GIBSON DUNN

New York Court of Appeals Round-Up & Preview

March 2023

Mylan L. Denerstein
Co-Chair
Public Policy Practice
212.351.3850
mdenerstein@gibsondunn.com

Akiva Shapiro
Chair,
New York Administrative Law and Regulatory Practice
212.351.3830
ashapiro@gibsondunn.com

Seth M. Rokosky
212.351.6389
srokosky@gibsondunn.com

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 past year marked an important turning point for the Court, with Judges Anthony Cannataro, Madeline Singas, and Shirley Troutman joining as new members on the seven-member bench. Then, in Summer 2022, Chief Judge Janet DiFiore abruptly resigned, leaving a surprising, additional vacancy. The Court designated Judge Cannataro to be acting Chief Judge until the vacancy could be filled.

To fill the seat, Democratic Governor Kathy Hochul nominated Justice Hector LaSalle, the Presiding Justice of the Appellate Division, Second Department (the busiest state appellate court in the nation). His nomination was quickly opposed by some in light of his prosecutorial background and a perception that his judicial rulings were overly conservative. The State Senate rejected his nomination in a largely party-line vote, with Democrats opposing his nomination—the first time New York legislators have rejected a governor's nomination for chief judge. The vacancy remains to be filled.

The Court's jurisprudence nonetheless continued along previous trends during this period. Judges Cannataro and Singas (like their predecessors) often voted with Judges DiFiore and Garcia to form a majority, while Judges Wilson and Rivera continued to author numerous, lengthy dissents. Judge Troutman (like her predecessor, Judge Fahey) appears poised to emerge as a potential swing vote. Although the Court in previous years was not perceived as particularly ideological, its rulings have been increasingly fractured along often-predictable voting lines. It remains to be seen if this trend will continue after a new chief judge is confirmed.

The Court also continued its trend of reviewing a reduced number of cases. The Court nevertheless issued significant opinions on a wide array of issues, from fantasy sports to electoral redistricting, insurance, mortgage-backed securities, and tort law.

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.

GIBSON DUNN:
Counsel for Amici
FanDuel, Inc. and
DraftKings Inc.

PARTNERS:
Mylan Denerstein
Allyson Ho

I. Constitutional Law

In the past year, the Court resolved significant issues of state constitutional law relating to interactive fantasy sports, redistricting, and executive compensation.

a. Fantasy Sports

1. *White v. Cuomo*, 38 N.Y.3d 209 (2022).

In a 4-3 decision (DiFiore, C.J., joined by Singas, Cannataro, and LaSalle, J.J.), the Court held that a state law authorizing and regulating interactive fantasy sports ("IFS") did not violate the New York Constitution's prohibition on "gambling." The Court explained that the Constitution prohibits "games of chance," which the Court interpreted to mean where chance is the "dominating" or "controlling" factor (rather than simply a material element). Because the Legislature had reviewed evidence and found that the outcomes of IFS contests are predominantly based on skill rather than future events outside the influence of contestants, the Court upheld the statute.

Judge Wilson (joined by Judges Rivera and Troutman) dissented, arguing that "gambling" should be determined by the activities that were "commonly understood to constitute gambling" at the time of ratification, and that IFS is predominantly a chance game because the contests lack any influence over athletes' performance.

b. Electoral Redistricting

1. *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022).

In a sharply divided, 4-3 decision (DiFiore, C.J., joined by Garcia, Singas, and Cannataro, J.J.), perceived by some as a rebuke of Democratic lawmakers, the Court held that electoral districts created by the Legislature violated recently enacted provisions of the New York Constitution because they were drawn after a bipartisan Independent Redistricting Commission ("IRC") had submitted only one set of dueling redistricting maps that each failed to garner majority support. The Court explained that the text, intent, and history of the Constitution contemplated bipartisan cooperation and electoral reform through the submission of at least two successive bipartisan redistricting proposals before the Legislature could amend them in self interest. The Court also held that the maps were unconstitutional because they resulted from partisan gerrymandering in Democrats' favor. Despite an impending 2022 primary election, the Court remitted the case for drawing of new maps "with all due haste," with the assistance of a special master and other relevant submissions by interested parties. The polarizing opinion drew criticism and had potential political ramifications, with many attributing subsequent Democratic Congressional losses to the decision.

Judge Troutman, dissenting in part, would not have reached the question whether the districts were gerrymandered and would have held that the proper remedy was merely to require the Legislature to choose between one of the IRC's proposals.

