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Second Circuit Review

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The Second Circuit in the Supreme Court

The past year marked the first change in the U.S. Supreme Court's membership in over a decade. Chief Justice John Roberts commenced his tenure, and Justice Samuel Alito replaced Justice Sandra Day O'Connor, often the Court's "swing vote." The Court's 2005 Term was closely watched.

With the Court beginning its 2006 Term early next month, we conduct our 22d annual review of the U.S. Court of Appeals for the Second Circuit's performance during the Supreme Court's past term, and briefly note the Second Circuit decision scheduled for review during the 2006 Term.

During its 2005 Term, the Supreme Court denied 316 petitions for certiorari to the Second Circuit and granted eleven. The Court reversed seven decisions, vacated and remanded two in light of other decisions reached this Term, dismissed one at the parties' request, and agreed to hear the remaining decision next Term. Overall, the Court issued 65 decisions during its 2005 Term, of which 51 reversed, vacated, or reversed in part a Court of Appeals decision. This percentage (80 percent) is roughly consistent with the Court's reversal rate over the past five years. Table 1 compares the Second Circuit's performance during the 2005 Term to that of its sister circuits.

Campaign Finance

In *Randall v. Sorrell*,[1] a deeply divided Supreme Court struck down Vermont's campaign finance law on First Amendment grounds. The law strictly limited campaign expenditures by candidates, and campaign contributions to candidates from individuals, organizations, political committees and parties. The Second Circuit found the law's contribution limits constitutional, because they furthered the state's compelling interests in avoiding corruption or the appearance of corruption, and limiting the amount of time candidates must spend fundraising. The Circuit also held the law's expenditure limits potentially constitutional on the basis of the latter compelling interest as well, and remanded the case to the district court to determine whether the law's expenditure limits were narrowly tailored to that interest.[2]

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The Supreme Court reversed and remanded the Second Circuit's ruling. The plurality (Justice Stephen Breyer, joined by the Chief Justice and Justice Alito) first emphasized that under *Buckley v. Valeo*[3] and its progeny, campaign expenditure limits offend the First Amendment; the plurality declined to overrule or distinguish *Buckley*.[4] The plurality then noted that campaign contribution limits generally are permissible under *Buckley* so long as they are narrowly tailored to the government's interest in curbing corruption and the appearance of corruption. But in the plurality's view, the Vermont law's contribution limits ($400 per contributor per candidate per election for statewide elections, and less for local elections) were "too low and too strict" to survive First Amendment scrutiny, because the law: (1) placed significant restrictions on the amount of funding available for challengers in competitive races; (2) threatened associational rights by restricting donations from political parties to the same low amounts as other contributors; (3) further threatened associational rights by treating volunteer expenses such as travel costs as "contributions" within the contribution limits; (4) did not adjust for inflation; and (5) did not offer any "special justification" for its restrictions (i.e., that corruption or its appearance is a more serious problem in Vermont than elsewhere).[5]

Individuals With Disabilities

In *Arlington Central School District Board of Education v. Murphy*,[6] a divided Court held that expert fees are not among the "reasonable attorneys' fees as part of the costs" awarded to prevailing parent-plaintiffs in Individuals with Disabilities Education Act (IDEA) actions. The Court reversed the Second Circuit's holding that the Act's legislative history mandates the inclusion of expert fees within attorneys' fees.[7]

The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on a state's compliance with "extensive goals and procedures."[8] Writing for the majority, Justice Alito stressed that Spending Clause legislation such as the IDEA must set out any conditions attached to the disbursement of federal funds to state governments "unambiguously." The Court held that the IDEA's text does not clearly condition the receipt of federal funds on a state's willingness to compensate prevailing parents for expert fees, and neither the Act's overarching statutory purpose, nor its legislative history, suffices to trump the dearth of explicit textual notice.[9]

Securities Litigation Uniform Standards Act

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*,[10] a unanimous Court held that Title I of the Securities Litigation Uniform Standards Act (SLUSA) preempts private

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Supreme Court October 2005 Term Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or Vacated	Affirmed/ Reversed in Part	% Reversed or Vacated
First	2	0	1	1	50
Second	10	1	9	0	90
Third	3	0	3	0	100
Fourth	5	1	4	0	80
Fifth	2	1	1	0	50
Sixth	7	2	5	0	71
Seventh	3	0	3	0	100
Eighth	3	2	1	0	33
Ninth	15	2	13	0	87
Tenth	4	3	1	0	25
Eleventh	6	1	5	0	83
D.C.	2	0	2	0	100
Federal	3	0	3	0	100

Source: Flumenbaum and Karp

state-law "holder class actions" regardless of whether the plaintiffs have a remedy under federal law, vacating the Second Circuit's holding that SLUSA only preempts state-law class action claims by plaintiffs who have a remedy under federal law.

