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SECOND CIRCUIT REVIEW

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The Second Circuit in the U.S. Supreme Court

The Supreme Court's 2006 term was, in the words of one observer, what "conservatives had long yearned for," and what "liberals feared."[1] Several of the Court's opinions reversed U.S. Court of Appeals for the Second Circuit rulings, and reflect the Court's much-discussed shift in favor of business interests.

With the Court's 2007 term approaching, we conduct our 23rd annual review of the Second Circuit's performance during the Supreme Court's past term, and briefly note the Second Circuit decisions scheduled for review during the 2007 term.

During its 2006 term, the Supreme Court denied 304 petitions for certiorari to the Second Circuit, granted five, and reversed three decisions. Overall, the Court issued 61 opinions reviewing decisions by the United States Courts of Appeals,[2] 42 (or 68 percent) of which reversed or vacated judgments. The accompanying performance table compares the Second Circuit's performance during the 2006 term to those of its sister circuits.

Antitrust Conspiracies: Pleading Standards

In *Bell v. Twombly*,[4] the Supreme Court ruled that local telephone subscribers cannot plead an antitrust conspiracy through allegations of parallel business conduct alone.

Twombly's background lies in the breakup of AT&T into "Baby Bells" or "Incumbent Local Exchange Carriers" (ILECs) in 1984, and Congress' subsequent mandate that these ILECs share their networks with new competitors known as "competitive local exchange carriers" (CLECs).[5] The plaintiffs, local telephone and high-speed Internet service subscribers, claimed that the ILECs conspired to restrain trade in violation of §1 of the Sherman Act, by (1) engaging in parallel conduct that stymied competition from CLECs, including "making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers"; and (2) failing to pursue business in each other's respective home regions.[6]

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The District Court dismissed the complaint, holding that allegations of parallel business conduct do not suffice to state a Sherman Act conspiracy absent some "additional facts that 'ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior."[7] The Second Circuit reversed, holding that "'to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.'"[8]

The Supreme Court reversed, and explicitly abrogated the well-known, 50-year-old *Conley v. Gibson*[9] "no set of facts" standard upon which the Second Circuit based its decision.[10] Writing for the majority, Justice David Souter explained that this standard, read literally, improperly precludes dismissal of conclusory pleadings if they so much as "[leave] open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Conley*, said the Court, should have held (and is often read as holding) only that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[11] The Court largely agreed with the District Court's reasoning—that §1 of the Sherman Act requires an actual agreement to restrain trade, and that even "conscious parallelism" among competing firms is not unlawful without such agreement.[12] While the plaintiffs had adequately alleged parallelism, the Court concluded that they had only offered an insufficient "bare assertion" of conspiracy.[13] The Court stressed the public policy concerns underlying its decision—that judicial case management cannot check the "unusually high cost" and "extensive scope" of discovery in antitrust litigation, which could "push cost-conscious defendants to settle even anemic cases."[14]

Securities Law Superseding Antitrust Law

In *Credit Suisse Securities (USA) LLC v. Billing*,[15] the Court held that IPO investors cannot sue underwriters for federal and state antitrust violations based on the underwriters' imposition of certain anticompetitive conditions—namely, "laddering agreements," where the investor must promise to place bids in the aftermarket at prices above the IPO price; "tying arrangements," where the

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investor must promise to purchase other, less attractive securities; and "noncompetitively determined commissions."[16] The Court agreed with defendants and the District Court that the federal securities laws impliedly preclude application of antitrust law to these practices, and reversed the Second Circuit's holding to the contrary.

Writing for the majority, Justice Stephen Breyer explained that Supreme Court precedent makes clear that securities law provisions impliedly repeal antitrust laws where there is a "plain repugnancy" or "clear incompatibility" between the two bodies of law.[17] Such incompatibility is determined by examining whether:

(1) the securities laws provide regulatory authority over the activities in question;
(2) "the responsible regulatory entities exercise that authority";
(3) there is a "risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct"; and
(4) "the possible conflict affect[s] practices that lie squarely within an area of financial market activity that the securities law seeks to regulate."[18]

The Court held that the first, second, and fourth factors could not reasonably be disputed here, given the importance of the IPO process, the extensive securities laws governing that process, and the SEC's vigorous enforcement of those laws.[19]

Turning to the third factor, the Court rejected plaintiffs' argument that because the antitrust and securities laws both "aim to prohibit the same undesirable activity," there can be no conflict between them.[20]

