GIBSON DUNN

New York Court of Appeals Round-Up & Preview

December 2021

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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, its broad jurisdiction over a wide array of cases in New York often results in rulings of great importance in commercial and other matters.

This year marks an important turning point for the seven-member Court, as new judges will soon comprise nearly half its bench. In June, the New York Senate confirmed the appointment of Anthony Cannataro and Madeline Singas. Judge Cannataro, who was formerly the Administrative Judge of the Civil Court of the City of New York, filled the vacancy left by Judge Paul Feinman, who passed away. Judge Singas, who was formerly the Nassau County District Attorney, filled the vacancy left by the retired Judge Leslie Stein. As Judges Feinman and Stein often voted with Chief Judge DiFiore and Judge Garcia to form a majority in the Court's decisions, it remains to be seen if that pattern continues.

The Court will also change in 2022 because Judge Eugene Fahey, a swing vote, reaches his mandatory retirement age at the end of this year. To fill his seat, Governor Kathy Hochul nominated Shirley Troutman, a justice in the Appellate Division, Third Department. If confirmed, she would be the second African American woman to sit on the Court. Justice Troutman has extensive experience as a prosecutor and a judge. She also has spent her career upstate, providing geographic balance. On the other hand, analysts have expressed concern that the Court lacks "professional diversity," as it would include four former prosecutors and only one judge (Fahey, or Troutman) with judicial experience in the Appellate Division.

Despite this turnover, the Court continued previous trends, with the pace of decisions reduced and a high number of fractured opinions. After Judge Feinman's passing, the Court ordered several cases to be reargued in a "future court session," which may suggest that his was a potential swing vote in those cases. Nevertheless, the Court continued to resolve significant issues in a wide array of areas, from territorial jurisdiction and agency deference to consumer protection and insurance contracts.

The New York Court of Appeals Round-Up & Preview summarizes key opinions primarily 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.

I. Constitutional Law

In the past year, the Court resolved significant issues of state constitutional law, including the constitutionality of a special prosecutor appointed by the Governor and the proper application of the "forever wild" provision that was enacted to protect the Adirondack Park's Forest Preserve.

a. Separation of Powers

1. *People v. Viviani*, 36 N.Y.3d 564 (Mar. 30, 2021)

In a unanimous decision (Garcia, J.), the Court struck down statutory provisions creating a special prosecutor who had concurrent authority with district attorneys to investigate and prosecute crimes of abuse or neglect of vulnerable victims in State facilities. The Court held that the statute was unconstitutional because it deprived district attorneys of the essential function of determining whom, whether, and how to prosecute by vesting concurrent discretionary power in a special prosecutor appointed by the Governor. The Court declined to accept a saving construction proffered by the special prosecutor and the New York State Attorney General, which would have limited the special prosecutor's powers to instances where local district attorneys had consented to and retained ultimate responsibility for the criminal prosecution. The Court reasoned that such a construction conflicted with the text of the statute. In a concurring opinion, Judge Stein emphasized that the Court's ruling did not extend to petty offenses prosecuted in local courts, where there may be authority for permitting district attorneys to consent to prosecutions by others, so long as they are kept aware of all the criminal prosecutions in the county. In a separate opinion, Judge Rivera endorsed a proposed saving construction as consistent with the statutory text, but concluded that it did not apply in the relevant cases because there was no record evidence of consent by respective district attorneys.

Despite striking down the provisions vesting a special prosecutor with discretionary authority to bring criminal cases, the Court held that other provisions remained in force, including permitting the special prosecutor to cooperate with and assist district attorneys and other local law enforcement officials in their efforts against abuse or neglect of vulnerable persons. The Court explained that it would sever those provisions from the unconstitutional portions because they furthered the overarching goal of the Legislature. The importance of the case to New York State was highlighted by the fact that it featured oral arguments by both the current New York Solicitor General, Barbara Underwood, and by a former New York Solicitor General.

