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GIBSON DUNN

New York Court of Appeals Round-Up

The New York Court of Appeals Round-Up summarizes key opinions issued by the Court over the past year. The cases are organized by subject. We also look ahead to highlight a number of civil cases that the Court will hear during the coming year, beginning in September 2016.

This Term has been marked by significant changes in the Court's membership. On January 21, 2016, Westchester County District Attorney Janet DiFiore was confirmed as Chief Judge, and on February 8, 2016, Michael Garcia was confirmed as an Associate Judge.

I. Contract Law

Over the past year, the Court of Appeals issued several decisions involving questions of contract interpretation. Consistent with prior precedent, the Court emphasized principles of strict contract construction, especially in cases involving sophisticated parties. The Court also clarified the statute of limitations governing common-law contract claims.

1. ***Monarch Consulting, Inc. v. National Union Fire Insurance Co. of Pittsburgh* (26 N.Y.3d 659; February 18, 2016).**

   In a unanimous decision (Stein, J.), the Court held that the Federal Arbitration Act ("FAA") applied to the insurance agreements at issue, and that the agreements required that the question of enforceability of the arbitration clause and the agreement itself be submitted to arbitration. Plaintiffs argued that under the McCarran-Ferguson Act, which exempts state insurance laws from the FAA, they could not be forced to arbitrate a dispute arising under a provision of the California state workers' compensation insurance law. The Court disagreed. It explained that the FAA controlled because California insurance law did not specifically prohibit or restrict arbitration related to workers' compensation policies. Therefore, the Court concluded, applying the FAA would not "invalidate, impair, or supersede" California law. The Court also held that, under the unambiguous terms of the agreement, an arbitrator—not the court—must decide questions of arbitrability and enforceability.

2. ***Cusimano v. Schnurr* (26 N.Y.3d 391; December 16, 2015).**

   In a unanimous decision (Lippman, C.J.), the Court construed the Federal Arbitration Act ("FAA") to cover intrafamily agreements among New York residents, provided that the agreements meet the FAA's requirement of "evidenc[ing] a transaction affecting interstate commerce." Noting that "the


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Acclaimed as a litigation powerhouse, Gibson Dunn has a long record of outstanding successes. *The American Lawyer* named the firm its **2016 Litigation Department of the Year**, our unprecedented third win in this biennial competition since 2010. The publication noted, "Gibson Dunn litigators set out to win big rather than just escape defeat, and they succeeded … the firm repeatedly delivered when it mattered most." Dubbing the firm's litigators "The Game Changers" in 2010, the publication in 2012 declared that we possess "The Complete Game" and named the firm a Finalist in 2014.

[U.S.] Supreme Court has made it abundantly clear that the FAA's reach is expansive," the Court found the statute applicable to three agreements, each of which included an arbitration provision, entered into among family members regarding family-owned entities and commercial real estate properties. While none of the agreements expressly referenced commercial transactions, the Court concluded that "the ultimate purpose of the agreements ... was to authorize participation in the business of commercial real estate," and that connection to interstate commerce sufficed to trigger application of the FAA. The Court further held that plaintiffs had waived the right to arbitrate, arguably rendering its analysis of the FAA's application unnecessary.

3. ***ACE Securities Corp. v. DB Structured Products, Inc.*** **(25 N.Y.3d 581; June 11, 2015).**

   In a unanimous decision (Read, J.) regarding a contract lawsuit over a "put-back" provision covering residential mortgage-backed securities, the Court held that the statute of limitations applicable to a lawsuit claiming breach of the put-back obligation began to run on the closing date of the sale because that was the date on which the alleged misrepresentations were made. The Court explained that if allegedly fraudulent representations "concern the characteristics of their subject as of the date they are made," then the applicable limitations period runs from the date the representations are made, rather than starting anew each time the sponsor failed to repurchase allegedly nonconforming loans. The Court underscored that "[o]ur statutes of limitation serve the same objectives of finality, certainty and predictability that New York's contract law endorses."

