NEW YORK STATE-FEDERAL JUDICIAL COUNCIL and the SECOND CIRCUIT JUDICIAL COUNCIL

*Virtual **Complimentary** CLE Program*
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INTERPLAY BETWEEN STATE AND FEDERAL LAW: PITFALLS TO AVOID

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I. RULES GOVERNING FEDERAL LAW'S INTERPLAY WITH STATE LAW

Common Pitfall

Jurisdiction = Power + Duty

Power =

Federal Court → Supplemental Jurisdiction (and Judicial Economy)
State Court → Presumption of Concurrent Jurisdiction

> *See Martin v. Hunter's Lessee*, 14 U.S. 304, 342 (1816) ("[T]he constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States."); *Claffin v. Houseman*, 93 U.S. 130, 137 (1876) ("If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.").
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> Note: This sharing of power is consistent with our system of checks and balances (including between two levels of government), as well as the Supremacy Clause and doctrine of comity.

Duty =

(1) Figure out the Separate Sovereign's law; and
(2) ***Give it proper weight.***

Observe the level of care and detail used by judges in discerning and weighing a separate sovereign's law. If it's important to them, it should be important to you. *See*, e.g., N.Y. Rule of Professional Conduct 3.3(a)(2) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal ***controlling legal authority*** known to the lawyer to be ***directly adverse*** to the position of the client and not disclosed by opposing counsel . . . .").

This CLE is a sort of refresher course for those of us who litigate (or help decide) diversity cases in federal court. It will focus on the rules governing application of state law in federal court (except bankruptcy), only touching on the rule governing the application of federal law in state court.

Bird's Eye View

In 2019, state courts handled 99.09% of civil and criminal cases filed in the United States (not including bankruptcy petitions), and 98.61% of all such cases (including bankruptcy petitions). "The Role of State Courts in Our Federal System: An Analysis of How State Courts Are Charged with Implementing Federal Law" at 6 (Nat'l Cntr. For State Courts, January 2022).

In 2019, of the 83.2 million cases filed in state court, 20% were general civil cases and 20% were non-traffic-related criminal cases. Meanwhile, of the 376,762 cases filed in federal court, 76% percent were civil and 24% were criminal (including traffic-related cases). "The Role of State Courts in Our Federal System: An Analysis of How State Courts Are Charged with Implementing Federal Law" at 1 (Nat'l Cntr. For State Courts, January 2022).

During last five years, 58-62% of cases in federal court have arisen from federal question jurisdiction, and 38-42% of cases have arisen from diversity jurisdiction (depending on whether year 2020 is omitted as an anomaly resulting from a glut of multidistrict litigation cases filed that year). *See Judicial Facts and Figures*, Table 4.8 (U.S. Courts, Sept. 30, 2022); *Federal Judicial Caseload Statistics 2022* (U.S. Courts, March 31, 2022).

During last five years, less than 1.84% of NYS Court decisions appearing on Westlaw have expressly involved the application of a federal statute (i.e., 190 out of more than 10,000 in 2018, 190 in 2019, 210 in 2020, 130 in 2021, and 200 in 2022), not including cases citing merely to the Code of Federal Regulations.

Removed Cases = As of 2002, about 12% of all civil cases in federal court were removed from state court. Jeffrey B. Wall, "Cross-Jurisdictional Remands," 70 *U. Chi. L. Rev.* 689, 690, n.10 (Spring 2003).

Focus of Inquiry: Questions of State Substantive Law in Diversity Cases

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

"*Erie R. Co. v. Tompkins*, [304 U.S. 64 (1938)] . . . did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern." *Meredith v. City of Winter Haven*, 320 U.S. 228, 237 (1943).

When State Law Is Settled, Simply Look to State's Decisional Law (i.e., the Relevant Rulings of the State's Highest Court)

> "When deciding a question of state law, we look to the state's decisional law, as well as to its constitution and statutes." *Chufen Chen v. Dunkin' Brands, Inc*., 954 F.3d 492, 497 (2d Cir. 2020) (citing *In re Thelen LLP*, 736 F.3d 213, 219 [2d Cir. 2013]) (internal quotation marks omitted).
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> > Note: Based on a 10% sample of the all the federal cases in federal district courts in New York State applying state law between 2018 through 2022 that appeared on Westlaw, about 20% of those cases regard *another* state's laws.

When State Law Unsettled (Without a Ruling from the State's Highest Court)

Rule on It Only When Necessary for a Decision

> "Federal courts asked to rule on an unsettled question of state law should do so only where an answer to the question is necessary for a decision." *Merritt v. United States*, 592 F. Supp.3d 340, 354 (D. Vt. March 15, 2022) (collecting authorities).
>
> "Where a ***pendent*** state claim turns on novel or unresolved issues of state law, . . . principles of federalism and comity may dictate that these questions be left for decision by the state courts." *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 305 (2d Cir. 2003) (emphasis added; quotations omitted).

If So, Carefully Predict How State's Highest Court Would Rule

> "Where state law is unsettled, we are obligated to carefully . . . predict how the state's highest court would resolve the uncertainty or ambiguity." *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 499 (2d Cir. 2020) (citing *In re Thelen LLP*, 736 F.3d 213, 219 [2d Cir. 2013]) (internal quotation marks omitted); *see also Maska U.S., Inc. v. Kansa Gen. Ins. Co*., 198 F.3d 74, 78 (2d Cir. 1999); *Travelers Ins. Co. v. 633 Third Assocs*., 14 F.3d 114, 119 (2d Cir.1994).
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> "Absent law from a state's highest court, a federal court sitting in diversity has to predict how the state court would resolve an ambiguity in state law." *Michalski v. Home Depot, Inc*., 225 F.3d 113, 116 (2d Cir. 2000).

Do So by Giving Proper Regard to Relevant Rulings from Lower Courts

> "Absent a clear directive from a state's highest court, federal authorities must apply what they find to be the state law after giving proper regard to relevant rulings of other courts of the State." *Chufen Chen v. Dunkin' Brands, Inc*., 954 F.3d 492, 499 (2d Cir. 2020) (citing *Travelers Ins. Co. v. 633 Third Assocs*., 14 F.3d 114, 119 [2d Cir. 1994]) (internal quotation marks omitted).
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> "In determining how the Court of Appeals would rule on this legal question, the decisions of New York State's Appellate Division are helpful indicators." *Michalski v. Home Depot, Inc*., 225 F.3d 113, 116 (2d Cir. 2000) (citing *In re Brooklyn Navy Yard Asbestos Litig. (Joint E. & S. Dist. Asbestos Litig.),* 971 F.2d 831, 850 [2d Cir. 1992]).

Effect of Rulings from Intermediate Appellate Courts

Intermediate Appellate Courts Control Unless There Exists Contrary New York Authority or Other Persuasive Data Establishing that the Court of Appeals Would Decide Otherwise

> "As a federal court applying state law, we are generally obliged to follow the state law decisions of state intermediate appellate courts . . . in the absence of any contrary New York authority or other persuasive data establishing that the highest court of the state would decide otherwise." *Broder v. Cablevision Sys. Corp*., 418 F.3d 187, 199-200 (2d Cir. 2005) (quoting *Pentech Int'l, Inc. v. Wall St. Clearing Co*., 983 F.2d 441, 446 [2d Cir. 1993]).
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> Note 1: Generally, the "other persuasive data" in question could include (1) decisions from New York State trial courts, (2) decisions from the Supreme Courts of other states, (3) decisions from fellow district courts in the Circuit, and (4) the law of the Circuit in question.
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> Note 2: When a state court is ruling on the application of federal law to state law, the Second Circuit has held "the state court's holding was persuasive authority, entitled to ***great respect***." *Indus. Consultants, Inc. v. H. S. Equities, Inc*., 646 F.2d 746, 749 (2d Cir. 1981) (applying holding of Oklahoma Supreme Court) (emphasis added; quotation marks omitted; citing cases applying holdings of Supreme Court of Virginia and Supreme Court of California).

Caution: The only cases found so far applying this "great respect" point of law did so with regard to a ruling of the *highest* court of the state in question, not lower state courts. *See e.g., Bragg v. Kuhlman*, 97-CV-3025, 1998 WL 867245, at *2 (S.D.N.Y. Dec. 14, 1998) ("Although that determination of the New York Court of Appeals does not bind this Court, it is 'persuasive authority . . . entitled to great respect' because it constitutes the holding of a state court concerning federal constitutional principles implicated by a state statute.") (internal quotation marks omitted); *cf. Concerned Home Care Providers, Inc. v. Cuomo*, 979 F. Supp.2d 288, 292, n.4 (N.D.N.Y. 2013) (noting, when faced with a single state court case from the Third Department, that "district courts are not bound to adopt or follow a state court's interpretation of federal constitutional principles").

