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APPELLATE DIVISION REVIEW

BY E. LEO MILONAS AND FREDERICK A. BRODIE

High Hopes Exist for Reversals in Appeals Despite Long Odds

If you appeal to the Appellate Division, what are your statistical chances of obtaining reversal? The numbers for 2004, the last ones released by the Chief Administrative Judge Jonathan Lippman, show that only 14 percent of the Appellate Division's dispositions after argument or submission were reversals.

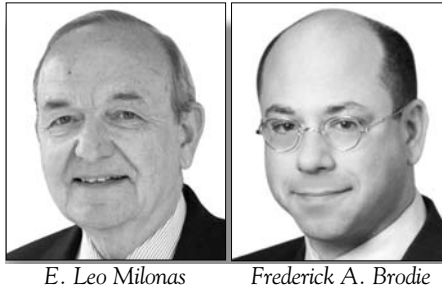
Broken down further, the percentage of reversals ranged from a high of 24 percent for civil appeals in the Second Department to a low of two percent for criminal appeals in the First Department. Of course, appellants' counsel still harbor high hopes for reversal despite the odds. And, in the words of the New York State Lottery, "Hey, you never know."

The four departments of the Appellate Division reversed trial courts in several closely watched cases from December 2005 through February 2006.

First Department

Same-Sex Marriage. Considering whether same-sex couples have a right to marry, the First Department in *Hernandez v. Robles*¹ upheld New York State's Domestic Relations Law (DRL), which does not authorize same-sex marriage, against a variety of constitutional challenges.

Writing for a 4-1 majority, Justice Milton L. Williams reversed a ruling by Supreme Court, New York County, that the DRL violated the New York Constitution's Due Process and Equal Protection clauses. The First Department upheld the DRL's restriction of marriage to heterosexual couples under a "rational basis" analysis. "The legislative policy rationale is that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage



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between sex, procreation and child rearing," the appellate court wrote. Additionally, the trial judge erred when, "upon determining the statute to be unconstitutional, [she] proceeded to rewrite it and purportedly create a new constitutional right, an act that exceeded the court's constitutional mandate and usurped that of the Legislature."

"The power to regulate marriage lies with the Legislature, not the judiciary," Justice Williams stressed.

The First Department's decision will not be the last word: the Court of Appeals has scheduled oral argument in this case for May 31, 2006.

Jury Trials. Alternate jurors cannot be substituted, over a party's objection, after jury deliberations have commenced, the First Department reminded the bench and bar in *Gallegos v. Elite Model Mgmt. Corp.*²

Writing for the unanimous panel, Justice Luis A. Gonzalez explained that "the substitution of an alternative juror after deliberations have commenced violates the parties' State constitutional right to a jury trial and any resulting verdict is therefore invalid." In this disability discrimination case, two regular jurors were disqualified after deliberations had begun. The two alternates who were substituted "had not participated in the beginning of the deliberations and therefore were not on equal footing with the original four jurors, who already had the opportunity to weigh the evidence, consider the views of their fellow jurors, and possibly had formed preliminary positions regarding their ultimate verdict." As a result, the appellate court vacated the damages verdict and remanded for a new trial.

AIDS Phobia. New York cases have limited recovery for fear of contracting AIDS to the six months following exposure, when the plaintiff

tests negative for HIV. This limitation is based on the medical consensus that it is highly unlikely that a person who tests HIV-negative more than six months after exposure will become infected. In *Ornstein v. New York City Health & Hosps. Corp.*,³ a 3-2 decision written by Justice George D. Marlow, the First Department refused to allow a nurse, who was negligently stuck by a needle used by an AIDS patient but tested HIV-negative six months later, to claim more than six months of emotional damages based on "post-traumatic stress disorder." The post-traumatic stress disorder claim, the court concluded, was "simply an end-run around the six-month AIDS phobia restriction." Because "any emotional distress beyond six months is, as a matter of law, unreasonable" when the plaintiff was not infected, the appellate court dismissed any claim for damages allegedly sustained more than six months after the incident.