4. ***JF Capital Advisors, LLC v. Lightstone Group*** **(25 N.Y.3d 759; July 1, 2015).**

   In a unanimous decision (Fahey, J.), the Court limited the reach of New York's statute of frauds, holding that it does not cover compensation for advisory services related to whether to enter into a real estate transaction. The plaintiff, a financial advisory group, alleged that defendant did not pay for advice related to certain real estate investments, and the defendant argued that the statute of frauds barred recovery. Reversing the Appellate Division in part, the Court of Appeals held that where compensation was sought "for services rendered in anticipation of a possible bid by defendants," the claim arose from "tasks performed so as to inform defendants whether to negotiate for the properties at issue," not services "in furtherance of negotiation for the subject properties."

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The National Law Journal named Gibson Dunn to its **2015 Appellate Hot List** featuring 20 firms that "represent appellate advocacy at its strongest – winning the big cases and changing the law."

II. Commercial Torts

In the past year, the Court decided significant cases involving common-law fraud claims between sophisticated financial entities. It also addressed a variety of circumstances in which one entity may be liable for another entity's defective products.

1. ***Pasternack v. Laboratory Corp. of America Holdings*** **(2016 N.Y. Slip Op. 05179; June 30, 2016).**

   In a case presenting two questions certified by the Second Circuit, the Court held that third-party reliance is not sufficient to state a common-law fraud claim, and also held that federal regulations and guidelines regarding drug-testing laboratories do not give rise to a duty of care under New York negligence law. Plaintiff, who alleged that he sustained injuries after a drug-testing laboratory employee allegedly made false statements about his conduct to federal regulators, brought a lawsuit claiming fraud and negligence in administering the drug test. The majority (Abdus-Salaam, J., joined by DiFiore, C.J., and Pigott, Garcia, and Stein, J.J.) held that "third-party reliance" on an alleged misrepresentation—here, the government's reliance on the lab employee's alleged misstatement about the plaintiff—"does not satisfy the reliance element of a fraud claim." As to the negligence claim, the majority (Abdus-Salaam, J., joined by DiFiore, C.J., and Pigott and Garcia, J.J.) held that federal drug-testing regulations do not impose on drug laboratories a general duty of care that is unrelated to "the scientific integrity of the testing process." Judges Fahey and Rivera would have held that a plaintiff may establish the reliance element of a fraud claim "by showing that a third party justifiably relied on false statements or omissions of a defendant that were intended to influence the plaintiff." And Judges Fahey, Rivera, and Stein would have held that "both a laboratory and a medical review officer … owe a duty of care to the subject of a drug test to conduct that procedure in keeping with professional standards."

2. ***In re NYC Asbestos Litigation (Dummitt v. A.W. Chesterton; Suttner v. A.W. Chesterton)*** **(2016 N.Y. Slip Op. 05063; June 28, 2016).**

   In a consolidated appeal, the majority (Abdus-Salaam, J., joined by Pigott, Rivera, Stein, and Fahey, J.J.) held that a manufacturer "has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." Applying this rule, the majority concluded that the manufacturer had a duty to warn regarding an asbestos-containing product that it did not manufacture, but which was used in conjunction with its product. Judge Garcia concurred in the result, but would have held that "at a minimum, some action by the manufacturer in originally marketing the product with asbestos and promoting or recommending asbestos-containing replacement parts is necessary to impose a duty to warn."

3. ***Finerty v. Abex Corp.*** **(27 N.Y.3d 236; May 3, 2016).**

   In a unanimous decision (Pigott, J.), the Court reaffirmed that a parent corporation "may not be held derivatively liable … under a theory of strict products liability" for the actions of a subsidiary unless the corporate veil is pierced. Plaintiff alleged that the parent company was liable for design defect and failure to warn claims under a strict products liability theory. Rather than alleging facts sufficient to pierce the corporate veil, plaintiff claimed that the parent was liable for its subsidiary's acts because the parent had helped design products that were manufactured and distributed by its wholly owned subsidiary, and worked to protect its trademark, which the subsidiary used. The Court disagreed. It reaffirmed that the parent's conduct in this case, and a parent-subsidiary relationship in general, was insufficient to hold the parent liable for the subsidiary's actions unless the corporate veil is pierced.

