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The Second Circuit in the Supreme Court

With the U.S. Supreme Court beginning its 2008 term next week, we conduct our 24th annual review of the U.S. Court of Appeals for the Second Circuit's performance in the Supreme Court, and briefly discuss the Second Circuit decisions that the Court has scheduled for review during the new term.

In 2007, the Second Circuit fared reasonably well in the Supreme Court. As the performance table (Table 1) demonstrates, the Court affirmed over 70 percent of the cases it decided from the Second Circuit, the second highest percentage of affirmance of any circuit court. In total, during its 2007 term, the Supreme Court denied 323 petitions for certiorari to the Second Circuit, dismissed one, granted 20, and summarily vacated and remanded seven, pursuant to decisions issued while those cases were pending appeal.

Overall, the Court issued 57 decisions reviewing opinions by the courts of appeals.[1] The Court reversed or vacated judgments in 35, or, as Table 1 shows, approximately 61 percent of the cases.

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Table 1

Supreme Court October 2007 Term Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or vacated	Affirmed/ reversed in part	% Reversed or vacated
First	2	1	1	0	50
Second	7	5	2	0	29
Third	0	0	0	0	0
Fourth	3	1	2	0	66
Fifth	5	1	4	0	20
Sixth	3	1	2	1	66
Seventh	6	5	1	0	17
Eighth	4	1	3	0	75
Ninth	10	2	8	0	80
Tenth	2	0	2	0	100
Eleventh	6	2	4	0	67
D.C.	5	2	3	0	60
Federal	4	1	3	0	75

Source: Martin Flumenbaum and Brad S. Karp

New York Election Law

• ***Constitutionality for Judicial Nominations.*** In *New York State Board of Elections v. López Torres*,[2] the Supreme Court reversed the Second Circuit and upheld the constitutionality of New York's statutory scheme for nominating candidates for the New York Supreme Court, which required that parties select their candidates for the Supreme Court at judicial district conventions composed of delegates elected by party members.

The facts, as recited briefly by the Court, were as follows. Section 6-106 of New York's election law provided that: "Party nominations for the office of justice of the supreme court shall be made by the judicial district convention."[3] Under the current scheme, parties were defined as "any political organization whose candidate for Governor received 50,000 or more votes in the most recent election."[4] Each of New York's 150 assembly districts elects delegates to attend the party's judicial convention for the judicial district in which the assembly district is located.[5] There are 12 judicial districts, and each has its own nominating convention.[6] Individuals may run for the position of delegate by obtaining 500 signatures of enrolled party members residing in the assembly district on a designating petition (or 5 percent of enrolled members, whichever is less)[7] within approximately 37 days before the scheduled delegate election, known as the delegate primary.[8] Nominees chosen at the party's judicial convention automatically appear on the general-election ballot.[9] Certain other candidates may appear on the ballot if they obtain the requisite amount of signatures.[10]

Candidates for the New York Supreme Court that failed to secure party nominations at their respective judicial district nominating conventions (along with a public interest organization and voters who purported to support the candidates) filed suit challenging New York's election scheme on the grounds that it violated the First Amendment, arguing "that New York's election law burdened the rights of challengers seeking to run against candidates favored by the party leadership, and deprived voters and candidates of their rights to gain access to the ballot and to associate in choosing their party's candidates."[11] The district court found "a clear likelihood that New York State's process for nominating Supreme Court Justices violates the First Amendment rights" of plaintiffs, and issued an injunction. On appeal, the Second Circuit affirmed, holding that "the First Amendment affords candidates and voters a realistic opportunity to participate in the nominating process, and to do so free from burdens that are both severe and unnecessary to further a compelling state interest."[12] Citing New York's extensive regulatory scheme, the court concluded that it presented a severe burden, and that the regime was not narrowly tailored to further a compelling state interest.[13]

