FOREWORD

NEW YORK APPEALS: AN EVOLVING TRADITION

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The Albany Law Review is delighted to present its second annual issue of New York Appeals. The goal of the New York Appeals issue is to elucidate emerging issues in appellate practice faced by judges on the bench, attorneys in practice, and professors and students involved in research and scholarship. Our focus includes interpretations of substantive law, explorations of the conflicts between the appellate divisions (New York’s intermediate courts), and interpretational conflicts between the New York State Court of Appeals (our state’s highest court) and the Second Circuit Court of Appeals.

THE ANTHONY V. CARDONA ANNUAL ISSUE OF NEW YORK APPEALS

As part of the Albany Law Review’s decision to continue the new tradition of the New York Appeals issue, we must pay tribute to esteemed Presiding Justice Anthony V. Cardona of our very own Third Department, located right around the corner from Albany Law School. In light of his unwavering support of the Albany Law Review, especially the annual New York Appeals issue, as well as Albany Law School at large, we have renamed this annual issue The Anthony V. Cardona Annual Issue of New York Appeals, in keeping with last year’s dedication of the inaugural issue to Justice Cardona. The Albany Law Review extends its most sincere gratitude to Justice Cardona, and we refer our readers to the

* Executive Editor for New York Appeals; J.D. Candidate, Albany Law School, 2011. Thank you to the 2010–2011 Editorial Board of the Albany Law Review, our Editor-in-Chief, Caitlìn Devereaux Lewis, Managing Editor, Christina M. Tripoli, and our Faculty Advisor, Professor Vincent M. Bonventre. And a special thank you to the editors who worked specifically on the New York Appeals articles: Jessie R. Cardinale, Krystle Chalich, Patrick J. Collima, Eric Garofano, Kristopher Ostrander, and Allison M. Zullo.
tribute published in the inaugural issue of New York Appeals,\(^1\) reprinted here in part:

Justice Cardona is a true friend to the Albany Law School community who we now know as much for his compassion, warmth, and wit as we do for his status as a dedicated public servant. Genuinely interested in our success, he always offers a kind word of encouragement or piece of advice contributing to our growth as students, lawyers, and, most importantly, people.\(^2\)

Thus, it is with continued admiration and gratitude that we are pleased and honored to dedicate our annual New York Appeals issue to Justice Cardona.

THE SECOND ANNUAL ISSUE: VOICES FROM THE FIELD

This issue of New York Appeals includes articles that strike directly at the heart of New York law. Throughout the creation and production of this second New York Appeals issue, the focus has centered upon the New York practitioner. Consequently, this issue consists solely of “voices from the field” as all of the articles in this edition were authored by practicing attorneys. Although not necessarily by design, with this focus the Albany Law Review provides practitioners with an additional resource, albeit in law review form, for pressing legal issues—a law review issue, essentially, by attorneys for attorneys.

Appropriately, many of the articles examine specific provisions of New York’s Civil Procedure Law and Rules (“CPLR”). An overview of recent interpretations of the CPLR is presented by Barbara D. Goldberg, Partner and Head of the Appeals Department at Martin Clearwater & Bell LLP, and Richard J. Montes, Partner at Mauro Lilling & Naparty, LLP.\(^3\) With a more particularized focus, we

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include an article examining CPLR 3201(b) and its pleading standard, authored by James G. Cavoli and Matthew J. Laroche, both of Milbank, Tweed, Hadley & McCloy LLP. Issues regarding appeals under CPLR 5501(a)(1) and the preservation of an argument on appeal are examined by Joseph F. Castiglione. This article discusses when a prevailing party can be a sore winner on appeal, specifically addressing the “aggrievement” requirement, and the circumstances under which a prevailing party can assert alleged errors below that “necessarily affect” the final judgment. Finally, David L. Ferstendig, Editor of the Weinstein, Korn & Miller treatise, provides a commentary on nonparty disclosure under New York law. Mr. Ferstendig specifically draws attention to the uncertainty surrounding CPLR 3101, and identifies the inconsistency between the departments, as well as the importance for practitioners of knowing how each department has interpreted this particular provision.

Exploring additional procedural hurdles facing the practitioner in New York State, David E. McCraw, Vice President and Assistant General Counsel of the New York Times, contributes an article addressing the standard applied to libel, which is unique to New York State. Additionally, an examination and critique of class action certification under New York law is provided by Justice Thomas A. Dickerson of the Appellate Division, Second Department.

