



CAPABILITIES
Appellate Practice

At Olshan, our appellate practice is fully integrated into our active trial practice. Our litigation attorneys' approach to appeals stems naturally from our experience litigating in New York State courts. In New York, unlike in the federal courts and many other state courts, parties can appeal from interim trial court rulings without waiting until a final judgment. This means, for example, a defendant can appeal from the denial of a motion to dismiss before the court has made its final decision on the merits. Because of this, our litigators routinely brief and argue appeals in New York's appellate courts, including New York's Court of Appeals, the State's highest court. We have also briefed and argued multiple appeals in the U.S. Court of Appeals for the Second Circuit, the Delaware Supreme Court and other federal and state courts.

Our appellate experience, in turn, complements and informs our trial strategy in state and federal courts. At the trial level, we consciously build the record to support (or withstand) appeal, and we know how to skillfully identify "mistakes in law" that provide clients with the best opportunity for success. Our trial savvy lets us act nimbly and quickly when stays and other injunctive relief are needed to preserve the status quo pending appeal. At all times, our appellate attorneys counsel clients as to the big picture, providing realistic expectations as to case time lines and inflection points for possible settlement.

While we routinely handle appeals on matters that we litigated in the trial court, we also brief and argue matters handled below by other counsel. In those matters, we bring a fresh and objective perspective to each case. In keeping with our overall approach to litigation, the appellate team is lean, focused and efficient and recognizes that every appeal we handle involves significant issues for our clients.

EXPERIENCE

Olshan Secures Affirmance of Consumer Class-Action Dismissal in New Jersey's Appellate Division

On May 31, 2022, New Jersey's Appellate Division affirmed the dismissal of a consumer class-action lawsuit that was filed against Olshan's client, a marketer of a male hair-regrowth product. The class action was filed under New Jersey's Consumer Fraud Act, one of the most pro-consumer statutes in the nation. It was dismissed on summary judgment prior to any discovery being conducted. Professional plaintiff Harold Hoffman claimed that the product was falsely advertised, but Olshan argued successfully on both the trial-court and appellate levels that Hoffman's failure to use the supplement before filing suit

PRACTICE CONTACTS

Lori Marks-Esterman

Brian A. Katz

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meant that he had not suffered any compensable loss. The three-judge appellate panel agreed, ruling that the ascertainable loss requirement of the Consumer Fraud Act had not been satisfied. Scott Shaffer handled the appeal on behalf of Olshan. [Read the decision here.](#)

Appellate Division Affirms Grant of Summary Judgment Holding that Olshan Client Was Not Required to Pay Unlicensed Subcontractor

On May 26, 2022, New York's First Appellate Department granted a unanimous win to Olshan's client, a California construction company. The client hired a plumbing subcontractor for a major project, but learned later that the subcontractor was unlicensed and had submitted a phony license number. Before the client learned the truth, it had signed a letter waiving all rights to assert defenses or claims against the subcontractor. The case was further complicated by the fact that the subcontractor factored the debt out to a New York lender for collection. California law strictly prohibits paying unlicensed contractors, but New York law has no such rule, and the case was filed in New York by the lender. The trial court ruled in favor of Olshan's client but relied on the wrong section of New York's Uniform Commercial Code. On appeal, the panel affirmed the ruling but substituted an alternate rationale put forth by Olshan. As a result, Olshan's client will not have to pay the subcontractor's bills even though the bills could have been enforceable under New York law. Scott Shaffer represented Olshan's client. [Read the decision here.](#)

Appellate Division Affirms Denial of Summary Judgment and Holding that Olshan Client Properly Pled Claims for Breach of Contract and Reformation of Warrant Agreement

