefore merely a "policy decision" that would be upheld if rational, out of "deference to its policy choice in administering" a federal program. And since other states are split on the issue, the court found that OTDA had not acted irrationally by determining that the payments were parental income. The Court further concluded that while OTDA's decisions have "not been a model of clarity" over time, the agency's new rule was "largely consistent" with its core policy and therefore rational.

2. *Matter of O'Donnell v. Erie County*, 35 N.Y.3d 14 (Mar. 26, 2020)

In a unanimous decision (Rivera, J.), the Court remitted to the Workers' Compensation Board in order to clarify why it had upheld an award for loss of certain earnings. The Board had drawn an inference for the claimant despite its practice of doing so only when the issue was undisputed. On appeal, the Board moved to dismiss on the basis that it had "inadvertently strayed" from its precedent, and the Court remitted for clarification. The Court carefully noted, however, that this should not be construed as precedent that "an agency's bare representation that it failed to follow internal precedent would be grounds for vacatur and remand to the agency." Instead, the Court noted that remittal would permit the parties to develop an appropriate record under the applicable standard.

III. Jurisdiction and Civil Procedure

The Court also addressed several significant issues in the areas of jurisdiction and civil procedure, including New York courts' jurisdiction over internal tribal disputes, several issues relating to statutes of limitations, standards for evaluating reconsideration of arbitration awards, pleading standards for class actions, and the requirement to provide written patient authorization when serving certain discovery.

a. Jurisdiction

1. *Cayuga Nation v. Campbell,* 34 N.Y.3d 282 (Oct. 29, 2019)

In a 4-2 decision (Feinman, J., joined by DiFiore, C.J., and Rivera and Stein, J.J.), the Court held that courts in New York lack subject matter jurisdiction to consider an internal governance dispute between two rival factions of the federally-recognized Cayuga Nation because the tribe has exclusive sovereignty over such disputes. The Court recognized that the Federal Bureau of Indian Affairs ("BIA") recognized one of the tribes involved as the governing leadership for federal contracting purposes, but explained that such tribes are independent political communities that have the exclusive power to make their own substantive law in internal matters, including in election disputes. In a dissenting opinion, Judge Garcia argued that the majority had left the "Nation entirely without recourse" and that all of the Nation's claims could be adjudicated through a civil action with one group as representative without resolving the internal tribal dispute over leadership. In a separate, lengthy dissenting option, Judge Wilson asserted that the majority had "slam[med] the courthouse door in the face of the Cayuga Nation" even though there is "no other forum to which it can turn," and that Congress and the New York legislature have granted New York courts jurisdiction to hear civil cases brought by Indian tribes in various statutes.

b. Statute of Limitations

1. *Deutsche Bank Nat'l Trust Co. v. Barclays Bank PLC,* 34 N.Y.3d 327 (Nov. 25, 2019)

In a 4-2 decision (Fahey, J., joined by DiFiore, C.J., and Stein and Feinman, J.J.), the Court held that plaintiff's breach of contract action relating to two residential mortgage-backed securities ("RMBS") transactions was untimely under California law. The Court began by emphasizing that the effects of "every decision made by [the] Court in the area of contract law" are "amplified" by the fact that New York is a "national and international leader in commerce," and numerous "contracting parties in the United States include New York choice-of-law and forum selection clauses in their contracts."

The Court then explained that under New York procedural law, C.P.L.R. 202 requires application of the shorter of New York's and any applicable foreign state's limitations periods. The Court applied California's four-year statute of

limitations period (rather than New York's six-year statute of limitations period) because the place of injury was in California, given the plaintiff's residence in California, and the fact that as trustee of the securities pool, the plaintiff was authorized to enforce the relevant agreements on behalf of certificate-holders. In coming to that conclusion, the Court rejected the plaintiff's argument that the Court should apply a multi-factor "center of gravity" test for statutes of limitations rather than a place-of-injury test because the alternative would result in unpredictability and confusion. In a dissenting opinion joined by Judge Rivera, Judge Wilson argued that the statute of limitations should be determined by the domiciles of the parties to the transaction agreements, rather than of the trustee. Judge Wilson wrote separately to explain that he would have held that the place of accrual is New York because the "gravamen of accrual is where the injury is sustained," and since a trustee is not injured by a diminished trust, and the certificate-holders were geographically diffuse, the trust as an entity itself sustained the injury.