4. ***Pennsylvania Public School Employees' Retirement System v. Morgan Stanley & Co.*** **(25 N.Y.3d 543; June 30, 2015).**

   In a unanimous decision (Stein, J.), the Court held that, in the absence of specific language to the contrary, the right to assert a fraud claim does not transfer with a related contract or note. Plaintiff Commerzbank brought fraud claims arising from the rating of notes in a structured investment vehicle that it had acquired in a merger with Dresdner Bank. Dresdner had in turn purchased the notes from a fund, but the fund had not expressly assigned to Dresdner the right to bring fraud claims related to the notes. Answering a question certified by the Second Circuit, the Court of Appeals held that Commerzbank lacked standing to bring the fraud claims because there was no affirmative proof that the fund had assigned any such right to Dresdner. The Court reached this conclusion even though the sale of the notes had been "unqualified," the fund had sold its "whole interest" in the notes, and executives at Dresdner and the fund attested that the parties intended to assign all causes of action arising from the notes.

5. ***ACA Financial Guaranty Corp. v. Goldman, Sachs & Co.*** **(25 N.Y.3d 1043; May 7, 2015).**

   The Court, by a 5-2 vote (per curiam, joined by Lippman, C.J., and Pigott, Rivera, Stein, and Fahey, J.J.), held that plaintiff sufficiently pleaded justifiable reliance by alleging that the defendant had provided a misleading response to a question about a collateralized debt transaction. Plaintiff, the guarantor of a synthetic collateralized debt obligation ("CDO"), alleged that the defendant, which structured the CDO, "fraudulently concealed" that one of its clients "planned to take a short position" in the CDO to "intentionally expos[e] plaintiff to substantial liability." Relying heavily on the standard for deciding a motion to dismiss, a majority of the Court of Appeals held that plaintiff had sufficiently pleaded justifiable reliance by alleging that it asked the defendant how its client "intended to 'participate' in the transaction," and that the defendant "misrepresented" that the client "would be the equity investor." The dissent (Read, J., joined by Abdus-Salaam, J.), argued that reliance had not been sufficiently pleaded because the

plaintiff, a "sophisticated party," had not "allege[d] the 'reasonable steps' that it took 'to protect itself against deception.'"

III. Corporate Law

In the past year, the Court decided a major case addressing the standard of review for challenges to a corporate merger.

1. ***Erie County Employees Retirement System v. Blitzer (In re Kenneth Cole Productions, Inc. Shareholder Litigation)* (27 N.Y.3d 268; May 5, 2016).**

   In a unanimous decision (Stein, J.), the Court held that the business judgment rule applies to a challenge to a going-private merger effectuated by a controlling shareholder, as long as certain shareholder-protective conditions are met. Plaintiff, a minority shareholder, brought suit alleging that, under the "entire fairness" standard, the majority shareholder breached his fiduciary duty to minority shareholders in negotiating a going-private merger with the company's board. Adopting the Delaware Supreme Court's standard in *Kahn v. M & F Worldwide Corp*., 88 A.3d 635 (Del. 2014), the Court of Appeals held that the more deferential business judgment rule—and not the entire fairness standard—applies if the transaction is approved by an independent special committee empowered to obtain its own advisors and negotiate a fair price, and by an informed and uncoerced majority of minority shareholders. If these conditions are not met, then the entire fairness standard applies. Finding that the plaintiff had failed to sufficiently allege the absence of these conditions, the Court applied the business judgment rule and affirmed the dismissal of the complaint.

IV. Civil Procedure

In the past year, the Court addressed numerous civil procedure issues, including out-of-state class members' right to opt out of a settlement, the admissibility of expert testimony, and the proper interpretation of choice-of-law provisions.

1. ***Jiannaras v. Alfant* (27 N.Y.3d 349; May 5, 2016).**

   In a unanimous decision (Pigott, J.), the Court held that out-of-state members of a class have a due process right under the Fourteenth Amendment to opt out of a settlement that extinguishes their right to pursue a claim for damages. Shareholders brought multiple class actions, seeking "mostly equitable relief," to stop a corporate merger. Eventually, shareholders agreed to "release and extinguish any and all damage claims relating to the merger." The Court invalidated the settlement. Because class certification had been sought under New York CPLR article 9, the Court found that *Matter of Colt Industry Shareholder Litigation*, 77 N.Y.2d 185 (1991) controlled. Applying *Colt*, the Court held that the settlement was improper because it "impinge[d] on the right of out-of-state class members to pursue any and all claims for damages relating to the merger, not only claims that may be considered incidental," without offering those class members an opportunity to opt out of the settlement.