Again, "[the] Court is bound to apply the law as interpreted by a state's intermediate appellate courts unless there is persuasive evidence that the state's highest court would reach a different conclusion." *V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010) (citing *Pahuta v. Massey–Ferguson, Inc*., 170 F.3d 125, 134 (2d Cir. 1999]).

Note 1: Where the intermediate appellate courts disagree, a federal court may essentially choose among them (again, to the extent the court has been persuaded that the same choice would be made by the state's highest court).

Note 2: The choice is NOT driven by the Department in which the underlying incident(s) occurred. *See, e.g., Michalski v. Home Depot, Inc*., 225 F.3d 113, 116-17 (2d Cir. 2000) ("Because of an apparent split in authority among the Appellate Divisions (discussed below), the district court decided to follow the law of the Third Department, reasoning that this was the law that would have been applied in the state trial court in the district where this accident occurred and where the suit was originally filed. As appealing as this notion might be as a means of deciding what law to apply, taking this shortcut led to the wrong result. Instead, the proper approach was for the trial court—through an examination of New York and, if necessary, other jurisdictions' case law—to have essayed a prediction on whether the New York Court of Appeals would rule that the open and obvious nature of a hazard precludes landowner liability. To this task we now turn."); *cf. Kermani v. New York State Bd. of Elec*., 487 F. Supp.2d 101, 114 (N.D.N.Y. 2006) (where court faced competing Appellate Division cases, from the Third and Fourth Department, finding that "Federal District Courts are not bound to adopt or follow the decisions of State courts when the State courts interpret Federal constitutional principles, even when those principles are applied to state statutes.").

Note 3: There is no "disagreement" between intermediate appellate divisions where there is an appellate division case on one hand, and some trial court cases from another appellate division on the other hand. *See Caul v. Petco Animal Supplies, Inc*., 20-CV-3534, 2021 WL 4407856, at *3 (E.D.N.Y. Sept. 27, 2021) ("While defendants suggest that New York State trial and intermediate appellate courts remain divided even after [the First Department's decision in] *Vega*, . . . defendants point only to a pair of Suffolk County Court cases. . . . Those cases are unpersuasive. The courts there reasoned that they were not bound to follow *Vega* because the Appellate Division's Second Department had taken a contrary approach. But the Second Department decision in question—*IKEA U.S. Inc. v. Indus. Bd. Of Appeals*, 241 A.D.2d 454 (N.Y. App. Div. 1997)—simply assessed whether the state Commissioner of Labor had proffered substantial evidence that a particular employer violated Section 191. *Id*. At 455. It did not controvert the explicit holding of *Vega*.").

Note 4: Where you have only a single case from a trial court, you are not required to follow it. *See Rodland v. Judlau Contracting, Inc*., 844 F. Supp.2d 359, 363 (S.D.N.Y. 2012) ("[A]s Shmushkina is only a trial [court] level case, this Court is not bound to follow it.") (citing *Conn. State Fed'n of Teachers v. Bd. Of Educ. Members*, 538 F.2d 471, 485 (2d Cir. 1976) for the point of law that, "as a definitive exposition of state law, these two unreported decisions by trial courts of general jurisdictions are not binding [on federal courts]"); *AEI Life LLC v. Lincoln Benefit Life Co*., 897 F.3d 126, 139, n.15 (2d Cir. 2018) ("The New York lower courts are divided on the issue of whether lack of consent renders a policy voidable or void ab initio. . . . We are not required to follow any of those decisions, however.").

Where Question of State Law Has Not Been Conclusively Resolved, Second Circuit Generally Looks to the Law of the Circuit in Which the State Is Located

"Where, as here, a question of state law has not been conclusively resolved by those courts, our general practice is to look next to the law of the circuit in which the state is located, here the Fourth Circuit." *Casey v. Merck & Co., Inc*., 653 F.3d 95, 100 (2d Cir. 2011) (citing *Factors, Etc., Inc. v. Pro Arts, Inc*., 652 F.2d 278, 283 [2d Cir. 1981]).

Certification of Questions of Law

Where Circuit Law Is No More Conclusive, Certification to a State's Highest Court Is an Option at the Second Circuit's Disposal

> "[W]here circuit law is no more conclusive, or where we have some reason to question the continuing validity of that law, certification of one or more questions to a state's highest court is an option at our disposal." *Casey v. Merck & Co., Inc*., 653 F.3d 95, 100 (2d Cir. 2011) (citing *Desiano v. Warner–Lambert & Co*., 467 F.3d 85, 92 n. 4 [2d Cir. 2006]).

Certification Process

> "[The Second Circuit has the] authority to certify 'determinative questions of New York law [that] are involved in a cause pending before [us] for which there is no controlling precedent of the Court of Appeals." *10012 Holdings, Inc. v. Sentinel Insurance Company, Ltd*., 21 F.4th 216, 223-24 (2d Cir. 2021) (quoting 22 N.Y.C.R.R. § 500.27[a]).
>
> Generally, the Second Circuit can certify questions to the highest courts of other states as well. *See, e.g., Shaw v. Agri-Mark, Inc*., 50 F.3d 117, 118 (2d Cir. 1995) (certifying questions of law to Delaware Supreme Court*); In re Ormond Beach Assocs. Ltd. Partnership*, 184 F.3d 143, 157 (2d Cir. 1999) (recognizing ability to certify question of law to Florida Supreme Court); *but see Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 47 n.6 (2d Cir. 2005) ("[C]ertification of the question to the New Jersey Supreme Court is not an option, because, under Rule 2:12A–1 of that court, certification is accepted by that court only from the Third Circuit.").
>
> "Certification is a valuable device for securing prompt and authoritative resolution of unsettled questions of state law, especially those that seem likely to recur and to have significance beyond the interests of the parties in a particular lawsuit." *10012 Holdings, Inc. v. Sentinel Insurance Company, Ltd*., 21 F.4th 216, 224 (2d Cir. 2021) (citing *Kidney v. Kolmar Lab'ys, Inc*., 808 F.2d 955, 957 [2d Cir. 1987]) (internal quotation marks omitted).
>
> "If a question of state law is arising primarily in diversity cases, it may be particularly important to certify in order to ensure that state courts are not substantially deprived of the opportunity to define state law. . . . Certification in diversity cases discourages forum shopping and affirm[s] that it is the state's High Court that is entitled to have the final say on any issue of state law." *10012 Holdings, Inc. v. Sentinel Insurance Company, Ltd*., 21 F.4th 216, 224 (2d Cir. 2021) (citing *Gutierrez v. Smith*, 702 F.3d 103, 116-17 [2d Cir. 2012]) (internal quotation marks omitted).

"But, of course, certification is not costless: Because the certification process always incurs the risk of some delay . . . , we must consider the age and urgency of the litigation, the impact that costs and delays associated with certification will have on the litigants, and the costs that delay imposes on other cases that depend on resolution of the legal issues." *10012 Holdings, Inc. v. Sentinel Insurance Company, Ltd*., 21 F.4th 216, 224 (2d Cir. 2021) (citing *Friends of Van Cortlandt Park v. City of New York*, 232 F.3d 324, 327 [2d Cir. 2000]) (internal quotation marks omitted).

Type of Review on Appeal

Circuit Court Reviews District Court's Interpretation of State Law *De Novo*

"We review the district court's interpretation and application of state law *de novo*." *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013) (citing *Santalucia v. Sebright Transp., Inc*., 232 F.3d 293, 297 [2d Cir. 2000]) (internal quotation marks omitted).

"Where a district court's jurisdictional finding is premised on an application of state law, we . . . review the district court's interpretation of state law *de novo*." *Chufen Chen v. Dunkin' Brands, Inc*., 954 F.3d 492, 497 (2d Cir. 2020) (citing *In re Thelen LLP*, 736 F.3d 213, 219 [2d Cir. 2013]).

No Deference Is Owed to a District Court's Interpretation of State Law

"While decisions of federal courts construing state law may also be considered, no deference is owed to a district court's interpretation of state law." *Hasemann v. Gerber Prods. Co*., 15-CV-2995, 2016 WL 5477595, at *10 (E.D.N.Y. Sept. 28, 2016) (citing *Reddington v. Staten Island Univ. Hosp*., 511 F.3d 126, 133 [2d Cir. 2007]) (internal quotation marks omitted).

