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Reporting on Significant Court of Appeals Opinions and Developments in New York Practice

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During this difficult time, there is always the conflict one feels about establishing some semblance of normalcy. On the one hand, so much seems unimportant now when compared to the battle the nation and the world are waging against this terrible virus. Countless people have been stricken, so many have perished, the worst is probably yet to come, and the lives of virtually all of us have been turned upside down. But, as anyone who lived through September 11 or a personal crisis (health or otherwise) knows, we learn to adjust to the "new normal." It is a coping mechanism. So, the routine and the mundane become our salvation. It is in that vein, that I have issued this month's *Digest*. I do not for a minute delude myself to believe that this *Digest* is anything other than what I would hope to be a momentary distraction. My mind, like so many of yours, is consumed with thoughts of sorrow and fear for those who have lost loves ones, who are currently suffering, and who will be suffering in the future. In the midst of that gloom, however, I see brilliant rays of hope in the caring of everyday people for one another; the courage of the health care workers, the first responders, the police, firemen and others, who are our heroes; the heroes who transport us from place to place, who deliver our necessary food and supplies, and who enable us to huddle in our homes to avoid the virus; and our leaders who have stepped up and showed true leadership. And so, I wish each of you and your families good health and hope this dreaded virus departs in short order.

David

CASE DEVELOPMENTS

Majority of Court of Appeals Upholds Determination That Delivery Service Workers Are Employees for Purposes of Contributions to the Unemployment Insurance Fund

Dissent Frustrated With Lack of Clarity in Precedent

Matter of Vega, 2020 N.Y. Slip Op. 02094 (March 26, 2020), is significant in its own right but also has widespread implications. The defendant, Postmates, Inc., is in the delivery business, using a website and smartphone application to direct couriers to pick up and deliver goods from restaurants and stores to customers throughout the United States. We are talking here generally about short-term deliveries completed within an hour. The way their system works is reminiscent of other "delivery" services (of both products and people) that are now ubiquitous. Postmates solicits and hires couriers who must undergo background checks before being approved. The couriers control when they log into the application and when to accept a job. Once the courier accepts a job, Postmates provides the courier with additional information, including the delivery destination. Postmates collects the delivery fee from the customer and pays its couriers 80% of the delivery fees charged to customers, regardless of whether the customer pays. The couriers' pay and delivery fees are nonnegotiable.

In this case, Mr. Vega had been working as a Postmates courier in June 2015 (for approximately six days according to the dissent), when he was blocked by Postmates for receiving negative reviews from customers alleging fraudulent activity. Mr. Vega then filed for unemployment benefits. (The decision notes that "[t]he record does not indicate whether Mr. Vega actually received or was eligible for unemployment insurance benefits and that issue is not before this Court.") The ping ponging of decisions began with the Department of Labor determining that Mr. Vega was a Postmates employee, requiring Postmates to pay unemployment insurance contributions on Mr. Vega's earnings, as well as on the earnings of "all other persons similarly employed." Subsequently, however, an administrative law judge (ALJ) sustained Postmates' objection, finding that Mr. Vega was an independent contractor. The Unemployment Insurance Appeal Board (the Board) then reversed the ALJ, determining that "'claimant and any other on-demand couriers (delivery drivers) similarly situated' were employees because Postmates exercised, or reserved the right to exercise, control over their services."

A split Appellate Division reversed, concluding that there was not substantial evidence of an employer-employee rela-

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tionship because there was insufficient proof of Postmates' "control over the means by which these couriers perform their work."

A majority of the Court of Appeals reversed, finding that there was substantial evidence in the record to support the Board's determination. In doing so, it focused on the following elements of Postmates' control over its couriers, which it stated was more than incidental control:

