New York Law Journal

Is Standing Jurisdictional to Be Raised First Time on Appeal? Part I

This article argues that the most recent pronouncements from the Court of Appeals advance the conclusion that standing is jurisdictional, albeit, plainly, not subject matter, may not be waived, and may be raised for the first time on appeal.

By **Elliott Scheinberg** | July 06, 2018

Elliott Scheinberg

This two-part article examines the troublesome issue of whether standing (a) goes to subject matter jurisdiction; (b) is jurisdictional, or has a jurisdictional effect sufficient to be properly raised for the first time on appeal, including sua sponte; or (c) may be waived by inaction of a party, thereby nonjurisdictional.

Plainly, a successful timely challenge to standing neutralizes the would-be plaintiff. The inconsistent case law at all appellate levels has made this issue arduous and unpredictable. This article argues that the most recent pronouncements from the Court of

Appeals advance the conclusion that standing is jurisdictional, albeit, plainly, not subject matter, may not be waived, and may be raised for the first time on appeal.

Part I begins with a synopsis of the epicenter of appellate review, the doctrine of preservation, also subject matter jurisdiction, and the inconsistent treatment of standing in the First Department. Part II continues with: (a) the Second Department's treatment of this issue; (b) the inconsistent decisions in the Third Department; and (c) the interrelationship between aggrievement, jurisdiction, justiciability and genuine controversy, as more recently set forth in case law from the Court of Appeals.

Preservation

"Fundamentally, the doctrine of preservation mandates that an issue is preserved for appellate review, and thus is available as a basis for reversal or modification of an order or judgment, only if it was first raised in the nisi prius court," as in *Sam v. Town of Rotterdam*, 248 A.D.2d 850 (3rd Dept 1998). In *Rentways v. O'Neill Milk & Cream*, 308 N.Y. 342 (1955), the Court of Appeals underscored the oft-cited principle:

> It is quite true that an appellate court should not, and will not, consider different theories or new questions, if proof might have been offered to refute or overcome them had they been presented at the trial.

Although the Court of Appeals emphasized that "the requirement of preservation is not simply a meaningless technical barrier to review" (*Wilson v. Galicia Contracting & Restoration*, 10 NY3d 827 (2008)), the court, in its landmark decision, *Telaro v. Telaro*, 25 N.Y.2d 433 (1969), nevertheless, repeated an exception to the principle in *Rentways*:

> Thus, it has been said: 'if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.'

Decisional authority continues to evolve exceptions to the rule of preservation, thereby

making them proper for consideration first time on appeal. The most commonly known, and by no means exhaustive, are legal arguments, questions of law (*People v. Knowles*, 88 NY2d 763 (1996)); statutory interpretation (*People v. Newman*, 32 N.Y.2d 379 (1973)); legislative intent and construction (*American Sugar Refining Co. of New York v. Waterfront Commission of New York Harbor*, 55 N.Y.2d 11 (1982)); and statutory applicability (*In re Will of Schuyler*, 133 AD3d 1160 (3d Dept. 2015)). There are also many issues (beyond the scope and spatial limitations of this analysis) where case law has allowed and disallowed the same issue first time on appeal.

Whether a party has sustained the right to seek relief should therefore be a proper inquiry even first time on appeal.

Standing Is a Threshold Issue

Standing is a procedural matter. (See *In re Estate of Palma*, 40 AD3d 1157 (3d Dept 2007).) "The standing analysis is, at its foundation, aimed at advancing the judiciary's self-imposed policy of restraint, which precludes the issuance of advisory opinions," according to *Community Board 7 of Borough of Manhattan v. Schaffer*, 84 NY2d 148 (1994).

> "The various tests that have been devised to determine standing are designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome so as to 'cast[ ] the dispute in a form traditionally capable of judicial resolution,'" Community Board 7 of Borough of Manhattan, quoting *Society of Plastics Industry v. County of Suffolk*, 77 NY2d 761 (1991)).