THE INTERPLAY BETWEEN THE NEW YORK COURTS & THE FEDERAL COURTS

This year’s issue also provides several comparative examinations of the interplay between the New York appellate courts and the federal courts. Specifically, two articles venture into the conflicts between New York State courts and the Second Circuit Court of

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6 Id.
Appeals. Glen Banks, Partner at Fulbright & Jaworski LLP, examines the discrepancy between the New York Court of Appeals and the Second Circuit in application of a damages standard under contract law, and considers whether the Second Circuit will apply the Court of Appeals’ standard. Meanwhile, William Maker, Partner at McMillan, Constabile, Maker & Perone, LLP, explores the issue of ripeness in federal and New York State courts, and how federal courts misinterpret New York’s land use law. In light of this confusion, Maker identifies a growing trend of parties seeking “relief from land use boards in the federal judiciary.”

TIMELY LEGAL ISSUES IN NEW YORK STATE

This issue also provides several articles which explore specific aspects of New York State law. Dwight A. Kern and David S. Kostus identify a potential expansion of manufacturer liability in “failure to warn” cases when a manufacturer’s own product is used in tandem with an asbestos-containing product produced by a third party. Specifically, Kern and Kostus discuss a First Department decision that “muddied the waters” in the context of this type of liability, and advocate adherence to the well-settled former rule, prevalent in the other departments as well as in other states.

Additionally, an analysis of the Arbitration Fairness Act of 2009 is presented in two complementary articles. The first, by Jyotin Hamid and Emily J. Mathieu, attorneys at Debevoise & Plimpton LLP, analyzes the Arbitration Fairness Act through the lens of the practitioner. Through a discussion of the perceived advantages and disadvantages of arbitration in general, the authors reveal the shortcomings of the Act, while making recommendations for an improved Arbitration Fairness Act. This theme is picked up by one of this year’s student comments, authored by Monica R. Skanes, a student at Albany Law School, who examines the reality of the supposed “finality” of arbitration agreements in New York courts.
Dissent & Vindication in the Departments: A Student Study

Following the contributions from practicing attorneys, this year's New York Appeals issue provides a study conducted by the Albany Law Review in the fall of 2010. The study highlights the four departments of the Appellate Division, providing a profile of each court, and a study of the dissents and their authors from 2000 to 2010. We are honored to begin this special section with a reflective essay authored by Judge Robert S. Smith of the New York Court of Appeals, revealing why judges dissent, and detailing the importance and value of a dissenting opinion.

This special section then provides four student-authored research studies, one for each department. Together, these articles provide a detailed examination of the concept of "vindication"—situations where the dissenting justice at the appellate level is vindicated by the Court of Appeals when it overturns the majority opinion below, upholding the legal reasoning articulated by the dissenting justice. The study also examines how the departments differ in their dissent rates, and identifies patterns that emerge regarding dissent vindication and the tendencies of individual judges.

Student Comments

In addition to the Skanes comment discussed above, we are proud to be publishing two additional timely and insightful student comments. The comment by Daniel Gross reviews recent improvements to Vehicle and Traffic Law section 1194, which now better assists prosecutors in obtaining blood alcohol level evidence following traffic accidents. Where the law previously only allowed for a short list of individuals authorized to order a blood draw of alleged intoxicated drivers, the law now expands that list, better serving rural communities which, in the absence of adequate resources, were often incapable of satisfying the prior demands of

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Finally, a comment by Albany Law School student, Elizabeth Trachy,\(^\text{19}\) explores an international component of New York State law. It provides a comprehensive constitutional analysis of state divestment action, highlighting the case law and relevant constitutional principles that could serve a normative function for state and local governments if used as a guideline for making future divestment decisions, thereby ensuring they are not unduly interfering with the power of the federal government. It then applies this constitutional analysis to New York's recent state divestment action by balancing the state interest in investment decisions for public funds with the federal government's power to conduct foreign affairs free from inconsistent state interference.

THANK YOU!

We sincerely hope our readers will enjoy this issue as much as we have enjoyed producing it, and will find it timely and useful in practice, research, and study. I remain honored and privileged to serve as Executive Editor for New York Appeals and I, along with my fellow Editorial Board members, would like to thank all of our authors for their contributions, and look forward to witnessing the evolution of the New York Appeals tradition in the years to come.