> The company is operated through Postmates' digital platform, accessed via smartphone app, which connects customers to Postmates couriers, without whom the company could not operate. While couriers decide when to log into the Postmates' app and accept delivery jobs, the company controls the assignment of deliveries by determining which couriers have access to possible delivery jobs. Postmates informs couriers where requested goods are to be delivered only after a courier has accepted the assignment. Customers cannot request that the job be performed by a particular worker. In the event a courier becomes unavailable after accepting a job, Postmates—not the courier—finds a replacement. Although Postmates does not dictate the exact routes couriers must take between the pick-up and delivery locations, the company tracks courier location during deliveries in real time on the omnipresent app, providing customers an estimated time of arrival for their deliveries. The couriers' compensation, which the company unilaterally fixes and the couriers have no ability to negotiate, are paid to the couriers by Postmates. Postmates, not its couriers, bears the loss when customers do not pay. Because the total fee charged by Postmates is based solely on the distance of the delivery and couriers are not given that information in advance, they are unable to determine their share until after accepting a job. Further, Postmates unilaterally sets the delivery fees, for which it bills the customers directly through the app. Couriers receive a company sponsored "PEX" card which they may use to purchase the customers' requested items, when necessary. Postmates handles all customer complaints and, in some circumstances, retains liability to the customer for incorrect or damaged deliveries.

Id. at *6–7.

The majority was not concerned that the couriers had the ability to choose their own schedule or delivery route. The Court distinguished its decision in *Matter of Yoga Vida NYC, Inc*., 28 N.Y.3d 1013 (2016), discussed in the February 2017 *Digest*. There, the Court maintained that the yoga instructors provided services unique to those instructors; non-staff instructors could choose their own customer following; non-staff instructors were paid only if a certain number of students attended, thereby requiring the instructors to actively assure customer involvement; and they chose the method of payment (hourly or via a percentage). In contrast, the couriers in *Vega* did not have such control over their customer base nor did they generate their own business.

In a lengthy concurrence, Judge Rivera opined that while the multi-factor test to determine whether a worker is an employee applied by the majority is "well-suited to most cases," it "may prove difficult to apply to electronically mediated work arrangements." *Vega*, 2020 N.Y. Slip Op. 02094, at *12. Thus, she applied the Restatement of Employment Law's test "which alternatively considers the worker's entrepreneurial control over their services and the extent to which the employer 'effectively prevents' such worker control." *Id.* In concluding that the couriers were not independent contractors, she stressed that they could not "commodify their efforts into a self-sustaining business" or develop a client base; Postmates' business model depends on delivery employees, not independent contractors; Mr. Vega was not hired as an independent contractor, and there was no evidence that Vega could act as an entrepreneur while delivering to Postmates' customers; and "Postmates benefits from the labor of unskilled workers and persons of low income—both vulnerable to employer exploitation, as well as misclassification under the statute." *Id*. at *32.

The dissent, written by Judge Wilson and joined by Judge Garcia, was critical of the multi-factor control analysis employed in the "inconsistent" case law, which it characterized as an "*ad hoc* test we do not articulate because it defies explanation." This combined with "the realities of the contemporary working world [which] have outpaced our jurisprudence" and a deferential standard of review, results in what the dissent terms two undesirable paths. "[E]ither we adhere to the caselaw and standard of review, leaving all agency decisions unreviewable, or we make haphazard reversals without explanation." *Id*. at *35. On the merits, the dissent concluded that none of the myriad factors listed by the Department of Labor as supporting a finding that Mr. Vega was an employee had actual support in the record; "Mr. Vega's six-day adventure as a courier neatly fit into the exertion of mere 'incidental control,' which does not provide substantial evidence for a Board's determination of employee status"; and Mr. Vega had complete control over his schedule, when and where he worked, and the jobs and routes he took. *Id*. at *52–53.

Echoing the dissent, I repeat my uneasiness that I noted in connection with our treatment of *Matter of Yoga Vida*: "How secure do you feel that you can tell the difference between an employee and an independent contractor?"

On Certified Questions, the Court of Appeals Holds That Complaint Alleged Consumer-Oriented Conduct

Thus, Plaintiff Would Be Permitted to Go Forward With His General Business Law §§ 349, 350 Claim Alleging Materially Misleading Representations About Insurance Policy Terms

The issue in *Plavin v. Group Health Inc*., 2020 N.Y. Slip Op. 02025 (March 24, 2020), was whether the plaintiff had sufficiently alleged consumer-oriented conduct to assert claims under General Business Law (GBL) §§ 349 and 350. Those sections, among others, provide consumers with a means of redress for injuries caused by unlawfully deceptive acts or practices. Specifically, GBL § 349 declares unlawful any "[d]eceptive acts or practices in the conduct of any business, trade or commerce in the furnishing of any service in this state." GBL § 350 provides that "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state" is unlawful.

