THE HON. PAUL G. FEINMAN: A NEW VOICE ON THE COURT OF APPEALS

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I. INTRODUCTION

The Honorable Paul G. Feinman was appointed to the New York State Court of Appeals in 2017.[1] A lawyer and long-time judge, Judge Feinman graduated from Columbia College, Columbia University in 1981, from the University of Minnesota Law School in 1985, and studied at France's Université de Paris VII, Université de Paris II, and Université de Lyon III.[2] His legal career began at the Legal Aid Society of Nassau County, where he worked as a Staff Attorney in the Appeals Bureau, before moving to the Criminal Defense Division of Manhattan's Legal Aid Society.[3] He also served as a judicial clerk for the Hon. Angela M. Mazzarelli in New York State Supreme Court and in the Appellate Division, First Department.[4]

Judge Feinman's judicial career began in 1996, when he was elected to the Civil Court of the City of New York, followed by assignment to the Criminal Court from 1997 to 2001, and reelection to the Civil Court in 2006.[5] His Supreme Court career began in 2004, when Chief Judge Jonathan Lippman designated him an Acting Supreme Court Justice,[6] before being elected to the bench in 2007.[7] Governor Andrew M. Cuomo appointed Judge Feinman to the

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[1] *Hon. Paul G. Feinman*, N.Y. STATE UNIFIED COURT SYS., https://www.nycourts.gov/ctapps/jfeinman.htm (last visited May 3, 2018).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See* Vincent Martin Bonventre, *Gov. Cuomo Picks Justice Paul Feinman for the High Court*, N.Y. CT. WATCHER (June 16, 2017), http://www.newyorkcourtwatcher.com/search/label/Feinman_Paul.

[7] *See id.*

Appellate Division, First Department in 2012, and nominated him to the New York State Court of Appeals on June 19, 2017.[8] His nomination was unanimously confirmed by the State Senate on June 21, 2017,[9] and he was officially sworn in as an Associate Justice of the Court of Appeals on October 18, 2017.[10] Judge Feinman will reach New York's mandatory age of retirement in 2030, allowing him to serve on the bench for approximately thirteen of the fourteen-year term.[11]

Judge Feinman was appointed after the tragic death of Judge Sheila Abdus-Salaam, another trailblazing New York jurist.[12] As the first African American woman appointed to the Court of Appeals, Judge Abdus-Salaam's appointment made history in New York.[13] Thus, it is only fitting that her untimely death would result in another historic appointment for the State. As the first openly gay judge appointed to the Court of Appeals, Judge Feinman's nomination was cause for celebration.[14] His appointment into Judge Abdus-Salaam's seat on the Court is only more appropriate considering the praise she received for her decision in a ground-breaking New York State case allowing gay, lesbian, and other non-biological parents the opportunity to seek parenting rights equally with biological parents.[15]

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[8] *Hon. Paul G. Feinman*, *supra* note 1.

[9] *Id.*

[10] *See* Josefa Velasquez, First Openly Gay Judge on Top NY Court Is Sworn In, N.Y.L.J., Oct. 18, 2017.

[11] Bonventre, *supra* note 6.

[12] *See, e.g.*, Melanie Eversley, *Body of Judge on N.Y.'s Highest Court Found in Hudson River*, USA TODAY (Apr. 12, 2017), https://www.usatoday.com/story/news/2017/04/12/body-first-muslim-judge-appointed-nys-highest-court-found-hudson-river/100401428/; Velasquez, *supra* note 10.

[13] *See* Samantha Schmidt, *Judge Sheila Abdus-Salaam, First African American Woman on New York's Top Court, Found Dead in Hudson River*, WASH. POST (Apr. 13, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/04/13/judge-sheila-abdus-salaam-first-african-american-on-new-yorks-top-court-found-dead-in-hudson-river/?utm_term=.d4ab07943926.