II. RULES GOVERNING STATE COURT'S APPLICATION OF FEDERAL LAW

Although a state court is bound by the decisions of the Supreme Court of the United States on issues of federal law, the state court is not bound by decisions of lower federal courts on issues of federal law, where there is a lack of uniformity among them.

See Oceanview Home for Adults, Inc. v. Zucker, et al., No. CV-22-1940, 2023 WL 3235674 (N.Y. App. Div., 3d Dept., May 4, 2023) ("Although we are bound by the decisions of the Supreme Court of the United States on issues of federal law (*see People v. Kin Kan*, 78 N.Y.2d 54, 59-60, 571 N.Y.S.2d 436, 574 N.E.2d 1042 [1991]), that is not the case with respect to decisions of lower federal courts where there is a lack of uniformity (*see Flanagan v. Prudential–Bache Sec., Inc.,* 67 N.Y.2d 500, 506, 504 N.Y.S.2d 82, 495 N.E.2d 345 [1986], *cert denied* 479

U.S. 931, 107 S.Ct. 402, 93 L.Ed.2d 355 [1986]; 31 *Carmody–Wait* 2d § 172:92). As such, we decline to apply the portion of Sierra finding that the least restrictive alternative test is the appropriate formulation of heightened scrutiny to apply in this type of case.").

III. HOLDINGS OF THE N.Y. STATE COURT OF APPEALS TO CERTIFIED QUESTIONS OF LAW FROM THE SECOND CIRCUIT

Bills, Notes and Checks – Interest

Ajdler v. Province of Mendoza, 33 N.Y.3d 120, 127-29 (N.Y. March 21, 2019).

Question 1: Does the running of the statute of limitations on a bondholder's claim for principal impact the recoverability of interest payments that may come due subsequent to that date under an indenture providing for the obligation to pay interest until the principal is paid?

Answer 1: No.

Question 2: If the answer to the first question is "yes," can interest claims arise ad infinitum as long as the principal remains unpaid, or are there limiting principles that apply?

Answer 2: No need to answer.

Damages – Measure

E.J. Brooks Co. v. Cambridge Security Seals, 31 N.Y.3d 441, 448, 457 (N.Y. May 3, 2018).

Question 1: Under New York law, can a plaintiff asserting claims of misappropriation of a trade secret, unfair competition, and unjust enrichment recover damages that are measured by the costs the defendant avoided due to its unlawful activity?

Answer 1: No.

Question 2: If the answer to the first question is "yes," is prejudgment interest under [N.Y. C.P.L.R. §] 5001(a) mandatory where a plaintiff recovers damages as measured by the defendant's avoided costs?

Answer 2: No need to answer.

Domestic Relationships – Divorce

Pangea Capital Management, LLC v. Lakian, 34 N.Y.3d 38, 40 (N.Y. June 25, 2019).

Question: If an entered divorce judgment grants a spouse an interest in real property pursuant to N.Y. Domestic Relations Law § 236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property?

Answer: No.

Judgments – Enforcement

Plymouth Venture Partners, II, L.P. v. GTS Source, LLC, 37 N.Y.3d 591, 594-95 (N.Y. Dec. 16, 2021).

Question 1: Does a judgment debtor suffer cognizable damages in tort when its property is seized pursuant to a levy by service of execution that does not comply with the procedural requirements of N.Y. C.P.L.R. § 5232(a), even though the seized property is applied to a valid money judgment?

Answer 1: No, not really: a judgment debtor's exclusive avenue for relief under these circumstances is to bring an appropriate action pursuant to CPLR article 52.

Question 2: Under these circumstances, can the judgment debtor can bring a tort claim against either the judgment creditor or the marshal without first seeking relief under N.Y. C.P.L.R. § 5240?

Answer 2: No, a judgment debtor's exclusive avenue for relief under these circumstances is to bring an appropriate action pursuant to CPLR article 52.

Labor and Employment

Donohue v. Cuomo, 38 N.Y.3d 1, 11-19 (N.Y. Feb. 10, 2022).

Question 1: Under New York state law, do the following five sections of the 2007–2011 collective bargaining agreement between the Civil Service Employees Association, Inc. and the Executive Branch of the State of New York ("the CBA"), singly or in combination, (1) create a vested right

in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lifetimes, notwithstanding the duration of the CBA, or (2) at least create sufficient ambiguity on that issue to permit the consideration of extrinsic evidence as to whether they create such a vested right: § 9.13 (setting forth contribution rates of 90% and 75%), § 9.23(a) (concerning contribution rates for surviving dependents of deceased retirees), § 9.24(a) (specifying that retirees may retain NYSHIP coverage in retirement), § 9.24(b) (permitting retirees to use sick-leave credit to defray premium costs), and § 9.25 (allowing for the indefinite delay or suspension of coverage or sick-leave credits) of the CBA.

Answer 1: No as to both parts "(1)" and "(2)." With regard to the part "(2)," the Court of Appeals explained that, when one is construing a CBA under New York contract law, that law does not recognize inferences favoring either the vesting of retiree health insurance rights or the determination of an ambiguity.

Question 2: If the CBA (either on its face or as interpreted at trial upon consideration of extrinsic evidence) creates a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lives (notwithstanding the duration of the CBA), does New York's statutory and regulatory reduction of its contribution rates for retirees' premiums negate such a vested right so as to preclude a remedy under state law for breach of contract?

Answer 2: No need to answer.

Limitations of Actions – Tolling

Bermudez Chavez v. Occidental Chemical Corp., 35 N.Y.3d 492, 501 (N.Y. Oct. 20, 2020).

Question 1: Does New York law recognize cross-jurisdictional class-action tolling, as described in this opinion?

Answer 1: Yes, New York law recognizes cross-jurisdictional tolling (pursuant to *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538 [1974]) of the statute of limitations for absent class members of a putative class action filed in another jurisdiction.

Question 2: Can a non-merits dismissal of class certification terminate class-action tolling, and if so, did the Orders at issue here do so?

Answer 2: Yes and yes.

Mortgages – Foreclosure

CIT Bank N.A. v. Schiffman, 36 N.Y.3d 550, 554-55 (N.Y. March 30, 2021).

Question 1: Where a foreclosure plaintiff seeks to establish compliance with N.Y. R.P.A.P.L. § 1304 through proof of a standard office mailing procedure, and the defendant both denies receipt and seeks to rebut the presumption of receipt by showing that the mailing procedure was not followed, what showing must the defendant make to render inadequate the plaintiff's proof of compliance with § 1304?

Answer 1: To rebut the presumption created (through proof of a standard office mailing procedure in the context of N.Y. R.P.A.P.L. § 1304 notices) there must be proof of a material deviation from an aspect of the office procedure that would call into doubt whether the notice was properly mailed, impacting the likelihood of delivery to the intended recipient. Put another way, the crux of the inquiry is whether the evidence of a defect casts doubt on the reliability of a key aspect of the process such that the inference that the notice was properly prepared and mailed is significantly undermined; minor deviations of little consequence are insufficient.

Question 2: Where there are multiple borrowers on a single loan, does N.Y. R.P.A.P.L. § 1306 require that a lender's filing include information about all borrowers, or does § 1306 require only that a lender's filing include information about one borrower?

Answer 2: No and yes. Although the statute does not specify whether information must be supplied concerning each party when there are multiple individuals or entities on a single loan, a plain reading indicates that N.Y. R.P.A.P.L. § 1306 is satisfied as long as one borrower is listed.

Usury

Adar Bays, LLC v. GeneSYS ID, Inc., 37 N.Y.3d 320, 323-24 (N.Y. Oct. 14, 2021).

Question 1: Where a stock conversion option permits a lender (in its sole discretion) to convert any outstanding balance to shares of stock at a fixed discount, should that option be treated as interest for the purpose of determining whether the transaction violates the criminal usury law, N.Y. Penal Law § 190.40?

Answer 1: Yes.

Question 2: If the interest charged on a loan is determined to be criminally usurious under N.Y. Penal Law § 190.40, is the contract void ab initio pursuant to N.Y. Gen. Oblig. Law § 5–511?

Answer 2: Yes.

Certified Question Declined

Compare Veloz v. Garland, 999 F.3d 798, 803-04 (2d Cir. 2021) (presenting certified question to determine whether petit larceny under New York law was "crime involving moral turpitude" that would subject noncitizen to removal.) *with Veloz v. Garland*, 37 N.Y.3d 1006, 1006 (N.Y. 2021) (declining certified question).

IV. RECENT FEDERAL CASES RELYING ON NOVEL POINTS OF NEW YORK STATE LAW

Arbitration – Labor and Employment

Based on four First Department cases from 2019 to 2022, a Southern District judge has departed from three Southern District cases to rule that former employees are not bound by amended collective bargaining agreements that were executed after the termination of their employment.