In *Saratoga County Chamber of Commerce v. Pataki*, 100 NY2d 801, 812 (2003), the Court of Appeals underscored the status of standing as "a threshold issue" "critical to the proper functioning of the judicial system":

> It is a threshold issue. If standing is denied, the pathway to the courthouse is blocked. ... The rules governing standing help courts separate the tangible from the abstract or speculative injury, and the

> genuinely aggrieved from the judicial dilettante or amorphous claimant.

In *Society of Plastics Industry v. County of Suffolk*, 77 NY2d 761 (1991), the court had previously emphasized that "standing is a threshold determination, resting in part on policy considerations," repeated again in *Association for a Better Long Island v. New York State Department of Environmental Conservation*, 23 NY3d 1, 6 (2014).

Parenthetically, it merits attention that "standing and capacity to sue are related, distinguishable, legal concepts," as in *Wells Fargo Bank Minnesota, National Association v. Mastropaolo*, 42 AD3d 239 (2d Dept 2007), citing *Silver v. Pataki*, 96 N.Y.2d 532 (2001). While the First Department distinguished the concepts, in *In re Part 60 RMBS Put-Back Litigation*, 155 AD3d 482 (1st Dept 2017), it noted that the terms are used interchangeably:

> "Capacity requires an inquiry into the litigant's status, i.e., its 'power to appear and bring its grievance before the court' (*Community Bd. 7 of Borough of Manhattan v. Schaffer*, supra at 155 ...), while standing requires an inquiry into whether the litigant has 'an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request.' ... While capacity to sue and standing are different legal concepts, they have been used interchangeably."

"Lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense," according to *Security Pacific National Bank v. Evans*, 31 AD3d 278 (1st Dept 2006).

Standing, Subject Matter Jurisdiction

It is settled that a "judgment or order issued without subject matter jurisdiction is void, and that defect may be raised at any time and may not be waived,'" as in *Montella v. Bratton*, 93 N.Y.2d 424 (1999); *Fry v. Village of Tarrytown*, 89 NY2d 714 (1997).

Three decisions from the Court of Appeals have held that a challenge to standing is waived

if not raised as an affirmative defense or by motion to dismiss—*Fossella v. Dinkins*, 66 NY2d 162 (1985); *Dougherty v. City of Rye*, 63 NY2d 989 (1984); *Prudco Realty v. Palermo*, 60 NY2d 656 (1983), thereby ruling that standing is not jurisdictional. Also, *People v. Stith*, 69 N.Y.2d 313 (1987): "The people's argument that defendants lacked standing to contest the lawfulness of the seizure was raised for the first time at the Appellate Division and thus is not preserved for our review."

The First Department: Standing Is Jurisdictional

The First Department has held that standing goes to subject matter jurisdiction and may therefore be raised first time on appeal sua sponte. In *Stark v. Goldberg*, 297 AD2d 203 (1st Dept 2002), citing the U.S. Supreme Court (*Allen v. Wright*, 468 U.S. 737 (1984)) and the Third Department, the First Department ruled:

> "Standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute" ... Therefore, the derivative action is properly subject to sua sponte dismissal despite the lack of any assertion by defendants of an objection to plaintiffs' standing (*Axelrod v. New York State Teachers' Retirement System*, 54 A.D.2d 827 ... (3rd Dept. 1989).)

Similarly, *Murray v. State Liquor Authority*, 139 AD2d 461 (1st Dept 1988), held that "a party's standing constitutes a question of subject matter jurisdiction." In *People ex rel. Spitzer v. Grasso*, 54 AD3d 180 (1st Dept 2008), the First Department, again, emphasized that "[standing] goes to the very power of the court to act." (In *Uhlfelder v. Weinshall*, 47 AD3d 169 (1st Dept 2007), the First Department affirmed standing sua sponte because it "is central to justiciability.")