On September 21, 2021, the First Department of the Supreme Court, State of New York, affirmed the trial court's ruling that client Empery Asset Master, Ltd. had stated claims for breach of contract and for reformation of contract on a warrant agreement. The court agreed that Empery had shown that the agreement was ambiguous, and raised questions of fact as to whether there was mutual mistake or a scrivener's error. In so doing, the court rejected defendant's effort to relitigate issues already decided six months before when the First Department affirmed denial of defendant's motion to dismiss. On October 14, 2021, the trial court held that Empery had proven its claims. Thomas Fleming and Kerrin Klein represented Empery. [Read the decisions here and here.](#)

Olshan Prevails Before the Second Circuit in Major Short Swing Profit Ruling

On November 23, 2020, in a significant case involving the application of Section 16's short swing profit rule to hedge funds and their advisors, the U.S. Court of Appeals for the Second Circuit vacated a judgment by the U.S. District Court holding Olshan's client, a hedge fund, liable under Section 16 for \$5 million in short swing profits on the theory that its delegation of investment authority over its portfolio to its registered investment advisor was ineffective. The District Court had cited the overlap in executive personnel between the fund and the advisor as one reason for the ineffectiveness of the delegation as well Second Circuit case law holding internal delegations within a limited partnership ineffective. In its precedential decision, the Second Circuit made clear the delegation from the hedge fund to its investment advisor would be effective so long as the fund and advisor were not under the common control of a single person or entity and limited the scope of its prior decisions. Thomas Fleming and John Moon represented client Raging Capital Management LLC. [Read the decision here,](#) and analysis in the Harvard Law School Forum on Corporate Governance is [here.](#)

Appellate Division Affirms Preliminary Injunction Granted to Olshan Client Vector Media, LLC

On October 13, 2020, the First Department of the Supreme Court, State of New York, affirmed a preliminary injunction granted to Vector Media to enforce its exclusive contract right to sell and place ads on sightseeing buses. While the underlying trial court decision predated the onset of the Covid-19 pandemic, the First Department rejected defendant's

effort to vacate the underlying order on the argument that the pandemic had rendered performance an impossibility. Brian Katz led the Olshan team. Read the decision [here](#).

Order Rescinding Securities Purchase Agreement on Grounds of Fraud Affirmed

On February 18, 2020, the First Department of the Supreme Court, State of New York, affirmed the trial court's judgment, after an eight-day bench trial, that the corporation in which Olshan's client had invested had falsely represented that its largest shareholder was an affiliate, which would have prevented that shareholder from rapidly selling off its shares causing a substantial drop in stock price and that the misrepresentation had induced Olshan's client to purchase securities in a private placement. The First Department held that the corporation's misrepresentation was material, Olshan's client did not have an adequate remedy at law and that rescission was warranted on grounds of fraudulent inducement. Such relief – the rescission of a stock purchase agreement – is rarely granted. Thomas Fleming and Peter Sartorius represented client Sabby Healthcare Master Fund Ltd. Read the decision [here](#).

Delaware Supreme Court Affirms that Olshan Client Did Not Unfairly Dilute Minority Stockholders

On November 18, 2019, the Delaware Supreme Court upheld the August 2018 ruling by the Delaware Court of Chancery, reached after a five-day trial, that plaintiffs had no standing to bring claims that Olshan's client Glenhill Capital Management LP, former controlling stockholder of furniture company Design Within Reach, Inc. (DWR), had unfairly diluted minority stockholders of DWR prior to its acquisition by Herman Miller, Inc. The Supreme Court also let stand the Chancery Court's decision that the \$170 million merger with Herman Miller Inc. should not be voided due to inadvertent mistakes made by DWR in effecting a reverse split and later conversion of Glenhill's preferred stock into common stock, instead affirming the Court of Chancery's judicial validation of DWR's ratification of the defective acts under 8 Del. C. § 205. Olshan litigation partners Adrienne Ward and Brian Katz represented Glenhill in this matter. The Supreme Court and underlying Court of Chancery decisions are available [here](#), [here](#) and [here](#).