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

Gibson Dunn named to 2021 Appellate Hot List

Gibson Dunn named a 2021 Finalist for Litigation Department of the Year, the seventh consecutive honor following an unprecedented four wins

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

PARTNER: Marshall King

b. Forever Wild

1. *Protect the Adirondacks! Inc. v. New York State Dep't of Envtl. Conservation*, 37 N.Y.3d 73 (May 4, 2021)

In a 4-2 decision (Rivera, J., joined by Fahey, Garcia, and Wilson, J.J.), the Court held that the planned construction of snowmobile trails in the state-owned Forest Preserve of the Adirondack Park would contravene the "forever wild" provision of the New York Constitution and thus could not be accomplished without a constitutional amendment. The "forever wild" provision was ratified in 1894 in response to widespread concern for the growing commercial destruction and despoliation jeopardizing state forests. In striking down the proposed construction, the Court concluded that such an encroachment would work a "substantial change" to the Forest Preserve, even though it would require only approximately 27 miles of trails to be constructed and remove other trials. In coming to that conclusion, the Court rejected arguments that few trees would be destroyed as compared to the massive size of the preserve, that the trails would enhance access to and enjoyment of the preserve, and that the trails would minimize destruction of trees to the maximum feasible extent. In a dissenting opinion (Stein, J., joined by DiFiore, C.J.), two judges argued that the "forever wild" provision was intended to preserve the forest for use and enjoyment of the People of New York, and that minimal trails to enhance that purpose were permissible.

II. Jurisdiction and Civil Procedure

The Court also addressed several significant issues in the areas of jurisdiction and civil procedure, including the application of forum non conveniens and personal jurisdiction, filing a notice of appeal for appellate jurisdiction, and res judicata of small claims judgments.

a. Forum Non Conveniens

1. *Estate of Margaret Kainer, et al. v. UBS AG, et al.*, 2021 N.Y. Slip. Op. 07056 (Dec. 16, 2021).

In a 5-1 decision (Cannataro, J., joined by DiFiore, C.J., and Garcia, Wilson, and Singas, J.J.), the Court held that a court may dismiss a case on *forum non conveniens* grounds without first determining whether it has personal jurisdiction over the defendants. The Court cited the U.S. Supreme Court's decision in *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007), which held that "[a] district court . . . may dispose of an action by a forum non conveniens dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." This portion of the Court's decision resolves an internal split among the Appellate Divisions.

The Court also reaffirmed precedent holding that, contrary to federal law, the availability of another suitable forum is not a prerequisite for applying the *forum non conveniens* doctrine in New York. Lastly, the Court recognized that a court's failure to consider "special and unusual circumstances favoring acceptance of a suit" would constitute an error of law on a *forum non conveniens* motion. It nevertheless concluded that the lower courts in this case sufficiently considered those circumstances—namely, that the plaintiffs' claims involved Nazi-looted art and that public policy favors "expeditious[]" resolution of such claims.

In a dissenting opinion, Judge Fahey argued that dismissal on *forum non conveniens* grounds was inconsistent with the "interest of substantial justice." Judge Fahey highlighted the "public policy of New York and the United States in resolving claims of Nazi-looted art on the merits" and the possibility that no suitable alternative forum exists for the plaintiffs' claims.

b. Territorial Jurisdiction

1. *Aybar v. Aybar*, 2021 N.Y. Slip Op. 05393 (Oct. 7, 2021)

In a 5-2 decision (Singas, J., joined by DiFiore, C.J., and Fahey, Garcia, and Cannataro, J.J.), the Court held that a corporation's measures undertaken to comply with the Business Corporation Law by registering to do business in New York and by designating a local agent for service of process do not constitute consent to general jurisdiction in the state. The Court noted that the relevant statutory provisions do not condition the right to do business on consent to jurisdiction, and the Court explained that the law on jurisdiction and due process, including through U.S. Supreme Court precedent, has since changed from a rigid "territorial approach" to an analysis of the nature and extent of a corporation's contacts, warranting a fresh look at precedent. That precedent in reality was limited only to determining the effect of service of process when a corporation had already consented to jurisdiction. In a lengthy dissent, Judge Wilson (joined by Judge Rivera) argued that the Legislature's intent behind the General Business Law was to provide jurisdiction, and that the Court was misinterpreting its past jurisprudence.

