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SECOND CIRCUIT REVIEW

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The Second Circuit in the Supreme Court

With the U.S. Supreme Court beginning its 2004 term in two weeks, we conduct our 20th annual review of the U.S. Court of Appeals for the Second Circuit's performance in the Supreme Court during its past term, and also briefly summarize those Second Circuit decisions that the Court has scheduled for review during its 2004 Term.

During the 2003 Term, the Supreme Court denied 295 petitions of certiorari to the Second Circuit and granted eight. The Court reversed two of the eight decisions it reviewed and vacated and remanded the six remaining cases in light of opinions in cases on appeal from other circuits.

The accompanying table on page six compares the Second Circuit's performance during the October 2003 term to that of other circuits.

Telecommunications Services

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[1] the Supreme Court reversed the judgment of the Second Circuit, holding that allegations that an incumbent local exchange telecommunications carrier did not reasonably share its network do not state a claim under §2 of the Sherman Act.

Respondent, a customer of AT&T, brought suit, alleging that Verizon violated the antitrust laws by filling its competitors' orders in violation of the Telecommunications Act of 1996, impeding AT&T's ability to enter the market and resulting in the provision of poor service. Dismissing the antitrust claims, the U.S. District Court for the Southern District of New York held that the respondent did not state an antitrust claim because it failed to allege the willful acquisition or maintenance of monopoly power, and noted that the duties imposed by the 1996 act are not the same as the duty to refrain from exclusionary practices.[2]

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The Second Circuit reversed the district court's dismissal of the antitrust claim, finding that, although a monopolist does not generally have a duty to cooperate with its competitors, it cannot prevent or impede competition in the market.[3] The court noted that the respondent might state a claim under the "essential facilities" doctrine, which provides that a monopolist must provide its competitors reasonable access to any facilities needed to compete in a given market. It explained that respondent stated an antitrust claim by alleging that Verizon failed to provide its competitors with reasonable access to the network.

The Supreme Court disagreed and held that the complaint did not state a claim under the Sherman Act.[4] Justice Antonin Scalia, writing for the majority, determined that preexisting antitrust standards, not the 1996 Act, governed the issue of whether an antitrust violation occurred. The Court reasoned that a refusal to cooperate with competitors is not necessarily an antitrust violation and found that Verizon's conduct did not warrant an exception to the refusal-to-cooperate precedents. The Court declined to recognize or repudiate the essential facilities doctrine. It found that because unavailability of access to an essential facility is required to invoke the doctrine, it could not be applied here because the 1996 Act compels access to the network and thus the essential facilities were available.

Antitrust Improvements Act

In *F. Hoffman — La Roche Ltd. v. Empagran S.A.*, the Supreme Court granted certiorari to resolve a circuit split regarding whether the exception to the Foreign Trade Antitrust Improvements Act of 1982 — namely, that the Sherman Act applies to conduct involving commerce or trade with foreign nations where such conduct substantially harms imports, domestic commerce, or American exporters — applies where plaintiff's claim rests solely on independent foreign harm.[5] The Supreme Court found that the Foreign Trade Antitrust Improvements Act does not apply to such situations. The Court reasoned that ambiguous statutes should be construed "to avoid unreasonable interference with the sovereign authority of other nations" and that the language and history of the act suggest that Congress crafted the statute so as "not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce."[6] *Empagran* abrogates the Second Circuit's decision in *Kruman v. Christie's Int'l PLC*, which found that the Foreign Trade Antitrust Improvements Act's exception does apply even where the

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foreign injury is independent.[7]

In light of its decision in *Empagran*, the Supreme Court vacated and remanded the Second Circuit's decision in *Bank Austria AG v. Sniado*,[8] a case involving claims that several European banks conspired to fix fees charged for exchanging currencies.[9] In *Sniado*, the Second Circuit vacated the district court's dismissal of the complaint for lack of subject matter jurisdiction in light of its decision in *Kruman*.

Habeas

In a divided decision, the Supreme Court reversed the Second Circuit in *Rumsfeld v. Padilla*.[10] The majority held that respondent, Jose Padilla, a U.S. citizen detained by the Department of Justice as an enemy combatant for allegedly conspiring with al Qaeda to carry out terrorist attacks on the United States, had improperly filed his habeas petition in the district court. Mr. Padilla was initially detained in New York, but had been moved under the custody of the Department of Defense to South Carolina at the time he filed his petition for habeas corpus.

The district court held that (1) Mr. Padilla properly filed his habeas petition in New York because Secretary of Defense Donald Rumsfeld's involvement in his custody made him a viable respondent to the petition, and (2) personal jurisdiction could be asserted over Mr. Rumsfeld under New York's long-arm statute.[11]

The Second Circuit affirmed in part and reversed in part, finding that where the person bringing a habeas petition is detained for reasons other than a federal criminal violation, the respondent does not need to be the immediate physical custodian.[12] The court held that Mr. Rumsfeld is the proper respondent because he has legal control over Mr. Padilla. The court then found that, due to Mr. Rumsfeld's numerous contacts with New York, the district court had personal jurisdiction over him. Contrary to the district court, the Second Circuit found that the president lacked the authority to detain Mr. Padilla and granted the writ of habeas corpus.