2. ***Lubonty v. U.S. Bank N.A.*, 34 N.Y.3d 250 (Nov. 25, 2019)**

In a 4-3 decision (Garcia, J., joined by DiFiore, C.J., and Wilson and Feinman, J.J.), the Court held that a bankruptcy stay is a "statutory prohibition" within New York's equitable tolling provision (C.P.L.R. 204(a)), such that the duration of any such stay must be excluded from the calculation of whether the statute of limitations has expired, regardless whether an earlier action on the same claim was filed or pending when the stay was imposed. The Court reasoned that C.P.L.R. 204(a) applies when any court or statute has stayed "the commencement of an action," and that neither the Court nor the Legislature has restricted the term "commencement" to mean the *first* time that a party files a cause of action. Moreover, a toll is an equitable device that compensates a claimant "for the shortening of the statutory period in which it must commence—or recommence—an action, irrespective of whether the stay actually deprived the claimant of any opportunity to do so." In a dissenting opinion (Stein, J., joined by Rivera and Fahey, J.J.), three judges argued that the meaning of "commencement" is unambiguous and referred to elsewhere in the C.P.L.R. in the context of first instituting an action.

3. ***Vanyo v. Buffalo Police Benevolent Assoc.*, 34 N.Y.3d 1104 (Dec. 17, 2019)**

The Court (per curiam, joined by DiFiore, C.J., and Stein, Fahey, Garcia, Wilson, and Feinman, J.J.) held that the filing of claims in an *untimely* amended complaint were *nevertheless timely* for purposes of the statute of limitations because they were filed after a timely (albeit unserved) initial complaint. The Court explained that the original and amended complaints included identical claims that were "timely interposed" when the action was commenced. In a dissenting opinion, Judge Rivera asserted that the relation-back doctrine should govern in such circumstances and that the claims did not

relate back to the first complaint because defendants did not have notice until they were served.

c. Arbitration

1. *American Int'l Specialty Lines Ins. Co. v. Allied Capital Corp.*, 35 N.Y.3d 64 (Apr. 30, 2020)

In a unanimous decision (Stein, J.), the Court held that an arbitration panel acted within the bounds of its authority when it reconsidered an initial determination that addressed only some issues submitted for arbitration through a "Partial Final Award." The Court declined to apply the common law doctrine of functus *officio*—precluding arbitrators from taking additional actions after a final award—because the reconsidered award was not final, given that it did not resolve all issues submitted to the arbitrators. The Court rejected the argument that the partial award should be considered final because there was no evidence of express, mutual agreement between the parties that the issuance of a partial decision would have the effect of a final award. The Court also emphasized that New York has a "long and strong public policy favoring arbitration" and that courts are discouraged from unnecessarily interfering with arbitrations.

d. Class Actions

1. *Maddicks v. Big City Properties*, 34 N.Y.3d 116 (Oct. 22, 2019)

In a 4-3 decision (Fahey, J., joined by Rivera, Stein and Wilson, J.J.), the Court held that pre-answer dismissal of certain class allegations was premature. The Court explained that plaintiff's allegations of a systemic plan of misconduct satisfied the "commonality" element of C.P.L.R. 901 because predominance, not unanimity, is the "linchpin" of commonality, and that the requirement of individualized proof for issues such as damages does not preclude a finding of commonality. The Court went on to note that it would be "antithetical to CPLR 901 to conclude that a statute of limitations defense applicable to some, but not all, members of a class of plaintiffs would insulate defendants from class liability." In a dissenting opinion (Garcia, J., joined by DiFiore C.J., and Feinman, J.), three judges would have held that the class allegations must be dismissed because an allegation of a systematic plan of misconduct without a common theory about how the plan was carried out is legally insufficient to establish "commonality."

e. Civil Practice

1. *Plastic Surgery Group, P.C. v. Comptroller of State*, 34 N.Y.3d 507 (Dec. 17, 2019)

In a unanimous decision (Fahey, J.), the Court held that C.P.L.R. 3122(a)(2) requires written patient authorizations when seeking medical records through

a subpoena duces tecum served after an action has been commenced, but not through subpoenas issued by the State Comptroller. The Court explained that C.P.L.R. 3122(a)(2) expressly states that written authorizations are required only when records are requested "pursuant to this rule," which refers to C.P.L.R. 3120 and governs practice only after an action has commenced. The Court also looked to legislative history to confirm its analysis, including a desire to ensure that physicians would not need to respond to subpoenas duces tecum during the discovery unless provided with written patient authorization.