2. ***Sean R. v. BMW of North America, LLC* (26 N.Y.3d 801; February 11, 2016).**

   In a unanimous decision (Pigott, J.), the Court reaffirmed that under New York law an expert's testimony may be excluded for failure to rely on "principles and methodologies" that are "generally accepted in the scientific community." Plaintiff alleged that a defect in his mother's vehicle caused *in utero* exposure to gasoline vapors, which resulted in mental and physical disabilities, and offered expert testimony regarding causation. The Court affirmed the exclusion of that testimony, emphasizing that under the *Frye* standard, 293 F. 1013 (D.C. Cir. 1923), "[i]t was plaintiff's burden to show that the methodolog[ies] his experts employed [were] generally accepted in the scientific community." Plaintiff had not satisfied that burden, the Court found, because his experts had not "identified any text, scholarly article or scientific study" supporting their methodologies and had not shown "a consensus" in the scientific community as to the reliability of those methodologies.

3. ***The Ministers & Missionaries Benefit Board v. Snow* (26 N.Y.3d 466; December 15, 2015).**

   In a 4-2 decision (Stein, J., joined by Lippman, C.J., and Pigott and Fahey, J.J.), the Court reaffirmed the bright-line rule that a New York choice-of-law provision "obviates the application of both common law conflict-of-laws principles and statutory choice-of-law directives." The decedent, who died while domiciled in Colorado, had retirement and death-benefit plans that were "governed by and construed in accordance with" New York law. All parties agreed that New York's substantive law should govern the dispute. But a New York choice-of-law statute for disposing of property upon death pointed to Colorado law, and the Second Circuit certified the question of whether New York or Colorado law controlled to the New York Court of Appeals. The Court held that "when parties include a choice-of-law provision in a contract, they intend that the law of the chosen state … will be applied." Therefore, courts should not "engage in any conflicts analysis where the parties include a choice-of-law provision in their contract," even if the parties do not explicitly waive application of a choice-of-law statute. The dissent (Abdus-Salaam, J., joined by Rivera, J.) disagreed, arguing that by selecting New York law, the parties included New York's choice-of-law statute pertaining to property disposition upon death, even though it points to Colorado's substantive law.

4. ***Brown & Brown, Inc. v. Johnson* (25 N.Y.3d 364; June 11, 2015)**.

   In a unanimous decision (Stein, J.), the Court invalidated a choice-of-law provision in a covenant not to compete on the ground that it offended New York's public policy. Brown & Brown, a Florida corporation with a New York subsidiary, sued a former employee to enforce a restrictive covenant in her contract and enjoin her from working with a competitor. In the contract, the parties stipulated that Florida law would govern. Although the Court underscored that choice-of-law provisions are usually enforced, it reaffirmed the principle that New York courts will not enforce choice-of-law provisions that "violate[] 'some fundamental principle of justice, some prevalent conception of good morals, some

deep-rooted tradition of the common weal.'" The Court found that the "heavy burden" of satisfying this public policy exception was met here, because of critical substantive differences between Florida and New York law with respect to non-compete covenants.

V. Attorney-Client Privilege

This year the Court of Appeals issued an important decision addressing the common interest doctrine under the attorney-client privilege.

1. ***Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*** **(2016 N.Y. Slip Op. 04439; June 9, 2016).**

   In a 4-2 decision (Pigott, J., joined by Abdus-Salaam, Stein, and Fahey, J.J.), the Court declined to eliminate the traditional requirement that shared communications between two parties must "be in furtherance of a common legal interest in pending or reasonably anticipated litigation" to be protected by the common interest exception to the attorney-client privilege. Plaintiff sought communications between the defendant and the company with which it eventually merged during the period after the merger was announced but before it closed. Defendants argued that those communications were protected by the attorney-client privilege because the two then-independent companies shared a "common legal interest" in completing the merger. The First Department agreed, finding that the existence of "pending or reasonably anticipated litigation was no longer a necessary element" to invoke the common-interest exception to attorney-client privilege. The Court of Appeals reversed. It "adhere[d] to the litigation requirement that has historically existed in New York" and maintained its narrow construction of the common interest doctrine, concluding that the benefits to expanding the privilege were outweighed by the loss of discoverable evidence. The dissent (Rivera, J., joined by Garcia, J.) argued that the litigation requirement was not rooted in the common law of privilege, and that the requirement should be abrogated so that information can flow freely between parties to a merger or other complex corporate transactions.