In an opinion written by Justice Antonin Scalia, the Supreme Court reversed. The Court rejected the Second Circuit's threshold determination that plaintiffs had a First Amendment Right to what the court termed a "fair shot" at competing in "their parties' candidate-selection process," stating "[t]his contention finds no support in our precedents."[14] Although, as the Court noted, prior cases "acknowledge an individual's associational right [under the First Amendment] to vote in a party primary without undue state-imposed impediment," plaintiffs were not claiming that they had been denied the right to vote in the primary election.[15] Moreover, even if the Court expanded current precedent to include a "right to run," the Court posited that the "requirements of the New York law (a 500-signature petition collected during a 37-day window in advance of the primary) are entirely reasonable."[16] Thus, the Court concluded that the impediment to plaintiffs' ability to run was not state law, but instead "the voters' (and their

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elected delegates) preference for the choices of the party leadership."[17] "None of our cases establishes an individual right to have a 'fair shot' at winning the parties' nomination," the Court reiterated.[18]

Turning to the plaintiffs' contentions concerning the control of party leadership over the election process, the Court stated "To be sure, we have… permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries" but "to say that the State can require this is a far cry from saying that the Constitution demands it."[19] Moreover, the Court admonished any judicial attempt to define a "fair shot," noting that "it is hardly a manageable constitutional question for judges—especially for judges in our legal system, where traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a 'fair shot' at a party nomination."[20] The Court concluded by hypothesizing that "[s]hould the New York Legislature…adopt something closer to the system the Second Circuit invalidated, the question whether *that* provides enough of a fair shot" would be presented.[21]

Turning to respondents "novel and implausible" argument that "the existence of entrenched 'one-party' rule demands that the First Amendment be used to impose additional competition in the nominee-selection process of the parties,"[22] the Court dismissed the claim, noting that "[t]he First Amendment creates an open marketplace where ideas, especially political ideas, may compete without government interference."[23]

Tort Claims

• ***Preemption of State Law Tort Claims Concerning Medical Devices.*** In *Riegel v. Medtronic Inc.*,[24] the Court affirmed the Second Circuit and held that state law tort claims challenging the safety and effectiveness of a medical device given premarket approval by the Food and Drug Administration (FDA) are preempted by the Medical Device Amendments of 1976 (MDA).

Following the failure of certain medical devices in the 1970s, most notably the Dalkon Shield, Congress passed the Medical Device Amendments of 1976, which established a complex regulatory approval process for certain high-risk medical devices before they entered the market.[25] The MDA contained express preemption provisions, which provided: "no State …may establish or continue in effect with respect to device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, or (2) which related to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device" under the MDA.[26]

Following a complication during surgery involving a medical device failure, petitioner and his wife brought suit against the manufacturer of the device alleging various state law claims, including strict liability, breach of implied warranty, negligence and loss of consortium.[27] The district court granted summary judgment in part for Medtronic, finding that the Riegels' common-law claims were preempted.[28] The Second Circuit agreed, noting that "the majority of circuits have held claims regarding [premarket approved] medical devices are…preempted," but expressly stated that "tort claims that are based on a manufacturer's departure from the standards set forth in the device's approved [premarket approval] application…are not preempted."[29]

In another opinion written by Justice Scalia, the Supreme Court affirmed. The MDA, the Court began, expressly preempts only state requirements that are "'different from, or in addition to, any requirement applicable…to the device' under federal law."[30] Distinguishing this case from its prior decision in *Medtronic Inc. v. Lohr*, the Court held that the MDA had established specific requirements for devices subject to the premarket approval process, noting the approval process "requires a device…be made with almost no deviations from the specifications in its approval."[31]

Turning to the second question of the preemption analysis: whether the claims impose requirements that are "different from, or in addition to," those under the MDA, the Court answered the question in the affirmative. Again citing *Lohr*, the Court stated that it adhered to its prior conclusion that "common-law causes of action for negligence and strict liability do impose 'requirements' and would be preempted by federal requirements specific to a medical device."[32] Accordingly, the Court held that the petitioners' claims were preempted by the MDA. It acknowledged, however, that nothing in the MDA prevented a state from "providing a damages remedy for claims premised on a violation of FDA regulation," but declined to address that issue as such claims were not before it on appeal.[33]

In 'N.Y. Bd. of Elections v. López Torres,' the Supreme Court reversed the Second Circuit and upheld N.Y.'s statutory scheme for nominating candidates for the N.Y. Supreme Court, which required that parties select candidates at district conventions composed of delegates elected by party members.