The Court of Appeals here in *Plavin* was answering certified questions from the Third Circuit Court of Appeals. Briefly, plaintiff's claims arose out of health insurance benefits he received as a now-retired New York City police officer.

Plaintiff alleges that the City offered over 600,000 employees and retirees a choice of 11 health insurance plans; defendant Group Health Incorporated (GHI) was among the plans offered; the New York City Office of Labor Relations distributed a summary program description describing the health insurance plans, and GHI created its own summary of benefits and coverage online (collectively referred to as "summary materials"); and if a retiree or employee chose the GHI plan, the City sponsored and paid all the premiums.

Plaintiff commenced an action in U.S. District Court for the Middle District of Pennsylvania claiming that there were numerous representations made in the summary materials noted above, including those relating to extensive, out of network coverage and "the freedom to choose any provider worldwide." Ultimately, plaintiff's wife received numerous out-of-network services, resulting in the plaintiff having to pay the lion's share of significant medical expenses (and GHI covering only a small portion of the claims).

Plaintiff asserted violations of GBL §§ 349 and 350, in that GHI allegedly made materially misleading representations about the plan terms to City employees and retirees, specifically "misleading statements and omissions in its summary materials regarding the Plan's out-of-network reimbursement rates, how often the reimbursement rate schedule was updated, the catastrophic coverage reimbursement rate, and the breadth of coverage of the optional rider—in order to induce plaintiff, and others similarly situated, to select the GHI Plan." *Id*. at *4.

GHI filed a pre-answer motion to dismiss for failure to state a claim, and the district court found that the plaintiff had not adequately pleaded that GHI's conduct was consumer-oriented. On appeal, the Third Circuit certified questions to the New York Court of Appeals relating to whether GHI had engaged in consumer-oriented conduct under GBL §§ 349 and 350.

The Court of Appeals noted that a plaintiff making a claim under either GBL § 349 or 350 "'must charge conduct of the defendant that is consumer-oriented' or, in other words, 'demonstrate that the acts or practices have a broader impact on consumers at large.'" *Id*. at *9. Referring to its prior seminal decisions in this area, the Court distinguished between "a private contract dispute over policy coverage and the processing of a claim which is unique to the parties," and conduct which affects the consuming public at large. *Id*. at *11 (*citing to New York Univ. v. Continental Ins. Co. (NYU)*, 87 N.Y.2d 308, 321(1995)).

The Court asserted that here, despite the existence of an underlying insurance contract negotiated by sophisticated entities, only one was a party to this action and neither the plaintiff nor any of the other employees or retirees participated in the negotiation of the GHI plan; the employees or retirees could only choose one of the 11 previously negotiated health plans; the insurers could market their plans directly to the employees and retirees; and the contract between the City and GHI was not at issue here but the allegedly misleading summary materials:

> Simply put, plaintiff alleged that GHI was incentivized by the competition created during the open enrollment period to leverage its information advantage in order to gain the business of the employees and retirees over other insurers. In that manner, the open enrollment period resembles the sort of sales marketplace—characterized by groups of similarly-situated consumers subjected to the competitive tactics of a relatively more powerful business—that GBL claims were intended to address.

Id. at *14.

In addition, the Court noted that

> plaintiff's complaint alleged claims that arose from the allegedly deceptive marketing materials distributed to plaintiff and the other City employees in order to induce them to select the GHI Plan over the other options available to them, as well as to pay additional premiums for the allegedly worthless out-of-network rider. Under these circumstances, "plaintiff[] ha[s] satisfied the threshold test" by alleging that the marketing actions "are consumer-oriented in the sense that they potentially affect similarly situated consumers." That is, GHI's alleged "dissemination of information to" hundreds of thousands of City employees in order to solicit their selection of its plan "is precisely the sort of consumer-oriented conduct that is targeted by General Business Law §§ 349 and 350" (citations omitted).

Id. at *14–15.

Finally, the Court maintained that GBL §§ 349 and 350 do not require that the consumer-oriented conduct must be directed to *all* members of the public.