c. Appellate Jurisdiction

2. *Matter of Miller v. Annucci*, 37 N.Y.3d 996 (Sept. 9, 2021)

In a unanimous per curiam decision, the Court confirmed that "filing" a notice of appeal under the C.P.L.R. requires a court clerk's office to actually receive the notice. In the case, a pro se inmate had argued that the Court should apply a "mailbox rule" to deem his notice of appeal timely upon delivery to prison authorities for forwarding to the proper court because he has no control over whether it is ultimately filed with the clerk's office. The Court rejected the inmate's invocation of U.S. Supreme Court precedent deeming a pro se prisoner's notice of appeal to be "filed" within the meaning of the Federal Rules of Appellate Procedure when delivered to prison officials because the Supreme Court's authority to interpret the Federal Rules—promulgated and adopted by the Supreme Court itself—exceeds the New York Court of Appeals's authority when interpreting the C.P.L.R., which the Court must interpret to give effect to the will of the Legislature. By its express terms, the C.P.L.R. indicates that a filing occurs when the clerk's office receives the notice of appeal, and that service by mail by contrast is complete upon mailing. The Court noted that C.P.L.R. 5520 provides authority to excuse untimely filing of a notice of appeal in the event of a mistake or excusable neglect upon timely service. And the Court noted that the inmate had not raised an as-applied constitutional challenge to the filing requirement in C.P.L.R. 5515, leaving open future challenges on that basis.

d. Res Judicata

3. *Simmons v. Trans Express Inc.,* 37 N.Y.3d 107 (June 3, 2021)

In a 4-2 decision (Stein, J., joined by DiFiore, C.J., and Fahey and Garcia, J.J.), the Court interpreted the statutory text and history of New York Civil Court Act § 1808 and concluded that while small claims judgments in Civil Court generally do not have issue preclusive effect, they may have traditional claim preclusive effect (subject to a setoff provision) in a subsequent action involving a claim between the same adversaries arising out of the same transactions or occurrences, like the res judicata effects of other judgments.

In a dissenting opinion, Judge Rivera (joined by Judge Wilson) argued that the Court had misinterpreted the statute by recognizing the applicability of traditional claim preclusion, and had imposed "a severe hardship on small claims pro se claimants" who, because of unawareness or the need for money, accept quick and modest small claims payouts in New York Civil Court rather than pursuing a larger award in another court, such as federal court.

III. Administrative Law

This year, the Court resolved several challenges to administrative action, illustrating the Court's approach to issues such as deference to administrative determinations and interpretations of agency authority as set forth in governing statutes.

a. Deference to Agencies

1. ***Matter of W. 58th St. Coalition, Inc. v. City of New York*, 37 N.Y.3d 949 (May 27, 2021)**

   The Court (per curiam) unanimously confirmed New York City's classification of a building in Manhattan as rational under the building code for purposes of opening a homeless shelter. The Court's ruling was based upon record evidence before the relevant agency. The Court went on to emphasize that the Appellate Division had erred in remitting for a hearing on whether the building's use as a homeless shelter was "consistent with general safety and welfare standards" because, in a C.P.L.R. article 78 proceeding challenging administrative action, "the scope of judicial review does not extend past the question of whether the challenged determinations were irrational, which is a question of law." After concluding that an administrative ruling is rational, the Court explained, a court "cannot second guess that determination by granting a hearing to find additional facts or consider evidence not before the agency when it made its determination."

