

COURT OF APPEALS NEW FILINGS

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

**February 17, 2012 through February 23, 2012**

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.**

AMAZON.COM, LLC, et al. v NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, et al.:

1<sup>st</sup> Dept. App. Div. order of 11/4/10; modification; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; CONSTITUTIONAL LAW - VALIDITY OF STATUTE - CHALLENGE TO TAX LAW § 1101(b)(8)(vi); Supreme Court, New York County dismissed the complaint; App. Div. modified to declare that the statute is constitutional on its face and does not violate the Equal Protection Clause either on its face or as applied, and to reinstate the complaint for further proceedings with regard to the claims that, as applied, the statute violates the Commerce and Due Process Clauses; thereafter plaintiffs stipulated to discontinue their remaining as applied claims.

ASSET PROTECTION & SECURITY SERVICES, LP, MATTER OF v SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200 UNITED:

4<sup>TH</sup> Dept. App. Div. order of 12/23/11; modification with dissents; sua sponte examination whether the two-justice dissent at the App. Div. is on a question of law;

ARBITRATION - PROCEEDING PURSUANT TO CPLR ARTICLE 75 - WHETHER ARBITRATOR EXCEEDED HIS AUTHORITY BY DIRECTING THAT THE EMPLOYEE BE REINSTATED AND AWARDING HER BACK PAY AND BENEFITS; JUST CAUSE FOR TERMINATION;

Supreme Court, Genesee County granted the petition seeking to vacate an arbitration award and denied the cross petition seeking to confirm the arbitration award; App. Div. modified by denying the petition in part, granting the cross petition in part and confirming the arbitration award insofar as the arbitrator found that there was no just cause to terminate petitioner-respondent's employee, and affirmed as so modified.

BELL v NEW YORK STATE HIGHER EDUCATION SERVICES CORPORATION:

3<sup>RD</sup> Dept. App. Div. order of 12/15/11; dismissal; sua sponte examination whether the appeal is timely taken, 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; APPEAL - CHALLENGE TO APPELLATE DIVISION ORDER THAT, AMONG OTHER THINGS, DISMISSED ONE OF THE PLAINTIFF'S APPEALS AS UNTIMELY TAKEN AND ANOTHER OF HIS APPEALS AS BEING TAKEN FROM A NON-APPEALABLE ORDER DENYING REARGUMENT;

App. Div. dismissed appeals from (1) a Supreme Court, Albany County, order, entered 9/16/09, that granted defendant's motion to dismiss the complaint as untimely taken; (2) a Supreme Court, Albany County, order, entered 1/15/10, that denied plaintiff's motion for reargument; and (3) a Supreme Court, Albany County, order entered 5/27/10, that denied plaintiff's motion to vacate two prior orders of that court.

CONSUMER DIRECTED CHOICES, INC., MATTER OF v NEW YORK STATE OFFICE OF THE MEDICAID INSPECTOR GENERAL:

3<sup>RD</sup> Dept. App. Div. order of 12/15/11; affirmance with dissents; Rule 500.11 review pending;

HEALTH - CHALLENGE TO STATE AGENCY'S WITHHOLDING OF MEDICAID PAYMENTS TO PROVIDER BASED UPON A REQUEST FROM ANOTHER STATE AGENCY, WHICH INDICATED THAT IT WAS CONDUCTING A FRAUD INVESTIGATION OF THE PROVIDER AND HAD DETERMINED THAT THE PROVIDER WAS CONSISTENTLY UPCODING ITS MEDICAID BILLINGS - WHETHER WITHHOLDING AGENCY WAS REQUIRED TO INDEPENDENTLY INVESTIGATE THE ALLEGATIONS OF FRAUD;

Supreme Court, Albany County dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to review two determinations of respondent partially withholding Medicaid payments to petitioner; App. Div. affirmed.

ILLINOIS UNION INSURANCE COMPANY v ASSURANCE COMPANY OF AMERICA:

1<sup>ST</sup> Dept. App. Div. order of 7/28/11; reversal with dissents;  
leave to appeal granted by App. Div., 12/27/11; Rule 500.11  
review pending;

INSURANCE - CONSTRUCTION OF POLICY - DUTY TO DEFEND - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE RECORD ESTABLISHED AS A MATTER OF LAW THAT THE PLAINTIFF IN AN UNDERLYING ACTION WAS NOT AN "EMPLOYEE" WITHIN THE MEANING OF THE INSURANCE POLICY; Supreme Court, New York County, as relevant here, denied in part plaintiff's motion for summary judgment and held that, under California law, plaintiff Illinois Union Insurance Company was entitled to reimbursement for defense costs associated with the slander claim in the underlying action; App. Div. reversed to declare that defendant Assurance Company of America is obligated to reimburse plaintiff Illinois Union Insurance Company for the defense costs it paid in the underlying action.

SCHEFFEY-HOHLE, MATTER OF v DURFEE:

3<sup>RD</sup> Dept. App. Div. order of 12/29/11; reversal with dissents;  
sua sponte examination whether the two-justice dissent at the App. Div. is on a question of law;

PARENT AND CHILD - CUSTODY - RELOCATION OF ONE PARENT - CHALLENGE TO APPELLATE DIVISION ORDER THAT REVERSED A FAMILY COURT ORDER GRANTING PETITIONER-MOTHER'S APPLICATION TO MODIFY A PRIOR CUSTODY ORDER AND PERMITTING HER TO RELOCATE WITH THE CHILD; Family Court, Schuyler County, among other things, granted petitioner-mother's application, in a proceeding pursuant to Family Court Act article 6, to modify a prior order of custody; App. Div. reversed, and dismissed the petition.