Charges Under the ADEA

In *Federal Express Corp. v. Holowecki*,[34] the Court defined a charge under the Age Discrimination in Employment Act (ADEA) as a filing that "must be reasonably construed as a request for the [Equal Employment Opportunity Commission (EEOC)] to take remedial action to protect the employee's rights or otherwise settle disputes between employer and employee."[35] Based on this definition, the Court affirmed a Second Circuit decision holding that the EEOC's determination that the filing of a Form 283 Intake Questionnaire and detailed affidavit constituted a charge was reasonable.[36]

The ADEA provides that "[n]o civil action be commenced…until 60 days after a charge alleging unlawful discrimination has been filed" with the EEOC.[37] On Dec. 3, 2001, Federal Express Corp. (FedEx) employee Patricia Kennedy filed a Form 283 Intake Questionnaire and detailed affidavit with the EEOC alleging that certain FedEx initiatives violated the ADEA, and subsequently brought a class action under the ADEA in federal court.[38] The district court dismissed the suit, finding that Ms. Kennedy's Intake Questionnaire and affidavit did not constitute a charge, and as such, Ms. Kennedy had not filed her charge with the EEOC at least 60 days before suit.[39] The Second Circuit reversed.[40]

The Court, in an opinion by Justice Anthony Kennedy, affirmed the Second Circuit. Because the ADEA "does not define charge," the Court stated that it should defer to the EEOC's reasonable regulations interpreting the term under *Chevron*,[41] and the agency's "reasonable interpretation of regulations it has put in force" under *Auer*.[42] Turning to the question of what a charge must contain, a point the Court noted on which "the regulations are silent," the Court agreed with the EEOC's interpretation that "the proper test for determining whether a filing is a charge is whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights."[43] After noting some of the inconsistencies in which the EEOC has interpreted a charge, however, the Court suggested that "reasonable arguments can be made that the agency should adopt a standard giving more guidance to filers, making it clear that the request to act must be stated in quite explicit terms," but ultimately concluded that this "is a matter for the agency to decide…."[44] Given this definition, the Court held that the Intake Questionnaire and attached affidavit fit the definition of a charge.[45]

RFOA Defense

• ***Employers' Burden When Raising RFOA Defense in ADEA Actions.*** In *Meacham v. Knolls Atomic Power Laboratory*,[46] the Court reversed the Second Circuit and held that an employer, who defended a disparate-impact claim under the Age Discrimination in Employee Act (ADEA) on the grounds that the employer's action was based on reasonable factors other than age (RFOA), had both the burden to raise the defense and the burden of persuasion.

In *Smith v. City of Jackson*, the Court held that plaintiffs may pursue disparate-impact claims under the ADEA.[47] In so holding, the Court noted that disparate-impact claims are substantially narrower under the ADEA than other discrimination statutes, as the RFOA provision precludes liability "if the adverse impact was attributable to a non-age factor that was 'reasonable.'"[48] The Second Circuit, interpreting the RFOA provision in light of *City of Jackson*, concluded that (1) the RFOA "reasonableness" inquiry essentially replaced the "business necessity test" under the *Wards Cove Packing Co. v. Atonio* burden-shifting framework, and (2) plaintiff bore the burden of persuasion to show the unreasonableness of the employer's actions in connection with the

disparate impact claim.[49]

The Court, in an opinion by Justice David Souter, reversed. The text of the ADEA provides that "[i]t shall not be unlawful for an employer…to take any action otherwise prohibited under the ADEA…where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business (BFOQ), or where the differentiation is based on reasonable factors other than age…"[50]