2. ***Matter of People Care Inc. v. City of N.Y. Human Res. Admin.*, 36 N.Y.3d 1088 (Mar. 25, 2021)**

   In a unanimous decision (per curiam), the Court held that funds for personal care services paid under the state Health Care Reform Act were "Medicaid funds" that were subject to the audit and recoupment authority of the New York City Human Resources Administration in accordance with the parties' contract. In coming to that ruling, the Court affirmed "for the reasons stated in the dissenting opinion" of the Appellate Division, which (among other things) emphasized that the New York City agency had developed a record that included its own statements by an official at the New York State Department of Health supporting the agency's view of its authority, and that the official's views were entitled to deference because they were based on knowledge and understanding of underlying operational practices, in which the Department of Health was in charge of overseeing Medicaid.

b. Statutory Interpretation

1. *Matter of Juarez v. New York State Office of Victim Servs.*, 36 N.Y.3d 485 (Feb. 18, 2021)

In a 5-2 decision (Stein, J., joined by DiFiore, C.J., and Garcia, Feinman, and Wilson, J.J.) the Court upheld regulations promulgated by the New York State Office of Victim Services that limited attorneys' fee awards for crime victim claimants to costs incurred on applications for reconsideration or appeal and on judicial review. The Court reasoned that such regulations were consistent with statutory language that required attorneys' fees to be awarded "for representation before the office" because the statute granted the agency authority to determine whether fees are "reasonable," and because the agency had rationally concluded that "relatively simple tasks" like completing initial claim forms do not warrant fees, particularly where the statutory purpose is to help crime victims rather than promote income for attorneys. In a concurring opinion, Judge Wilson concluded that the Court came to the correct conclusion through an unnecessarily complex reading of the agency's broad powers, as set forth in the statute. Judge Rivera (joined by Fahey, J.) dissented, arguing that the categorical denial of attorneys' fees for legal work in filing an administrative claim involves "no exercise of discretion at all" and thus was not a permissible interpretation of the statute, and that discouraging attorneys from assisting claimants undermines the legislative purpose.

IV. Torts

In the past year, the Court decided several important cases concerning deceptive business practices under the consumer protection statute, claims against employers under various statutes, and recognition of implied private rights of action.

a. Deceptive Business Practices

1. *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 N.Y.3d 169 (June 3, 2021)

In a 5-1 decision (Rivera, J., joined by DiFiore, C.J., Stein, Garcia, and Wilson, J.J.), the Court clarified the reach of New York's consumer protection statute, General Business Law § 349, which prohibits deceptive, "consumer-oriented" conduct. The Court held that publishing, advertising, and distributing a landlord-tenant law treatise was "consumer-oriented" because it was made available to the public. The Court rejected the argument that the treatise "could only be used by businesses" and was not directed "at consumers at large for personal, family, or household use," because the statute is intended to sweep broadly regardless of use to be made by the public. The Court similarly rejected the argument that the treatise was marketed and sold to businesses and "legal professionals" such as lawyers, judges, and tenant advocates, because legal professionals are a subclass of consumers.

The Court nevertheless held that the treatise was not "materially misleading" because the treatise's susceptibility to revision at any time based on legislative developments, coupled with the fact that a disclaimer in the parties' contract "addresse[d] the precise deception alleged in the complaint," left no possibility that a reasonable consumer would have been misled by the treatise's content. In a dissenting opinion, Judge Fahey argued that the treatise was materially misleading, and he would have examined prior Court precedent regarding the requirement of an injury, explaining that "[t]he underlying legislative purpose behind GBL § 349, as well as common sense, require the conclusion that when a consumer would not have purchased a product but for the defendant's deceptive conduct, that consumer has suffered a cognizable injury, i.e., the price that the consumer paid for the product."

b. Employment Law

1. *Doe v. Bloomberg, L.P.*, 36 N.Y.3d 450 (Feb. 11, 2021)

In a 6-1 decision (Garcia, J., joined by DiFiore, C.J., and Stein, Fahey, Wilson, and Feinman, J.J.), the Court held that Michael Bloomberg could not be vicariously liable as an "employer" under the New York City Human Rights Law based on his status as owner and officer of Bloomberg, L.P. The Court explained that where a plaintiff's employer is a business entity, the shareholders, agents, limited partners, and employees are not employers within the meaning of the City's Human Rights Law. Rather, they may incur liability only for their own discriminatory conduct, for aiding and abetting others, or for retaliation against protected conduct. The Court found unpersuasive the analysis adopted by the Appellate Division, which held that an employer must engage in some participation in the specific conduct against the plaintiff, because that test was derived from case law determining whether an employer is liable under the New York State Human Rights Law, not who is an employer under the City's Human Rights Law. The Court similarly rejected a test that would have found an individual to be an employer under the Human Rights Law if he had an ownership interest in the organization or had the power to do more than carry out personnel decisions by others.

