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SECOND CIRCUIT REVIEW

Expert Analysis

Court Rejects Attempts by Police Unions to Intervene in Stop-and-Frisk Case

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This month, we discuss *Floyd v. City of New York*,[1] in which the U.S. Court of Appeals for the Second Circuit affirmed a district court order denying a motion by a group of police unions to intervene in New York City's "stop-and-frisk" settlement. The panel, which included Second Circuit Judges John M. Walker Jr., José A. Cabranes and Barrington D. Parker, issued a per curium opinion resolving the appeals in both *Floyd* and *Ligon v. City of New York*, a class action challenging New York City's use of stop-and-frisk tactics in areas near public housing buildings. The panel affirmed the district court's order, denied motions by the police unions to intervene in the related appeals, granted the city's motion for voluntary dismissal of the appeals with prejudice, and remanded the case for further proceedings.

Prior Proceedings

In 1968, the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), approved the police tactic of stopping and frisking people in the absence of probable cause, so long as the officer has a reasonable suspicion of criminal activity. Over the years, this lower threshold for stop-and-frisks has been highly controversial, with many asserting that the disproportionate demographic effect of stop-and-frisk procedures reflects racial bias. In 2003, the City settled *Daniels v. City of New York*, 99 Civ. 1695 (SAS), E.C.F. No. 153 (S.D.N.Y. 1999), a putative class action alleging that a unit in the New York City Police Department engaged in a pattern of race-based stop-and-frisks. The city agreed to amend certain of its stop-and-frisk practices and training, and to implement community outreachprograms, for a five-year period.

In 2008, shortly after the earlier settlement agreement expired, the Floyd plaintiffs filed a complaint alleging that "the City had a policy, custom, and practice of suspicionless and race-based stops-and-frisks."[2] After a lengthy bench trial, the district court, Judge Shira Scheindlin, issued a 198-page opinion in which she found the city liable for violating the Floyd plaintiffs' Fourth and Fourteenth Amendment rights. Scheindlin found that race is a significant factor in determining how likely a person is to be stopped or arrested, and that the city was on notice of this fact as early as 1999. Scheindlin found that not only did the city fail to remedy the situation, but some officers were even punished if they failed to stop a sufficient number of people per month.

Based on these and other factual findings, Scheindlin determined that the city "acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks."[3] On the same day, the district court issued an order imposing various injunctive remedies to address the city's stop-and-frisk practices and procedures.

Within a month of the order, five police unions moved to intervene in the district court and filed notices of appeal. The city also appealed the district court's orders. In response to the city's motion to expedite its appeal, the Second Circuit stayed the district court orders and took the unusual step of ordering that the case be assigned to a different district judge.

While the city's appeal was pending, Bill de Blasio was elected Mayor of New York City. Within a few months of Mayor de Blasio taking office, the parties reached a settlement, pursuant to which the city agreed to comply substantially with the injunctive relief ordered by Judge Scheindlin. In turn, Judge Analisa Torres—to whom the case was reassigned on remand—modified the injunctive remedies to reflect the terms of the parties' agreement. Torres also denied the police unions' motions to intervene, holding that the motions were untimely and that the unions lacked a legally protectable interest in the action.

> The Second Circuit held that Judge Torres did not abuse her discretion in finding the police unions failed to demonstrate that they had a legally protected interest in 'Floyd.'

The Second Circuit's Decision

Rule 24 of the Federal Rules of Civil Procedure provides for intervention by right and by permission of the court.[4] The Second Circuit requires litigants seeking to intervene to "(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action."[5] The Second Circuit held that Judge Torres did not abuse her discretion in finding that the police unions failed to meet the timeliness requirement or demonstrate that they had a legally protected interest in *Floyd*.

Timeliness. The panel emphasized that the timeliness analysis for purposes of motions

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to intervene is highly dependent on the facts of the particular case. District judges have great discretion to evaluate this "flexible" requirement. The Second Circuit previously has identified factors that district courts should consider, including how long the would-be intervenor knew or should have known of its interest in the case, balancing the prejudice to the parties due to the intervenor's delay against the prejudice to the intervenor's interests if the motion is denied, and any unusual circumstances.[6]

The Second Circuit held that the district court did not abuse its discretion in finding that the police unions' motions to intervene were untimely. In so holding, the court seems to have been particularly influenced by two factors: the public nature of the stop-and-frisk litigation and the fundamentally political nature of the city's decision to settle the case.

The Second Circuit rejected the unions' argument that they were unaware of their interest in the case until Judge Scheindlin granted "sweeping and disruptive" injunctive remedies. The panel noted that the Floyd litigation had been pending for years, and numerous public filings reflected the scope of the issues in the case and the potential remedies. The panel also noted that the proceedings had received "intense media scrutiny," which should have put the unions on notice of the potential ramifications of the case.