Gibson Dunn named Appellate Firm of the Year

Gibson Dunn named Appellate Firm of the Year

Gibson, Dunn & Crutcher LLP

Gibson Dunn ranked Top Tier in National Appellate Law and among The Elite for Litigation: General Commercial and White Collar Crime & Government Investigations in New York

GIBSON DUNN & CRUTCHER 2022

Gibson Dunn named East Coast Appellate Firm of the Year

Judges Wilson and Rivera separately dissented, on the basis that the Legislature properly redistricted after the IRC chose not to submit a redistricting plan, and that the petitioners failed to prove gerrymandering "beyond a reasonable doubt."

c. Executive Compensation

1. ***Delgado v. State of N.Y.*, 2022 N.Y. Slip Op. 06538 (Nov. 17, 2022).**

In a 3-1-2 decision (Cannataro, J., joined by Rivera and Troutman, J.J.), the Court upheld the constitutionality of an act that tasked a committee with determining whether the salaries of legislators and other state officials warrant an increase and making a recommendation that would become effective if not modified by statute. A plurality of the Court reasoned, among other things, that the act did not improperly delegate authority or violate the separation of powers because the Legislature created a temporary commission with a discrete purpose and set standards on the exercise of authority through appropriate guidance, and because the Legislature and the Governor remained politically accountable given that they assented to the salary-determination process.

Judge Wilson concurred in the result because he was concerned that the statute weakened the Governor's ability to check excessive compensation. He concluded that a narrow construction, coupled with heightened judicial scrutiny, would be sufficient to at least address the separation of powers problems posed by the statute.

Judges Singas and Garcia dissented, arguing that the act impermissibly delegated the Legislature's power to determine which provisions of statutes would stand and which would fall, undermining the integrity of the law-making process, and that the Constitution specifically requires that a statute provide unchanging compensation.

II. Jurisdiction and Civil Procedure

The Court also addressed several important issues in the areas of jurisdiction and civil procedure, including statutes of limitations, appellate review of interlocutory orders, and mootness on appeal.

a. Relation-Back of Statutes of Limitations

1. ***34-06 73, LLC v. Seneca Insurance Co.*, 39 N.Y.3d 44 (2022).**

In a unanimous decision (Rivera, J.), the Court held that plaintiffs could not amend their complaint at trial to include an untimely cause of action for reformation of a written insurance contract because their original complaint, which alleged a breach of contract, failed to provide notice of the transactions or occurrences to be proved in support of their reformation claim. The Court looked to the "four corners of the original pleading," rather than evidence gleaned through discovery and trial, and noted that the original complaint alleged compliance with every condition in the policy, thereby

disclaiming any challenge to the policy's terms. Thus, nothing in the stand-alone breach of contract claim put defendant on notice of a prior oral agreement excluding a particular term or its inclusion as a mistake. The court left open the possibility that an original pleading alleging breach of contract could, under different circumstances, provide notice of an alleged reformation.

b. Appellate Jurisdiction and Interlocutory Orders

1. ***Bonczar v. American Multi-Cinema, Inc.*, 38 N.Y.3d 1023 (2022).**

In a unanimous, per curiam decision, the Court affirmed judgment for the defendant in a labor law case, after a jury found that plaintiff's failure to position a ladder properly was the sole proximate cause of his injuries. The Court reasoned that a rational trier of fact could have found in the defendant's favor.

The bulk of the Court's ruling, for which the Court had granted leave to appeal, pertained to an earlier order denying partial summary judgment for plaintiff on substantially the same issues. The Court held that it lacked jurisdiction to review that interlocutory order because it did not "necessarily affect" the judgment. The Court explained that the plaintiff had an opportunity to raise the same issues during trial.

c. Mootness on Appeal

1. ***Matter of Mental Hygiene Legal Serv. v. Delaney*, 38 N.Y.3d 1076 (2022).**

In a 6-1 per curiam decision, the Court dismissed as moot a habeas petition and challenge to certain programs for children implemented and facilitated by the New York State Office for People with Developmental Disabilities ("OPWDD") and the New York State Department of Health. After the petitioner sought immediate discharge from a hospital emergency room on behalf of a 16-year old with developmental disabilities because no suitable placement into the community had been arranged, the child was discharged to a suitable residential school. The Court rejected the argument that the case presented a substantial, recurring issue that typically evades review because OPWDD had developed a new program aimed at preventing such individuals from experiencing a crisis that may result in hospitalization. The Court explained that the new program reduced the likelihood of these issues recurring.

