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Gibson Dunn Partner Argues Three Public-Policy Appeals in Nine Days

By Brian Lee
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Akiva Shapiro might be a study in pivoting from one New York appellate court to the next.

The chair of Gibson Dunn's New York administrative law and regulatory practice recently argued three appeals—two in state court, one in federal—within a tight nine-day window that ended on Wednesday.

Shapiro said it's a noteworthy pitch count, and the cases are significant to him professionally because, while he does a fair amount of commercial litigation, the three appeals all intersect administrative law with important public-policy matters.

Two were challenges of the state government's controversial conversion of a Medicaid program, the Consumer Directed Personal Assistance Program, from about 600 fiscal intermediaries to just one.

The program impacts an estimated 280,000 patients, allowing them to receive home care services from family or friends, with the caregivers' wages paid by Medicaid.

The other appeal fights for the 13,000-seat Forest Hills Stadium in Queens, at which The Beatles held their first stadium concert, famously arriving by helicopter, to continue to hold concerts against opposition from a 900-member homeowners' association.

Shapiro was on the losing end of two CDPAP cases and portions of the Forest Hills litigation in the trial courts. But in an interview with the Law Journal, he said they're far from losers, and he believes his firm is on the right side of policy and law.

The most recent argument took place on Sept. 16 in the Appellate Division, First Department, *Freedom Care v. New York State Department of Health*.

That lawsuit alleges state government officials rigged the CDPAP bid by pre-selecting Public Partnership LLC as the lone statewide FI.

Courtesy photo

Akiva Shapiro, partner in Gibson Dunn

The Article 78 claim had asked to invalidate the multi-billion-dollar contract, with Gibson Dunn arguing it developed evidence showing the fix was in, and that the contract had conflicts of interest, disqualifying close ties with the state Department of Health, and that the DOH waived key requirements in awarding the bid.

State Supreme Court Justice Verna Saunders had disagreed and denied the petition, finding that the allegations of a sham process rested on "conjecture, speculation and unsubstantiated assertions."

However, the state Senate Investigations Committee has since held a hearing in which its chairman revealed a proposed draft of bill language intending to award PPL a no-bid contract. Democrats and Republicans alike grilled state DOH Commissioner James McDonald and the PPL's vice president, Patty Byrnes, during the August hearing.

Shapiro said he's petitioned the appellate court to take judicial notice of the Senate testimony and the draft bill.

"We were heartened to see the state Senate crossed the aisle, and folks are taking allegations

very seriously, and really probing what happened here," he told the Law Journal and Law.com.

CDPAP Transition

In the U.S. Court of Appeals for the Second Circuit, Shapiro argued for a different set of plaintiffs in related litigation against the CDPAP on Sept. 11 in *Principle Home Care v. McDonald*.

His claim alleging the state violated the federal takings and contracts clauses, and due process, challenges the state statute that upended the 600-plus FI ecosystem in the home care space.

In the trial court, U.S. Judge Margaret M. Garnett denied Shapiro's request for a preliminary injunction, finding the state amendment was reasonable and appropriate public policy.

"From our perspective," Shapiro said, "the public policy aspect of it is really focused on protecting small businesses."

He said the 600 FIs have invested significant money and time over the past 10 years or longer to build up their community-based companies, and they had the expectation of being able to enter into contracts and maintain their businesses.

He suggested that if courts allow them to be boxed out, this might pave the way for state governments to someday create similar "megacompanies" in other industries. It could someday decide to upend independent doctors, or unify the health system or insurance industries, Shapiro suggested.

Forest Hills Stadium

Shapiro's first in the wave of appeals occurred Sept. 8 in the Appellate Division, Second Department, for the defendants in *Forest Hills Gardens Corporation v. West Side Tennis Club*.

His client owns and operates the 1923-built open-air stadium that hosts more than 30 A-list concerts annually.

The plaintiff homeowners' association had vied to stop the concerts by raising zoning, trespass, nuisance, and other claims.

Shapiro got five of the seven claims dismissed on the pleadings, and the association appealed.

Gibson Dunn's cross-appeal of the two surviving claims involve state Supreme Court Justice Joseph Esposito's April 2024 order for the tennis club to obtain a sound device permit from the New York City Police Department, and for his clients to create and implement to use barricades that would direct and limit concertgoers' access to most of the residential areas, and to engage with security personnel operations, to ensure concertgoers follow the assigned route.

In the interview, Shapiro notes that the city benefits from the stadium's use, and he said his clients invested in significant renovations over the last 15 years, efforts that have brought more shows, resulting in what he said was a revival of the neighborhood with new restaurants, bars and other businesses.

"The bottom line," Shapiro said, "is this case and the appeals are about trying to ensure that the music stays playing at Forest Hills Stadium, and that this small number of people who object to it can't have their will imposed on the tens and hundreds of thousands of people who come to the stadium and enjoy the shows, and really make it an essential and cultural keystone for the music and art scene in New York."

Prep Work

To prepare for pivoting quickly from one appeal to the next, Shapiro spent more than a month with three Gibson Dunn teams that met every other day, if not more regularly.

He said that handing the cases all at once forced him to focus on bigger-picture themes, rather than minute details, and to think about what he wanted to convey to the courts within his limited time to argue.

Asked if the experience maxed his bandwidth, and if there were conversations about divvying the cases, Shapiro replied:

"It's a fair question. I would say I wouldn't have wanted to throw a fourth argument into the mix, and perhaps if the timing had fallen out slightly differently, it would have been challenging."

His familiarity with the laws at hand and Shapiro's handling of the cases in the lower courts gave him confidence he could tackle all three.

"I felt that I was the right person for the job, given that background, and the timing, even though tight, was doable," he said.