The Court noted that the SEC allows underwriters to work jointly in "syndicates" during the IPO process, to fix the levels of their commissions (even if the resultant share price is "excessive"), to inquire during the "book building" process as to customers' future purchases and the prices they might be willing to pay, and to allocate IPO shares based in part on a customer's retention of the underwriting firm for other services at nonexcessive rates.[21] This, said the Court, creates "an unusually serious line-drawing problem" between SEC-permitted activities that plaintiffs would concede are antitrust immune and activities that the SEC forbids.[22] Were the latter to become fodder for antitrust lawsuits "throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries," the Court warned, the result would be inconsistent verdicts and "unusually serious mistakes."[23] This, in turn, would lead underwriters to avoid "a wide range of joint conduct that the securities law permits or encourages."[24] Thus, the Court held that the securities laws are clearly incompatible with the antitrust regime that the investors sought to apply.

Fair Labor Standards Act

In *Long Island Care at Home, Ltd. v. Coke*,[25] the Court upheld Department of Labor regulations that extend certain "domestic service employee" exemptions from Fair Labor Standards Act minimum wage and maximum hour rules to those employed by an employer or agency, rather than by a family or household.[26] In so holding, the Court reversed the Second Circuit and agreed instead with a District Court decision to dismiss on the pleadings. Writing for a unanimous Court, Justice Breyer rejected the plaintiff's arguments, adopted by the circuit, that the regulation fell outside the scope of Congress' delegation of rule-making authority, that it was nonbindingly "interpretive," and that it was adopted following a legally insufficient "notice-and-comment" procedure.[27]

Dormant Commerce Clause

In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[28] the Court held that local ordinances requiring that all local waste be processed by a state-created public corporation did not violate the dormant commerce clause.

New York created a "Solid Waste Management Authority" for Oneida and Herkimer counties and "flow control" laws giving that authority a monopoly on processing garbage collected within the counties—although private haulers still collect the garbage—and allowing it to impose higher-than-market rates for waste disposal at its facilities.[29] Such rates in turn enabled the authority "to provide recycling of 33 kinds of materials, as well as composting, household hazardous waste disposal, and a number of other services."[30] An association of private waste management companies sued the counties and Authority, claiming that the flow control laws and higher waste disposal fees violate the Commerce Clause of the Constitution by preventing the waste haulers from enjoying cheaper waste disposal sites in other states.[31]

In *C&A Carbone Inc. v. Clarkstown*,[32] the Supreme Court had struck down, on Commerce Clause grounds, a flow control ordinance that forced haulers to deliver waste to a particular private processing facility. The District Court held *Carbone* applied to the Oneida-Herkimer public facility, and enjoined enforcement of the flow control laws; the Second Circuit—disagreeing with a U.S. Court of Appeals for the Sixth Circuit decision reaching the opposite conclusion—reversed, holding that a statute does not discriminate against interstate commerce by favoring local government at the expense of all private industry.[33]

The Supreme Court affirmed. Writing for the majority, Chief Justice John Roberts noted that while "the only salient difference" between the *Carbone* and Oneida-Herkimer

Supreme Court October 2006 Term Performance of the Circuit Courts[3]

Circuit	Cases	Affirmed	Reversed or Vacated	Affirmed/ Reversed in Part	% Reversed or Vacated
First	1	1	0	0	0
Second	5	2	3	0	60
Third	1	0	1	0	100
Fourth	2	1	1	0	50
Fifth	4	1	3	0	75
Sixth	7	3	4	0	57
Seventh	3	1	2	0	67
Eighth	5	1	4	0	80
Ninth	19	2	16	1	89
Tenth	3	1	2	0	67
Eleventh	5	3	2	0	40
D.C.	3	2	1	0	33
Federal	3	1	2	0	67

Source: Martin Flumenbaum and Brad S. Karp

flow control ordinances is that "the laws at issue here require haulers to bring waste to facilities owned and operated by a state-created public benefit corporation," that difference is "constitutionally significant."[34] "Unlike private enterprise," the Court explained, "government is vested with the responsibility of protecting the health, safety, and welfare of its citizens," and thus "it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism."[35] The Court noted that waste disposal is "a traditional government activity," and that the ordinances furthered this activity by allowing the counties to finance their waste disposal services and enforce their recycling laws.[36] Because the Oneida-Herkimer ordinances "favor the government…but treat every private business, whether in-state or out-of-state, exactly the same," the Court reasoned that they do not discriminate against interstate commerce for Commerce Clause purposes.[37]