Consistent with these cases, the First Department has also held that standing is a question of law (*People v. Knowles*, 88 NY2d 763 (1996)), which may be raised first time on appeal; also *Fleischer v. New York State Liquor Authority*, 103 A.D.3d 581 (1st Dept 2013); *Delgado v. New York City Board of Education,* 272 A.D.2d 207 (1st Dept 2000), lv. denied 95 N.Y.2d 768 (2000).

The First Department: Standing Is Not Jurisdictional

The foregoing notwithstanding, the First Department has also held that standing does not go to subject matter jurisdiction and, concomitantly, may not be raised first time on appeal:

Mortgage Electronic Registration Systems v. Gifford, 133 AD3d 429 [1st Dept 2015]:

> "Whether the action is being pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it" ... The Supreme Court is a court of general jurisdiction, and indisputably has the power to entertain mortgage foreclosure actions, including "issues regarding the defense of lack of capacity or standing and waiver, had those issues been timely raised."

Security Pacific National Bank v. Evans, 31 AD3d 278 (1st Dept 2006), appeal dismissed, 8 N.Y.3d 837 (2007), a sharply divided court held:

> We cannot agree with [the] conclusion that a lack of standing divests the court of subject matter jurisdiction over the action. "The question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it" (*Matter of Fry*, 89 N.Y.2d at 718 ...). Because New York's Supreme Court "is a court of original, unlimited and unqualified jurisdiction" (*Kagen v. Kagen*, 21 N.Y.2d 532, 537 ... (1968)), it is competent to entertain all causes of action, including mortgage foreclosure actions. The Court of Appeals and lower appellate courts [] have consistently held that pursuant to CPLR 3211(e), the failure to raise the defense of lack of standing in a motion to dismiss or answer results in a waiver of such defense.

Part II examines: (a) the Second Department's treatment of this issue; (b) the inconsistent decisions in the Third Department; and (c) the interrelationship between aggrievement,

jurisdiction, justiciability and genuine controversy, as more recently set forth in case law from the Court of Appeals.

Elliott Scheinberg *is a member of New York State Bar Association committee on courts of appellate jurisdiction. He is the author of "Contract Doctrine and Marital Agreements in New York," NYSBA, (3d ed. 2016). He is also a fellow of the American Academy of Matrimonial Lawyers.*

New York Law Journal

Is Standing Jurisdictional to Be Raised First Time on Appeal?—Part II

Part I, yesterday, began the analysis of whether standing has a jurisdictional impact by examining the epicenter of appellate review, the doctrine of preservation, standing, subject matter jurisdiction, and the treatment of standing in the First Department. Part II continues the analysis.

By **Elliott Scheinberg** | July 09, 2018

Part I, yesterday, began the analysis of whether standing has a jurisdictional impact by examining the epicenter of appellate review, the doctrine of preservation, standing, subject matter jurisdiction, and the treatment of standing in the First Department. Part II continues the analysis in the other courts.

Elliott Scheinberg

Second Department

In *Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo*, 42 AD3d 239 [2d Dept 2007], a mortgage foreclosure action, the Second

Department held that lack of standing to commence an action is a defense that is waived if not raised in an answer, or in a pre-answer motion to dismiss the complaint, ergo nonjurisdictional. *Mastropaolo*, in a lengthy analysis, stated that the First and Third Department rulings that standing goes to subject matter jurisdiction rendered this issue "unsettled":

> The reasoning underlying [the First and Third Department] decisions is that where there is no aggrieved party, there is no genuine controversy, and where there is no genuine controversy, there is no subject matter jurisdiction. These decisions cannot be reconciled with the Court of Appeals authority cited above. Moreover, they confuse a plaintiff's right to recovery with the court's power to hear the case. A court lacks subject matter jurisdiction when it lacks the competence to adjudicate a particular kind of controversy in the first place. As the Court of Appeals has observed, "[t]he question of subject matter jurisdiction is a question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it" (Fry v. Village of Tarrytown, 89 N.Y.2d 714 ...). Whether the action is pursued by the proper party is an issue separate from the subject matter of the action or proceeding, and does not affect the court's power to entertain the case before it.