[14] James C. McKinley Jr., *First Openly Gay Judge Confirmed for New York's Highest Court*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/nyregion/paul-feinman-court-of-appeals-gay-judge.html. Appropriately, Governor Cuomo announced Judge Feinman's appointment during New York City's Gay Pride Week. *Id.*; *see Gay Pride Marches Across U.S. Take on Celebratory, Political Tones*, CBS NEWS (June 25, 2017), https://www.cbsnews.com/news/gay-pride-marches-across-america-take-on-celebratory-political-tones/.

[15] *See* Julia Marsh, *Woman Loses Landmark Same-Sex Custody Battle*, N.Y. POST (Apr. 14, 2017), https://nypost.com/2017/04/14/woman-loses-custody-battle-in-first-of-its-kind-case/; Susan Sommer, *Lambda Legal Mourns the Death of Judge Sheila Abdus-Salaam*, LAMBDA LEGAL (Apr. 12, 2017), https://www.lambdalegal.org/blog/20170412_death-of-judge-sheila-abdus-salaam. *See generally*, Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016) ("[W]here a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to

Although only present on the Court of Appeals for a brief time, this paper will seek to review and evaluate Judge Feinman's decisions and votes, drawing conclusions based on his opinions and voting patterns, where appropriate. To do this, I will consider and discuss his decisions on the Court of Appeals thus far, first reviewing dissenting and concurring opinions, followed by the opinions he has authored for the majority, and finally reviewing the decisions in which he voted with the majority on a divided court. Ultimately, the goal of this paper is to learn more about Judge Feinman, by reviewing his opinions and votes thus far while on the Court of Appeals bench.

II. DISAGREEING WITH THE MAJORITY: JUDGE FEINMAN'S DISSENTING AND CONCURRING OPINIONS

During his relatively short time on the Court of Appeals bench, Judge Feinman has penned one dissenting opinion and has joined one concurring opinion. Judge Feinman joined in Judge Jenny Rivera's concurrence in *People v. Helms*,[16] agreeing that the Appellate Division, Fourth Department's decision should be reversed, but reaching the conclusion on different grounds.[17] Judge Feinman authored his first dissent about two months after he was sworn in in *Nomura Home Equity Loan, Inc. v. Nomura Credit and Capital, Inc.*,[18] disagreeing with the majority's reading of contractual provisions between the parties.[19] In both instances, Judge Feinman's willingness to step away from the majority's position so early in his career on the Court is notable.

A. Dissent in Nomura

Nomura dealt with four residential mortgage-based securities transactions, in which the appellant, Nomura Credit & Capital ("Nomura") sold pools of mortgage loans to a depositor, which in turn put the loans into a separate trust with respondents, HSBC Bank USA ("HSBC").[20] When many of the loans failed to conform to the representations and warranties contractually guaranteed and

seek visitation and custody under [New York law].").

[16] People v. Helms, 88 N.E.3d 1189 (N.Y. 2017).

[17] *Id.* at 1195 (Rivera, J., concurring).

[18] Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 92 N.E.3d 743 (N.Y. 2017).

[19] *See id.* at 752 (Feinman, J., dissenting).

[20] *Id.* at 745.

Nomura failed to cure the defect, HSBC filed an action on behalf of each trust.[21] On appeal, the Court debated the appropriateness of the defendant's motion to dismiss for failure to state a cause of action, in light of contractual provisions providing the sole remedies for breaches of representations and warranties.[22]

The Hon. Leslie E. Stein's majority opinion[23] dismissed the plaintiffs' claims seeking general contract damages.[24] Focusing on a "Sole Remedy Clause" in the contract, the Court held that the clause was directly related to a "No Untrue Statements" provision in the writing, and thus, any claims based on alleged misrepresentations were subject solely to the proscribed remedy.[25] The majority concluded that permitting the plaintiffs to recover general contract damages would effectively render the Sole Remedy Clause meaningless, and interpreting this clause to be the only remedy agreed on by the parties, the Court barred the plaintiffs from seeking general contract damages.[26]