FSIA

• ***Foreign Sovereign Immunities Act.*** In *Permanent Mission of India to the United Nations v. City of New York,*[38] the Court addressed a Foreign Sovereign Immunities Act provision exempting lawsuits over "rights in immovable property situated in the United States" from the general rule that foreign states are immune from suit; the Court affirmed the Second Circuit's opinion that the provision applies to declaratory judgment actions concerning the validity of tax liens against foreign government-owned (but not diplomatic) properties.[39] Writing for the majority, Justice Clarence Thomas held that tax liens must concern "rights in immovable property," given the broad wording of the provision, the fact that federal and common law at the time of the FSIA's adoption defined a lien as a legal right on another's property, and the traditional view that "property ownership is not an inherently sovereign function."[40]

The 2007 Term

As of today, the Supreme Court is already scheduled to review six Second Circuit decisions during its 2007 term—the most of any circuit. The Second Circuit decisions currently slated for review are *Riegel v. Medtronic, Inc.*,[41] in which the Court will decide whether the express preemption provision of the Medical Device Amendment to the Food, Drug, and Cosmetic Act preempts state-law tort claims seeking damages for injuries caused by medical devices that received premarket approval from the FDA; *Knight v. C.I.R.*,[42] in which the Court will decide whether §67(e) of the Internal Revenue Code, which provides that the adjusted gross income of an estate or trust must be computed in the same manner as the adjusted gross income of an individual, permits a full deduction of investment management and advisory service costs and fees provided to trusts and estates; *Federal Express Corp. v. Holowecki*,[43] in which the Court will decide whether the submission of an "intake questionnaire" to the EEOC constitutes the filing of a "charge of discrimination" required under the Age Discrimination in Employment Act; *Klein & Co. Futures, Inc. v. Board of Trade of City of New York*,[44] in which the Court will decide whether futures commission merchants have statutory standing to invoke the Commodity Exchange Act's express private right of action; *New York City Board of Education v. Tom F.*,[45] in which the Court will decide whether children who have not previously attended public school may avail themselves of the Individuals with Disabilities Education Act's tuition-reimbursement remedy; and *New York State Board of Elections v. Torres*,[46] in which the Court will decide whether New York State may mandate primaries in lieu of party conventions for the nomination of trial judges.

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1. Linda Greenhouse, "In Steps Big and Small, Supreme Court Moved Right," New York Times, July 1, 2007, at A1.
2. This figure does not include cases vacated as moot, or dismissed pursuant to Supreme Court Rule 46.
3. Multiple cases from the same Court of Appeals addressed in a single Supreme Court decision are counted as a single case.
4. 127 S. Ct. 1955 (2007).
5. Id. at 1961 (citing the Telecommunications Act of 1996, 110 Stat. 56).
6. Id. (citing 15 U.S.C. §1).
7. Id. at 1963 (citing 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003) (Lynch, J.).
8. Id. (citing 425 F.3d 99, 114 (2d Cir. 2005)).
9. 355 U.S. 41 (1957).
10. *Twombly*, 127 S. Ct. at 1968 (citing id. at 45-46 ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief")).
11. Id. at 1969.
12. Id. at 1964.
13. Id. at 1965.
14. Id. at 1967.
15. 127 S. Ct. 2383 (2007).
16. Id. at 2388-89.
17. Id. at 2389-92 (citing *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659 (1975); and *U.S. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 422 U.S. 694 (1975)).
18. Id. at 2392.
19. Id. at 2392-93.
20. Id. at 2394.
21. Id. at 2393-95.
22. Id. at 2394.
23. Id. at 2395-96.
24. Id. at 2396.
25. 127 S. Ct. 2339 (2007).
26. Id. at 2344 (citing 29 U.S.C. §213(a)(15) and 29 CFR §552.109(a) (2006)).
27. Id. at 2346-51.
28. 127 S.Ct. 1786 (2007).
29. Id. at 1790-92.
30. Id. at 1791.
31. Id. at 1792.
32. 511 U.S. 383 (1994).
33. Id. at 1792 (citing *Nat'l Solid Wastes Mgmt. Ass'n v. Daviess Cty.*, 434 F.3d 898 (2006)).
34. Id. at 1790.
35. Id. at 1795.
36. Id. at 1796, 1798
37. Id.
38. 127 S. Ct. 2352 (2007).
39. Id. at 2354-56 (quoting 28 U.S.C. §1605(a)(4)).
40. Id. at 2354-57.
41. 127 S. Ct. 3000 (2007).
42. 127 S. Ct. 3005 (2007).
43. 127 S. Ct. 2914 (2007).
44. 127 S. Ct. 2431 (2007).
45. 127 S. Ct. 1393 (2007).
46. 127 S. Ct. 1325 (2007).

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