> *See Sanchez v. Clipper Realty, Inc*., 21-CV-8502, 2022 WL 16578981, at *9 (S.D.N.Y. Oct. 31, 2022) (Failla, J.) ("[T]he existence of an arbitration agreement is determined by state contract law. . . . When interpreting an unsettled issue of substantive state law, federal courts give 'great weight' to the decisions of lower state courts. . . . When asked about the retroactive applicability of an amended CBA, New York courts have reached the same conclusion time and again: former employees are not bound by CBA amendments executed after the termination of their employment. *Konstantynovska,* 103 N.Y.S.3d at 365 [1st Dep't 2019]; *Pustilnik*, 164 N.Y.S.3d at 446 [1st Dep't 2022]; *Hichez*, 117 N.Y.S.3d at 215-16 [1st Dep't 2020]; *Lorentti-Herrera*, 104 N.Y.S.3d at 104 [1st Dep't 2019]. The [federal court] cases on which PSC Community Services relies — *Rodriguez* [S.D.N.Y. 2016], *Pontier* [S.D.N.Y. 2011], and *Duraku* [S.D.N.Y. 2010] — were all decided without the benefit of these later-issued New York decisions. The Court sees no reason to depart from this consensus of state authority.").

Based on New York State Human Rights Law, N.Y. Exec. Law § 297, and its regulations (which provide, inter alia, that, if the New York State Division of Human Rights or "NYSDHR" finds probable cause to believe the respondent engaged in an unlawful discriminatory practice, and a conciliation agreement has

not been reached, the NYSDHR "shall . . . require[e] the respondent . . . to answer the charges of such complaint and appear at a public hearing"), a Northern District judge has ruled (in denying a petitioner's motion to compel arbitration and enjoin the respondent from proceeding to a hearing on the merits on his discrimination claims before the NYSDHR) that the arbitration between the petitioner and its former employee, the respondent, was unlikely to be a basis on which to effectively bar the NYSDHR, which was not a party to the Agreement, from acting in accordance with its statutory authority to prosecute the complaint of the respondent.

> *See Charter Commc'ns, Inc. v. Jewett*, 573 F. Supp. 3d 742, 744, 748-49, 57 (N.D.N.Y. 2021) (Sannes, J.) ("Therefore, the Court finds that the Arbitration Agreement between Charter and Jewett, is unlikely to be a basis on which to effectively bar the NYSDHR, which is not a party to the Agreement, from acting in accordance with its statutory authority to prosecute the complaint Jewett filed through to a final determination by the Commissioner.").

Civil Rights – New York City Human Rights Law

Relying on a New York City Council directive, a Southern District judge has ruled (in finding that a plaintiff has established a prima facie case of failure to accommodate under the NYCHRL) that obesity, hypertension, and coronary artery disease are impairments of the cardiovascular and musculoskeletal systems that qualify as disabilities under the NYCHRL's broad definition.

> *See Goldman v. Sol Goldman Inv. LLC*, 20-CV-06727, 2022 WL 6564021, at *8 (S.D.N.Y. Aug. 5, 2022) (Netburn, M.J.) ("Whether or not obesity, either alone or comorbid with other conditions, qualifies as a disability under the NYCHRL appears to be an unsettled question of state law. *See Spiegel v. Schulmann*, 604 F.3d 72, 83 (2d Cir. 2010). Although Defendants quibble with the exact nature of Plaintiff's disability, they do not dispute that he had one within the meaning of the NYCHRL. Given the City Council's directive that the NYCHRL be construed 'broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible,' I conclude that Plaintiff has established that he is a person with a disability within the meaning of the statute. *Albunio,* 16 N.Y.3d at 477–78; *see also Arazi v. Cohen Brothers Realty Corp.*, No. 20-cv-8837 (GHW), 2022 WL 912940, at *7 n.5 (S.D.N.Y. Mar. 28, 2022) (citing May 20, 2020 guidance from the New York City Human Rights Commission in support of conclusion that "an individual with an underlying condition that renders them more susceptible to COVID-19 . . . has a disability for which they may seek an accommodation under the NYCHRL."), report-recommendation adopted, 2022 WL 4482296 (S.D.N.Y. Sept. 27, 2022).

Interpreting New York State's anti-discrimination statutes (in accordance with the Americans with Disabilities Act), an Eastern District Judge has found that the term "place of public accommodations" (in those statutes) includes a standalone website.

> *See Martinez v. Gutsy LLC.*, 22-CV-0409, 2022 WL 17303830, at *2-3, 7 (E.D.N.Y. Nov. 29, 2022) (Garaufis, J.) (denying defendant's motion to dismiss plaintiff's claims under New York State Human Rights Law, N.Y. Exec. Law § 292 *et seq.*, and New York City Human Rights law, N.Y.C. Admin. Code § 8-102, *et seq.*, noting that "the corresponding state and city law analyses mimic the analysis required for a claim under the ADA," and recognizing that, although there is a split within the Second Circuit, the district courts are largely of the opinion that "that commercial websites qualify as places of public accommodation independent of a nexus to a physical space") (collecting cases).

Conflict of Law / Choice of Law

Based on three New York State Court of Appeals cases from between 2012 and 2018, a Southern District judge has ruled (in deciding whether New York's statute of limitations or its borrowing statute applies under a choice-of-law provision providing that agreement would be construed "without giving effect to the principles of conflict of laws") that (1) there is a significant difference between common-law conflict-of-laws principles and a statute-of-limitations issue governed by New York State's borrowing statute, N.Y. C.P.L.R. § 202, (2) the question of whether to give effect to conflict-of-laws principles when evaluating a choice-of-law provision bears primarily on the substantive law that a court applies, not the procedural law, and (3) there is no question that N.Y. C.P.L.R. § 202 is an abiding part of New York's procedural law, not its substantive law.

> *See Arcadia Biosciences, Inc. v. Vilmorin & Cie*, 356 F. Supp. 3d 379, 397 (S.D.N.Y. 2019) (Rakoff, J.) ("[A]s the Court of Appeals has recently explained, there is "a 'significant difference' between . . . common-law conflicts principles and a statute of limitations issue governed by the CPLR, including CPLR 202. . . . Indeed, 'CPLR 202 is in derogation of the long-standing common-law conflicts principle that the law of the forum applies to procedural issues such as the statute of limitations.' Id. More generally, recent Court of Appeals decisions make clear that the question of whether to give effect to conflict-of-laws principles when evaluating a choice-of-law provision bears primarily on the *substantive* law that a court applies, not the *procedural* law. . . . And there is no question that 'CPLR 202 is an abiding part of New York's procedural law.'").

Criminal – New York City Traffic Rules

Based (in part) on a 2014 case from New York City Criminal Court, an Eastern District judge ruled that the officer-defendants had violated no clearly established provision of New York law when they arrested the plaintiff for failing to produce his license documents in connection with a purported traffic violation involving a parked car purportedly blocking a sidewalk.

> *See Frederick v. Boyd*, 13-CV-0897, 2021 WL 2646326, at *6 (E.D.N.Y. June 28, 2021) (Komitee, J.) ("Lastly, in People v. Jeffrey, 998 N.Y.S.2d 307 (N.Y. Crim Ct. 2014), the court held that officers could conclude a person found hiding under a vehicle and clutching its keys had 'operated' the car for purposes of VTL Sections 1192(3), 1192(1), 600(1)(a), and 509(1), which prohibit the 'operation' of vehicles while intoxicated (among other things). *Jeffrey*, 998 N.Y.S.2d at 307 (holding that these allegations "collectively support the conclusion that the defendant had recently 'operated' the now inoperable vehicle"). As *Jeffrey* suggests, a reasonable police officer could have concluded, based on the circumstantial evidence, that Plaintiff was the 'operator' of the vehicle. In light of these precedents, it simply cannot be said that no reasonable officer in Defendants' position would have seen probable cause to arrest Plaintiff after he refused to produce his identification documents.").

Criminal – State Convictions Serving as Elements of Federal Offenses

Interpreting the New York Penal Law, an Eastern District judge has found that New York's second-degree manslaughter statute is categorically a "crime of violence" for purposes of the "force" clause set forth in 18 U.S.C. § 924(c)(3)(A), after the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019) (invalidating the "residual clause" set forth in 18 U.S.C. § 924[c][3][B]), and the Second Circuit's decision in *United States v. Scott*, No. 18-163-cr, 2021 WL 786632, at *1 (2d Cir. March 2, 2021) (en banc) (reversing panel decision and holding that first-degree manslaughter was indeed a crime of violence).