Only approximately two months after his confirmation, Judge Feinman authored his first dissent. Agreeing with the majority that the plaintiffs' misrepresentation claims falling directly within the scope of the Sole Remedy Clause should not be subject to general contract damages, Judge Feinman disagreed with the majority of the Court on the allegations falling outside of the scope of the provision.[27] Concluding that the Sole Remedy Clause applied only to the enumerated representations within the section of the contract, Judge Feinman dissented, arguing that not all of the plaintiffs' allegations fell within these enumerated representations, and general contract damages should be available for those outside of the scope of that contractual section.[28] As not all of the contract breaches were duplicative of the other, Judge Feinman concluded that the plaintiffs' claims were properly plead, and should have survived the motion to dismiss.[29]

In a separate dissenting opinion, Judge Jenny Rivera concurred in

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[21] *Id.*

[22] *Id.* ("[W]e are asked to decide whether claims for general contract damages based on alleged breaches of a 'no untrue statement' provision can withstand a motion to dismiss based on a contract provision mandating cure or repurchase as the sole remedy for breaches of mortgage loan-specific representations and warranties.").

[23] *Id.* (joined by Judges Balkin, Centra, Fahey, and Wilson).

[24] *Id.*

[25] *See id.* at 750.

[26] *See id.* at 750–51.

[27] *Id.* at 752 (Feinman, J., dissenting).

[28] *See id.* at 757 (citation omitted).

[29] *Id.* (citing Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 667 (N.Y. 1995)).

part with Judge Feinman's analysis and conclusions, with both judges urging the Court to adopt a more liberal interpretation of the contract clauses, as a breach of one section of the contract, although based on misrepresentations and breaches of warranties, did not necessarily result in a breach of another section.[30] Both judges concluded that the allegations should not be subject to the Sole Remedy Clause, allowing the plaintiffs to seek general contract damages, and thus, should have survived the defendant's motion to dismiss.[31]

B. Joining Judge Rivera's Concurring Opinion in Helms

People v. Helms considered the appropriateness of a criminal sentence, specifically whether second felony offender punishment was warranted.[32] After being subject to a traffic stop, the defendant was found to have a loaded firearm, and was charged with criminal possession of a weapon in the second degree.[33] The charges were resolved when the defendant pleaded guilty to attempted criminal possession of a weapon in the second degree, a violent felony.[34] Since the defendant had been previously convicted of burglary in Georgia, the Court was forced to determine whether the subsequent conviction should result in a second felony offender punishment.[35]

Judge Eugene M. Fahey's majority opinion[36] concluded that the defendant was properly sentenced as a second violent felony offender.[37] The Court held that New York's strict equivalency test permits the court to examine other statutes and case law, as well as the elements of the foreign crime, to determine whether the past conviction is equivalent to a violent felony in New York.[38] The majority grappled with whether a knowledge requirement was included in the Georgia burglary statute—a crucial element in New

[30] *See Nomura Home Equity Loan, Inc.*, 92 N.E.3d at 765 (Rivera, J., dissenting) ("As Judge Feinman explains in detail, plaintiff alleges statements that are untrue but that may not breach a section 8 representation as well.").

[31] *See id.* at 766; text accompanying notes 27–28.

[32] *See* People v. Helms, 88 N.E.3d 1189, 1191 (N.Y. 2017).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* (joined by Chief Judge DiFiore, and Judges Garcia, Stein, and Wilson).

[37] *Id.* at 1193.

[38] *Id.* at 1193 (citing People v. Jurgins, 46 N.E.3d 1048, 1051 n.3 (N.Y. 2015); People v. Gonzalez, 463 N.E.2d 1210, 1213 (N.Y. 1984)) ("[W]e now re-emphasize that the strict equivalency test allows a reviewing court to examine a foreign statute that a defendant has been convicted of violating, as well as any foreign statute or case law that informs the interpretation of a foreign code breached by the defendant.").