Mastropaolo quoted the Court of Appeals' lament, in *Lacks v. Lacks*, 41 N.Y.2d 71 [1976], over the "elastic" usage of the term "jurisdiction," citing the residence requirement in Domestic Relations Law Section 230:

> "Jurisdiction is a word of elastic, diverse, and disparate meanings. A Statement that a court lacks 'jurisdiction' to decide a case may, in reality, mean that elements of a cause of action are absent. Similarly, questions of mootness and standing of parties may be characterized as raising questions of subject matter jurisdiction. But these are not the kinds of judicial infirmities to which CPLR 5015 (subd. [a], par. 4) [providing for relief from a judgment or order] is addressed. That provision is designed to preserve objections so fundamental to the power of adjudication of a court that they survive even a final judgment or order.In Thrasher v. United States Liab. Ins. Co., 19 N.Y.2d 159

> ... this Court, in discussing subject matter jurisdiction, drew a clear distinction between a court's competence to entertain an action and its power to render a judgment on the merits. Absence of competence to entertain an action deprives the court of 'subject matter jurisdiction'; absence of power to reach the merits does not" (Lacks, at 74–75 ...). The Supreme Court "is a court of general jurisdiction, and is competent to entertain all causes of action [] unless its jurisdiction has been specifically proscribed" (Thrasher ... at 166).

In *Manhattan Telecom. Corp. v. H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013], the court, referenced *Lacks* only to the extent of correcting the "loose" use of "jurisdiction" when applied to "elements of a cause of action [that] are absent": "[I]t is necessary to understand ["jurisdiction"] in its strict, narrow sense. So understood, it refers to objections that are 'fundamental to the power of adjudication of a court.'"

Justice Alan Scheinkman, Practice Commentaries, C230:1, explains that the ruling in *Lacks* stemmed from "confusion [that] crept in as a result of early holdings that construed DRL § 230 as being jurisdictional in nature. The theory [] was that, since jurisdiction in matrimonial actions is limited to that conferred by statute, a failure to meet the statutory residence requirements divested the court of subject matter jurisdiction." Section 230 was imposed as a policy precaution "to prevent the courts [] from becoming 'divorce mills'" when the grounds for divorce were liberalized. (*Lacks*, 74.) Standing is entirely irrelevant to this concern.

The Second Department continues to hold that "A party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint by the court." *HSBC Bank USA, N.A. v. Taher*, 104 AD3d 815 [2d Dept 2013]; *Davis v. Delena*, 70 NYS3d 82, 83, 70 N.Y.S.3d 82 [2d Dept 2018].

Critically, the foregoing notwithstanding, in JP Morgan Chase Bank, N.A. v. Atedgi, 2018 NY Slip Op 04315 [2d Dept 2018], the Second Department very recently held:

> The appellants' contention that the plaintiff failed to establish, prima facie, that it has

standing to commence the action because it failed to demonstrate that it was the holder of the note and mortgage at the time of the commencement of the action is not improperly raised for the first time on appeal.

The Third Department

The Third Department, like the First Department, has held that standing is and is not waivable: Standing may be waived and does not go to subject matter jurisdiction: *Plainview-Old Bethpage Congress of Teachers v. New York State Health Ins. Plan*, 133 AD3d 1140 [3d Dept 2015]; *Castillo v. Luke*, 63 AD3d 1222 [3d Dept 2009] (mother now claims that the father did not have standing to seek visitation); *CNB Realty v. Stone Cast, Inc.*, 127 AD3d 1438 [3d Dept 2015] (foreclosure).