2. *Sassi v. Mobile Life Support Services, Inc.*, 37 N.Y.3d 236 (Oct. 12, 2021)

In a unanimous decision (DiFiore, C.J.), the Court held that state laws prohibiting discrimination in employment applications based on a previous criminal conviction could apply to a plaintiff who was convicted during employment and subsequently sought re-employment following incarceration. The Court explained that the word "application" is reasonably interpreted to mean a request for employment, and that the complaint's allegations were sufficient to plead that plaintiff had sought re-employment rather than been terminated from current employment. In a concurring opinion, Judge Garcia emphasized that state law prohibits discrimination based on a "previous" conviction, not a termination based on conviction during employment; that plaintiff must sufficiently allege that he applied for an open position; and that prior employment history may be relevant in subsequent hiring decisions.

c. Private Rights of Action

1. *Ortiz v. Ciox Health LLC*, 2021 N.Y. Slip Op. 06425 (Nov. 18, 2021).

In a unanimous decision (Singas, J.), the Court held that an implied private right of action for damages does not exist for violations of Public Health Law § 18(2)(e), which limits the reasonable charge for paper copies of medical records to $0.75 per page. The Court reasoned that plaintiffs, who were seeking copies of medical records, were clearly part of a class that the statute was designed to protect. While it was "unclear whether a private right of action would promote the legislative purpose" of increasing patient access to records, however, a private right of action would be inconsistent with the legislative scheme, which provided for other remedies such as substantial fines from government officials, and provided mechanisms for enforcing other provisions of the statute. In a concurring opinion, Judge Wilson argued that the Court applied the wrong analysis of legislative purpose, which he believed should have turned on whether the Legislature intended to create or deny the implied damages remedy in question. The majority believed this approach would wrongly subsume the other factors in the implied-remedy analysis.

V. Contracts

The Court also issued a broad array of decisions concerning the interpretation of insurance contracts, the proper application of state usury laws, and procedures relating to foreclosure actions brought by mortgage lenders against borrowers.

a. Insurance

1. *J.P. Morgan Securities Inc. v. Vigilant Insurance Co.*, 2021 N.Y. Slip Op. 06528 (Nov. 23, 2021).

In a 6-1 decision (DiFiore, C.J., joined by Fahey, Garcia, Wilson, Singas, Cannataro, J.J.), the Court held that disgorgement payments to the federal Securities and Exchange Commissions were not excluded from insurance coverage as a "penalty imposed by law" under the policies. The Court reasoned that the payment was not a "penalty" because it was calculated based on wrongfully obtained profits as a measure of the harm caused by alleged wrongdoing, while a separate "penalty" payment was not derived from an estimate of harm or gain from the improper trading practices. As the Court explained, the disgorgement served a compensatory goal and was eligible to offset private civil claims. The Court further rejected the applicability of the U.S. Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)—which held as a matter of statutory interpretation that the five-year limitations period for actions to enforce a "penalty" encompassed disgorgements—because that decision did not involve interpretation of an insurance contract and was decided long before the parties executed their agreement. In a dissenting opinion, Judge Rivera argued that the primary purpose of disgorgement is to punitively deter wrongdoing, not to compensate victims.

b. Lending and Borrowing

1. *Adar Bays, LLC v. GeneSYS ID, Inc.*, 2021 N.Y. Slip Op. 05616 (Oct. 14, 2021)

In a 6-1 decision (Wilson, J., joined by DiFiore, C.J., Rivera, Fahey, Singas, and Cannataro, J.J.), the Court examined the text and history of the state's usury laws and held that if the interest charged on a loan to a corporate borrower is determined to be more than 25% and is thus criminally usurious under Penal Law § 190.40, then (as in cases where the defense of civil usury has been established) the contract is void *ab initio*, resulting in non-collectability of both principal and interest on the contract.