York's similar penal law[39]—ultimately concluding that although not expressly stated, it should be inferred.[40] Focusing on lesser included offenses, criminal trespass in particular, the Court concluded that "the mental state for the greater crime logically cannot be less than the mental state for the lesser crime."[41] Thus, the Georgia crime was held to be the New York crime's equivalent, allowing for the defendant to be sentenced as a second violent felony offender.[42]

Judge Feinman joined Judge Rivera's concurring opinion, reaching the same conclusion as the majority, but on different grounds.[43] Although agreeing both that the defendant's second violent felony offender sentencing was appropriate and that New York's strict equivalency test allows for analysis of other statutes and case law, the concurring opinion rejected the majority's use of lesser included offense statutes to reach the decision.[44] Instead, Judge Rivera pointed to *Price v. State*,[45] and the Georgia Supreme Court's holding that the burglary statute has an implied knowledge requirement.[46] As the Georgia Supreme Court had already answered the question at issue, the majority's consideration of the lesser included offense was unnecessary, and no further inquiry into Georgia's penal laws was required.[47]

III. AS THE VOICE OF THE COURT: WRITING FOR THE MAJORITY

In the four opinions he has authored for the Court thus far, Judge Feinman has been met with little resistance from his colleagues. Three of these opinions were unanimous.[48] Judge Feinman's

[39] *See Helms*, 88 N.E.3d at 1194 ("The Georgia statute underlying defendant's prior conviction provided that '[a] person commits the offense of burglary when, without authority and with the intent to commit a felony or a theft therein, he enters or remains within the dwelling house of another' . . . . The New York statutes criminalizing burglary [provide] . . . that '[a] person is guilty of burglary in the second degree when he [or she] *knowingly* enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . [t]he building is a dwelling.'").

[40] *See id.*

[41] *Id.*

[42] *Id.* at 1194–95.

[43] *Id.* at 1195 (Rivera, J., concurring).

[44] *Id.*

[45] Price v. State, 712 S.E.2d 828 (Ga. 2011).

[46] *Helms*, 88 N.E.3d at 1195.

[47] *Id.* ("[T]he Georgia Supreme Court construed *sub silentio* Georgia's burglary statute to require that a defendant make a knowingly unauthorized entry of another's dwelling (majority op. at 10, n 4). That completes the inquiry and establishes that the defendant may be sentenced as a predicate felon based on his Georgia conviction.").

[48] *See* Global Reins. Corp. of Am. v. Century Indem. Co., 91 N.E.3d 1186 (N.Y. 2017); Davis v. Scottish Realty Grp. Ltd., 88 N.E.3d 892 (N.Y. 2017); People v. Novak, 88 N.E.3d 305 (N.Y.

majority opinion in *In re World Trade Center Lower Manhattan Disaster Site Litigation*,[49] was met with two concurring opinions.[50] The case considered the Appellate Division's dismissal of claims by New York City workers whom participated in the cleanup of the September 11, 2001 terrorist attacks, under a newly enacted state law extending the statute of limitations.[51] In reversing the lower court's decision, Judge Feinman answered for the majority, holding that "under the capacity rule, public benefit corporations have no greater stature to challenge the constitutionality of State statutes than do municipal corporations or other local governmental entities."[52] Thus, courts need not make a "particularized inquiry," as public benefit corporations are considered the State, in terms of the capacity bar.[53] Answering the second certified question in the case, Judge Feinman clarified that the standard for reviewing the constitutionality of claim-revival statutes, holding that the State's Due Process Clause is satisfied if the law "was enacted as a reasonable response in order to remedy an injustice."[54]

In the first of two concurring opinions, Judge Rivera expanded on the majority's New York State capacity rule decision, reaching beyond the Court's holding on the constitutionality of claim-revival statutes.[55] Rather than simply pointing out the harmony in the Court's previous holdings on claim-revival statutes, Judge Rivera instead asserted that the Court's decision should be aligned with the United States Supreme Court, such that "a claim-revival statute is constitutional unless it deprives a party of a vested property interest."[56]

The second concurring opinion, authored by Judge Rowan D. Wilson, addressed the Justice's disagreement with the majority's capacity doctrine holding.[57] Arguing that the Court's analysis of capacity and the treatment of public benefit corporations were irrelevant, Judge Wilson argued that the case's true issue was "whether and under what circumstances a public benefit corporation

2017).

[49] *In re* World Trade Ctr. Lower Manhattan Disaster Site Litig., 89 N.E.3d 1227 (N.Y. 2017).

[50] *Id.* at 1229, 1243 (majority opinion joined by Chief Judge DiFiore, and Judges Fahey, Garcia, Rivera, and Stein, with concurring opinions by Judges Rivera and Wilson).