Previously, the Court noted, it had referred to both the RFOA and BFOQ exemptions as affirmative defenses, and that such exemptions are subject to the "familiar principle that when a proviso…carves an exception out of the body of a statute or contract those who set up such exception must prove it."[51] Setting forth its prior holdings that the BFOQ is an "affirmative defense against claims of disparate treatment"—and citing similar holdings concerning statutory language in the Equal Pay Act of 1963 and Fair Labor Standards Act of 1938—the Court thus concluded "[b]oth [the BFOQ and RFOA provisions] exempt otherwise illegal conduct by reference to a further item of proof, thereby creating a defense for which the burden of persuasion falls on the one who claims its benefits."[52]

The Court then turned to the Second Circuit's conclusions. First, it rejected the Second Circuit's holding that pursuant to the Court's decision in *City of Jackson* the RFOA exemption replaced or modified the business necessity test in ADEA cases, pronouncing that the business necessity test "should have no place in ADEA disparate-impact claims."[53] It then dismissed the Second Circuit's reliance on *Wards Cove* in evaluating the burdens of production and persuasion in the context of the RFOA defense:

> [A]s *Wards Cove* did not purport to construe any statutory defenses under Title VII, only an over-reading of *City of Jackson*, would find lurking in it an assumption that *Wards Cove* has anything to say about statutory defenses in the ADEA (never mind one that Title VII does not have).[54]

In closing, the Court reaffirmed that in order to pursue a disparate impact claim, the plaintiff is required to "isolat[e] and identif[y] the specific employment practices that are allegedly responsible for any observed statistical disparities."[55]

Trusts and Taxes

In *Knight v. Commissioner of Internal Revenue*,[56] the Court held that investment advisory fees incurred by a trust may only be deducted from the trust's fiduciary income tax return to the extent the fees exceed 2 percent of the trust's adjusted gross income because such fees would commonly be incurred by individuals. Under the U.S. Tax Code, trusts, like individuals, are permitted to make certain itemized deductions for various expenses, including investment advisory fees, to the extent those deductions exceed 2 percent of the trust's adjusted gross income (commonly referred to as the "2 percent floor").[57] Trusts, however, are also permitted to deduct "costs which are paid or incurred in connection with the administration of the estate or trust and which would not have been incurred if the property were not held in such trust or estate…."[58]

At issue before the Court was whether investment advisory fees incurred by a trust are fees that "would not have been incurred if the property were held in such trust or estate," or whether such costs must exceed the 2 percent floor in order for the trust to make the deduction. Chief Justice John Roberts, writing for a unanimous Court, held that the proper test for determining whether an expense is one that is unique to trusts, and thus not subject to the 2 percent floor, is whether the expense is one that "it would be uncommon or unusual, or unlikely for such a hypothetical individual to incur."[59] Applying the test to the facts before it, the Court determined that "[i]t is not uncommon or unusual for [a hypothetical individual] to hire an investment adviser," and thus the expenses were not unique to the trust.[60] As such, they were subject to the 2 percent floor.

The 2008 Term

While additional Second Circuit cases will likely be added to its docket during the upcoming months, the Supreme Court is currently scheduled to review at least four Second Circuit decisions during its 2008 Term:

- *14 Penn Plaza LLC v. Pyett*,[61] in which the Court will consider the enforceability of an arbitration clause contained in a collective bargaining agreement, freely negotiated by a union and an employer, which clearly and unmistakably waives the union members' right to a judicial forum for their federal, state and city statutory discrimination claims;
- *Federal Communications Commission (FCC) v. Fox Television Stations Inc.*,[62] in which the Court will consider whether the FCC had a reasonable basis for its determination that the broadcast of isolated vulgar expletives that are not repeated may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language" under 18 U.S.C. §1464;
- *Entergy Corp. v. EPA*,[63] in which the Court will consider the question of "[w]hether §316(b) of the Clean Water Act, 33 U.S.C. 1326(b), authorizes the Environmental Protection Agency (EPA) to compare costs with benefits in determining the 'best technology available for minimizing adverse environmental impact' at cooling water intake structures"; and
- *Ashcroft v. Iqbal*,[64] in which the Court will consider two questions: (1) whether an allegedly conclusory allegation that a high-level cabinet officer or other high-ranking official knew of, condoned or agreed to subject a person to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*; and (2) whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the grounds that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