Title I of SLUSA states that state-law-based class actions alleging material misrepresentations or omissions "'in connection with the purchase or sale'" of securities may not be maintained in any state or federal court by any private party.[11] Mr. Dabit, representing a class of former Merrill Lynch stockbrokers, sued Merrill Lynch in federal court for state-law securities violations. He claimed the firm manipulated stock prices by disseminating misleading research in order to benefit its investment banking clients; this allegedly led class members to both poorly advise their own clients (and eventually lose commissions when those clients took their business elsewhere) and to hold onto their own overvalued securities.[12]

Federal courts have long recognized an implied private right of action to enforce the Securities and Exchange Act's prohibition against deception, misrepresentation and fraud "in connection with the sale or purchase of any security."[13] But in *Blue Chip Stamps v. Manor Drug Stores*,[14] the Supreme Court limited this right of action to individuals who alleged that they actually purchased or sold securities because of fraud, as opposed to individuals who claimed that they held securities whose value was reduced by others' fraudulent sales. Mr. Dabit argued (and the Second Circuit agreed) that the "in connection with the purchase or sale" of securities language in SLUSA should be as narrowly construed as its counterpart in the Securities and Exchange Act and SEC Rule 10b-5, promulgated pursuant thereto. That is, Mr. Dabit essentially argued that SLUSA preemption should be inversely related to Rule 10b-5 "standing."[15]

Rejecting Mr. Dabit's argument, the Supreme Court stressed that the "policy consideration" of curtailing vexatious securities class action litigation underpinned its decision in *Blue Chip Stamps*, and later led Congress to pass the Private Securities Litigation Reform Act of 1995 (PSLRA).[16] When the PSLRA drove many class actions involving nationally traded securities into state courts, Congress passed SLUSA to prevent frustration of the PSLRA's objectives. Dabit's narrow reading of SLUSA, the Court held, would "undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose."[17] The Court noted that SLUSA does not preempt state law claims brought by individual plaintiffs, by classes of fewer than 50 plaintiffs, or by state agencies.[18]

The Speedy Trial Act

In *Zedner v. United States*,[19] the Supreme Court unanimously held that criminal defendants may not prospectively waive the Speedy Trial Act's requirement that trial commence within 70 days of indictment or initial appearance.

Following his indictment, Mr. Zedner requested that his trial be adjourned several months. Concerned that such a delay would interfere with its "heavily scheduled calendar," the district court proposed, and the parties agreed, that Mr. Zedner prospectively waive his speedy trial rights under the Act "for all time." The district court later denied, on the basis of this waiver, Mr. Zedner's motion to dismiss the indictment on the basis of an unexplained 91-day delay between two subsequent court appearances. The district court noted that one provision of the Act, 18 U.S.C. §3162(a)(2), states that a defendant's failure to move to dismiss his indictment prior to trial or pleading constitutes a waiver of the right to dismissal; the district court reasoned that if defendants can retrospectively waive violations of the Act by failing to object before trial, they can prospectively waive the Act's requirements as well. The Court also mentioned in passing that the case was "complex."[20] Affirming Zedner's conviction, the Second Circuit noted that defendants should not be able to protest trial delays that they themselves request, and that in light of the complexity of the case and Zedner's prior request for more time to prepare for trial, the district court properly excluded the 91-day period based on the "ends of justice."[21]

Noting that §3162(a)(2) does not mention prospective waivers, Justice Alito's opinion for the Court explained that there is no indication that Congress would want to treat prospective and retrospective speedy trial waivers similarly. The Speedy Trial Act was "designed with the public interest firmly in mind," and not "solely to protect a defendant's right to a speedy trial."[22] Allowing defendants to prospectively waive the Act's 70-day trial deadline would undermine this public interest "because there are many cases—like the case at hand—in which the prosecution, the defense, and the court would all be happy to opt out of the Act."[23] Section 3162(a)(2)'s waiver provision, by contrast, is intended only to give defendants an incentive to spot Speedy Trial Act violations—and to limit the time in which they may assert violations to the period before a trial commences. The Court accordingly held that Mr. Zedner's prospective "for all time" waiver of the Speedy Trial Act was ineffective.[24]

Additionally, the Court stressed that to delay trial on the basis of the "ends of justice," a district court must make contemporaneous, on-the-record findings that the ends of justice served by the continuance outweigh the public's and defendant's interests in a speedy trial. The district court's "passing reference to the case's complexity" failed to satisfy the requirement, the Court held.[25]

Proximate Cause

In *Anza v. Ideal Steel Supply Corp.*,[26] a divided Court held that tax fraud cannot form the basis for a Racketeer Influenced and Corrupt Organizations Act (RICO) civil action by one private business against its competitor.