The Court went on to hold that a stock conversion option that permits a lender to convert an outstanding balance to shares at a fixed discount has intrinsic value that is bargained for and should thus be treated as interest for the purpose of determining whether the transaction violates the criminal usury law, to the extent that such value, when measured at the time of contracting, can be reasonably determined. The Court emphasized that the value of such an option is a question of fact, and the burden to prove the value to establish the affirmative defense of usury is on the borrower rather than the lender.

In a dissenting opinion, Judge Garcia expressed concern that the Court's ruling will cause commercial borrowers and lenders to do business in other states, resulting in less relevance for New York commercial law.

2. *Freedom Mtge. Corp. v. Engel*, 37 N.Y.3d 1 (Feb. 18, 2021)

In a set of split decisions, the Court (DiFiore, C.J.) held that an "unequivocal overt act" that accelerates maturity of a mortgage for statute of limitations purposes cannot include commencement of an action that involved prior versions of the relevant agreement; nor can it include a default letter warning that debt "will be accelerated" when it subsequently warns that failure to cure the default "may result" in foreclosure and sale of the property. Turning to whether the noteholder's voluntary discontinuance of a foreclosure action revoked acceleration, the Court held that the noteholder's voluntary withdrawal of a foreclosure action revokes an election to accelerate, absent any contemporaneous statement to the contrary. In coming to its conclusions, the Court emphasized that these rules adopt clear principles in areas where the need for clarity is at its "zenith," including contracts affecting real property, such as mortgages, and the applicability of statutes of limitations.

In a concurring opinion, Judge Wilson wrote to clarify that the Court had not decided whether the notes and mortgages at issue permit a lender to revoke an acceleration in the first instance, which remains unclear. And Judge Rivera dissented in part, arguing that a noteholder should be required (as for an acceleration) to provide express notice to the borrower regarding the effect of withdrawal of a foreclosure action on the de-acceleration of a loan, rather than to revoke acceleration merely by withdrawing a foreclosure action.

3. *CIT Bank N.A. v. Schiffman*, 36 N.Y.3d 550 (Mar. 30, 2021)

In a unanimous decision (DiFiore, C.J.), the Court clarified two aspects of procedure required under the Real Property Actions and Proceedings Law ("RPAPL") for a lender to commence a residential foreclosure action. First, the Court held that where a presumption of mailing and receipt of a required 90-day notice under RPAPL 1304 arises from proof of a standard office mailing procedure, the presumption may be rebutted through proof of a "material deviation from the ordinary practice that calls into doubt whether the notice was properly mailed," impacting the likelihood of delivery to the intended recipient. The Court emphasized that minor deviations "of little consequence" are insufficient and that proof may be "contextual" and depend, in part, on the nature of the mailing practices. As the Court reasoned, finding that a single deviation was sufficient to rebut the presumption would "undermine the purpose of the presumption" because, in practice, it would require entities to take the impractical course of retaining actual proof of mailing for every document that could be potentially relevant in a lawsuit.

Second, the Court held that RPAPL 1306, which requires a lender to submit certain borrower information to the New York State Department of Financial Services ("DFS"), requires the lender only to submit information about one borrower, rather than each individual liable on a loan. The Court emphasized the statutory text, which uses the word "borrower" rather than borrowers, and noted that the primary purpose of the filing requirement was to help permit DFS to monitor the extent of foreclosure filings on a statewide basis and to properly allocate counseling resources to combat the mortgage crisis.

In a concurring opinion, Judge Fahey (joined by Stein and Wilson, J.J.), wrote to briefly outline New York law on the proof necessary to give rise to a presumption of mailing based on standard office procedure. Judge Fahey explained that proof of standard procedure must be geared to ensure the likelihood that the document is always properly addressed and mailed and should generally include a description of the practices used by the mailing party to ensure the accuracy of addresses and delivery to the post office.