[51] *See id.* at 1229.

[52] *Id.* at 1238.

[53] *Id.*

[54] *Id.* at 1243.

[55] *Id.* at 1244 (Rivera, J., concurring).

[56] *Id.* at 1245–46 (citing Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311 – 12 (1945)).

[57] *Id.* at 1247 (Wilson, J., concurring).

can challenge a legislative act as unconstitutional."[58] Thus, rather than a question of capacity, he argued for a focus on standing and governmental structure.[59]

IV. IN TIMES OF DISAGREEMENT: HOLDING WITH THE MAJORITY

The instances where Judge Feinman has joined the Court's majority in split decisions are significant in analyzing his positions thus far on the Court. Holding with the Court majority in four divided decisions, Judge Feinman has held for the People of New York in criminal cases, and the plaintiffs in civil cases.

A. Joining the Majority in People v. Garvin

In *People v. Garvin*,[60] the Court considered its prior decisions on warrantless arrests under the Fourth Amendment.[61] Joining in the majority's refusal to overrule previous precedent, Judge Feinman agreed with the Court's holding for the People.[62] The majority decision,[63] authored by Judge Stein, held that the "warrantless arrest of a suspect in the threshold of a residence is permissible under the Fourth Amendment, provided that the suspect has voluntarily answered the door and the police have not crossed the threshold."[64]

In the first of three dissents, Judge Eugene M. Fahey dissented in part, agreeing with the bulk of the majority's decision, but rejecting the sentencing decision, asserting that "New York's persistent felony offender sentencing scheme is unconstitutional."[65] Judge Rivera also dissented, arguing that the People failed to show that a reasonable expectation of privacy was lacking, and thus, the warrantless arrest violated the defendant's rights.[66] Finally, Judge Wilson also dissented, asserting that both federal and state constitutional standards were unsatisfied by the case's lack of exigent circumstances.[67]

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[58] *Id.*

[59] *See id.*

[60] People v. Garvin, 88 N.E.3d 319 (N.Y. 2017).

[61] *Id.* at 321.

[62] *Id.* at 320.

[63] *Id.* at 321 (joined by Chief Judge DiFiore, and Judges Feinman and Garcia).

[64] *Id.*

[65] *Id.* at 330 (Fahey, J., dissenting).

[66] *Id.* at 337 (Rivera, J., dissenting) (citing People v. Molnar, 774 N.E.2d 738, 740 (N.Y. 2002)).

[67] *See id.* at 345 (Wilson, J., dissenting).

B. Joining the Majority in People v. Hardee

Judge Feinman also joined the majority's short memorandum opinion in *People v. Hardee*,[68] considering the Court's jurisdiction to review a motion to suppress evidence found in a limited interior vehicle search.[69] The majority concluded that the Court could not review the lower court's decision, as the issue–whether the search was based on a substantial likelihood that there was a weapon in the defendant's vehicle–was a question of both law and fact, and there was support on the record justifying the search.[70]

Judge Stein authored a dissenting opinion,[71] asserting that the issue was a question of law reviewable by the Court.[72] The dissent concluded that the People failed to meet the minimum showing required to justify the protective search, as there were no facts on the record justifying a belief that there was a weapon in the vehicle threatening officer safety.[73] Thus, Judge Stein insisted that the evidence found in the subsequent search should have been suppressed.[74]

C. Joining the Majority in Carlson v. American International Group, Inc.

Judge Feinman joined Judge Wilson's majority opinion in *Carlson v. American International Group, Inc.*,[75] a case reviewing dismissed insurance policy claims, and considering whether, under New York State insurance law, the policies were "'issued or delivered' in New York."[76] The case hinged on a cartage agreement between defendant, DHL Express, Inc., and another company, MVP Delivery and Logistics, Inc., and its effect on liability for an accident resulting in the death of the plaintiff's wife.[77] First, addressing the defendant's motion to dismiss, the Court considered whether the truck was a

[68] People v. Hardee, 88 N.E.3d 354 (N.Y. 2017).