In a lengthy dissenting opinion, Judge Rivera explained that she would have found that the State's representations about the efficacy of its program were insufficient to demonstrate that the same issues are unlikely to recur. She would have reached the merits of the appeal and concluded that the petitioner pled viable causes of action.

III. Torts

The Court also resolved significant tort-law issues relating to negligence claims against municipalities, as well as to determinations of causation in asbestos cases.

a. Special Duty for Municipalities

1. *Ferreira v. City of Binghamton*, 38 N.Y.3d 298 (2022).

In a 5-2 opinion (Singas, J., joined by DiFiore, C.J., Garcia, Cannataro, and Tourtman, J.J.), the Court reinforced the perception that it often favors law enforcement over criminal defendants by holding that a municipality that executes a residential no-knock warrant through police must breach a "special duty" of care to individuals within the home for it to be liable for negligence. The Court clarified that the "special duty" requirement—which requires that the municipality breach a duty beyond that owed to the public—applies to cases where municipal employees allegedly failed to protect the plaintiff, just as it does to failures by private actors. The Court went on to explain that a special duty may be established where the police plan and execute a no-knock search warrant on a targeted residence because, under those circumstances, the police effectively take control of the premises and knowingly create an unpredictable and potentially dangerous condition for those in the home.

In a lengthy dissenting opinion, Judge Wilson (joined by Rivera, J.), explained that they would have found that a municipality executing a no-knock search warrant owes an ordinary duty to act reasonably under the circumstances, given evolving "needs of modern society," and that requiring the plaintiff to establish a "special duty" would unduly restrict negligence claims or improperly apply the requirement.

2. *Maldovan v. County of Erie*, 2022 N.Y. Slip Op. 06632 (Nov. 22, 2022).

In a 4-1 decision (Troutman, J., joined by Cannataro, Garcia, and Singas, J.J.), the Court considered a case in which an individual with developmental disabilities was murdered after Protective Services investigated reports that she was abused and advised a family member that investigations had closed. The Court held that no special duty existed as a matter of law because the government employees did not voluntarily assume a special duty to the victim, given that they took no action that could have induced justifiable reliance and the victim's family remained vigilant and followed up regarding the individual. The Court declined to abandon the justifiable reliance requirement for individuals with diminished capacity, noting that the requirement is based on the rationale that exposing municipalities to tort liability may render them less, not more, effective in protecting citizens. The Court also noted that it had no occasion to address a case where an individual is incapable of pursuing other avenues of protection and lacks a competent family member to advocate on their behalf .

Judge Wilson dissented in part on the basis that the County owed a special duty by virtue of a provision in the Social Services Law and otherwise voluntarily assumed

a duty through its investigations into abuse. Judge Wilson, among other things, would have relaxed the reliance standard for individuals with intellectual disabilities and argued that the Legislature would have supported such a result.

3. ***Howell v. City of N.Y.*, 39 N.Y.3d 1006 (2022).**

In a 4-2 per curiam decision, the Court considered a case in which a plaintiff's ex-boyfriend violated an order of protection by attacking her and pushing her out of a third-floor window. The Court held that the plaintiff failed to demonstrate that the City voluntarily assumed a special duty to the victim because, among other things, she had no contact with police on the day of the incident, she remained vigilant despite the order of protection, and the officers never told her that they would assist at some reasonable time. The court rejected the argument that an order of protection itself proved justifiable reliance because courts issue hundreds of orders of protection per day, and finding a special duty would have significant, unanticipated impacts on municipalities.

Judge Wilson and Judge Rivera dissented. Judge Wilson would have held that the City of New York bore a special duty by virtue of the Domestic Violence Intervention Act, and that there was otherwise a triable issue of fact as to whether officers assumed positive control of a dangerous situation or made representations on which the plaintiff justifiably relied. Judge Rivera separately dissented on the grounds that the Court should "realign" the special duty requirement to make clear that a plaintiff need not establish justifiable reliance where there is a statewide uniform policy requiring arrest for violating a protection order.

