

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office

February 25 through March 2, 2011

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rule 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rule 500.23 and direct any questions to the Clerk's Office.

ASSURED GUARANTY (UK) LTD. &c. v J.P. MORGAN INVESTMENT MANAGEMENT, INC.:

1ST Dept. App. Div. order of 11/23/10; modification; leave to appeal granted by App. Div., 2/17/11;

INSURANCE - REINSURANCE - BREACH OF FIDUCIARY DUTY - FRAUD - WHETHER COMMON LAW CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AND GROSS NEGLIGENCE ARE PREEMPTED BY NEW YORK STATE'S MARTIN ACT (GENERAL BUSINESS LAW §§ 352-359) - ACTION AGAINST INVESTMENT MANAGER OF ASSETS OF REINSURANCE COMPANY;

Supreme Court, New York County granted defendant's motion pursuant to CPLR 3211 to dismiss the complaint; App. Div. modified to reinstate the contract claims based on defendant's alleged violation of Delaware Insurance Code Chapter 13 that accrued on or after 6/26/07, as well as claims for breach of fiduciary duty and gross negligence that accrued on or after that date, and otherwise affirmed.

BHUGRA v MASSACHUSETTS CASUALTY INSURANCE COMPANY, et al.:

1ST Dept. App. Div. order of 1/18/11; reversal; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

INSURANCE - DISABILITY INSURANCE - WHETHER DISABILITY POLICY ISSUED TO PLAINTIFF IS A CONTRACT BINDING THE INSURER'S AGENT; CONTRACT; PRINCIPAL AND AGENT;

Supreme Court, New York County, among other things, denied the motion of defendant Disability Management Services (DMS) to dismiss the first cause of action as against it; App. Div. reversed, granted defendant DMS's motion to dismiss the first cause of action as against it and directed the clerk to enter judgment dismissing the complaint as against DMS.

McDOUGALL, MATTER OF v SCOPPETTA:

2ND Dept. App. Div. judgment of 7/20/10; grant of CPLR article 78 petition; leave to appeal granted by Court of Appeals, 2/15/11; CIVIL SERVICE - FIREFIGHTERS - DISCIPLINARY PROCEEDINGS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE TERMINATION OF PETITIONER'S EMPLOYMENT AS A FIREFIGHTER AND THE ATTENDANT FORFEITURE OF HIS PENSION AFTER TESTING POSITIVE FOR THE PRESENCE OF COCAINE IN HIS SYSTEM WAS SO DISPROPORTIONATE TO THE OFFENSE THAT IT SHOCKS THE JUDICIAL CONSCIENCE - PENALTY FOR VIOLATING FIRE DEPARTMENT'S "ZERO TOLERANCE" POLICY REGARDING THE USE OF PROHIBITED SUBSTANCES;

App. Div. granted a CPLR article 78 petition to the extent of annulling so much of a determination of respondent Commissioner of the New York City Fire Department as imposed a penalty of termination of petitioner's employment, remitted the matter to respondents for the imposition of the lesser penalty allowing the petitioner to retire as of June 27, 2008, and fined the petitioner the sum of \$80,000.

McMANUS, PEOPLE ex rel. v HORN:

1ST Dept. App. Div. order of 10/26/10; affirmance; leave to appeal granted by Court of Appeals, 2/17/11;

BAIL - RIGHT TO BAIL - RIGHT TO HAVE BAIL SET WITH AT LEAST TWO FORMS OF PAYMENT SPECIFIED - WHETHER CPL 520.10(2) LIMITS THE DISCRETION OF A JUDGE TO DIRECT THAT BAIL BE POSTED IN ONE FORM ONLY - "CASH ONLY" BAIL;

Supreme Court, Bronx County denied petitioner's application for a writ of habeas corpus and dismissed the petition; App. Div. affirmed.

SEDACCA, MATTER OF v MANGANO, et al.:

2ND Dept. App. Div. order of 11/3/10; modification; leave to appeal granted by Court of Appeals, 2/17/11;

PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - WHETHER, ABSENT CAUSE, THE NASSAU COUNTY EXECUTIVE MAY REMOVE COMMISSIONERS FROM THE NASSAU COUNTY ASSESSMENT REVIEW COMMISSION PRIOR TO THE EXPIRATION OF THEIR TERMS; DECLARATORY JUDGMENT;

Supreme Court, Nassau County denied the CPLR article 78 petition and, in effect, dismissed the proceeding; App. Div. modified by adding to the judgment a provision declaring that the County Executive of the County of Nassau, notwithstanding the absence of cause, has authority to remove Commissioners of the Nassau County Assessment Review Commission from their offices prior to the expiration of their statutory terms, and affirmed as so modified.

STUTO v KERBER:

3RD Dept. App. Div. order of 10/28/10; affirmance; leave to appeal granted by Court of Appeals, 2/15/11;

LABOR - HOURS AND WAGES - WHETHER BUSINESS CORPORATION LAW § 630, MAKING THE TEN LARGEST SHAREHOLDERS OF A CLOSELY HELD CORPORATION PERSONALLY LIABLE FOR UNPAID WAGES DUE TO EMPLOYEES, APPLIES TO FOREIGN CORPORATIONS;

Supreme Court, Albany County, among other things, granted a motion by defendants McNeary and Jayko to dismiss the complaint against them; App. Div. affirmed.