[69] *Id.* at 354–55 (joined by Chief Judge DiFiore, and Judges Fahey, Feinman, and Garcia).

[70] *Id.* (citing People v. Omowale, 962 N.E.2d 252, 252 (N.Y. 2011); People v. Mundo, 780 N.E.2d 522, 523–24 (N.Y. 2002); People v. Carvey, 680 N.E.2d 150, 152 (N.Y. 1997).

[71] *Hardee*, 88 N.E.3d at 355 (Stein, J., dissenting) (Judges Rivera and Wilson joined the dissent).

[72] *See id.*

[73] *Id.*

[74] *Id.* at 360–61 (citing People v. Torres, 543 N.E.2d 61, 65 (N.Y. 1989)).

[75] Carlson v. Am. Int'l Grp., Inc., 89 N.E.3d 490 (N.Y. 2017).

[76] *Id.* at 493 (joined by Judges Rivera, Feinman, and Eng; Judge Fahey took no part).

[77] *See id.* at 493–94.

"hired auto" used by DHL but owned by MVP.[78] Reasoning that the plaintiff's expert affidavit stating that the trucks were hired autos was unchallenged by the defense, the majority concluded that a question of fact existed, sufficient to defeat a motion to dismiss.[79] Rejecting the position that the insurance policy was not issued or delivered in New York, the majority concluded that State insurance law covers "insureds and risks located in the State."[80] Thus, the plaintiff's claims were improperly dismissed, as the relevant insurance law did not bar recovery.[81]

Interpreting the insurance policies and cartage agreement different than the majority, Judge Michael J. Garcia dissented,[82] concluding that hired auto coverage did not apply to the case.[83] The dissent determined that MVP was an independent contractor, not a hired auto, reasoning that the crux of the interpretation should have been maintenance of control over the vehicles.[84] Highlighting perceived broad implications, Judge Garcia considered the insurance law issue, despite asserting that the case could be decided on the hired auto coverage issue alone.[85] Utilizing a narrow plain meaning interpretation, the dissent concluded that the statutory language in question–"issued or delivered"–would bar plaintiff's recovery in New York.[86]

D. Joining the Majority in Desrosiers v. Perry Ellis Menswear, LLC.

Joining Judge Fahey's decision in *Desrosiers v. Perry Ellis Menswear, LLC*,[87] Judge Feinman signaled agreement with the majority's decision on class action notice requirements.[88] In interpreting ambiguous language in New York's Civil Practice Law and Rules ("CPLR"), the Court considered the statutory language, the legislature's intent, and both federal and state case law on the issue.[89] Concluding that the statute applies to pre-certified classes in a class

[78] *See id.* at 495.
[79] *See id.*
[80] *Id.* at 500.
[81] *See id.* at 503.
[82] *Id.* at 504 (Garcia, J., dissenting) (joined by Chief Judge DiFiore and Judge Stein).
[83] *See id.* at 506.
[84] *See id.* at 506–07.
[85] *Id.* at 510, 513 ("Given the sharp change in the meaning of 'issued or delivered,' and the frequency with which that phrase is used, the majority's holding will surely wreak havoc well beyond this case.").
[86] *See id.* at 512–13.
[87] Desrosiers v. Perry Ellis Menswear, LLC, 90 N.E.3d 1262 (N.Y. 2017).
[88] *Id.* at 1263–64 (joined by Chief Judge DiFiore, and Judges Feinman and Rivera).
[89] *See id.* at 1265–67.

action, the majority held that "notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given."[90]

Through Judge Stein's voice,[91] the dissent concluded that no notice requirement existed.[92] Reasoning that proposed class members would not be bound by the case's determination since there was no class–as the plaintiffs failed to actually certify the class action–the dissent concluded that notice of settlement was not required.[93] Also disagreeing with the majority's interpretation of the CPLR, the dissent asserted that the statute's language was unambiguous, and should be interpreted consistent with its plain language.[94] Using this interpretation, the dissent concluded that the there is no notice requirement for purported class members under the CPLR.[95]

V. PATTERNS: ANALYZING JUDGE FEINMAN'S VOTES AND OPINIONS

Although only recently appointed, patterns and conclusions can be drawn from Judge Feinman's brief time as an Associate Justice. A review of his votes and opinions thus far, point to two patterns in his decisions on the bench: first, observations show a tendency to hold for the plaintiff; and second, Judge Feinman's concurring and dissenting votes demonstrate an early voting alliance with Judge Rivera.