IV. Torts

In the past year, the Court decided several important cases concerning consumer protection statutes in New York, bankruptcy law, and the liability of employers for the conduct of employees.

a. Deceptive Business Practices

1. *Plavin v. Group Health Inc.*, 35 N.Y.3d 1 (March 24, 2020)

In a unanimous decision (Stein, J.), the Court held that a retired New York City police officer sufficiently alleged that an insurance company had engaged in "consumer-oriented conduct" for purposes of false advertisement and deceptive business conduct claims under General Business Law ("GBL") §§ 349 and 350. The Court clarified this area of the law in important respects, explaining that such statutes "do not impose a requirement that consumer-oriented conduct be directed to *all* members of the public." The Court also noted that plaintiff could allege "consumer-oriented conduct" for purposes of the consumer protection statutes even if the New York Attorney General's Office had already taken enforcement action.

As for the allegations, plaintiff alleged that the City of New York offered an insurance company's comprehensive benefits plan to approximately 600,000 employees and retirees and then circulated summary descriptions of that plan to choose between it and numerous other plans. According to plaintiff, these materials contained false or misleading information about the plan's reimbursement rates and coverage. Although the plan itself was negotiated by a small number of sophisticated parties (such as the City and various labor unions), the hundreds of thousands of employees and retirees who had been subject to the plan did not participate in negotiations, and their open enrollment period had exposed them to marketing resembling a traditional consumer-sales environment. Furthermore, the insurance company was incentivized by competition from other plans to leverage its information advantage over consumers who were choosing between plans. Thus, the open enrollment period resembled the "sort of sales marketplace—characterized by groups of similarly-situated consumers subjected to the competitive tactics of a relatively more powerful business—that GBL claims were intended to address."

2. ***Daniel Collazo v. Netherland Property Assets LLC*, 35 N.Y.3d 987 (Apr. 2, 2020)**

In a 6-1 decision (DiFiore, J., joined by Stein, Fahey, Garcia, Wilson, and Feinman, J.J.), the Court held that tenants of an apartment building failed to allege "consumer-oriented conduct" to bring claims against the owners under GBL § 349. Although the Appellate Division concluded that conduct between a landlord and tenant is inherently "private" rather than "consumer-oriented" conduct, the Court assumed without deciding that a claim may lie under GBL § 349 based upon a landlord's misrepresentation to the public about an exemption from rent regulation, then explained that defendants had allegedly failed only "to admit that they violated the Rent Stabilization Law in deregulating plaintiffs' apartments," not taken "affirmative conduct that would tend to deceive consumers." In a dissenting opinion, Judge Rivera would have rejected any "per se" rule finding conduct inherently private—"as to the real estate industry or any other"—and have remitted to Supreme Court for a determination in the first instance.

b. Bankruptcy and Preemption

1. ***Sutton 58 Assocs. LLC v. Pilevsky*, --- N.Y.3d --- (Nov. 24, 2020).**

In a 4-3 decision (Stein, J., joined by DiFiore, C.J. and Wilson and Feinman, J.J.), the majority held that federal bankruptcy law did not preempt plaintiff's state law claims asserted against non-debtor third parties for alleged tortious interference with loan agreements between plaintiff and debtors in pending chapter 11 bankruptcy proceedings. Applying the presumption against preemption that exists in the bankruptcy context, the Court concluded that field preemption did not apply where, *inter alia*, there was no evidence of "a congressional intent to interfere with the authority of state courts to provide traditional tort remedies for claims brought by a *non-debtor* against alleged *non-debtor* tortfeasors for interference with contractual agreements that exist independently of a bankruptcy proceeding." Further, the Court declined to apply conflict preemption where plaintiff's tortious interference claims were premised upon conduct that occurred before the bankruptcy proceedings, and where their resolution in state court would not impugn the bankruptcy process. In a lengthy dissenting opinion with which Judges Fahey and Garcia concurred, Judge Rivera argued that the majority's decision would frustrate Congress's intent in enacting the Bankruptcy Code, which, in the dissent's view, provides remedies for a party aggrieved by conduct alleged by plaintiff in its state action.

