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Recent Developments at the New York Court of Appeals

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MCLE Certificate Information

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THE NEW YORK COURT OF APPEALS: BACKGROUND

01

The New York Court of Appeals

Introduction

- New York's highest court, hearing appeals from intermediate appellate courts:
 - Appellate Division, First Department (Manhattan)
 - Appellate Division, Second Department (Brooklyn)
 - Appellate Division, Third Department (Albany)
 - Appellate Division, Fourth Department (Rochester)
- The appellate courts hear appeals from New York's trial courts
 - i.e. Supreme Court, County Courts, Family Court, Court of Claims
- Final word on issues of New York law.
- Sits in Albany, the capital of New York state.
- Comprised of the Chief Judge and six associate judges.

The New York Court of Appeals: History

- | | |
|------|---|
| 1691 | Colonial Assembly establishes the Supreme Court of Judicature, with appeals to Royal Governor |
| 1777 | New York's first Constitution created a higher appellate court |
| 1846 | State court system reorganized, creating the Court of Appeals |
| 1869 | State courts divided into four judicial departments |
| 1894 | Creation of the Appellate Division |
| 1917 | Court of Appeals moves to 20 Eagle Street (Court of Appeals Hall) in Albany |
| 1985 | Court of Appeals becomes a certiorari court |

The New York Court of Appeals: Judges

Judges are appointed by the Governor and confirmed by the Senate for 14 year terms, with a mandatory retirement age of 70.

Chief Judge
Rowan Wilson



Jenny Rivera



Michael Garcia



Madeline Singas



Anthony Cannataro



Shirley Troutman

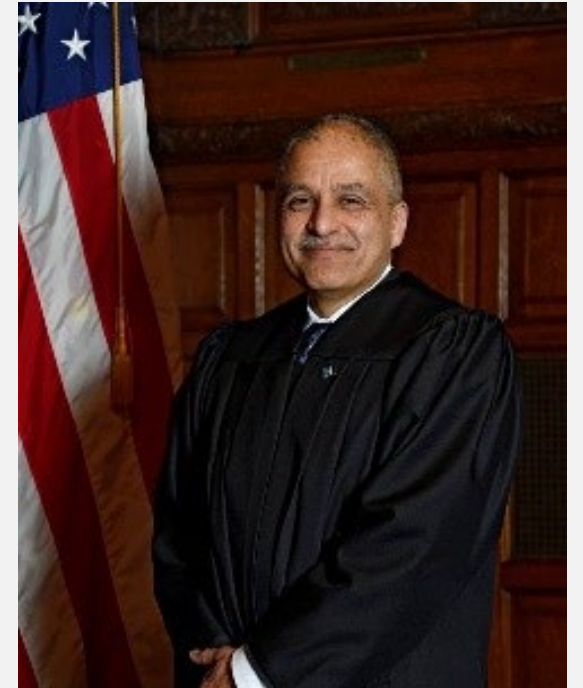


Caitlin Halligan

The New York Court of Appeals

Chief Judge Rowan Wilson

- Elevated to Chief Judge on April 18, 2023
- Former Associate Judge and corporate litigator in private practice
- Known for concurrences and dissents
- First Black Chief Judge on the Court.



The New York Court of Appeals

Judge Caitlin Halligan

- Joined the Court in April 2023
- Fills Chief Judge Wilson's seat as an Associate Judge
- Previous positions in government and in private practice



The New York Court of Appeals

Practice

- The Court generally considers only final rulings, disposing of the entire case.
 - The issue must be a legal issue that was raised below and preserved on appeal.
- The Court hears certain cases as a matter of right.
 - Two-judge dissent in the Appellate Division
 - Constitutional question
- The Court often hears cases by permission (i.e., motion for leave to appeal).
 - Issue involves a conflict among the Departments of the Appellate Division.
 - Issue involves a conflict with prior Court of Appeals decisions.
 - Issue is novel.
 - Issue is of statewide importance.
- The Court often considers amicus briefs.

The New York Court of Appeals

Observations

- Respected court of last resort, nationally and in New York.
- Hears many cases, but slowly decreasing in recent years.
- Growing lack of unanimity in opinions
- Turnover on bench (2 new judges in 2021; 1 in 2022; 1 in 2023).
- Growing sophistication of appellate bar

THE NEW YORK COURT OF APPEALS: RECENT DECISIONS

02

Recent Decisions: **Constitutional Law**

Electoral Redistricting

Matter of Harkenrider v. Hochul

The Court held that electoral districts created by Legislature violated recently enacted provisions of the NY Constitution.