> *See Brooks v. United States*, 94-CR-0729, 2021 U.S. Dist. LEXIS 264585, at *15-18 (E.D.N.Y. Mar. 11, 2021) (rejecting petitioner's argument that second-degree murder under N.Y. Penal Law § 125.25(1) "can be committed with minimal force and through omission," and thus does not constitute a "crime of violence" under the "force clause" set forth in 18 U.S.C. § 924(c)(3)(A), and finding "N.Y. Penal Law 125.25(1) to be categorically a crime of violence post-*Davis*").

Discovery – Article 78 Proceedings

In denying a motion to quash subpoenas in an Article 78 proceeding filed in federal court, a Southern District judge has declined to impose the typical procedures applicable to Article 78 proceedings (which generally prohibit the petitioner from taking discovery outside the administrative record of the proceedings under consideration).

> *See Dukes v. NYCERS*, 331 F.R.D. 464, 468, 471-73 (S.D.N.Y. 2019) (Aaron, M.J.) ("Movants argued that the special procedures applicable to Article 78 proceedings circumscribe the discovery that should be permitted in this case . . . [I]n a typical Article 78 case in New York state court, which is a special proceeding (CPLR § 7804(a)), the petitioner generally is not permitted to take discovery outside the 'record of the proceedings under consideration,' which is filed with the Court pursuant to CPLR § 7804(e). However, this is not a typical Article 78 case. First, the process by which [Movant New York City Employees' Retirement System] reached its decision in this case is far from clear. . . . Second, . . . one of the three members of the Medical Board . . . already had his deposition taken. . . . Third, this case is pending in federal court, not New York state court. In diversity cases in federal court, the Federal Rules of Civil Procedure govern discovery, not the CPLR. . . . For all the foregoing reasons, the Court in its discretion denies Movants' motion to quash. In the unique circumstances of this case, particularly given the broad scope of discovery in the federal courts, the Court finds that the depositions of Bottner and Reich shall proceed, with the limitations set forth below.").
>
> *Accord, Sweigert v. Goodman*, 18-CV-8653, 2021 WL 1578097, at *4 (S.D.N.Y. Apr. 22, 2021) (Aaron, M.J.) ("The Court denies Defendant's request for a stay of discovery, as Defendant has not established that a stay is required and/or warranted. Discovery is ongoing and the Court declines to apply any limitations on discovery that may be imposed under the New York Civil Practice Law and Rules [citing *Dukes v. NYCERS*, discussed above].").

In denying a motion to stay discovery in an Article 78 proceeding removed to federal court, an Eastern District judge has found that the third factor governing a request for such a stay (i.e., the risk of unfair prejudice to the party opposing the stay) weighs against granting a stay under the circumstances (which include the fact of removal of the case by the movant), despite the general lack of a right to discovery in an Article 78 proceeding.

> *See Fahey v. Incorporated Village of Manorhaven*, 22-CV-7041, 2023 WL 2021019, at *2-3 (E.D.N.Y. Feb. 15, 2023) (Wicks, M.J.) ("In an Article 78 proceeding, as the parties here full well know, discovery is not a matter

of right [citing *Dukes v. NYCERS*, discussed above] . . . . . Discovery may be permitted by the state court, but only with leave of the court. *See* . . . *Alexander M. v. Cleary*, 188 A.D.3d 1471, 1474 (3d Dep't 2020) . . . . Defendants cannot ring the bells of burdensome discovery or prejudice when they in fact charted this procedural course, that is, Defendants chose to remove this case to federal court on the basis that the pleadings from state court state a federal question. By doing so, Defendants availed (or perhaps subjected) themselves to all the attendant benefits and burdens of federal practice. . . . [Moreover], Plaintiffs state that they have asserted claims pursuant to Article 78 but also constitutional claims related to the procedures used to enact two local laws, and the latter claims do not depend on the former. . . . Plaintiffs argue that they should be allowed discovery to obtain testimony and records of the specific steps taken by the Defendants when adopting these laws, and discovery of the administrative record. . . . Plaintiffs note that pursuant to local laws, Defendants have already deposed Plaintiffs without having to file the administrative record . . . , and without producing any initial disclosures relevant to Plaintiffs' constitutional claims. . . . Plaintiffs argue that although they have complied with their initial disclosure obligations under Rule 26, they have not had the opportunity for any other discovery. . . . Considering the factors outlined above, Defendants have not met their burden to justify a stay of discovery at this juncture.").

Discovery – Deliberative-Process Privilege

Based on a Fourth Department case from 2017, a Southern District judge has ruled that the deliberative process privilege is not available to civil actions arising under New York law.

See Dukes v. NYCERS, 331 F.R.D. 464, 468, 470 (S.D.N.Y. 2019) (Aaron, M.J.) ("The New York Court of Appeals has not recognized a deliberative process privilege in civil litigation. . . . The parties have not referred the Court to any controlling decision by the Appellate Division, First Department, regarding the deliberative process privilege, nor has this Court found any such decision. However, *Mosey v. County of Erie*, 148 A.D.3d 1572, 50 N.Y.S.3d 641 (4th Dep't 2017), is on point. There, the Fourth Department held that the FOIL deliberative process privilege does not apply in civil actions. *See id.* at 1574-76, 50 N.Y.S.3d 641 . . . . Based upon this Appellate Division precedent, this Court finds that a deliberative process privilege is not available to Movants here, under New York law.").

Note: Of course, the rule is different with respect to civil actions arising under *federal* law. *See* Fed. R. Evid. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—

governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."); *see, e.g., Walsh v. Versa Cret Contracting Co., Inc*., 21-CV-5697, 2022 WL 2987086, at *5 (E.D.N.Y. July 28, 2022) (Wicks, M.J.) (upholding deliberative process privilege objections in a case involving the FLSA).

Discovery -- Physician-Patient Privilege

In granting motion to compel deposition testimony of non-party witnesses James Doe and Jane Doe (to which the Does objected based on the physician-patient privilege), a Southern District judge has found that the first of the four elements of such a privilege (i.e., the existence of a physician-patient relationship under N.Y. C.P.L.R. § 4504) was not established between a physician and a parent consulted to aid in their child's treatment.

See Conti v. Doe, 17-CV-9268, 2021 WL 5198882, at *3-6 (S.D.N.Y. Oct. 1, 2019) (Lehrburger, M.J.) ("New York recognizes that a physician-patient relationship warranting privilege protections does not require an express contract; it can be implied by circumstances. *See Pizzo-Juliano [v. Southside Hops.]*, 129 A.D.3d [695,] 697 [2d Dep't 2015] ('the law also recognizes circumstances where the existence of a physician-patient relationship is implied by circumstances'). While largely in the context of medical malpractice actions, courts have held that a doctor-patient relationship is established by implication where a physician 'affirmatively advises a prospective patient as to a course of treatment and it is foreseeable that the putative patient will rely on this advice.' . . . But neither party has presented – nor has this Court located – a case where an implied physician-patient relationship was found to have existed between a physician and a parent consulted to aid in their child's treatment.").

Labor Law – Private Right of Action

Based on a New York Court of Appeals case from 2022, an Eastern District judge has ruled that a plaintiff does not have an *implied* right of action under N.Y. Labor Law § 191(1)(a) (which requires that manual workers be paid weekly); however, based on a First Department case from 2019, the judge has ruled that a plaintiff has an *express* private right of action under N.Y. Labor Law § 191(1)(a) when it is read together with N.Y. Labor Law § 198(1-a) (which sets forth "Costs and Remedies" for an "action instituted upon a wage claim").

See Georgiou v. Harmon Stores, Inc., 22-CV-2861, 2023 WL 112805, at *1-6 (E.D.N.Y. Jan. 5, 2023) (Cogan, J.) ("New York authority, although

> scant, allows a private cause of action under NYLL § 191. . . . In *Konkur v. Utica Academy of Science Charter School*, 38 N.Y.3d 38, 165 N.Y.S.3d 1 (2022), the New York Court of Appeals considered NYLL § 198-b, . . [and] held that even though Konkur satisfied two of the three factors for implying a private right of action . . . he had not satisfied the third factor – that an implied right of action was consistent with the legislative scheme of enforcement. . . . Three years prior to the decision in *Konkur*, the Appellate Division, First Department, had decided a case that is on all fours with the instant case. In *Vega v. CM & Assocs. Constr. Mgmt., LLC,* 175 A.D.3d 1144, 1145, 107 N.Y.S.3d 286, 288 (1st Dep't 2019), the First Department found a private right of action for failure to pay wages weekly instead of bi-weekly under § 191. It found such a private right of action both expressly in the NYLL, and alternatively, by implication. . . . I have no trouble finding that *Vega*'s alternative holding that there is an implied right of action has been abrogated by *Konkur*. . . . That leaves us, then, with *Vega*'s holding that § 191, read together with § 198, contains an express private cause of action. . . . Despite my doubts about the viability of *Vega* in light *of Konkur, Konkur* does not rise to the level of 'persuasive evidence' that the Court of Appeals would reject *Vega.* . . . I will therefore follow *Vega* to hold that plaintiff has a private right of action under §§ 191 and 198(1-a), at least pending further instruction from the New York State courts.").