Citing the U.S. Supreme Court (*Allen v. Wright*, 468 U.S. 737 [1984]) and other authority, earlier Third Department decisions held that "standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute" which may be raised sua sponte first time on appeal: *Axelrod v. New York State Teachers' Retirement Sys.*, 154 AD2d 827 [3d Dept 1989]; *Battenkill Ass'n of Concerned Citizens v. Town of Greenwich Planning Bd., Washington County*, 156 AD2d 863 [3d Dept 1989]; *Eaton Assoc., Inc. v Egan*, 142 AD2d 330 [3d Dept 1988].

Aggrievement Is Jurisdictional

In *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 NY2d 801, 812 [2003], the court explained standing in language of aggrievement: "The rules governing standing help courts separate ... the genuinely aggrieved from the judicial dilettante or amorphous claimant."

Settled law at all levels recognizes aggrievement as jurisdictional: *Leeds v. Leeds*, 60 NY2d 641 [1983] ("On the Court's own motion, appeal dismissed upon the ground that appellant is not a party aggrieved (CPLR 5511).)"); *Mixon v. TBV, Inc.*, 76 A.D.3d 144 [2d Dept. 2010] ("The procedural posture of the case presents a threshold issue concerning an essential

element of appellate jurisdiction, i.e., the question of aggrievement."); *Klinge v. Ithaca College*, 235 A.D.2d 724 [3d Dept 1997] ("The requirement that an appellant be an aggrieved party is jurisdictional and subject to the court's threshold review, even if the issue has not been raised by the respondent."); *Dolomite Products Co., Inc. v. Town of Ballston*, 151 AD3d 1328 [3d Dept 2017] ("Aggrievement is a central but, more importantly, a necessary component to invoke this Court's jurisdiction ... [I]f a party is not aggrieved, then this Court does not have jurisdiction to entertain the appeal.")

Aggrievement, as a jurisdictional principle, should be deemed to subsume a would-be party's ab initio standing to seek the relief from which he, she or they eventually may appeal. It is difficult to comprehend that a party may seek an appeal from a denial of relief that the party had no right to seek and was not entitled to in the first place. [*Telaro.*]

Genuine Controversy, Advisory Opinions Are Jurisdictional

Mastropaolo's challenge to the First and Third Departments regarding "genuine controversy" is refuted by decisions from the Court of Appeals which predate *Mastropaolo*, that genuine controversy is a component of advisory opinions, which is, in turn, a component of subject matter jurisdiction (syllogism). Advisory opinions contravene "the *jurisdiction* of this Court [which] extends only to live (genuine) controversies ... We are thus prohibited from giving advisory opinions or ruling on 'academic, hypothetical, moot, or otherwise abstract questions.' " *Saratoga Count* [2003]. In *Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 NY2d 148 [1994], Part I, the court tied standing to impermissible advisory opinions: "[T]he standing analysis is, at its foundation, aimed at advancing the judiciary's self-imposed policy of restraint, which precludes the issuance of advisory opinions", which per *Saratoga*, is jurisdictional.

Socy. of Plastics stated: "The requirement of injury in fact ['aggrievement'] for standing purposes is closely aligned with our policy not to render advisory opinions ... Injury in fact thus serves to define the proper role of the judiciary."

"[T]he jurisdiction of this Court extends only to live controversies ... [, and w]e are thus prohibited from giving advisory opinions ...", *Harris v. Seneca Promotions, Inc.*, 149 AD3d 1508, 1509 [4th Dept 2017], rearg denied, 151 AD3d 1968 [4th Dept 2017], citing *Saratoga.* Advisory opinions goes to subject matter jurisdiction. *Monroe County Pub. School Districts v. Zyra*, 51 AD3d 125, 129 [4th Dept 2008].