Judges Disagree as to Whether the Trial Court Erred in Admitting Evidence of Prior Accidents

But Neither the Court of Appeals Nor the Appellate Division Provide Us Details as to the Basis for Their Diametrically Opposed Conclusions

Daniels v. New York City Tr. Auth., 2020 N.Y. Slip Op. 02027 (March 24, 2020), is a very brief unanimous opinion of the Court of Appeals. While not mentioned in the decision, the facts can be summarized briefly: the plaintiff alleged that she was injured when she exited a crowded subway car, when her leg slipped into the gap between the train car and the platform edge and that the gap was a dangerous condition, not in compliance with industry safety standards.

In reversing the Appellate Division order, the Court of Appeals first ruled that the trial court properly admitted the plaintiff's expert testimony. The second ruling, with which we are concerned here, was that the

> Supreme Court abused its discretion as a matter of law by admitting evidence of prior accidents at New York City subway stations involving the gap between the train car and platform in the absence of a showing that the relevant conditions of those accidents were substantially the same as plaintiff's accident.

Id. at *1.

An equally unanimous Appellate Division (First Department) had concluded, also without any further explanation, that

> [t]he trial court did not err in admitting evidence of gap accidents at other stations or precluding NYCTA's witnesses from testifying. Plaintiff demonstrated that the relevant conditions of the subject accident and the previous ones were substantially the same, though they occurred at other stations. . .

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171 A.D.3d 601, 602 (1st Dep't 2019).

So, we are left with two courts unanimously ruling in a diametrically opposed manner, with no further explanation. The significant question was whether the plaintiff had established that the subject accident and the prior ones were substantially similar. We would have liked a little more than two conclusory statements. However, it is a great lesson that such eminent jurists can see the same facts and circumstances so differently.

Further Conflict Among the Appellate Division Departments

The Departments Disagree as to Whether Appellant Must Make Post-Verdict Motion for New Trial to Preserve Contention that Verdict Was Contrary to the Weight of the Evidence

CPLR 4404(a) provides that "upon the motion of any party or on its own initiative," a court can direct judgment or order a new trial "where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court."

In *Evans v. New York City Tr. Auth.*, 179 A.D.3d 105 (2d Dep't 2019), the Second Department was concerned with whether an appellant needs to make a post-verdict motion for a new trial to preserve a contention that a jury verdict was contrary to the weight of the evidence. In holding that the appellant need *not* make such a motion, it put itself at odds with the Third and Fourth Departments.

In *Evans*, the plaintiff alleged injuries when she exited a New York City bus and into a pothole, causing her to fall. The jury found in favor of the defendants, concluding that although they were negligent, their negligence was not a substantial factor in causing the accident. After the verdict, the plaintiff did not make an oral motion to set aside the verdict. In addition, notwithstanding the fact that her counsel sought and obtained an extension of time to file a written posttrial motion, the plaintiff never filed a posttrial motion to set aside the verdict, and judgment was entered in favor of the defendants.

On appeal, the Appellate Division initially dealt with the issue of whether the plaintiff had to preserve her weight of the evidence argument. In holding no such requirement exists, the Second Department stressed that:

- "[T]he Court of Appeals has recognized that the Appellate Division has the authority to review a verdict based upon the weight of the evidence, without any requirement that the issue be preserved." *Id*. at 109.
- Prior Appellate Division authority had held that a contention that the verdict was against the weight of the evidence did not have to be preserved by a motion for a new trial.
- CPLR 5501(c), which governs the Appellate Division's scope of review on an appeal from a final judgment, provides that the court "shall review questions of law and questions of fact on an appeal from a judgment. . . ."
- As noted above, CPLR 4404(a) provides the trial court with the authority to order a new trial "on its own initiative." Because the Appellate Division's power is as broad as the trial court, it "also possesses the power to order a new trial where the appellant made no motion for that relief in the trial court." *Id.* at 110.

The court discounted two of its prior decisions seemingly holding to the contrary—*Condor v. City of New York*, 292 A.D.2d 332 (2d Dep't 2002), and *Bendersky v. M & O Enters. Corp.*, 299 A.D.2d 434 (2d Dep't 2002)—as "aberrations" that should no longer be followed. Ultimately on the merits, the court held that the verdict was against the weight of the evidence.

The Third and Fourth Departments have taken the contrary view, imposing a preservation requirement. *See Creamer v. Amsterdam High School*, 277 A.D.2d 647, 651 (3d Dep't 2000); *Cyrus v. Wal-mart Stores, E., LP*, 160 A.D.3d 1487, 1488 (4th Dep't 2018).

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