A. His Early Votes Show a Pro-Plaintiff Justice

Evidence of Judge Feinman's tendency to side with the plaintiff has emerged on the bench. This pro-plaintiff leaning is best evidenced by Judge Feinman's dissent in *Nomura*, where he rejected the majority's interpretation of contractual provisions, resulting in dismissal.[96] Instead, Judge Feinman urged the Court to adopt a more liberal interpretation of the contract, which would allow the plaintiffs' claims to survive.[97] Additionally, in two of the four of the cases where Judge Feinman penned the Court's opinion, the decisions announced rights-favoring holdings for the plaintiff or for a criminal defendant.[98]

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[90] *Id.* at 1264.

[91] *Id.* at 1269 (Stein, J., dissenting) (joined by Judges Garcia and Wilson).

[92] *Id.*

[93] *Id.*

[94] *See id.*

[95] *Id.* at 1275.

[96] Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 92 N.E.3d 743, 752 (N.Y. 2017) (Feinman, J., dissenting).

[97] *See id.* at 757–58.

[98] *See* Davis v. Scottish Realty Grp. Ltd., 88 N.E.3d 892, 898 (N.Y. 2017); People v. Novak, 88 N.E.3d 305, 308 (N.Y. 2017).

The Associate Justice also joined the majority, holding for the plaintiff, in both instances where a civil case left the Court fractured.[99]

A propensity for allowing plaintiffs their day in court has followed Judge Feinman from his time on the First Department bench. Although the jurisdiction and subject matter differs from New York's highest court, his pro-plaintiff leaning has remained the same. As a First Department Justice, Judge Feinman authored nine dissenting opinions, with six dissents concluding that the court should have held for the plaintiff,[100] and two urging the court to decline to dismiss the defendant's counterclaims.[101] Although the majority of his dissents focused on questions of fact–an issue generally not seen on the Court of Appeals bench–Judge Feinman's pro-plaintiff tendency is still notable and worth considering in his forthcoming decisions.

B. A Potential Judicial Ally in Judge Jenny Rivera

Judge Feinman has been joined by Judge Jenny Rivera in both instances where he has disagreed with the Court's majority.[102] Judge Feinman's first dissent on the Court of Appeals was joined in part by

[99] *See* Carlson v. Am. Int'l Grp., Inc., 89 N.E.3d at 492, 492–93 (N.Y. 2017); *Desrosiers*, 90 N.E.3d at 1263–64.

[100] *See In re* N.Y.C. Asbestos Litig., 48 N.Y.S.3d 365, 382 (App. Div. 2017) (Feinman, J., dissenting) ("The evidence, viewed in the light most favorable to plaintiffs, was legally sufficient and the disputed issues were properly submitted to the jury for factual determination."); Soto-Bay v. Prunty, 982 N.Y.S.2d 123, 126 (App. Div. 2014) (Feinman, J., dissenting) ("[T]he motion court's grant of summary judgment to the Daniel defendants should be reversed and the motion denied."); Tompa v. 767 Fifth Partners, LLC, 979 N.Y.S.2d 288, 290 (App. Div. 2014) (Feinman, J., dissenting) ("I respectfully dissent in part because defendant failed to establish a prima facie entitlement to summary judgment."); Barreto v. Metro. Transp. Auth., 973 N.Y.S.2d 636, 641 (App. Div. 2013) (Feinman, J., dissenting) ("Accordingly, I would modify the order to grant plaintiff's motion for partial summary judgment."); Tadmor v. N.Y. Jiu Jitsu Inc., 970 N.Y.S.2d 777, 780 (App. Div. 2013) (Feinman, J., dissenting) ("I respectfully dissent, because, in my view, the motion court . . . properly denied defendant's summary judgment motion."); Fayolle v. E. W. Manhattan Portfolio L.P., 970 N.Y.S.2d 186, 190 (App. Div. 2013) (Feinman, J., dissenting) ("I would reverse the order granting the Gallery House defendants' motion for summary judgment and would grant plaintiff partial summary judgment.").