c. Employment Law

1. ***Rivera v. State*, 34 N.Y.3d 383 (Nov. 25, 2019)**

In a 4-3 decision (DiFiore, C.J., joined by Stein, Garcia, and Feinman, J.J.), the Court held that the State could not be liable under the doctrine of

respondeat superior for injuries sustained by an inmate during an attack initiated by the State's corrections officers. Applying a common law test, the Court reasoned that the time, place, and occasion of the attack suggested that the officers were acting "in the course of their employment," but the gratuitous attack was not in furtherance of employer goals or in line with normal employee conduct. Moreover, there was no way the employer could have "reasonably anticipated such a flagrant and unjustified" attack on the inmate. Finally, the Court noted that the victim could pursue other relief, including a claim for negligent supervision or a tort claim directly against the officers. A dissenting opinion (Rivera, J., joined by Fahey and Wilson, J.J.), argued that genuine issues of material fact remained as to whether two officers who restrained the victim after the initial assault were acting within the scope of employment.

V. Looking Ahead

We highlight below a number of civil cases the Court of Appeals will hear and decide during the coming year. We have selected cases that may have broad importance and relevance to our clients.

a. Jurisdiction and Constitutional Law

GIBSON DUNN: Counsel for UBS AG and UBS Global Asset Management (Americas), Inc.

PARTNER: Marshall King

1. ***Estate of Kainer v. UBS AG*, 175 A.D.3d 403 (1st Dep't 2019), *lv. granted*, APL-2019-00090.**

   The Court of Appeals granted leave to consider the dismissal on *forum non conveniens* grounds of claims arising out of the disposition of a foreign estate that contained Holocaust-era art, including the propriety of granting *forum non conveniens* dismissal before ruling on personal jurisdiction.

2. ***Aybar v. Aybar*, 169 A.D.3d 137 (2d Dep't 2019), *lv. granted*, APL-2019-00239.**

   The Court of Appeals granted leave to consider whether a foreign corporation can be subject to general jurisdiction in New York because it registered to do business in the state and appointed the Secretary of State as its agent for service of process.

3. ***Zervos v. Trump, 171 A.D.3d 110* (1st Dep't 2019), *lv. granted*, APL-2020-00009.**

   The Appellate Division granted leave for the Court to address whether the U.S. Constitution bars state courts from exercising jurisdiction over a President while he or she is in office.

4. ***White v. Cuomo*, 181 A.D.3d 76 (3d Dep't 2020), *appeal pending*, APL-2020-00027.**

   The Court of Appeals will consider an appeal regarding whether the New York Constitution's gambling prohibition forbids the Legislature from enacting a statute that authorizes and provides for the regulation of interactive fantasy sports contests.

b. Commercial Litigation

1. ***Home Equity Mortgage Trust Series 2006-1 v. DLJ Mortg. Capital, Inc.*, 175 A.D.3d 1175 (1st Dep't 2019), *lv. granted*, APL-2019-00247; *U.S. Bank, N.A. v. DLJ Mort. Capital, Inc.*, 176 A.D.3d 466 (1st Dep't 2019), *lv. granted*, APL-2020-00018.**

   The Appellate Division granted leave in two RMBS cases for the Court of Appeals to address whether an RMBS plaintiff can pursue claims for breach of representation and warranty on loans identified as in breach after a suit was timely filed, such as through the relation-back doctrine; whether statistical sampling is a permissible means of proving liability and damages in an RMBS case; and whether an RMBS contract providing for "accrued" interest as part of the contract's repurchase remedy provides for interest on liquidated loans.

2. ***Adar Bays, LLC v. GeneSYS ID, Inc.*, 962 F.3d 86 (2d Cir. 2020), *question certified*, CTQ-2020-00005.**

   The Court of Appeals accepted certification of a question from the Second Circuit as to whether a stock conversion option that permits a lender to convert any outstanding balance to shares at a fixed discount should be treated as interest under New York's criminal usury law, and if so, whether the contract is avoid *ab initio* or the interest rates are merely canceled or revised.