Nor did the Second Circuit credit the police unions' argument that their members should be able to rely on the city—their employer—to protect their interests. The police unions asserted that they first learned that the city would not protect their interests when newly elected Mayor de Blasio announced that the city would seek a settlement rather than pursue its appeal. The court, however, reasoned that there is an "inherent conflict" between the interests of a municipal government and those of its unionized employees. Because of this conflict, the unions should not have been able to rely on the city to protect their members' interests, and certainly should not have done so after the district court dismissed the claims against the individual union member defendants. Therefore, the court held, "in the particular and highly unusual facts and circumstances presented" in this case, the police unions should have known that the city was not necessarily protecting the unions' interests.[7]

The court reasoned that allowing intervention in these circumstances would prejudice the existing parties to the action.[8] In light of the parties' settlement agreement and the district court's order amending the injunctive remedies, the unions essentially sought post-judgment intervention. Such intervention generally is disfavored, and the panel expressed "serious reservations about the prospect of allowing a public-sector union to encroach upon a duly-elected government's discretion to settle a dispute against it."[9]

Interest in the Action. Intervention is not permitted unless the applicants have a legally protectable interest in the litigation—one that is both direct and substantial. In *Floyd*, the Second Circuit affirmed Judge Torres' decision rejecting both interests asserted by the unions: (1) restoring their members' reputations, and (2) protecting the unions' collective bargaining rights.

The police unions invoked Judge Scheindlin's findings of fact and law about the unconstitutionality and race-based nature of certain stop-and-frisk interactions to argue that they had a legally protectable interest in their members' reputations. The panel rejected this argument, noting that the record was devoid of evidence, aside from the unions' self-serving assertions, that any of their members suffered any particular harms from Scheindlin's orders.

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In a footnote, the panel distinguished *United States v. City of Los Angeles*, in which the U.S. Court of Appeals for the Ninth Circuit held that a police union had a legally protectable interest in the merits of a case in which the Los Angeles Police Department had agreed to the entry of a consent decree enjoining certain practices.[10] Noting that *City of Los Angeles* is "a decision by a sister Circuit that is not binding" in the Second Circuit, the panel distinguished the case from *Floyd* on the basis that the consent decree in that case had not yet been entered when the court addressed the Los Angeles union's motion to intervene, and officers remained subject to individual liability in that case.

In so noting, the court rejected the unions' position. The unions asserted that in both cases, the cities agreed to settlements that included injunctive relief before the unions moved to intervene. In addition, presumably, any individual officer who faced liability in the Los Angeles case had a strong interest in defending himself and protecting his interests. Furthermore, the Los Angeles union was free to provide any affected individual officer with the resources necessary to pursue those interests on his own behalf. Nonetheless, the Second Circuit held that the "interests of individual police officers, and the police force generally…were far more direct and substantial than the reputational interest asserted by the unions" in *Floyd*.

The Second Circuit also upheld the district court's finding that the police unions' collective bargaining rights were too remote from the issues in *Floyd* to be legally protectable. In this regard, the panel held that the injunctive stop-and-frisk remedies did not directly impact any issues that are properly the subject of collective bargaining.

Voluntary Dismissal. In the final substantive portion of its opinion, the panel granted the city's motion for voluntary dismissal, emphasizing its discomfort with the district court's previous orders. The panel described the district court's findings and the injunctive remedies as "complex and controversial" and emphasized that the "liability determinations are not part of the settlement."[11] The panel also clarified that the injunctive remedies are not permanent and, indeed, may need to be revisited to account for future events.

Conclusion

In *Floyd*, the Second Circuit repeatedly emphasized its discomfort with the district court's findings and injunctive remedies, and with the police unions' attempts to undermine the policy decisions of a newly elected mayoral administration. In light of the fact-intensive nature of motions to intervene, this decision likely does not signal a relaxation of the standard for intervention. At a minimum, however, the case represents the culmination, at least for now, of a years-long struggle over New York City's approach to some of its most visible law enforcement policies—policies that continue to provoke great public attention and debate.

1. *Floyd v. City of New York*, — F.3d —, 2014 WL 5486552 (Oct. 31, 2014).
2. *Floyd v. City of New York*, — F.R.D. —, 2014 WL 3765729, *3 (S.D.N.Y. July 30, 2014).
3. *Floyd v. City of New York*, 959 F.Supp.2d 540, 562 (S.D.N.Y. 2013).
4. Fed. R. Civ. P. 24(a), (b).
5. *R Best Produce v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 241 (2d Cir. 2006).
6. See *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 390 (2d Cir. 2006).
7. *Floyd*, 2014 WL 5486552, at *6.
8. Although previous cases have suggested that the timeliness of the motion should be considered independently of the relative prejudice to the parties, the two issues are highly interconnected and the court appears to have considered them together in *Floyd*.
9. *Floyd*, 2014 WL 5486552, at *6.
10. *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002).
11. *Floyd*, 2014 WL 5486552, at *8.