VI. E-Discovery

In the past year, the Court weighed in on when a company may have a duty to preserve electronically stored information of another company in which it has an ownership stake, and when spoliation sanctions might be warranted.

1. ***Pegasus Aviation I, Inc. v. Varig Logistica S.A.*** **(26 N.Y.3d 218; December 15, 2015).**

   In a 4-2 decision (Pigott, J., joined by Lippman, C.J., and Abdus-Salaam and Fahey, J.J.), the Court ruled that MP Volo, the owner of 20% of Varig Logistica, a Brazilian air cargo company, "possessed sufficient control over VarigLog so as to trigger a duty on [MP Volo's] part to see to it that VarigLog was preserving" its electronically stored information ("ESI"). The Court unanimously affirmed the Appellate Division's holding that MP Volo exercised control over VarigLog,

where a Brazilian court ordered MP Volo to "take over the administration and management" of VarigLog. As a result, the Court explained, MP Volo was liable for VarigLog's failure to issue a litigation hold and for computer crashes that destroyed discoverable information. The Court affirmed that failure to institute the litigation hold was simple negligence, rather than gross negligence, and remitted the case to the Supreme Court to determine whether the destroyed ESI was relevant to the plaintiffs' claims, and if so, what sanction, if any, was warranted. Judges Stein and Rivera dissented in part, arguing that the record showed that the purchasers "failed to use even slight care" in preserving electronic information and were thus grossly negligent.

VII. Administrative and Constitutional Law

In the past year, the Court handed down several decisions regarding the scope of the government's regulatory authority.

1. ***People ex rel. Schneiderman v. Greenberg*** **(2016 N.Y. Slip Op. 04253; June 2, 2016).**

   In a unanimous decision (Stein, J.), the Court addressed the scope of the New York Attorney General's authority to seek equitable relief under the Martin Act and the Executive Law. Defendants argued that those statutes did not allow the Attorney General to obtain a permanent injunction without showing irreparable harm, or to obtain disgorgement. The Court held that, consistent with the Martin Act's remedial nature, the Attorney General may obtain permanent injunctive relief "upon a showing of a reasonable likelihood of a continuing violation based upon the totality of the circumstances." The Court also held that the Attorney General may seek disgorgement because the Martin Act contains a "broad, residual relief clause," and because "courts are not limited to the remedies specified" under either the Martin Act or the Executive Law.

2. ***People ex rel. Schneiderman v. Sprint Nextel Corp.*** **(26 N.Y.3d 98; October 20, 2015).**

   In a 4-1 decision (Lippman, C.J., joined by Pigott, Abdus-Salaam, and Fahey, J.J.), the Court held that a sales tax provision of the tax law was not ambiguous and that retroactive application of New York's False Claims Act ("FCA") did not violate the Ex Post Facto Clause of the U.S. Constitution. The New York Attorney General alleged that Sprint had knowingly misinterpreted the tax law to avoid sales taxes on mobile telecommunications services, leading Sprint to make false statements about its tax obligations and triggering liability under a 2010 amendment of the state FCA that covers false tax claims. Sprint argued that the statute was ambiguous, that its reading of the statute was reasonable in any event, and that the FCA could not be applied retroactively to its pre-2010 conduct. The Court held that the statute was not ambiguous, but that discovery was needed to determine whether Sprint reasonably held its belief about the meaning of the tax law. The Court also held that the FCA could retroactively cover Sprint's conduct because the legislature deemed the FCA's treble-damages remedy "civil," despite the Court's recent statement in *State ex rel. Grupp v. DHL Express (USA), Inc.*,

19 N.Y.3d 278, 286-87 (2012), "that the FCA's penalty and damage scheme serves the aims of punishment, retribution, and deterrence." Judge Stein dissented in part, finding that the tax law was ambiguous, and therefore that the Attorney General could not sufficiently plead the actual falsity element of an FCA claim.