Standing, Justiciability Implicates Jurisdiction

In *New York State Inspection, Sec. and Law Enf't Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 NY2d 233 [1984], the court explained justiciability:

> Justiciability is the generic term of art which encompasses discrete, subsidiary concepts including, *inter alia*, political questions, ripeness and *advisory opinions*. At the heart of the justification for the doctrine of justiciability lies the jurisprudential canon that the power of the judicial branch may only be exercised in a manner consistent with the "judicial function" (emphasis provided).

In *Community Board 7* [1994], the court held: "Standing is an element of the larger question of 'justiciability.'" "Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation." *Dairylea Coop., Inc. v. Walkley*, 38 NY2d 6 [1975], also *Socy. of Plastics*. "The 'justiciable controversy' upon which a declaratory judgment may be rendered requires [] that the plaintiffs in such an action have an interest sufficient to constitute standing to maintain the action ..." *Am. Ins. Ass'n v. Chu*, 64 NY2d 379 [1985].

S*ocy. of Plastics* held that "[s]tanding is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria ... "—the court quotes this language in *Assn. for a Better Long Is., Inc. v. New York State Dept. of Envtl. Conservation*, 23 NY3d 1 [2014]; also, *Roberts v. Health and Hosps. Corp.*, 87 AD3d 311 [1st Dept 2011]; *Eastview Properties, Inc. v. Town of Chester Planning Bd.*, 138 AD3d 838 [2d Dept 2016]; and *Broadway-Flushing Homeowners' Ass'n, Inc. v. Dilluvio*, 97 AD3d 614 [2d

Dept 2012].

In *Uhlfelder v. Weinshall*, 47 AD3d 169 [1st Dept 2007], the First Department, citing *Socy. of Plastics*, affirmed standing sua sponte because it is "the core requirement that a court can act only when the rights of the party requesting relief are affected ... [it] is central to justiciability."

Citing *New York State Inspection*, the Third Department held that "justiciability [is a] matter[] pertaining to subject matter jurisdiction which can be raised at any time." *New York Blue Line Council, Inc. v. Adirondack Park Agency*, 86 AD3d 756, n. 4 [3d Dept 2011]; *333 Cherry LLC v. N. Resorts, Inc.*, 66 AD3d 1176, n. 5 [3d Dept 2009]; also *Citizen Review Bd. of City of Syracuse v. Syracuse Police Dept.*, 150 AD3d 121 [4th Dept 2017], citing *Community Board 7 of Borough of Manhattan.*

Conclusion

Fundamentally, a party's standing has no bearing on a court's subject matter competence. However, power over the matter alone is insufficient. Subject matter jurisdiction and standing combine two discrete and conjunctive jurisdictional probes, each vital to the court's ultimate adjudicatory power over the dispute. It is critical to be mindful of the court's jurisprudential admonition in *Telaro v. Telaro,* 25 N.Y.2d 433 [1969]: "No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court." The cautionary language is broadly worded and not restrictively, it must subsume a party's threshold right to seek relief.

The inconsistent case law is "unsettling." The Court of Appeals' recent pronouncements on standing as "the threshold issue" [*Socy. of Plastics; Saratoga County Chamber of Commerce; Assn. for a Better Long Is.*], as "critical to the proper functioning of the judicial system" [*Saratoga County Chamber of Commerce*] and going to justiciability [*Community Board 7*] demonstrate a forward-thinking approach toward standing. There has been no elastic use of the term jurisdiction in these cases. The combination of these cases outweigh *Fossella v. Dinkins*, 66 NY2d 162 [1985]; *Dougherty v. City of Rye*, 63 NY2d 989 [1984]; and

Prudco Realty Corp. v. Palermo, 60 NY2d 656 [1983], which held standing is waivable. Standing should thus be permissible first time on appeal.

Elliott Scheinberg is a member of NYSBA Committee on Courts of Appellate Jurisdiction. He is the author of Contract Doctrine and Marital Agreements in New York, NYSBA, (3d ed. 2016). He is also a Fellow of the American Academy of Matrimonial Lawyers.