Same ruling by a Southern District judge, regarding the existence of an express right of action under N.Y. Labor Law § 191(1)(a) when it is read together with N.Y. Labor Law § 198(1-a).

> *See Harris v. Old Navy, LLC*, 21-CV-9946, 2022 WL 16941712, at *7, 10 (S.D.N.Y. Nov. 15, 2022) (Gorenstein, M.J.) ("[T]he First Department in *Vega* interpreted NYLL § 198(1-a) to 'expressly provide[ ] a private right of action for a violation of Labor Law § 191.' 175 A.D.3d at 1146. While we would likely not reach this conclusion ourselves if the issue were presented afresh, for reasons explained further below, we feel bound to follow *Vega*'s holding on this point. . . . In sum, the First Department's decision in Vega provides a definitive ruling on the question of whether a private right of action is available under NYLL § 191(1)(a). While we are not bound by *Vega* inasmuch as it comes from an intermediate appellate state court, we cannot say that Old Navy's arguments overcome the presumption requiring us to acquiesce in *Vega*'s result."), adopted by, 2023 WL 2139688 (S.D.N.Y. Feb. 20, 2023) (Woods, J.).

> *Accord, Mabe v. Wal-Mart Assocs., Inc*., 20-CV-0591, 2022 WL 874311, at *7 (N.D.N.Y. Mar. 24, 2022) (McAvoy, J.) ("[T]he Court does not read *Konkur* as establishing that the New York Court of Appeals would reject the conclusions reached in Vega.").

Accord, Elhassa v. Hallmark Aviation Servs., L.P., 21-CV-9768, 2022 WL 563264, at *2 (S.D.N.Y. Feb. 24, 2022) (Liman, J.) (finding that *Konkur* was not inconsistent with *Vega*'s holding that the NYLL expressly permitted private rights of action for § 191(1)(a)).

Labor Law – Standing

Following *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (holding that, to establish constitutional standing, plaintiffs must show that they suffered an injury and identify the particular concrete harm flowing from that injury), a judge in the Eastern District has found that plaintiffs lack standing based merely on the allegation the defendant failed to provide them with the wage statements and wage notices that were required by New York Labor Law, without any other allegations amounting to concrete injury.

See Sanchez v. Trescly, 19-CV-4524, 2023 WL 2473070, at *1 (E.D.N.Y. Mar. 13, 2023) (Matsumoto, J.) ("[T]he Court finds that Plaintiffs lack Article III standing to bring and obtain damages for [NYLL § 195(1) wage notice and NYLL § 195(3) wage statement] claims because Plaintiffs fail to allege actual and concrete injuries. . . . Plaintiffs here did not 'link[ ] any injury-in-fact to [Defendant's] failure to provide statutory notices under the NYLL.' Plaintiffs' only factual allegations related to the wage notice and wage statement claims are that Defendant 'willfully failed to post notices of the minimum wage and overtime wage requirements in a conspicuous place at the location of [Plaintiffs'] employment' and 'willfully failed to keep payroll records,' or provide wage statements, which do not plausibly allege more than technical violations of the NYLL."); *cf. Marine v. Vieja Quisqueya Rest. Corp.*, 20-CV-4671, 2022 WL 17820084, *2 (E.D.N.Y. Sept. 8, 2022) (Levy, M.J.) (finding that the plaintiff had sufficiently pleaded a claim for failure to provide proper wage notices and wage statements under the NYLL where Paragraphs 55-59, 72-25, and 81-82 of his Amended Complaint alleged that the defendants' failure to provide wage notice and wage statements was done willfully in order to disguise the actual number of hours worked by the plaintiff and to avoid paying the plaintiff properly for those hours), adopted, Order (N.D.N.Y. filed Sept. 23, 2022) (Chen, J.).

Also following *TransUnion,* a judge in the Eastern District has found that plaintiffs possessed standing for their claim under Section 191 of the New York Labor Law (regarding frequency of payments).

See Gilett v. Zara USA, Inc., 20-CV-3734, 2022 WL 3285275, at *7 (E.D.N.Y. Aug. 10, 2022) (Failla, J.) ("This Court does not read *TransUnion* or any other binding precedent to require a plaintiff to specify

how he intended to take advantage of the time value of his wages if they had not been improperly withheld for a period of time. The factual allegations of the Amended Complaint establish that Plaintiff here was deprived of the time value of the money that Defendants illegally delayed. As such, Plaintiff has suffered an injury in fact for which he may seek redress in federal court, regardless of his intentions with respect to the delayed funds.").

Mortgage Foreclosure – Default Judgment

Judges of the Eastern have held that a plaintiff's failure to show compliance with New York Real Property Actions and Proceedings Law ("RPAPL") § 1304 (requiring a lender to send notice to a mortgagor at least 90 days before the commencement of any foreclosure action by registered or certified mail, by first-class mail to the last known address of the borrower, and to the residence that is the subject of the mortgage) does not preclude the entry of default judgment.

See Sec'y of U.S. Dep't of Hous. & Urb. Dev. v. Rhodie as Co-Tr. of Lornice Rhodie Revocable Living Tr., 21-CV-3165, 2022 WL 3213048, at *4 (E.D.N.Y. Aug. 9, 2022) (Matsumoto, J.) (noting that, absent a decision from the NY Court of Appeals, the court was required to apply NY law as interpreted by the intermediate appellate courts unless there was persuasive evidence that the NY COA would come to a contrary decision, and finding to be persuasive the Appellate Division cases that have held that a plaintiff is "not required to demonstrate its compliance with RPAPL 1304 in order to obtain a default judgment, since the failure to comply with RPAPL 1304 is not a jurisdictional defect, and that defense was not raised by [Defendants], who failed to answer the complaint") (collecting cases).

Accord, Secretary of U.S. Dep't of Housing and Urban Develop. v. Robedee, 22-CV-0809, 2022 WL 18284844, at *3 (E.D.N.Y. Dec. 5, 2022) (Wicks, M.J.) ("Given the persuasive authority in the New York State Second Department Appellate Division, the Court adopts the analysis in *Rhodie* and finds that 'Plaintiff's failure to establish compliance with Section 1304 does not preclude the entry of default judgment.'"), *adopted,* 2022 WL 17850116 (E.D.N.Y. Dec. 22, 2022) (Block, J.).

Accord, U.S. Bank Nat'l Ass'n as Tr. for RMAC Tr., Series 2016-CTT v. Kozikowski, 19-CV-0783, 2022 WL 4596753, at *5-6 (E.D.N.Y. Sept. 30, 2022) (Irizarry, J.) (adopting the analysis set forth in *Rhodie* and reaching the same conclusion).

A judge from the Northern District has denied without prejudice motion for default judgment in real-property foreclosure actions litigated by bank based on

diversity jurisdiction, after relying on N.Y. C.P.L.R. § 6511(a), which provides that, "[u]nless it has already been filed in th[e] county [where the property affected is situated], the complaint shall be filed with the notice of pendency."

> *See West Coast Servicing, Inc. v. Gimmichelle*, 19-CV-1193, 2020 WL 5229374, at *4 (N.D.N.Y. Sept. 2, 2020) (Suddaby, C.J.) ("The evidence submitted by Plaintiff along with its motion sufficiently shows that it has met the three common-law elements of a foreclosure action, as well as three of the four above-described procedural requirements: the requirement that it serve the two statutory notices on the mortgagor, the requirement that it file certain information with the Superintendent of the New York State Department of Financial Services, and the requirement that it file a notice of pendency. . . . However, Plaintiff has not shown that it either served its Complaint along with the notice of pendency or that it previously filed its Complaint at the Ulster County Clerk's Office. See N.Y. C.P.L.R. § 6511(a) . . . In particular, the notice of pendency merely provides a description of the mortgaged property, which was "annexed hereto and made a part hereof." . . . As a result, the Court cannot find that Plaintiff has met all the requirements to show liability for the purposes of its motion for default judgment.").
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> *Accord, U.S. Bank Trust v. Valade*, 17-CV-0173, 2020 WL 6196150, at *6 (N.D.N.Y. Oct. 22, 2020) (Suddaby, C.J.).
>
> *Accord, U.S. Bank Trust v. Valade,* 17-CV-0173, 2021 WL 4710029, at *4-5 (N.D.N.Y. Oct. 8, 2021) (Suddaby, C.J.).