- Bipartisan Independent Redistricting Commission (“IRC”) submitted only one set of dueling redistricting maps that each failed to garner majority support .
- The Court explained that the Constitution’s text, intent, and history contemplated bipartisan cooperation and electoral reform.
- One dissent would have held the proper remedy was for the Legislature to choose one of the RC’s proposals.
- Another dissent would have upheld the redistricting proposal.

Forever Wild Provision

Protect the Adirondacks! v. NYS Department of Environmental Conservation

The Court held that minor snowmobile trails violated the “Forever Wild” provision of the State Constitution.

- The Court analogized to construction of a bobsled run during the 1932 Olympic Games.
- The Court rejected the argument that destruction of trees was minor.
- The Court also rejected the argument that the project would benefit the people of New York.

Recent Decisions: Jurisdiction & Civil Procedure

Territorial Jurisdiction

Aybar v. Aybar

The Court held that registering for business and designating agent for service of process does not consent to territorial jurisdiction in New York courts.

- The Court explained that relevant statutes don't condition doing business in New York on consenting to general jurisdiction.
- The Court also explained that "general jurisdiction" now generally requires a company to be "at home" in the forum state, rather than simply doing business there.

Appellate Jurisdiction and Interlocutory Orders

Bonczar v. American Multi-Cinema, Inc.

The Court held that it lacked jurisdiction to review an interlocutory order denying summary judgment because it did not "necessarily affect" the judgment.

- The Court affirmed a judgment in which the jury found that plaintiff's failure to position a ladder properly was the sole proximate cause of his injuries.
- The Court found that a significant part of the ruling, which the Court had granted leave to appeal, pertained to substantially the same issues as the denied partial summary judgment.

Recent Decisions: **Statutory Interpretation**

Insurance Brokers

Independent Insurance Agents & Brokers of N.Y. v. New York State DFS

The Court affirmed the validity of Insurance Regulation 187

- The Court concluded that the regulation's terms, such as "recommendation," "suitability information," and "best interest" were not unconstitutionally vague.
- The Court also found that the Department of Financial Services acted within its authority to supervise and establish "professional standards of conduct."
- DFS's regulation was not found to be procedurally defective or arbitrary and capricious.

Employment Law

Doe v. Bloomberg

The Court clarified who may be vicariously liable as an employer under the NYC Human Rights Law

- A Bloomberg employee brought suit against the company, her supervisor, and Michael Bloomberg asserting alleged discrimination, sexual harassment, and sexual abuse claims.
- The Court held that the statute makes only "managers" vicariously liable, while imposing only personal liability on employees, agents, and others with ownership stakes.
- The dissent believed including individuals who have ownership interest in the organization or power to do more than carry out personnel decisions would facilitate the intent of the statute.

Recent Decisions: Torts

Deceptive Business Practices

Himmelstein, McConnell v. Matthew Bender

The Court held that a housing law treatise was “consumer-oriented” for purposes of consumer protection statutes.

- Law firm and tenant advocates sued for incomplete housing statutes in the “Tanbook.”
- The Court rejected arguments that “consumer oriented” means for “personal, family, or household use,” or use by non-professionals (i.e., not lawyers, judges, etc.).
- No reasonable consumer would have been misled, because laws often change.

Special Duty for Municipalities

Ferreira v. City of Binghamton

The Court held that for negligence, a municipality that executes a residential no-knock warrant through its police must breach a “special duty” of care to those in the home.

- The police conducted a dynamic entry into the residence of an alleged armed and dangerous felony suspect.
- The Court reaffirmed that the public duty rule (municipality owes a general duty to the public, but not to individuals absent special duty) applies where the government itself allegedly caused the injury, based on precedent and public policy.
- The dissent believed a general duty to act reasonably under the circumstances would be more appropriate and less restrictive.

THE NEW YORK COURT OF APPEALS: PENDING CASES

03

Pending Cases: Certification by Second Circuit

Employment Law

Syeed v. Bloomberg

The Court will consider whether a nonresident plaintiff can bring a claim under the New York City and State Human Rights Laws if the nonresident plaintiff can demonstrate that a City or State employer deprived her of a job opportunity on discriminatory grounds.

- Plaintiff filed a class-action lawsuit against Bloomberg for alleged sexual and racial discrimination and constructive discharge, in relation to not being assigned her desired role and lack of career advancement.
- Certification by Second Circuit on unresolved question of law.

Insurance

Nitkewicz v. Lincoln Life

The Court will consider whether a planned payment to an interest-bearing policy account, as part of a universal life insurance policy, constitutes a “premium actually paid for any period” under a refund provision of the Insurance Law.

- Policyholder paid her last annual planned premium five months before passing away, and insurer paid out a specified amount, but declined to refund a portion of the premium.
- Certification by Second Circuit on resolved question of law.