3. ***In the Matter of NYC C.L.A.S.H. v. New York State Office of Parks, Recreation and Historic Preservation*** **(27 N.Y.3d 174; March 31, 2016).**

   In a unanimous decision (Fahey, J.), the Court reiterated that state agencies may enact broad regulations so long as they "act[] within the confines" of applicable "legislative edicts." Plaintiff challenged, on constitutional and separation-of-powers grounds, a rule issued by the state parks authority that prohibited smoking in state parks located in New York City and other designated areas. The Court rejected the challenge. Applying the four-factor test announced in *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), the Court held that the agency "did not make 'value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems,' and did not cross 'the difficult-to-define line between administrative rule-making and legislative policy-making.'" Therefore, the agency "did not usurp the authority of the legislature by promulgating the regulation at issue."

4. ***In the Matter of Sierra Club v. Village of Painted Post*** **(26 N.Y.3d 301; November 19, 2015).**

   In a unanimous decision (Abdus-Salaam, J.), the Court addressed the requirement that a plaintiff show direct injury to establish standing in a land use matter. Petitioner challenged a development project under the State Environmental Quality Review Act, alleging that it would "increase[] noise and air contamination" for those living near the facility. Reversing the Appellate Division, the Court found petitioner had standing under *Society of the Plastics Industry v. County of Suffolk*, 77 N.Y.2d 761 (1991). The Court explained that although "[t]he harm that is alleged must be specific to the individuals who allege it, and must be 'different in kind or degree from the public at large' ... it need not be unique." Citing *Matter of Ass'n. for a Better Long Island v. New York State Department of Environmental Conservation*, 23 N.Y.3d 1 (2014), the Court rejected "overly restrictive" interpretations of standing that would "completely shield a particular action from judicial review" and "effectively insulate" governmental actions from challenge.

VIII. Insurance

In the past year, the Court decided several cases regarding insurance coverage and the rights of insurers.

1. ***In the Matter of Viking Pump, Inc.*** **(27 N.Y.3d 244; May 3, 2016).**

   In a unanimous decision (Stein, J.), the Court reiterated that contract principles control the interpretation of insurance agreements, including whether the agreement requires "all sums" allocation—where an insurer pays "all sums" related to a policyholder's liability—or "vertical exhaustion"—where the insured

need only exhaust the primary and umbrella policies tied to an excess policy before that excess policy is triggered. Plaintiffs sued in Delaware state court seeking coverage from their excess insurers for asbestos-related liabilities. The excess insurers argued that under New York law, which governed the dispute, liabilities should be allocated pro rata among insurers (not on an "all sums" basis) because the injuries occurred over multiple coverage periods. The excess insurers also argued that "horizontal exhaustion" (as opposed to "vertical exhaustion") applied, meaning that plaintiffs were required to exhaust *all* primary and umbrella policies before *any* excess policy was triggered. The Delaware Supreme Court certified the allocation and exhaustion questions to the New York Court of Appeals. The Court of Appeals held that "all sums" allocation applied under "general principles of contract interpretation" because the agreement included a "non-cumulation clause[]," and such clauses "cannot be reconciled with pro rata allocation." The Court further explained that the "other insurance" provisions in the excess policies showed that vertical exhaustion applied because those excess policies were tied to specific underlying policies in effect during the same policy period.

2. ***Selective Insurance Co. v. County of Rensselaer*** **(26 N.Y.3d 649; February 11, 2016).**

   In a unanimous decision (Abdus-Salaam, J.), the Court held that, under the insurance policy at issue, each class member's claim was a separate "occurrence," but that attorney's fees were to be allocated only to the named plaintiff. The insurance dispute arose after the county settled a class action lawsuit alleging civil rights violations. The county argued that the class action was a single "occurrence," and that attorney's fees should be wholly allocated to the named plaintiff. The Court agreed in part. It emphasized that its interpretation of the agreement turned on whether the provision in the policy defining "occurrence" was ambiguous. Where the agreement was unambiguous, its language controlled; where the agreement was ambiguous, it was to be construed in favor of the insured.