Municipal Examination of Plaintiff Under N.Y. Gen. Mun. Law § 50-h

Based on the omission of the term "any officer, appointee or employee [of the municipality]" from N.Y. Gen. Mun. Law § 50-h, as compared to the inclusion of that term in N.Y. Gen. Mun. Law § 50-e, an Eastern District judge has ruled that N.Y. Gen. Mun. Law § 50-h does not require a municipal examination of plaintiff in an action against municipal-*employee* defendants.

> *See Bradley v. Golphin*, 14-CV-4289, 2018 WL 480754, at *4 (E.D.N.Y. Jan. 18, 2018) (Garaufis, J.) ("The GML [§ 50-e] requires that a notice of claim be a 'condition precedent [to] bringing personal injury actions against a municipal corporation and its officers, appointees and employees.' . . . The requirement that plaintiffs attend a municipally-scheduled examination or '50-h hearing' [in a personal injury action against municipal-employee defendants] is not so broad. Unlike GML § 50-e's notice-of-claim requirement, § 50-h does not refer to claims filed against 'officers, appointees and employees' of municipal corporations. *See* N.Y. Gen. Mun. L. § 50-h (referring only to claims filed against 'a

> city, county, town, village, fire district, ambulance district or school district the city,' and not to officers and employees) . . . .").
>
> *Accord, Othman v. City of New York*, 13-CV-0477, 2018 WL 1701930, at *4 (E.D.N.Y. Mar. 31, 2018) (Garaufis, J.) ("Because GML § 50-h 'does not refer to claims filed against officers, appointees and employees of municipal corporations,' failure to attend a 50-h hearing can only bar a plaintiff's state-law claims against a municipality, not its employees.") (citing *Bradley v. Golphin*).
>
> *Accord, Nolan v. Cnty. of Erie, 19-CV-01245, 2020 WL 1969329, at *6 (W.D.N.Y. Apr. 24, 2020) (Reiss*, J.) ("Plaintiff S. Nolan's state-law claims against Sheriff Howard, Undersheriff Wipperman, and Defendants Diina and Hartman in their individual capacities, however, are not subject to dismissal for failure to comply with a demand for examination.") (citing *Bradley v. Golphin*).
>
> *Accord, Bird v. Cnty. of Westchester*, 20-CV-10076, 2022 WL 2263794, at *13 (S.D.N.Y. June 23, 2022) (Román, J.) ("[T]he County Defendants aver the Court must dismiss Plaintiff's state law claims for failure to comply with the oral examination requirement of 50-h as he failed to attend the scheduled examination. . . . However, the claims may only be dismissed against Westchester and the other County Defendants in their official capacities.") (citing *Bradley v. Golphin*).

Same ruling by a Northern District judge, despite the existence of two New York State cases that dismissed a claim against municipal-employee defendants because of the plaintiff's failure to attend a municipal examination under Section 50-h.

> *See Williams v. City of Syracuse*, 22-CV-0067, 2023 WL 1071437, at *4-6 (N.D.N.Y. Jan. 7, 2023) (Suddaby, J.) ("In response, Defendants argues that the issue is controlled by two state court cases that dismissed a claim against municipal employees because of the plaintiff's failure to attend a Section 50-h examination: *Kluczynski v. Zwack*, 170 A.D.3d 1656 (N.Y. App. Div., 4th Dep't 2019); *Ross v. Cnty. of Suffolk*, 84 A.D.3d 775 (N.Y. App. Div., 2nd Dep't 2011). The problem is that, in *Kluczynski v. Zwack*, the Fourth Department merely cited the rule that 'a plaintiff who has not complied with General Municipal Law § 50-h(1) is precluded from maintaining an action against a municipality,' and applied it to both a municipality and municipal defendants 'who were acting within the scope of their duties as municipal employees.' *Kluczynski v. Zwack*, 170 A.D.3d 1656, 1657 (N.Y. App. Div., 4th Dep't 2019). Setting aside the fact that the individual Defendants in the case before the Court have been sued not merely in their official capacities but also in their individual capacities . . .

, the fact remains that the Fourth Department provided no explanation of why the claims against municipal defendants were included in the dismissal. Similarly, in *Ross v. Cnty. of Suffolk*, the Second Department provided even less explanation for why it dismissed the claims against the individual defendants (who were not even expressly identified as municipal employees).").

Distinguishing a Second Department case from 2017, and relying on a First Department case from 1986, a Northern District judge has ruled that a plaintiff's invocation of his Fifth Amendment privilege against self-incrimination for a dozen questions during a three-hour examination did not render him noncompliant with N.Y. Gen. Mun. Law Section 50-h, which requires that the demand for examination be "duly complied with."

See Williams v. City of Syracuse, 22-CV-0067, 2023 WL 1071437, at *7-8 (N.D.N.Y. Jan. 7, 2023) (Suddaby, J.) ("[J]ust because an answer is relevant to a claim does not mean that it is required at a Section 50-h examination. The First Department explained the distinction eloquently . . . : 'It must be noted that the initial hearing to which a municipality is entitled pursuant to General Municipal Law § 50-h is not designed to duplicate the broad and comprehensive method of obtaining disclosure provided for in the CPLR. The purpose of the hearing, as a supplement to the notice of claim, is to afford the city an opportunity to early investigate the circumstances surrounding the accident and to explore the merits of the claim, while information is readily available, with a view towards settlement.' *Alouette Fashions, Inc. v. Consol. Edison Co*., 119 A.D.2d 481, 487 (N.Y. App. Div., 1st Dept. 1986). The cases relied upon by Defendants . . . [including *Di Pompo v. City of Beacon Police Dep't*, 153 A.D.3d 597 (N.Y. App. Div., 2d Dep't 2017)] are easily distinguishable from the case before this Court. . . . During the examination, Plaintiff answered Defendants' questions for more than three hours on relevant topics, providing Defendants ample information to "assess the factual circumstances" of plaintiff's claims. He refused to answer a dozen questions on one topic, because of the criminal implications of those answers.").

Navigation Law – Preemption

A judge from the Northern District has ruled (in denying defendants' motion to dismiss) that a plaintiff's claim under New York Navigation Law was not preempted by the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq*. ("CERCLA"), because (on that claim) the plaintiff was seeking damages related to petroleum contamination, which is specifically excluded from coverage under CERCLA.

See Honeywell v. Buckeye, 18-CV-0646, 2020 WL 9264854, at *5, 18-19 (N.D.N.Y. Apr. 24, 2020) (Lovric, M.J.) (considering "a claim for contribution related to petroleum discharges at the Onondaga Lake Bottom Site and SYW-12, pursuant to the New York Navigation Law, N.Y. Nav. Law §§ 176(8), 181" and concluding that, because "CERCLA specifically excludes from coverage damages related to petroleum contamination," the plaintiff's "Navigation Law claims related to [Defendants'] alleged release of petroleum are not preempted by CERCLA"), *report and recommendation adopted in pertinent part and rejected in part*, 2021 WL 1206536 (N.D.N.Y. Mar. 31, 2021) (Scullin, J.).

Removal – Complete Preemption Doctrine

Second Circuit has found that a patient's state-law claims for malpractice, negligence, and gross negligence (arising from injuries allegedly sustained while hospitalized with COVID-19) do not fall within the scope of the federal Public Readiness and Emergency Preparedness Act's ("PREP Act") exclusive federal cause of action for willful misconduct, and thus cannot be removed to federal court under the complete preemption doctrine, because (1) negligence and gross negligence did not rise to level of willful misconduct, (2) medical malpractice required only deviation from community standards of practice that proximately caused injuries (which was more relaxed than showing required for willful misconduct), and (3) PREP Act did not create any other exclusive federal cause of action that might have encompassed patient's claims.

