

Recent Changes Mark A Key Moment For New York High Court

By **Mylan Denerstein, Akiva Shapiro and Seth Rokosky** (July 10, 2023, 2:20 PM EDT)

For nearly 200 years, the New York Court of Appeals has been a cornerstone of justice, resolving issues of paramount significance for New York and the nation.

Nevertheless, the court has recently undergone a period of great change, with growing diversity and sophistication among the bench and bar, rapid turnover in composition, and a perception by some in the public of increased politicization. These changes mark an important moment for the court.

The New York Court of Appeals

The New York Court of Appeals is the state's highest court and, like the Legislature and the governor, it is located in Albany.

Many distinguished judges have affected the law while on the court, which is often referred to as one of the nation's most respected courts.[1]

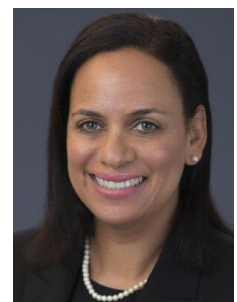
Moreover, the court's broad jurisdiction over a wide array of cases in New York — a global financial and cultural center — often results in rulings of great importance in commercial and other matters.

Like the U.S. Supreme Court, the primary role of the Court of Appeals is to develop a body of decisional law for courts to follow, and to interpret New York state's voluminous constitution.

Although the ability to appeal in New York is extremely broad, intermediate appellate courts — particularly the Appellate Division — dispose of the great majority of the appeals.[2]

This makes the Appellate Division one of the busiest appellate courts in the nation, but it leaves for further review by the Court of Appeals only a relatively small number of cases.

Most appeals to the court are taken by permission, and such an application in a civil case is typically granted solely to resolve a novel, important question of statewide significance or a split among lower appellate courts.[3]



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Even in federal courts, decisions of the Court of Appeals may be controlling. A federal court may even ask the New York Court of Appeals to decide unsettled issues of New York law that would dispose of the litigation.

Alternatively, federal courts may seek to predict how the court, and lower appellate courts applying its jurisprudence, would resolve the issue.[4]

All of this makes the court the final arbiter of New York law, resolving questions of great significance. But getting a case before the court and prevailing in that forum requires considerable skill.

The judges on the court come from distinguished backgrounds. As recently noted by Henry Greenberg, counsel to the New York State Commission on Judicial Nomination, the current judges represent "the most diverse, highly credentialed cadre in Court of Appeals history." [5]

In addition, over the last decade, the development of electronic filings and records in the Court of Appeals and the Appellate Division has facilitated the ability to monitor key developments.[6]

Increased access to information has made it easier to analyze the court's work and to effectively advocate as counsel, whether by seeking to draw upon past rulings and filings, or to coordinate with amici about weighing in on matters of significant interest as they percolate through New York's appellate courts.

The Court's Changing Composition

The last two years have marked an important turning point for the court, as new judges comprise more than half its seven-member bench.

In June 2021, New York's Senate confirmed the appointment of Anthony Cannataro, who was formerly the administrative judge for the New York City Civil Court, and Madeline Singas, who was formerly the Nassau County District Attorney.

The judges they replaced often voted with two former prosecutors nominated by former Gov. Andrew Cuomo — Chief Judge Janet DiFiore and Judge Michael Garcia — to form a majority, and that pattern continued after Judges Cannataro and Singas took the bench.

Judge Eugene Fahey also reached his mandatory retirement age. To fill his seat, Gov. Kathy Hochul nominated Shirley Troutman, a justice in the Appellate Division, Fourth Department, who had extensive experience as a prosecutor and judge, and is the second Black woman on the court.

Because she spent her career upstate, her nomination provided geographical balance to the court, but some continued to express concern that the court lacks professional diversity.

Like Judge Fahey, Judge Troutman appears to have emerged as a potential swing vote, with Judges Rowan Wilson and Jenny Rivera often joining together in numerous opinions, including concurring and dissenting opinions.

The court's substantial turnover was compounded when, last summer, Judge DiFiore 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, Hochul nominated Justice Hector LaSalle, the presiding justice of the Appellate Division, Second Judicial Department, and a well-respected appellate judge. Had he been confirmed, Justice LaSalle would have been the first Hispanic chief judge on the Court of Appeals.

Justice LaSalle's nomination, however, was quickly opposed by many members of the state Senate 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 nomination for chief judge.

These developments and others, including a recent, sharply divided decision holding that electoral districts drawn by Democratic legislators violated the New York Constitution,[7] stirred criticism that the court, like the U.S. Supreme Court, was being viewed through a political lens.

The chief judge vacancy was filled this April, when the Senate approved the elevation of Judge Wilson to chief judge, making him the first Black chief judge on the court.

Also in April, the Senate confirmed the appointment of Caitlin Halligan. Judge Halligan was formerly the solicitor general of the state of New York and held numerous other positions in government and private practice.

The Court's Jurisprudence

Despite the recent turmoil, the court's jurisprudence in the last few years continued along previous trends.

Rulings in the court, like in the U.S. Supreme Court, have been increasingly fractured along often-repeated voting lines, with numerous polarized and contentious splits, but it remains to be seen if this trend will continue with Judge Wilson as chief judge, and with Judge Halligan on the court.

Indeed, this spring, Rolando Acosta, former presiding justice of the Appellate Division, First Department, eloquently remarked that the court is in good hands with Chief Judge Wilson, and cautioned that a key pillar of our democracy and public trust in the courts is a strong and independent judiciary that evenly applies the rule of law.[8]

The court's trend of reviewing a reduced number of cases continued. In recent years, the court has decided only about 100 cases annually. That number, and the number of leave grants, has been declining, prompting criticism.[9]

The elevation of Judge Wilson and confirmation of Judge Halligan — who have both expressed a desire to hear more cases — may be cause for optimism, especially in commercial cases because of their BigLaw experience, and in criminal cases.[10]

Even with its reduced pace of decisions, the court continued to issue significant opinions on a wide array of issues, ranging from jurisdiction,[11] statutes of limitations[12] and agency deference,[13] to insurance,[14] consumer protection,[15] commercial litigation,[16] employment law,[17] environmental law,[18] torts[19] and more.