b. Asbestos Causation

1. ***Nemeth v. Brenntag N. Am.*, 38 N.Y.3d 336 (2022).**

In a 5-1 decision (Garcia, J.), the Court held in an asbestos case that the plaintiff's proof of causation was insufficient as a matter of law. In this case, involving commercial talcum powder, the Court "reaffirmed" requirements for causation it previously articulated in other toxic tort cases, explaining that a plaintiff must, using expert testimony based on generally accepted methodologies, establish that sufficient exposure can cause the claimed illness and that it was at sufficient levels to cause the illness. It is not enough to demonstrate that exposure was excessive, and testimony that merely links a toxin to a disease or "works backwards from reported symptoms" to divine an otherwise unknown concentration of a toxin is insufficient. The Court found insufficient an expert's testimony that contaminated powder was a substantial contributing factor to the "sentinel health event of asbestos exposure" (mesothelioma) and literature that failed to estimate the level of exposure required to cause such illness. The Court further noted that standards promulgated by regulatory agencies could not fill this gap, and that the plaintiff had additionally failed to introduce any evidence regarding the decedent's actual inhalation levels in the relevant environment.

In a dissenting opinion, Judge Rivera recounted the relevant expert testimony, asserted that the Court had misread or ignored certain testimony, and objected that the Court's holding was based on the "weight, not sufficiency" of the evidence.

IV. Contracts

In the past year, the Court continued to issue a broad array of decisions concerning the interpretation of contractual provisions, including relating to insurance, collective bargaining, attorney fees, and residential mortgage-backed securities.

a. Insurance

1. *Bonem v. William Penn Life Ins. Co. of N.Y.*, 38 N.Y.3d 955 (2022).

In a 5-2 per curiam decision (DiFiore, C.J., joined by Garcia, Singas, Cannataro, and Troutman, J.J.), the Court held that a decedent's spouse was not entitled to life insurance benefits under a contract because the policy lapsed shortly before the decedent's death. The Court reasoned that the policy "clearly and unambiguously" stated that the decedent's annual premium was due shortly after the due date, and that the lack of a full-year payment period introduced "no ambiguity" into the contract.

Judge Wilson (joined by Judge Rivera) dissented on the grounds that the contract was ambiguous and should have been interpreted against the drafter and in favor of the insured because insurance companies "engage teams of lawyers to draft lengthy, impenetrable take-it-or-leave-it contracts presented to consumers," and the "insurer can protect itself going forward by improving its form contract."

b. Collective Bargaining

1. *Donohue v. Cuomo*, 38 N.Y.3d 1 (2022).

In a unanimous decision (Singas, J., joined by Rivera, Garcia, Wilson, and Cannataro, J.J.), the Court held that construing a collective bargaining agreement ("CBA") to infer vesting of certain retiree health insurance rights would be inconsistent with established principles of contract interpretation. The Court explained that New York law focuses on the parties' chosen language to "impart stability to commercial transactions," and that "injecting considerations untethered to the words that the parties included in their agreement"—such as the probability that retiree benefits are generally intended to depend in duration upon the fortunes of active employees—would conflict with this bedrock principle. The Court noted that none of the provisions in the CBA established a vested right to lifetime premium contributions, and it thus declined to consider the effects of New York statutory and regulatory reductions on potential state law remedies for breach of contract.

c. Attorneys' Fees

1. *Sage Systems v. Liss*, 39 N.Y.3d 27 (2022).

In a unanimous decision (Rivera, J.), the Court held that an indemnification provision in a partnership agreement lacked express language or indicia of intent to

waive the American Rule, under which a prevailing party in litigation generally cannot recover attorneys' fees from the losing party. The Court emphasized the "exacting standard" for waiver of the American Rule: a private agreement must use "unmistakenly clear" language of intent to waive. The Court noted that the agreement's indemnification provision "broadly applie[d] to all types of action" and third parties. As a result, the Court found nothing specifically indicating the partners intended to permit recovery for attorney's fees in an action between them on the written contract.

d. Residential Mortgage Backed Securities ("RMBS")

1. ***U.S. Bank N.A. v. DLJ Mortg. Capital, Inc.*, 38 N.Y.3d 169 (2022).**

In a 5-1 decision (DiFiore, C.J., joined by Garcia, Singas, Cannataro, Troutman, and LaSalle, J.J.), the Court held that a contractual "repurchase protocol," typically the "sole remedy" in RMBS cases, requires a trustee to provide loan-specific, pre-suit notice to invoke the sponsor's repurchase obligation and to satisfy the contractual prerequisite to suit. Emphasizing the importance of "freedom of contract" in New York, and of enforcing contracts according to their terms, the Court reasoned that the parties structured the repurchase protocol through the "lens of individual 'mortgage loans'—clearly contemplating a loan-by-loan approach to the agreed-upon sole remedy for breach," and that the parties in any event could reasonably have intended a contractual 90-day notice period only to operate on a "loan-by-loan basis."