Securities Industry Regulation. Despite a growing tide of precedent in other state and federal courts favoring qualified immunity, the First Department in *Cicconi v. McGinn, Smith & Co.*⁴ adhered to its position that a securities industry employer's statements on a Uniform Termination Notice (U-5) are absolutely privileged. Despite "[t]he possibility...that brokerage firms may use the form U-5 in bad faith to terminate brokers without proper cause," Justice David B. Saxe's 3-2 decision concluded that affording securities firms an absolute privilege against defamation claims based on U-5s protects investors. With immunity from tort liability, brokerage firms will not "hesitate to clearly state the exact grounds for an employee's termination," and will provide "clear descriptions of questionable conduct" for the benefit of future employers and customers.

Criminal Trials. A criminal defendant's statutory right to be present at all material stages of his trial includes robing room conferences between the judge and counsel, the First Department held in *People v. Douglas*.⁵ In a unanimous opinion authored by Justice Gonzalez, the appellate court explained that Criminal Procedure Law §260.20 grants the defendant a right to be present at proceedings when the defendant "may have something valuable to contribute or when his or her presence would have a substantial effect on the ability to defend against the charges." The

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robing room discussion at issue related to the defendant's own testimony regarding his justification defense. Because that issue "clearly implicated defendant's peculiar factual knowledge such that his participation might have assisted him in advancing his justification defense," the panel vacated the affected convictions and remanded for a new trial on those counts.

Second Department

Experts. The party offering expert testimony on a novel scientific theory need not produce medical literature that expressly supports its view, the Second Department clarified in *Zito v. Zabarsky*.⁶ Instead, Justice Daniel F. Luciano wrote for a unanimous panel, "[i]t is sufficient if a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert." Thus, in a medical malpractice case based on allegations that a doctor prescribed an excessive dose of the drug Zocor, thereby causing a condition known as polymyositis, the expert's theory was not required to be supported by "cases or studies considering circumstances exactly parallel to those under consideration in the litigation." Rather, the plaintiff needed only to show that "a synthesis of various studies or cases reasonably permits the conclusion reached by the plaintiff's expert." A contrary rule, the court explained, would mean that the first users of a new drug who sustain injury would be unable to recover.

Public Employees. A public employee in New York has the right to insist on union representation in an investigatory interview that the employee reasonably believes may result in discipline, Justice Barry A. Cozier concluded for a unanimous panel in *New York City Tr. Auth. v. New York State Pub. Empl. Relations Bd.*⁷ The panel upheld a decision of the Public Employment Relations Board that such a right is implicit in §202 of the Public Employees' Fair Employment Act (also known as the Taylor Law).⁸ Among other things, §202 affords public employees the right to "participate in" a union. Justice Cozier concluded that the board's interpretation of the term "participation" to include union representation during investigatory interviews furthered the Taylor Law's underlying policies and, therefore, was not arbitrary or capricious.

We note that Justice Cozier has left the bench to enter private practice and convey our best wishes.

Class Action Settlements. Most class actions settle, and most class settlements are approved. Judges, however, cannot grow complacent and accept class settlements tendered by counsel without conducting the rigorous examination required by the Civil Practice Law and Rules (CPLR). That's the lesson of *Klein v. Robert's Am. Gourmet Food Inc.*,⁹ a unanimous decision authored by Justice Steven W. Fisher. Klein arose from misrepresentations of the fat and caloric content of snack foods known as Pirate's Booty, Fruity Booty and Veggie Booty. Nassau County Supreme Court certified a nationwide settlement class and approved a settlement

providing, among other things, for price discounts to the general public and the payment of \$790,000 in attorney's fees. Hampering appellate review of the settlement was the fact that, "apart from a brief statement by counsel indicating approval of the Settlement," there was no fairness hearing transcript. Thus, the appellate court could not determine whether the Supreme Court made an informed decision and providently exercised its discretion in certifying the class. The Second Department identified numerous possible defects in the definition of the class, the scope of the claims certified, and the relief awarded. Additionally, the attorney's fee award was supported only by "brief and general descriptions of the work performed by the firm as a whole," rather than a detailed breakdown of time and tasks. The appellate

Expressing agreement with the First Department's decision in 'Hernandez v. Robles,' the Third Department upheld the Domestic Relations Law's exclusion of same-sex marriage against constitutional challenges in 'Samuels v. N.Y. State Department of Health.'

court therefore remanded the case for further proceedings on those and other questions.