This diverse caseload has been a hallmark of the court and is likely to continue moving forward.

The court is already poised to consider a number of important and interesting issues in the coming year. For example, the court will consider whether a nonresident plaintiff may bring a claim under the New York City and New York State State Human Rights Laws if she can demonstrate that a city or state employer deprived her of a job opportunity on discriminatory grounds.[20]

It will also consider the constitutionality of a New York City ordinance prohibiting police officers from "compressing the diaphragm" of an individual during an arrest, a significant issue pertaining to police governance.[21]

And the court will consider whether the failure to comply with the provisions of a life insurance policy requiring written notice of assignment renders the assignment ineffective, raising a novel issue of common law.[22]

Practitioners can look forward to the court continuing its important work under Judge Wilson, and there will be much to follow and consider as the court continues to evolve in the coming year.

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[1] Hon. Alan D. Scheinkman & David D. Siegel, Practitioner's Handbook for Appeals to the Court of Appeals of the State of New York 2 (3d ed. N.Y. State Bar Assoc. 2008).

[2] Arthur Karger, Powers of the NY Court of Appeals § 1.1 (Westlaw Aug. 2022).

[3] See, e.g., 22 N.Y.C.R.R. § 500.22(b)(4).

[4] See, e.g., Brettler v. Allianz Life Ins. Co. of N. Am., 57 F.4th 57, 65 (2d Cir. 2022).

[5] Henry M. Greenberg, The New York Court of Appeals: A Triumph of Merit Selection (Law.com Apr. 25, 2023), <https://www.law.com/newyorklawjournal/2023/04/25/the-new-york-court-of-appeals-a-triumph-of-merit-selection/>.

[6] Compare, e.g., New York State Bar Assoc., Report on the Progress Toward Implementing Statewide Electronic Filing in New York Courts 25 (Mar. 30, 2012), available at <chrome-extension://efaidnbnmnibpcjpcglclefindmkaj/https://nysba.org/app/uploads/2020/02/E-FilingReport.pdf>, with, e.g., Appellate Division, First Judicial Department, Filing and Service by Electronic

Means, <https://www.nycourts.gov/courts/ad1/e-filing/efiling.shtml>; N.Y. Court of Appeals, Court-PASS, <https://courtpass.nycourts.gov/>.

[7] See *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022).

[8] See Hon. Rolando T. Acosta, *A House Divided: Our Democracy and Courts in Peril—A Speech by Hon. Rolando T. Acosta* (N.Y. County Lawyers' Assoc. May 15, 2023), <https://www.nycla.org/resource/speech/a-house-divided-our-democracy-and-courts-in-peril-a-speech-by-hon-rolando-t-acosta/>.

[9] See, e.g., *New York State Bar Assoc., Declining Caseload Trends of the New York Court of Appeals* (May 3, 2023), available at <https://www.youtube.com/watch?v=6oz4iFxf7c>.

[10] See, e.g., Brian Lee, *Top Court's Case Dispositions in Steep Decline Since 2016, Study Shows* (Law.com Apr. 27, 2023), <https://www.law.com/newyorklawjournal/2023/04/27/top-courts-case-dispositions-in-steep-decline-since-2016-study-shows/>.

[11] See, e.g., *Aybar v. Aybar*, 37 N.Y.3d 274 (2021); *Matter of Miller v. Annucci*, 37 N.Y.3d 996 (2021); *Bonczar v. American Multi-Cinema, Inc.*, 38 N.Y.3d 1023 (2022).

[12] See, e.g., *34-06 73, LLC v. Seneca Insurance Co.*, 39 N.Y.3d 44 (2022).

[13] See, e.g., *Matter of W. 58th St. Coalition, Inc. v. City of N.Y.*, 37 N.Y.3d 949 (2021); *Matter of People Care Inc. v. City of N.Y. Human Resources Admin.*, 36 N.Y.3d 1088 (2021).

[14] See, e.g., *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 37 N.Y.3d 552 (2021); *Bonem v. William Penn Life Ins. Co. of N.Y.*, 38 N.Y.3d 955 (2022); *Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253 (2022).

[15] See, e.g., *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 N.Y.3d 169 (2021).

[16] See, e.g., *Adar Bays, LLC v. GeneSYS ID, Inc.*, 37 N.Y.3d 320 (2021).

[17] See, e.g., *Doe v. Bloomberg L.P.*, 36 N.Y.3d 450 (2021); *Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236 (2021); *Konkur v. Utica Academy of Science Charter Sch.*, 38 N.Y.3d 38 (2022).

[18] See, e.g., *Protect the Adirondacks! Inc. v. New York State Dep't of Env'tl. Conservation*, 37 N.Y.3d 73 (2021).

[19] See, e.g., *Ferreira v. City of Binghamton*, 38 N.Y.3d 298 (2022); *Maldovan v. County of Erie*, 39 N.Y.3d 166 (2022); *Howell v. City of N.Y.*, 39 N.Y.3d 1006 (2022).

[20] See *Syeed v. Bloomberg, L.P.*, CTQ-2023-00001.

[21] See *Police Benevolent Assoc. of City of N.Y. v. City of N.Y.*, APL-2022-00078.

[22] See *Brettler v. Allianz Life Ins. Co. of N. Am.*, CTQ-2022-00004.