The Court also held the trustee cannot rely on the relation back doctrine of C.P.L.R. 203(f) to avoid its failure to comply with this requirement because the statute "provides a vehicle in the context of civil litigation" to excuse "noncompliance with other statutory procedural requirements," not "the trustee's failure to comply with the contractual prerequisite to suit." The Court could not "rewrite the contract by substituting a different, post-suit notice procedure" for the one the parties chose.

Finally, the Court concluded that the plain language of the parties' agreement limited interest recoverable on liquidated loans to interest accruing prior to liquidation because the contract's inclusion in the repurchase price of "accrued and unpaid interest . . . plainly refers to interest that has accumulated on a loan but that has not yet been paid," and because interest no longer "accrues" on a liquidated loan.

In a dissenting opinion, Judge Rivera explained that in her view the Court's holding was "at odds with the obligations imposed by the RMBS agreement to remedy defective loans—obligations intended to prevent [the sponsor] from avoiding liability for the types of egregious pool-wide violations alleged" in the case. Judge Rivera would have held that the contractual language did not foreclose "providing notice by identifying breaches of the representations and warranties as they affected specific loans . . . as examples of . . . widespread failure to comply with those representations and warranties." The original complaint, in her view, sufficiently alleged the "transactions or occurrences" by asserting violations of systemic breaches of representations and warranties relating to the loan pool.

2. ***ACE Securities Corp. v. DB Structured Prods., Inc.*, 38 N.Y.3d 643 (2022).**

In a 6-1 decision (DiFiore, C.J., joined by Rivera, Garcia, Singas, Cannataro, and Troutman, J.J.), the Court held that a RMBS trustee could not avoid dismissal of its time-barred claim by invoking C.P.L.R. 205(a), which allows "the plaintiff" in a dismissed action—"or, if the plaintiff dies," his "executor or administrator"—six months to commence a new action based on the same transaction or occurrence. The Court reasoned that two certificate holders, not the trustee, were the "original plaintiff," and that construing the statute to authorize a new action by any entity seeking to pursue the "same rights" would render the language permitting new actions by administrators and executors superfluous. The Court further reasoned that this was consistent with the policy underlying the statute, which protects diligent suitors. The Court had no occasion to consider how the statute would apply to bankruptcy trustees.

Judge Wilson dissented on the grounds that the "plaintiff" in the statute is the "real party interest"—i.e., the trust—not "the nominal entity filing suit." In his view, the original plaintiffs were seeking to enforce the trust's rights, and there was no prejudice.

V. Statutory Interpretation

The Court issued important decisions interpreting state statutes and regulations, including regarding insurance, labor law, firearm regulation, and drunk driving.

a. Insurance

1. ***Independent Insurance Agents & Brokers of N.Y., Inc. v. New York State Dep't of Fin. Servs.*, 39 N.Y.3d 56 (2022).**

In a unanimous decision (Singas, J.), the Court upheld the validity of Insurance Regulation 187, which requires agents and brokers who make "recommendations" in life insurance and annuity transactions to act in the "best interest of the consumer" by, among other things, making reasonable efforts to obtain "suitability information," basing recommendations on an evaluation of such information, and having a reasonable basis to believe the consumer is reasonably informed and would benefit. The Court concluded that the regulation's application of the terms "recommendation," "suitability information," and "best interest" were not unconstitutionally vague because the regulation set forth "clear, objective legal guidelines" for compliance and "employ[ed] standard legal terms to explain exactly" how to comply with the regulation.

The Court also held that the Department of Financial Services ("DFS") did not engage in impermissible lawmaking because it "squarely" acted within its authority to supervise and establish "professional standards of conduct" for insurance producers, it drew upon its expertise and experience studying the issue, and it did not act after failed legislative efforts. The Court also rejected challenges that the regulation was procedurally defective and arbitrary and capricious.