See Solomon v. St. Joseph Hospital, 62 F.4th 54, 60-61 (2d Cir. 2023) ("Solomon's state-law claims for malpractice, negligence, and gross negligence do not fall within the scope of the PREP Act's exclusive federal cause of action for willful misconduct. As a result, his claims cannot be removed to federal court under the complete preemption doctrine. . . . First, claims for medical malpractice, negligence, and gross negligence are plainly not 'within the scope' of willful misconduct. Negligence and gross negligence do not rise to the level of willful misconduct, which the PREP Act defines as 'a standard for liability that is more stringent than a standard of negligence in any form." 42 U.S.C. § 247d-6d(c)(1)(B).' . . . Similarly, under New York law, medical malpractice requires only a deviation from the community standards of practice that proximately caused the injuries. . . . This standard is more relaxed than the showing required for willful misconduct . . . . Second, the PREP Act does not create any other exclusive federal cause of action that might encompass Solomon's state-law claims. Instead, the PREP Act principally creates an immunity scheme. And immunity has no bearing on complete preemption, which is a jurisdictional doctrine, not a preemption-defense doctrine.").

The Second Circuit has recently re-affirmed its holding in *Solomon* in *Rivera-Zayas*.

> *See Rivera-Zayas v. Our Lady of Consolation Geriatric Care Ctr.*, No. 21-2164-CV, 2023 WL 2926286, at *3 (2d Cir. Apr. 13, 2023) ("*Solomon*'s holding forecloses OLOC's complete preemption arguments here. OLOC attempts to distinguish *Solomon* by pointing to allegations in the complaint that its 'conduct was willful and knowing, and that OLOC acted in so careless a manner as to show complete disregard for the rights and safety of others, acted or failed to act knowing that their conduct would probably result in injury or damage and acted in so reckless a manner or failed to act in circumstances where an act was clearly required, so as to indicate disregard of the consequences of their actions or inactions.' . . . But these allegations all support Plaintiff's claim of gross negligence, which *Solomon* held was outside the scope of the PREP Act's cause of action for willful misconduct.") (internal quotation marks omitted).

Removal – Federal Officer Removal Statute

The Second Circuit has found that a patient's state-law claims for malpractice, negligence, and gross negligence (arising from injuries allegedly sustained while hospitalized with COVID-19) cannot be removed to federal court under the federal officer removal statute, because (1) a private company's compliance or noncompliance with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official" for purposes of federal-officer removal (even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored), and (2) the federal government's mere designation of an industry as important—or even critical—is insufficient to federalize a private entity's operations and confer federal jurisdiction under the federal-officer removal statute.

> *See Solomon v. St. Joseph Hospital*, 62 F.4th 54, 62-63 (2d Cir. 2023) ("Under the federal-officer removal statute, an action against certain federal officers commenced in state court may be removed to federal court. *See* 28 U.S.C. § 1442(a)(1). . . . Defendants' argument that they 'act under' a federal officer for purposes of the PREP Act is meritless. First, Defendants do not 'act under' a federal officer simply because they operate in a heavily regulated industry. A private company's 'compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.' And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored.'. . . Second, Defendants' role during the COVID-19 pandemic has nothing to do with whether they were 'acting under" a federal officer. As other courts of appeals have held, '[i]t cannot be that the federal government's mere

> designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction.'") (citations omitted).

The Second Circuit adhered to *Solomon* when faced with a substantially similar argument in *Rivera-Zayas*.

> *See Rivera-Zayas v. Our Lady of Consolation Geriatric Care Ctr.*, No. 21-2164-CV, 2023 WL 2926286, at *4 (2d Cir. Apr. 13, 2023) ("Here, too, Solomon forecloses OLOC's argument. . . . OLOC's federal officer arguments fall short for the same reasons. While OLOC emphasizes the important role played by congregate care facilities in the early days of the COVID-19 pandemic, the government directives they cite ultimately consist of guidance and regulations, which do not suffice to establish the requisite 'special relationship' to find they acted under federal officers within the meaning of the statute.").

The practical effect of the *Solomon* decision can be seen in the Eastern District, where judges, relying on that decision, have remanded to state court for lack of subject-matter jurisdiction.

> *See, e.g., Rhonda Abel et al. v. Rutland Nursing Home, Inc. et al.*, 22-CV-4503, 2023 WL 3371843, at *1 (E.D.N.Y. May 11, 2023) (Matsumoto, J.); *Lewis-Briggs v. Concord Nursing Home, Inc.*, 22-CV-4953, 2023 WL 3306936, at *1 (E.D.N.Y. May 8, 2023) (Matsumoto, J.).

Service of Complaint

Analyzing the New York State's personal-service statute, a judge in the Eastern District has found that service should not be deemed effective under C.P.L.R. § 308(2) until the end of the ten-day period following the filing of proof of service, and that a lack of effective service under that provision is a jurisdictional flaw.

> *See Ruiz v. Practical Appraising et. al.*, 20-CV-5918, Memorandum and Order, at 4-7 (E.D.N.Y. filed March 29, 2023) (Vitaliano, J.) ("The Court therefore finds that the most convincing answer to this controversial question is that service should not be deemed effective under C.P.L.R. § 308(2) until the end of the ten-day period following the filing of proof of service, and that a lack of effective service under that provision is a jurisdictional flaw. Accordingly, plaintiff's failure to timely complete service on Strongwater means that the Court lacks personal jurisdiction over him. Because this failure is jurisdictional, it cannot be *cured nunc pro tunc*.").

Standing (see also Labor Law – Standing)

The Supreme Court's ruling in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021), has had led to some interesting scenarios, such as state courts entertaining federal claims that cannot otherwise be brought in federal court.

See, e.g., Wolkenfeld v. Portfolio Recovery Assocs., LLC, 22-CV-1156, 2022 WL 1124828, at *4 (E.D.N.Y. Apr. 14, 2022) (Chen, J.) (holding that the plaintiff failed to allege concrete injury to support Article III standing for his federal Fair Debt Collection Practices Act claim, and remanded the case back to the Supreme Court of the State of New York, County of Kings).

Substitution of Parties on Suggestion of Death Under Fed. R. Civ. P. 25

An Eastern District judge has found that defendant's three surviving children are the "proper parties" for substitution under Fed. R. Civ. P. 25(a), even though they were not formally appointed as representatives of the decedent's estate.

See U.S. Bank Nat'l v. Sager, 19-CV-2229, 2022 WL 4392668, at *4-5 (E.D.N.Y. Sept. 23, 2022) (Brown, J.) ("[A] party substituted for a decedent under Rule 25 need not be formally appointed as the representative of the estate. . . . 'Where there is no appointed representative, and no practical need to seek one, the district court should . . . look at the facts and circumstances of each case and then determine whether the person moving to substitute will sufficiently prosecute or defend the action on the decedent's behalf. . . . Here, plaintiff conducted a diligent search to ascertain defendant's heirs and the lawful distributees. Plaintiff's agent reviewed public records, ran skip trace searches, located decedent's obituary, and interviewed decedent's heirs. Plaintiff's agent provided decedent's children with an opportunity to identify other heirs, but they have not replied. Neither the plaintiff, this Court, nor defendant's counsel has found any record of probate proceedings relating to defendant. . . . After this exhaustive search, it appears defendant died intestate and defendant's three surviving children Brian, Alessandra, and Christopher are the distributees of her estate. . . . Indeed, two of the children are living in decedent's former home, and they have apparently listed the property for sale. . . . Thus, as the only apparent heirs-at-law who have a demonstrated interest in the subject property, defendant's three surviving children – Brian R. Sager Jr., Alessandra Sager, and Christopher Sager – are the 'proper parties' to substitute decedent as decedent's successor. . . . At this juncture, waiting for a probate proceeding that may never take place, requiring plaintiff to apply for the appointment of an administrator, or assuming the existence of a will disinheriting decedent's children who reside at the subject property would constitute an unnecessary waste of

> time and run counter to the purpose of Rule 25, which was to simplify and expedite the process of administering federal cases after the death of a party. For these reasons, the Court finds that defendant's three surviving children are the 'proper parties' for substitution under Fed. R. Civ. P. 25(a).").

Since then, two more Eastern District Judges have cited *Sager* favorably and noted that a party does not have to be formally appointed to represent the estate in order to be substituted.

> *See Gass v. Target*, 22-CV-1152, 2023 WL 2919414, at *4 n.2 (E.D.N.Y. Mar. 24, 2023) (Wicks, M.J.) ("[A]party does not need to be formally appointed as a represent[ive] [of the] estate to be substituted for a decedent."); *Saada v. Golan*, 18-CV-5292, 2023 WL 2184601, at *5 (E.D.N.Y. Jan. 23, 2023) (Levy, M.J.) ("[A] party substituted for a decedent under Rule 25 need not be formally appointed as the representative of the estate.") (internal quotation marks omitted), *report and recommendation adopted in pertinent part*, 2023 WL 1993538 (E.D.N.Y. Feb. 13, 2023) (Donnelly, J.).