Third Department

Lemon Law. Under New York's Lemon Law, a new car buyer may obtain a refund or replacement vehicle if a nonconformity, defect or condition has been subject to repair "four or more times" within a prescribed period, but "continues to exist."¹⁰ In *DaimlerChrysler Corp. v. Spitzer*,¹¹ the Third Department grappled with the recurring question of whether the statute requires that the defect still exist at the time of trial or hearing. Recognizing that the Lemon Law must be "liberally construed in favor of consumers," the unanimous panel decision authored by Justice Anthony J. Carpinello concluded that a plaintiff may recover under the Lemon Law even if the alleged defect is ultimately repaired before the hearing or trial. The appellate court recognized that "most consumers have no realistic option but to persist in having a defect corrected even after a fourth failed attempt."

Same-Sex Marriage. Expressing agreement with the First Department's decision in *Hernandez v. Robles*, discussed above, the Third Department upheld the DRL's exclusion of same-sex marriage against constitutional challenges in *Samuels v. N.Y. State Department of Health*.¹² Writing for a unanimous panel,

Justice John A. Lahtinen wrote that the plaintiffs' claim was "not simply about the right to marry the person of one's choice, but represent[ed] a significant expansion into new territory which is, in reality, a redefinition of marriage." The court found that restricting marriage to one man and one woman has several rational bases, including "preserving the historic legal and cultural understanding of marriage; recognizing heterosexual marriage as a social institution in which procreation occurs; and conforming with the current legal landscape nationwide."

Fourth Department

Trust and Estates. A trustee could not be surcharged for retaining the trust's concentrated investment in Eastman Kodak Co. stock between 1973 and 2002, the Fourth Department ruled in *Chase Manhattan Bank v. Hunter*,¹³ a unanimous memorandum decision. The Surrogate's Court had ordered the trustee to pay beneficiaries more than \$24 million for failing to divest 95 percent of the trust's Kodak stock by Jan. 31, 1974. Although the decedent's will provided that the Kodak stock should not be sold "for the purpose of diversification," it allowed the shares to be sold if there were a "compelling reason" other than diversification. The Fourth Department found at least three grounds for reversal. First, the beneficiaries' theory at trial was that the low yield of Kodak stock constituted a "compelling reason" to sell on Jan. 31, 1973. The Surrogate rejected that contention, but then found compelling reasons as of Jan. 31, 1974. The Surrogate erred in determining "sua sponte ...that the trustee acted imprudently on an unpleaded date based on a composite, unpleaded theory of imprudence." Second, the Surrogate's determination that the stock should have been sold on Jan. 31, 1974 was "impermissibly based on nothing more than hindsight," and the evidence established that a sale at that time would have been imprudent. Third, retaining the Kodak stock, despite its low-income yield, was reasonable in view of the income beneficiary's needs and interests.

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- 1. 2005 N.Y. Slip Op. 09436 (1st Dept. Dec. 8, 2005).
 - 2. 2005 N.Y. Slip Op. 10233 (1st Dept. Dec. 29, 2005).
 - 3. 2006 N.Y. Slip Op. 00038 (1st Dept. Jan. 3, 2006).
 - 4. 2005 N.Y. Slip Op. 10050 (1st Dept. Dec. 22, 2005).
 - 5. 2006 N.Y. Slip Op. 00980 (1st Dept. Feb. 7, 2006).
 - 6. 2006 N.Y. Slip Op. 00506 (2d Dept. Jan. 24, 2006).
 - 7. 2005 N.Y. Slip Op. 10134 (2d Dept. Dec. 27, 2005).
 - 8. N.Y. Civ. Serv. L. §202.
 - 9. 2006 N.Y. Slip Op. 00633 (2d Dept. Jan. 31, 2006).
 - 10. Gen. Bus. L. §198-a(d)(1).
 - 11. 2005 N.Y. Slip Op. 98380 (Dec. 1, 2005).
 - 12. 2006 N.Y. Slip Op. 01213 (Feb. 16, 2006).
 - 13. 2006 N.Y. Slip Op. 00866 (Feb. 3, 2006).

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