2. ***Columbia Memorial Hosp. v. Hinds*, 38 N.Y.3d 253 (2022).**

In a unanimous decision (Wilson, J.), the Court held that employees were entitled to cash consideration for demutualization of insurance companies where they

were the policyholders. The Court's analysis "began and ended" with the "text of New York's Insurance Law," which made clear that consideration goes to policyholders. The Court explained that employers paid premiums solely for insurance coverage and that employees were not "unjustly enriched" because they were receiving compensation for their loss of ownership interests. Employers, in turn, received the full benefit of their contracts, which did not assign benefits to themselves.

b. Wage Kickbacks

1. ***Konkur v. Utica Academy*, 38 N.Y.3d 38 (2022).**

In a 4-2 decision (Garcia, J., joined by DiFiore, C.J., and Singas and Cannataro, J.J.), the Court held that Labor Law § 198-b, which prohibits wage kickbacks, contains no implied private right of action. The Court explained that the Legislature had specifically considered and expressly provided for enforcement mechanisms other than private rights of action, including criminal enforcement and civil penalties such as restitution, liquidated damages, and backpay, and that these alternative mechanisms indicated a chosen, comprehensive enforcement scheme.

In a dissenting opinion, Judge Rivera (joined by Wilson, J.) explained that another provision in the legislative scheme contemplates a private right of action and objected that the Court's holding leads to "absurd results" by requiring employees to hope that state officials act expeditiously in recovering stolen wages.

c. Municipal Firearm Regulations

1. ***Hunters for Deer v. Town of Smithtown*, 37 N.Y.3d 1214 (2022).**

The Court (per curiam) held that Town Law § 130 (27), which authorizes certain towns to prohibit discharge of "firearms," does not extend to regulating "bows." The Court reasoned that the "usual and commonly understood meaning" of "firearm," as demonstrated by dictionary definitions and the New York Penal Law, does not encompass "bows." The Court had no occasion to consider whether a town may otherwise regulate bows under its home rule authority to regulate public safety, let alone whether the Environmental Conservation Law would preempt such regulation.

d. Driver Refusal of Chemical Tests

1. ***Matter of Endara-Caicedo v. New York State Dep't of Motor Vehicles*, 38 N.Y.3d 20 (2022).**

In a 5-1 decision (DiFiore, C.J., joined by Garcia, Wilson, Singas, and Cannataro, J.J.), the Court held that the two-hour rule in Vehicle and Traffic Law ("VTL") § 1194, which authorizes chemical tests of motorists' blood-alcohol level, did not apply to a driver's license revocation hearing after a refusal to submit to the chemical test. The Court reasoned that the mandatory, administrative revocation hearing for refusing to submit to a chemical test evolved independently and subsequently to the two-hour evidentiary rule relating to the admissibility of blood alcohol content for criminal prosecutions; that the statute unambiguously lists issues to be considered without mentioning the two-hour rule; and that the statutory framework

has been carefully crafted over decades to prevent drunk driving. The Court also rejected an argument based on a longstanding policy of the Department of Motor Vehicles ("DMV") because the Court need not defer to an agency's interpretation of plain statutory language and intent, and the agency had abandoned its interpretation.

Judge Rivera dissented on the grounds that VTL language applying the two-hour rule to criminal prosecutions should be applied consistently to administrative revocation hearings, and that courts and DMV applied that interpretation for decades without the Legislature correcting such an interpretation.

VI. Looking Ahead

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

GIBSON DUNN:
Counsel for Respondents

PARTNER:
Joseph Evall

a. Constitutional Law and Civil Procedure

1. ***Matter of Stevens v. New York State Div. of Criminal Justice Servs.*, 206 A.D.3d 88 (1st Dep't 2022), *appeal pending*, APL-2022-00075.**

   The Court will consider whether the New York State Commission on Forensic Science has statutory authority to adopt a regulation that authorizes familial searching of the State's DNA Databank.

2. ***Tax Equity Now NY LLP v. City of N.Y.*, 182 A.D.3d 148 (1st Dep't 2022), *lv. granted*, APL-2022-00049.**

   The Court granted leave to consider constitutional and legal challenges to New York City's property-tax system.

3. ***Police Benevolent Assoc. of City of N.Y. v. City of N.Y.*, 205 A.D.3d 462 (1st Dep't 2022), *appeal pending*, APL-2022-00078.**

   The Court granted leave to consider the constitutionality and validity of a New York City regulation prohibiting police officers from "compressing the diaphragm" of an individual during arrest.