RICO's §1964(c) grants a private right of action to "'[a]ny person injured in his business or property by reason of a violation' of the Act's substantive restrictions."[27] In *Holmes v. Securities Investor Protection Corp.*,[28] the Court restricted this provision to acts that are the proximate cause of the plaintiff's injury. Ideal claimed that Joseph and Vincent Anza, owners of a competing steel supply business, failed to charge New York State sales tax to cash-paying customers, and submitted fraudulent tax returns to conceal their conduct. Ideal argued that the Anzas' submission of fraudulent tax returns constituted a pattern of racketeering activity under RICO (namely, mail and wire fraud), and directly harmed Ideal by allowing the Anzas to out-compete it by effectively lowering their prices. The Second Circuit agreed.[29]

Justice Anthony Kennedy's majority opinion rejected the Second Circuit's expansive view of RICO proximate cause. The direct victim of the Anzas' racketeering activity, the Court held, was New York State. Ideal, by contrast, was directly harmed only by the Anzas' offering of lower prices—which was "entirely distinct from the alleged RICO violation."[30] The Court explained that "[t]he attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes*"—namely the difficulty in determining how much of the Anzas' lower prices were attributable to its tax fraud, and how much of Ideal's lost business was attributable to the Anzas' lower prices.[31] The Court found this

proximate cause limitation on RICO claims "especially warranted," because the immediate victim of the alleged RICO violation (New York) could pursue its own claims against the alleged racketeer, and the adjudication of such claims would be relatively simple.[32]

Collateral Review Doctrine

In *Will v. Hallock*,[33] a unanimous Supreme Court held that where a trial court dismisses a Federal Tort Claims Act (FTCA) action against the government, but refuses to apply the FTCA's "judgment bar" to a related *Bivens*-type action against individual government employees, the latter decision is not immediately appealable under the "collateral order doctrine."

After federal agents mistakenly seized and damaged their computer equipment, Richard and Susan Hallock sued the United States under the FTCA, and commenced a *Bivens* action[34] against the individual agents involved. The government moved successfully to dismiss the Hallocks' FTCA claim. The agents then moved to dismiss the claims against them, pursuant to the FTCA's "judgment bar" provision.[35] The district court denied the agents' motion, and the agents filed an interlocutory appeal with the Second Circuit, which affirmed, after finding that it had jurisdiction to review the case under the collateral order doctrine.[36]

The Supreme Court vacated the Second Circuit's decision on jurisdictional grounds. Writing for the Court, Justice David Souter explained that the conditions for collateral appealability are "stringent": a court order (1) conclusively determining a disputed question, (2) resolving an important issue completely separate from the merits of the action, and (3) effectively unreviewable on appeal from a final judgment. Further, the class of collaterally appealable orders is "small," previously including only orders rejecting absolute, qualified, or Eleventh Amendment immunity, or rejecting a double jeopardy defense. Collateral appealability requires more than an order denying a motion for pretrial dismissal; such motions can occur in nearly every case. Rather, collateral appeals are appropriate only when a trial would imperil a "substantial public interest," such as the separation of powers, governmental efficiency, or State sovereignty.[37]

A district court's refusal to apply the FTCA's judgment bar is not an immediately appealable collateral order, the Court held, because the judgment bar does not serve a similarly "weighty public objective."[38] Unlike qualified immunity for government agents, which is designed to encourage officials to show "initiative" when the relevant law is not clear, the FTCA's judgment bar is designed simply to help officials avoid subsequent and duplicative litigation. As such, the Court explained, it functions more like the doctrine of res judicata or claim preclusion, and defenses based on claim preclusion are not immediately appealable.[39]

Health Benefits

In *Empire Healthchoice Assurance, Inc. v. McVeigh*,[40] a divided Supreme Court affirmed the Second Circuit's holding that the Federal Employees Health Benefits Act (FEHBA) does not extend federal jurisdiction to subrogation claims by private insurance carriers against government employee beneficiaries.