VI. 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.

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a. Constitutional Law and Civil Procedure

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

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

2. ***Nonhuman Rights Project, Inc. v. Breheny*, 189 A.D.3d 583 (1st Dep't 2020), *lv. granted*, APL-2021-00087.**

   The Court of Appeals granted leave to consider whether Happy the elephant is a "person" for purposes of state law governing habeas corpus.

b. State and Municipal Litigation

1. ***Matter of Endara-Caicedo v. New York State Dep't of Motor Vehicles*, 180 A.D.3d 499 (1st Dep't 2020), *lv. granted*, APL-2020-00133.**

   The Court of Appeals will consider whether a motorist who declined a chemical test of blood-alcohol level more than two hours after arrest has "refused" the chemical test for purposes of mandatory license revocation in an administrative proceeding under the New York Vehicle & Traffic Law.

2. ***Ferreira v. City of Binghamton*, 975 F.3d 255 (2d Cir. 2020), *question certified*, CTQ-2020-00007.**

   The Court of Appeals accepted certification of a question from the Second Circuit as to whether the "special duty" requirement for negligence cases against a municipality applies to claims alleging negligence by employees of the municipality themselves, rather than negligence committed by others.

c. Employment Law

1. ***Moore Charitable Foundation v. PJT Partners, Inc.*, 178 A.D.3d 433 (1st Dep't 2019), *lv. granted*, APL-2020-00137.**

   The Court of Appeals granted leave to consider the extent to which an employer owes a duty of care to prospective customers when supervising its own employees for purposes of a negligence claim.

d. Insurance

2. *Matter of Independent Insurance Agents & Brokers of New York, Inc. v. New York State Dep't of Fin. Servs.*, 195 A.D.3d 83 (3d Dep't 2021), *appeal pending*, APL-2021-00108.

The Court of Appeals will consider the constitutionality of a regulation promulgated by the New York State Department of Financial Services, which requires insurers to establish standards and procedures to supervise recommendations by agents and brokers with respect to certain contracts so that transactions concerning such policies are in the "best interest" of the consumer and appropriately address the consumer's needs and objectives.

e. Commercial Litigation

1. *US 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 an RMBS case 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; and whether an RMBS contract providing for "accrued" interest as part of the contract's repurchase remedy provides for interest on liquidated loans.

2. *ACE Securities Corp. v. DB Structured Products Inc.*, 177 A.D.3d 493 (1st Dep't 2019), *lv. granted*, No. 2020-00126.

The Court of Appeals granted leave to consider whether an RMBS trustee may refile an action under C.P.L.R. 205(a) for statute of limitations purposes where certificate-holders of the trust previously timely commenced an action on the same transaction or occurrence.

3. *Revis v. Schwartz*, 192 A.D.3d 127 (2d Dep't 2020), *appeal pending*, APL-2021-00010.

The Court of Appeals will consider the interplay between arbitration provisions and arbitrability of substantive allegations relating to alleged attorney misconduct in the performance of NFL-player contracts.

Gibson Dunn's New York Appellate Practice

Gibson Dunn's Appellate and Constitutional Law Group is the premier appellate practice group in the nation. We recently won the *Best Lawyers* Law Firm of the Year for Appellate Practice, *Benchmark Litigation* named us its 2021 East Coast Appellate Firm of the Year, and *The National Law Journal* named Gibson Dunn to its 2021 Appellate Hot List, which "highlights law firms that have handled exemplary appellate matters." *U.S. News* and *Chambers USA* have also ranked us Tier 1 in appellate practice, and in 2020, the firm was named the appellate group "of the year" by *U.S. News* and *Law360*. 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 was a finalist in *American Lawyer*'s 2021 Litigation Department of the Year competition, following our unprecedented four wins in this biennial competition and the firm's seventh consecutive Finalist honor.

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, including former government officials and seasoned appellate advocates with extensive appellate experience, 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, 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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