3. ***Aetna Health Plans v. Hanover Insurance Co.*** **(2016 N.Y. Slip Op. 04658; June 14, 2016).**

   In a 5-2 decision (Pigott, J., joined by DiFiore, C.J., and Abdus-Salaam, Stein, and Garcia, J.J.), the Court held that New York's no-fault insurance law did not permit a health insurer (as opposed to a health-care provider) to maintain a claim against a no-fault insurer for reimbursement of medical expenses that the no-fault insurer should have paid. Plaintiff, a health insurer, paid an insured's medical bills after a car accident, although under the no-fault law those bills should have been paid by the defendant, a no-fault insurer. The health insurer sued, seeking reimbursement as the insured's assignee. The lower courts dismissed the claim and the Court of Appeals affirmed. It held that a "health insurer" could not receive benefits under the no-fault law because "the no-fault regulation permits only the insured—or providers of health care services by an assignment from the insured—to receive direct no-fault benefits." Judge Stein concurred. Judges Fahey and Rivera dissented, taking the position that the no-fault law did not preclude the plaintiff from seeking equitable subrogation.

4. ***Millennium Holdings LLC v. The Glidden Co.*** **(2016 N.Y. Slip Op. 03543; May 5, 2016).**

   In a unanimous decision (Abdus-Salaam, J.), the Court declined to extend the antisubrogation rule to bar an insurance company from seeking subrogation from a party that is not covered by its policy. Plaintiff insurance companies sought subrogation from an entity that was not their insured. The lower courts applied the antisubrogation rule, prohibiting plaintiffs from asserting their right to subrogation, on the ground that the insurers were seeking "to recover for the very risk they insured." The Court of Appeals reversed. It explained that "[t]he essential element of the antisubrogation rule is that the party to which the insurer seeks to subrogate is covered by the relevant insurance policy." Therefore, "absent a policy reason supporting application of the antisubrogation rule"—such as to avoid a conflict of interest—the rule does not apply to "non-covered third parties."

IX. Looking Ahead

We highlight below a number of the civil cases the Court of Appeals will hear during the coming year, beginning in September 2016.

1. **Contract Law**

   a. ***Town of Amherst v. Granite State Insurance Co.*** **(129 A.D.3d 1657 (4th Dep't 2015); APL-2016-00045; argument not yet scheduled).**

      The Court of Appeals granted leave to address whether a court or an arbitrator has the authority to decide if a party has expressly waived its right to arbitrate. The Court may clarify the scope of its holding in *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 45-46 (1997), that, unless an agreement says otherwise, "the question of arbitrability is an issue generally for judicial determination in the first instance."

   b. ***Garthon Business Inc. v. Stein*** **(138 A.D.3d 587 (1st Dep't 2016); APL-2016-00097; argument not yet scheduled).**

      The Court of Appeals granted leave to address whether a court or arbitrator has the authority to resolve claims arising out of more than one agreement, where the agreements at issue provide for different dispute resolution mechanisms. The Court may clarify the scope of its recent holding in *Monarch Consulting, Inc. v. National Union Fire Insurance Co. of Pittsburgh*, 26 N.Y.3d 659 (2016), which held that when parties "clearly and unmistakably delegate[] the question of arbitrability and enforceability of the arbitration clauses to the arbitrators … the FAA mandates that the arbitration provisions be enforced as written."

2. **Civil Procedure**

a. ***Rivera v. Montefiore Medical Center* (123 A.D.3d 424 (1st Dep't 2014); APL-2015-00064; argument scheduled for September 7, 2016).**

The Court of Appeals granted leave to clarify the trial court's discretion regarding the disclosure of expert testimony under CPLR 3101(d) and admission of such testimony. The question presented is whether the trial court properly denied plaintiff's application to exclude defendant's expert from testifying as to a theory of causation, when that application came at trial and not upon receipt of defendant's expert disclosure statement (because, according to plaintiff and the dissent below, that disclosure did not specify the theory that the expert proffered at trial).

b. ***Wilson v. Dantas* (128 A.D.3d 176 (1st Dep't 2015); APL-2015-00199; argument not yet scheduled).**

The First Department granted leave for the Court of Appeals to address whether a plaintiff's lawsuit should be dismissed on *forum non conveniens* grounds when foreign law governs, relevant events took place abroad, and the remaining parties are not New York residents, but the foreign jurisdiction offers no right to a jury trial, New York entities are involved, and relevant evidence is in New York. The Court may clarify its decision in *Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 N.Y.3d 129 (2014), where it found dismissal on *forum non conveniens* grounds was required as a matter of law.