3. ***Fast Trak Investment Co., LLC v. Sax*, 962 F.3d 455 (9th Cir. 2020), *question certified*, CTQ-2020-00006.**

   The Court of Appeals accepted certification of the question from the Ninth Circuit whether a litigation financing agreement can qualify as a "loan" or a "cover for usury" where the obligation of repayment arises at least in part from attorney's fees the client's lawyer may recover in unrelated litigation, and if so, what may be the appropriate consequences for such an agreement.

c. Deceptive Business Practices

1. ***Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP v. Matthew Bender & Co.*, 172 A.D.3d 405 (1st Dep't 2019), *lv. granted*, APL-2020-00008.**

   The Court of Appeals granted leave to address questions relating to alleging deceptive omissions in a legal treatise by Matthew Bender, including what injuries and causation may be cognizable under General Business Law § 349 when a law firm allegedly would not have purchased the treatise absent deceptive content.

d. Employment Law

1. ***Doe v. Bloomberg L.P.*, 178 A.D.3d 44 (1st Dep't 2019), *appeal pending*, APL-2019-00218.**

   The Court of Appeals will consider the extent to which Michael Bloomberg can be held liable as an "employer" under the New York City Human Rights Law for alleged discrimination of managers and supervisors in Bloomberg L.P., where plaintiff alleges that Bloomberg fostered a culture of discrimination and sexual harassment but does not allege that he personally encouraged, condoned, or approved specific discriminatory conduct.

e. Insurance

1. ***J.P. Morgan Securities Inc. v. Vigilant Insurance Co.*, 166 A.D.3d 1 (1st Dep't 2019), *lv. granted*, APL-2020-00044.**

   The Court of Appeals granted leave to address whether disgorgement payments to the SEC are insurable and constitute a covered "loss" under New York law.

2. ***Brooklyn Center for Psychotherapy, Inc. v. Philadelphia Indemnity Insurance Co.*, 955 F.3d 305 (2d Cir. 2020), *question certified*, CTQ-2020-00002.**

   The Court of Appeals accepted certification of the question from the Second Circuit whether a general liability insurance carrier must defend an insured in an action alleging discrimination under a failure-to-accommodate theory.

Gibson Dunn's New York Appellate Practice

Gibson Dunn's Appellate and Constitutional Law Group is the premier appellate practice group in the nation. In 2020, *U.S. News* named our firm the appellate group "of the year," *Law360* named us one of its five appellate groups for 2020, and *Chambers USA* rated us Tier 1 in Appellate Law. *The National Law Journal* similarly named us to its 2020 Appellate Hot List, which features law firms that "tackled novel issues and undoubtedly overcame unprecedented challenges over the past year, boasting high-profile and high-stakes wins in the nation's highest appellate courts across a number of practice areas." Gibson Dunn's lawyers have litigated in all 13 federal courts of appeals and in state appellate courts across the country, with a strong presence in the U.S. Supreme Court, where we have litigated numerous times in the last decade. Moreover, our Litigation Department has been named *American Lawyer*'s 2020 Litigation Department of the Year—the firm's fourth win in the last six years of the publication's biennial competitions, and the sixth time in a row the firm has been a finalist.

In New York, the firm's Appellate and Constitutional Law Group brings specialized experience to bear on the unique challenges faced by our clients. Our New York office is home to a team of top appellate specialists and litigators who regularly represent clients in appellate matters involving an array of constitutional, statutory, regulatory, and common-law issues, including securities, antitrust, commercial, intellectual property, insurance, unfair trade practice, First Amendment, class action, and complex contract disputes. In addition to our expertise in New York's appellate courts, we regularly brief and argue some of the firm's most important appeals, file amicus briefs, participate in motion practice, develop policy arguments, and preserve critical arguments for appeal. That is nowhere more critical than in New York—the epicenter of domestic and global commerce—where appellate procedure is complex, the state political system is arcane, and interlocutory appeals are permitted from the vast majority of trial-court rulings.

We will continue to draw on this expertise to monitor and report on developments at the New York Court of Appeals.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the New York Court of Appeals, or in state or federal appellate courts in New York. Please feel free to contact the following lawyers in New York, or any member of the Appellate and Constitutional Law Practice Group:

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