4. ***Matter of Owner Operator Independent Drivers Assoc. v. New York State Dept. of Transportation*, 205 A.D.3d 53 (3d Dep't 2022), *appeal pending*, APL-2022-00050.**

   The Court will consider the constitutionality of a regulation requiring commercial truck drivers to install GPS devices to monitor driving hours.

5. ***Favourite Limited v. Cico*, 208 A.D.3d 99 (1st Dep't 2022), *appeal pending*, APL-2022-00102.**

   The Court will consider whether a trial court can exercise discretion to grant leave to amend a complaint after the Appellate Division ordered it dismissed.

b. Torts and Contracts

1. ***Grady v. Chenango Valley Cent. Sch. Dist.*, 190 A.D.3d 1218 (3d Dep't 2021), *appeal pending*, APL-2021-00041; *Secky v. New Paltz Cent. Sch. Dist.*, 195 A.D.3d 1347 (3d Dep't 2021), *lv. granted*, APL-2022-00003.**

   The Court will consider the legal validity and contours of the assumption of risk doctrine in cases concerning sports and recreational activities.

2. ***Cordero v. Transamerica Annuity Serv. Corp.*, 34 F.4th 994 (11th Cir. 2022), *question certified*, CTQ-2022-00001.**

   The Court will consider whether a plaintiff sufficiently alleged a breach of the implied covenant of good faith and fair dealing upon pleading that the defendant drastically undermined the parties' fundamental objective, even when the underlying duty at issue was not explicitly referred to in the contract.

c. Employment Law

1. ***Syeed v. Bloomberg L.P.*, 58 F.4th 64 (2d Cir. 2023), *question certified*, CTQ-2023-00001.**

   The Court will consider whether a nonresident plaintiff satisfies the impact requirement of the New York City or New York State Human Rights Laws if the plaintiff demonstrates that an employer deprived him of a New York City or New York State-based job opportunity on discriminatory grounds.

d. Insurance

1. ***Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.*, 205 A.D.3d 76 (1st Dep't 2022), *lv. granted*, APL-2022-00160.**

   The Court granted leave to consider whether COVID-19 caused "direct physical loss or damage" under a property and business-interruption insurance policy.

e. Commercial Litigation

1. ***IKB Int'l, S.A. v. Wells Fargo Bank, N.A.*, 208 A.D.3d 423 (1st Dep't 2022), *lv. granted*, APL-2022-00165.**

   The Court granted leave to consider a number of RMBS issues, including whether a trustee is obligated to enforce repurchase obligations prior to default and whether futility can excuse failure to comply with a repurchase protocol.

2. ***Matter of TCR Sports Broadcasting Hldg., LLP v. WN Partner, LLC*, 187 A.D.3d 623 (1st Dep't 2020), *lv. granted*, APL-2021-00144.**

   The Court will consider alleged partiality by a Major League Baseball tribunal in an arbitration dispute involving telecast rights fees for certain baseball games.

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 *U.S. News - Best Lawyers* Law Firm of the Year for Appellate Practice; *Benchmark Litigation* named the firm its 2022 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." *Chambers USA* has also ranked us Tier 1 in appellate practice; *The American Lawyer* ranked us on its 2021 A-List; and in 2021, *Law360* named us the appellate group of the year. 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 won 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, members of the firm's Appellate and Constitutional Law Group bring 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 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, First Amendment, insurance, bankruptcy, intellectual property, 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 nationwide, file amicus briefs, participate in legal strategy and motion practice, develop policy arguments, and ensure that trial teams are preserving critical arguments for appeal. That is nowhere more important 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:

Mylan L. Denerstein (+1 212-351-3850, mdenerstein@gibsondunn.com)
Akiva Shapiro (+1 212-351-3830, ashapiro@gibsondunn.com)
Seth M. Rokosky (+1 212-351-6389, srokosky@gibsondunn.com)

Please also feel free to contact the following practice group leaders:

Thomas H. Dupree Jr. – Washington, D.C. (+1 202.955.8547, tdupree@gibsondunn.com)
Allyson N. Ho – Dallas (+1 214.698.3233, aho@gibsondunn.com)
Julian W. Poon – Los Angeles (+1 213.229.7758, jpoon@gibsondunn.com)

www.gibsondunn.com

Abu Dhabi	Dallas	Hong Kong	Munich	Paris
Beijing	Denver	Houston	New York	San Francisco
Brussels	Dubai	London	Orange County	Singapore
Century City	Frankfurt	Los Angeles	Palo Alto	Washington, D.C.