FEHBA authorizes the Office of Personnel Management (OPM) to contract with private carriers for federal employee health plans, and contains a preemption clause stating that its terms displace state law regarding "coverage or benefits."[41] OPM regulations "channel[] disputes over coverage or benefits into federal court by designating a United States agency (OPM) sole defendant" in suits contesting denials of health benefits by carriers.[42] But nothing in FEHBA addresses carriers' subrogation or reimbursement rights. Denise McVeigh, administrator of the estate of a federal employee enrolled in Empire's health benefits plan and injured in an accident, sued the alleged tortfeasor in state court and received a monetary settlement. Empire then sued McVeigh in federal court to recover its expenditures for the decedent's medical care. The district court dismissed for lack of subject matter jurisdiction, and the Second Circuit affirmed.[43]

Justice Ruth Bader Ginsburg's majority opinion notes that "claims of this genre, seeking recovery from the proceeds of state-court litigation, are the sort ordinarily resolved in state courts;" federal courts should "await a clear signal from Congress before treating such auxiliary claims as 'arising under' the laws of the United States."[44] Since FEHBA and its regulations explicitly create federal jurisdiction over lawsuits by beneficiaries denied benefits, Congress could also have explicitly extended federal jurisdiction to subrogation claims by carriers against beneficiaries. The fact that it did not, the Court reasoned, indicated that Congress preferred not to extend federal jurisdiction to such claims.[45] The Court also agreed with the Second Circuit that Empire failed to demonstrate a "significant conflict ... between an identifiable federal policy or interest and the operation of state law," and that absent such a showing, there is no reason to displace state law or create federal jurisdiction.[46]

The 2006 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 only one Second Circuit decision during its 2006 term, *Bell Atlantic Corp. v. Twombly*.[47] The Court will decide whether a complaint states a claim under §1 of the Sherman Act if it alleges that defendants engaged in "parallel conduct" and that defendants participated in a conspiracy, but does not provide any other factual allegations establishing the existence of a conspiracy.

1. 126 S. Ct. 2479 (2006).
2. Id. at 2486-87 (citing *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004)).
3. 424 U.S. 1 (1976) (per curiam).
4. *Randall v. Sorrell*, 126 S. Ct. at 2489-91.
5. Id. at 2492, 2495-99.
6. 126 S. Ct. 2455 (2006).
7. Id. at 2458 (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332 (2d Cir. 2005)).
8. Id.
9. Id. at 2459-63.
10. 126 S. Ct. 1503 (2006).
11. Id. at 1506 (quoting 15 U.S.C. §78bb(f)(1)(A)).
12. Id. at 1507.
13. Id. at 1509.
14. 421 U.S. 723 (1975).
15. *Merrill Lynch v. Dabit*, 126 S. Ct. at 1508, 1512 (citing *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005)).
16. Id. at 1510-11.
17. Id. at 1513.
18. Id. at 1514.
19. 126 S. Ct. 1976 (2006).
20. Id. at 1981-83, 1986.
21. Id. at 1983 (citing *U.S. v. Zedner*, 401 F.3d 36 (2d Cir. 2005)).
22. Id. at 1986.
23. Id.
24. Id. at 1987.
25. Id. at 1988-89.
26. 126 S. Ct. 1991 (2006).
27. Id. at 1994 (quoting 18 U.S.C. §1964(c)).
28. 503 U.S. 258 (1992).
29. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. at 1995 (citing *Ideal Steel Supply Corp. v. Anza*, 373 F.3d 251 (2d Cir. 2004)).
30. Id. at 1996-97.
31. Id. at 1997-98.
32. Id. at 1998.
33. 126 S. Ct. 952 (2006).
34. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).
35. The "judgment bar" provision states that judgment in an FTCA claim against the government "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." *Will v. Hallock*, 126 S. Ct. at 957 (citing 28 U.S.C. §2676).
36. Id. at 956-57 (citing *Hallock v. Bonner*, 387 F.3d 147 (2d Cir. 2004)).
37. Id. at 957-59.
38. Id. at 959-60.
39. Id.
40. 126 S. Ct. 2121 (2006).
41. Id. at 2126-27.
42. Id. at 2129.
43. Id. at 2129-30 (citing 396 F.3d 136 (2d Cir. 2005)).
44. Id. at 2127.
45. Id. at 2134-35.
46. Id. at 2132-33.
47. 126 S. Ct. 2965 (2006).