1. Both *Warner-Lambert Co. LLC v. Kent*, 128 S.Ct. 1168 (2008) and *Bd. of Educ. v. Tom F.*, 128 S.Ct. 1 (2008) were summarily affirmed by an equally divided Court, and, as such, are not discussed in detail in this column.
2. 128 S.Ct. 791 (2008).
3. N.Y. Elec. Law Ann. §6-106 (West 2007).
4. Id. §1-104(3).
5. N.Y. State Law Ann. §1221 (West 2003).
6. N.Y. Elec. Law Ann. §§6-126, 6-158(5).
7. Id. §§6-136(2)(i), (3).
8. Id. §§6-134(4), 6-158(1).
9. Id. §7-104(5).
10. Id. §§6-138, 6-142(2).
11. 128 S.Ct. at 797.
12. *López Torres v. New York State Bd. of Elections*, 462 F.3d 161, 169 (2d Cir. 2006).
13. Id. at 200-01 (citations omitted).
14. 128 S.Ct. at 798.
15. Id. (citation omitted).
16. Id. (citations omitted).
17. Id.
18. Id.
19. Id. at 799.
20. Id.
21. Id. at 800 (emphasis in original).
22. Id.
23. Id. at 801.
24. 128 S.Ct. 999 (2008).
25. Id. at 1003-1005 (citing 21 U.S.C. §360k).
26. 21 U.S.C. §360k(a).
27. 128 S.Ct. at 1005-06.
28. *Riegel v. Medtronic Inc.*, 451 F.3d 104, 107 (2d Cir. 2006).
29. Id. at 106.
30. 128 S.Ct. at 1006 (citing 21 U.S.C. §360k(a)(1)).
31. Id. at 1006-7 (citing *Lohr*, 116 S.Ct. 2240 (1996)).
32. Id. at 1008 (citing *Lohr*, 116 S.Ct. at 2240).
33. Id. at 1011.
34. 128 S.Ct. 1147 (2008).
35. Id. at 1158.
36. Id. at 1159-1160.
37. 29 U.S.C. §626(d).
38. 128 S.Ct. at 1150, 1153.
39. Id.
40. *Holowecki v. Federal Exp. Corp.*, 440 F.3d 558 (2d Cir. 2006).
41. 128 S.Ct. at 1154 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 104 S.Ct. 2778 (1984)).
42. Id. (citing *Auer v. Robbins*, 117 S.Ct. 905 (1997) (holding that the court should accept the agency's position unless it is "plainly erroneous or inconsistent with the regulation")).
43. Id. (citation omitted).
44. Id. at 1158.
45. Id. at 1159-60.
46. 128 S.Ct. 2395 (2008).
47. 125 S.Ct. 1536, 1540 (2005).
48. Id. at 1540-41, 1544.
49. *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134, 141-42, 144 (citing *Wards Cove*, 109 S.Ct. 2115 (1989)).
50. 29 U.S.C. §623(f)(1).
51. 128 S.Ct. at 2400 (quotation and citations omitted).
52. Id. (quotation and citation omitted).
53. Id.
54. Id.
55. Id. at 2405-06 (citation omitted).
56. 128 S.Ct. 782 (2008).
57. 26 U.S.C. §67(a), (e).
58. Id. §67(e)(1).
59. 128 S.Ct. at 790.
60. Id.
61. 128 S.Ct. 1223 (Feb. 19, 2008).
62. 128 S.Ct. 1647 (March 17, 2008).
63. 128 S.Ct. 1867 (April 14. 2008). The case is consolidated with *PSEG Fossil LLC v. Riverkeeper Inc.*, Docket No. 07-589, and *Utility Water Act Group v. Riverkeeper Inc.*, Docket No. 07-597.
64. 128 S.Ct. 2931 (June 16, 2008).