Dismissal of Parent Company of Commercial Tenant Affirmed by Second Department

On October 23, 2019, the Second Department of the Supreme Court, State of New York, affirmed the trial court's dismissal of a case brought by a commercial landlord against Jennifer Convertibles, Inc., the parent of the tenant. The trial court had held that the landlord failed to allege that the parent company had used its domination of the tenant to breach the commercial lease, as required to pierce the corporate veil. The Olshan team included Michael Fox and Joseph Weiner. Read the decision [here](#).

Olshan Secures Appellate Victory for Client to Enforce International Loan Agreement

On June 27, 2019, the First Department of the Supreme Court, State of New York, unanimously reversed the trial court and entered judgment in favor of Olshan's clients to enforce an \$8 million loan agreement and accompanying personal and corporate guarantees. Olshan's clients, the lender, had sued after the borrowers and guarantors defaulted on their obligations. The defendants responded with counterclaims to set aside the transaction claiming fraud and other wrongs. After an eight-day bench trial, the trial court found in favor of the defendants and rescinded the loan agreement and guarantees. Olshan appealed and obtained a stay of the rescission order. In reversing the judgment, the First Department took the unusual step of making its own fact-finding from the trial record to embrace Olshan's arguments and rejected the defendants' defenses, including that they had no obligation to read the agreements they signed, found no breaches of fiduciary duties or fraud occurred, and even had such misconduct occurred, the lender should not suffer any consequences. Olshan Litigation partner Thomas Fleming led the team. Read the decision [here](#).

Third Circuit Affirms that Litigation Funding Agreements Are Not Usurious

On February 27, 2018, the U.S. Court of Appeals for the Third Circuit affirmed a District Court judgment in favor of Olshan clients Fast Trak Investment Company, LLC and RJC Funding, LLC. The three-member panel rejected defendant's attempts to invalidate a series of litigation funding agreements executed in 2013 and 2014 on the grounds that such agreements were allegedly usurious. Also at issue was the calculation of damages under the agreements, which included increases in the repayment amount up through the date of the District Court's judgment. The Third Circuit affirmed the decision of the District Court on all counts, finding the litigation funding agreements valid and enforceable and affirming the damages award. The Olshan litigation team was led by Thomas Fleming. Read the decision [here](#).

Olshan Wins Appeal for USPA as Second Circuit Vacates Finding of Contempt

On May 13, 2015, the U.S. Court of Appeals for the Second Circuit ruled that Olshan client United States Polo Association could not be held in contempt for violating a court order that banned the use of a "Double Horsemen" trademark on fragrance products by selling sunglasses with that mark. The decision reversed a 2012 District Court ruling, with the Second Circuit stating that it was wrong to conclude that banning the trademark on fragrance products meant that it cannot be used on other products like sunglasses. The dispute between the USPA and Ralph Lauren had gone on for more than three decades and the validity of USPA's Double Horsemen marks had been litigated and upheld repeatedly. Kyle Bisceglie and Steven Gursky represented the USPA. Read the decision [here](#).

NEWS & INSIGHTS**NEWS**[08.14.2023 | Article](#)

Kenneth Silverman and Brian Katz Publish Article in Securities Regulation Law Journal on SEC Rulemaking and Significant Litigation for Q1 2023

[06.01.2023 | Accolade | *Nine Firm Lawyers Recognized for Their Leadership*](#)

Olshan Named a Leading Law Firm in Shareholder Activism, Litigation, and Real Estate in Chambers 2023 USA Guide

[06.15.2022 | Firm News](#)

Olshan Secures Affirmance of Consumer Class-Action Dismissal in New Jersey's Appellate Division

[06.01.2022 | Firm News](#)

Appellate Court Grants Unanimous Decision on Behalf of Olshan Client

PUBLICATIONS[03.15.2023 | Article | *Bloomberg Law*](#)

How to Obtain Discovery in the US for Use in Foreign Litigation

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