[101] *See* Newmark & Co. Real Estate v. Frischer, 41 N.Y.S.3d 694, 698 (App. Div. 2016) (Feinman, J., dissenting) ("Accordingly, the order appealed from should be modified to deny plaintiff's motion to dismiss defendant's counterclaim for unjust enrichment, and otherwise affirmed."); Gottlieb v. Gottlieb, 25 N.Y.S.3d 90, 128 (App. Div. 2016) (Feinman, J., dissenting) ("I would modify the order of the Supreme Court, to the extent appealed from, by denying plaintiff's motion for summary judgment, reinstating defendant's first and third counterclaims, and remanding for trial on whether the prenuptial agreement should be declared unenforceable in whole or in part.").

[102] Judge Feinman's voting record generally shows no other alliances: Judge Fahey – 48 votes; Chief Judge DiFiore – 47 votes; Judge Stein – 45 votes; Judge Rivera – 44 votes; Judge Garcia – 43 votes; Judge Wilson – 42 votes.

Judge Rivera.[103] Although addressing the Court in her own dissent, Judges Feinman and Rivera nevertheless agreed on the same conclusion: the plaintiffs' claims were properly plead and should not have been dismissed.[104] Additionally, Judges Feinman and Rivera disagreed with the majority again in *Helms*, urging the Court to consider different grounds in reaching its conclusion.[105] Considering Judge Rivera's exceptionally liberal voting records and likelihood to dissent,[106] a potential alliance between she and Judge Feinman is particularly important. If Judge Feinman continues to dissent and concur in alliance with Judge Rivera, we will likely see him take an active and vocal role on the Court.

VI. CONCLUSION

The Hon. Paul G. Feinman's appointment to the New York State Court of Appeals was notable for his historic appointment as the first openly gay judge nominated to the State's highest court. Although his time on the bench has been relatively short, Judge Feinman has already begun to find his voice, authoring one major dissenting opinion, joining in the concurrence on another, and writing the opinion of the majority on four occasions. A longtime litigator and jurist, Judge Feinman's holdings on the Court thus far demonstrate both a pro-plaintiff propensity, and a tendency to align with Judge Jenny Rivera in instances of disagreement with the majority. As Judge Feinman continues to grow into his new role on the Court of Appeals, continued observation of these patterns as they continue to develop will surely be interesting.

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[103] *See* Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc., 92 N.E.3d 743, 766 (N.Y. 2017).

[104] *Compare id.* 757 (Feinman, J., dissenting) ("Accordingly, HSBC adequately pleaded breaches of the No Untrue Statement Provision that do not duplicate breaches of section 8, and which should therefore survive defendant's motion to dismiss.") *with id.* at 766 (Rivera, J., dissenting) ("[I]t was error to dismiss plaintiff's causes of action for damages based on alleged breaches of section 7 that are distinct from breaches of section 7. For [these] reasons . . . plaintiff's claims for relief from violations of the Untrue Statement Provision are properly pleaded.").

[105] *See* People v. Helms, 88 N.E.3d 1189, 1195 (N.Y. 2017) (Rivera, J., concurring) (joined by Judge Feinman).

[106] *See, e.g.*, Vincent Martin Bonventre, *Part 8 – Observations: Generally Conservative*, N.Y. CT. WATCHER (Oct. 31, 2016), http://www.newyorkcourtwatcher.com/2016/10/part-8-observations-generally.html (noting that in the early part of the DiFiore Court, Judge Rivera dissented 18 times); Vincent Martin Bonventre, *Part 9 – Observations: Polarized? Decisions Unsigned?*, N.Y. CT. WATCHER (Nov. 9, 2016), http://www.newyorkcourtwatcher.com /2016/11/part-9-observations-polarized-decisions.html ("Judges Rivera and Garcia have compiled the most liberal and conservative voting records, respectively.").