c. ***Rushaid v. Pictet & Cie* (127 A.D.3d 610 (1st Dep't 2015); APL-2015-00268; argument not yet scheduled).**

The Court granted leave to address whether use of a foreign bank's correspondent account in New York, as part of an alleged fraudulent kickback scheme run by an employee, constitutes "transact[ing]" business in New York under CPLR 302. The Court may clarify the reach of its decision in *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327 (2012), where the Court found long-arm jurisdiction based on allegations that a foreign bank had repeatedly and deliberately used a New York account to support a terrorist organization.

d. ***D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro* (128 A.D.3d 486 (1st Dep't 2015); APL-2015-00319; argument not yet scheduled).**

The Court granted leave to address the scope of New York's long-arm statute authorizing personal jurisdiction over a non-domiciliary that "transacts any business within the state or contracts anywhere to supply goods or services in the state." The question presented in the case is whether a Spanish wine maker, which was not authorized to do business in New York and did not have offices, employees, telephone listings, or bank accounts in New York,

nonetheless "transact[ed]" business in New York by attending promotional events for its wine in New York City.

3. **Administrative and Constitutional Law**

   a. ***In re 381 Search Warrants Directed to Facebook, Inc.* (132 A.D.3d 11 (1st Dep't 2015); APL-2015-00318; argument not yet scheduled).**

      The Court granted leave to address whether Facebook may challenge search warrants issued by the Manhattan District Attorney as part of a fraud investigation that sought information from 381 Facebook users' accounts. The Court may also address the scope of privacy rights in the digital age, including whether the warrants violate the First or Fourth Amendment or the federal Stored Communications Act, and whether there is a public right of access to an unsealed investigator's affidavit underlying the warrants.

   b. ***People ex rel. Schneiderman v. Trump Entrepreneur Initiative LLC* (137 A.D.3d 409 (1st Dep't 2016); APL-2016-00115; argument not yet scheduled).**

      The First Department granted leave for the Court of Appeals to address whether the Attorney General is authorized to bring a stand-alone cause of action for fraud under Executive Law § 63(12). The Court may also address whether the statute of limitations for a fraud claim under Section 63(12) is three years, under CPLR 214(2), or six years, under the residual statute of limitations in CPLR 213(1).

4. **Other**

   a. ***Three Amigos SJL Restaurant, Inc .v. CBS News Inc.* (132 A.D.3d 82 (1st Dep't 2015); APL-2015-00238; argument scheduled for September 6, 2016).**

      The Court of Appeals, taking up a case in which two justices dissented below, will address the requirement that a plaintiff in a defamation action must show that the statement at issue is "of and concerning" the plaintiff. The question presented is whether, as a matter of law, a "wholly accurate news report" about a club is "of and concerning" the club's vendors who provided management services, when the news report did not directly identify those vendors.

   b. ***Justinian Capital SPC ex rel. Blue Heron Segregated Portfolio v. WestLB AG* (128 A.D.3d 553 (1st Dep't 2015); APL-2015-00231; argument scheduled for September 14, 2016).**

      The Court of Appeals granted leave to address the meaning of the safe harbor provision of Judiciary Law § 489(2), which exempts from the general champerty statute the purchase of certain debts and related claims where the purchase price is at least $500,000. The question presented is whether the

safe harbor is triggered when a party promises to pay at least $500,000, or when the party actually pays that amount.

c. ***Avella v. City of New York*** **(131 A.D.3d 77 (1st Dep't 2015); APL-2015-00298; argument not yet scheduled).**

The Court granted leave to determine whether a plan for environmental remediation and construction of new facilities on the site of the now-demolished Shea Stadium in Willets Point, Queens may proceed. The key question is whether the Public Trust Doctrine's requirement for legislative approval is satisfied by a 1961 statute providing that the site may be used for construction of Shea Stadium and other public purposes.

d. ***Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*** **(821 F.3d 265 (2d Cir. 2016); CTQ-2016-00001; argument not yet scheduled).**

The Court of Appeals accepted the following certified question from the Second Circuit, involving a pre-1972 copyright dispute: "Is there a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right?"