Pending Cases: Jurisdiction and Constitutional Law

Personal Jurisdiction

Lelchook v. Société Générale de Banque au Liban SAL

The Court will consider the circumstances in which an entity that acquires all of another's liabilities and assets, but does not merge with that entity, may inherit that entity's status for purposes of specific personal jurisdiction.

- In 2006, Hizbollah carried out rocket attacks in Israel. U.S. citizens who were allegedly harmed brought suit.
- Plaintiffs allege that the Lebanese Canadian Bank provided financial assistance to Hizbollah; in 2011, another entity acquired the bank's assets and liabilities. Plaintiffs allege that the entity is liable as the bank's successor.

Vagueness and Preemption

Police Benevolent Association of the City of New York v. City of New York

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

- Plaintiffs challenged a New York City law, enacted in July 2020, that makes it a criminal misdemeanor to compress the diaphragm in the course of an arrest.
- Supreme Court held the law to be unconstitutionally vague.
- Appellate Division found the provision constitutional and not preempted by state law.

Pending Cases: **Antitrust and Contracts**

Antitrust

Taxi Tours, Inc. v. Go New York Tours, Inc.

The Court granted leave to appeal on antitrust issues.

- Plaintiffs allege violation of the Donnelly Act among competitors in NYC's hop-on, hop-off bus industry.
- Second Circuit dismissed federal law claims with prejudice, but dismissed state law claims without prejudice.
- Plaintiffs argue that New York pleading standards and the Donnelly Act permit pleading of state law antitrust claims to be broader than pleading of federal antitrust law claims.
- Parties dispute the scope of conduct prohibited by state law.

Contracts

Brettler v. Allianz

The Court will consider whether failure to comply with the provisions of a life insurance policy requiring written notice of assignment renders the assignment ineffective.

- Trustee of family trust fund sought declaratory judgment that Allianz policy, allegedly owned by the trust, remains in effect after it paid premiums before the policy lapsed.
- Insurer argued that the policy had not been assigned to the trust because no written notice of assignment had been provided.
- Certification by Second Circuit on unresolved question of law.

THE NEW YORK APPELLATE PRACTICE

04

New York Appellate Practice: **Important and Groundbreaking**

- The New York Court of Appeals and Second Circuit are distinguished courts that resolve important questions of nationwide significance.
- Appeals often are from cases of great importance for clients and the public.
- New York appeals can set important precedents for federal cases.
- Appeals to Appellate Division available from almost any order or judgment (final or interlocutory).
- New York appellate courts and litigants are growing increasingly sophisticated.

New York Appellate Practice: **Complex and Unique**

- Significant and interesting motion practice
 - TROs, stays pending appeal, motions to dismiss, etc.
- Quirky and arcane procedural rules.
- New York appellate courts are very different from federal circuit courts.
- Unique issues when challenging the City of New York and State of New York.

New York Appellate Practice: Demands Effective Advocacy

- Understanding of New York state common law.
- Mastery of civil procedure, especially appellate procedure.
- Strategic thinking and research from unique angles.
- Comfort with lack of clarity, precedent, etc.
- Persuasive oral and written advocacy.
- Familiar with courts and judges

Conclusions

➤ **Mylan Denerstein** – MDenerstein@gibsondunn.com

- Ms. Denerstein is a litigation partner and Chair of Gibson Dunn’s Public Policy Practice Group. She leads complex litigation and internal investigations, representing companies confronting a wide range of legal issues, in their most critical times.
- Ms. Denerstein previously served as Counsel to New York State; in a diverse array of legal positions in New York State and City agencies; and as a federal prosecutor and Deputy Chief in the U.S. Attorney’s Office for the SDNY.



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- Mr. Shapiro is a litigation partner and Chair of Gibson Dunn’s New York Administrative Law and Regulatory Practice Group. His practice focuses on a broad range of high-stakes constitutional, commercial, and appellate litigation matters.
- Mr. Shapiro is regularly engaged in New York’s trial courts, federal and state courts of appeal, and the U.S. Supreme Court.



➤ **Seth Rokosky** – SRokosky@gibsondunn.com

- Mr. Rokosky is Of Counsel in Gibson Dunn’s Litigation Department and focuses his practice in the Appellate and Constitutional Law Group.
- Mr. Rokosky rejoined Gibson Dunn after serving in the New York Attorney General’s Office, Bureau of Appeals and Opinions, where he represented the State and its agencies as principal attorney on 43 appellate matters. He is currently Co-Chair of the Appellate Practice Committee of the New York State Bar Association’s Commercial and Federal Litigation Section.



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