The Supreme Court reversed the Second Circuit on the issue of whether the district court had jurisdiction over Mr. Padilla's habeas petition and remanded the case for entry of an order of dismissal without prejudice.[13] Writing for the majority, Chief Justice William Rehnquist held that the immediate custodian rule applies where, as here, the petitioner is in physical custody and added that a habeas petitioner challenging his present physical custody must name the immediate custodian as respondent and file his petition in the district of confinement. The Court found that the "legal reality of control" rule relied on by the Second Circuit applies only where the petitioner is not challenging any present confinement. The Court also found that there is no recognized long-arm approach to habeas jurisdiction, and therefore a court does not obtain jurisdiction over a custodian who is only present through the actions of other officers in the hierarchy. To hold otherwise would result in forum shopping, overlapping jurisdiction, inconvenience and expense.

The Supreme Court is scheduled to review at least two Second Circuit decisions during its 2004 term and probably will add more to the docket in the coming months.

Sovereign Immunity

The Supreme Court vacated and remanded the Second Circuit's decision in *Abrams v. Societe Nationale des Chemins de Fer Francais* and summary orders in the consolidated cases, *Whiteman v. Republic of Austria* and *Garb v. Republic of Poland*.[14] Plaintiffs in *Whiteman* and *Garb* are Jewish and present and former citizens of Austria and Poland, respectively, who sought relief from deprivations effected by the defendant countries during and after World War II. In *Abrams*, Holocaust victims and descendants of Holocaust victims brought suit against the French national railroad company, claiming violations of international law arising out of the deportation of Jews and others from France to Nazi death and slave labor camps.

In both *Abrams* and *Garb*, the district court dismissed plaintiffs' claims finding that defendants were entitled to sovereign immunity.[15] In *Whiteman*, the district court ordered the parties to conduct discovery concerning whether the court may exercise subject matter jurisdiction over the defendants under the Foreign Sovereign Immunities Act.[16]

In *Abrams*, the Second Circuit applied the framework established by the Supreme Court in *Landgraf v. USI Film Products* to determine whether the Foreign Sovereign Immunities Act applies to pre-enactment conduct.[17] Finding that the act contains no express command concerning its application to pre-enactment events and finding that the record contained insufficient facts to determine whether applying the Foreign Sovereign Immunities Act to plaintiffs' causes of action would fully bar claims that previously could have been adjudicated in the United States, the Second Circuit vacated the district court's order and remanded for further proceedings to determine whether immunity for the defendant national railroad company would have been recognized at the time the underlying conduct occurred. The Second Circuit accordingly vacated and remanded *Garb* and *Whiteman* for further consideration in light of its opinion in Abrams.

The Supreme Court vacated and remanded all three cases in light of its decision this term in a case on appeal from the Ninth Circuit, *Republic of Austria v. Altmann*.[18] In *Altmann*, the Court determined that the Foreign Sovereign Immunities Act applies to conduct occurring prior to its enactment in 1976 and prior to the State Department's adoption of the restrictive theory of sovereign immunity adopted in 1952. The Court found that because the Foreign Sovereign Immunities Act does not address whether it affects procedural or substantive rights, *Landgraf* is not the appropriate analytical framework to apply. Rather, because the purpose of sovereign immunity is not to permit foreign states to "shape their conduct in reliance on the promise of future immunity," but "to reflect current political realities and relationships," it is appropriate to defer to the Foreign Sovereign Immunities Act rather than to presume that statute "inapplicable merely because it postdates the conduct in question" as required by *Landgraf*. The Court held that the preamble of the act and its overall structure support the conclusion that Congress intend-

ed it to apply to pre-enactment conduct.

ERISA and Preemption

The Supreme Court vacated and remanded the Second Circuit case *Vytra Healthcare v. Cicio*,[19] in light of its decision this term in a case on appeal from the U.S. Court of Appeals for the Fifth Circuit, *Aetna Health Inc. v. Davila*.[20] In *Davila*, the Court held that claims that health maintenance organizations refused to cover certain medical services in violation of a duty created by state law "to exercise ordinary care when making health care treatment decisions" were completely preempted by ERISA. The Court reasoned that because defendants' liability in such a case derives entirely from the obligations set out in the benefits plan, notwithstanding the presence of an element of medical judgment, the state cause of action is not entirely independent from the federally regulated contract and is accordingly preempted.

In light of *Davila*, the Court vacated and remanded the Second Circuit's decision in *Vytra Healthcare v. Cicio*.[21] In *Cicio*, the Second Circuit, vacating the district court's finding of preemption, held that a medical malpractice claim, "if based on a 'mixed eligibility and treatment decision,' is not subject to ERISA preemption when that state law cause of action challenges an allegedly flawed medical judgment as applied to a particular patient's symptoms."[22]

Freedom of Information

The Supreme Court also vacated and remanded the Second Circuit's decision in *Perlman v. Department of Justice*.[23] In *Perlman*, a case concerning a request under the Freedom of Information Act, the Second Circuit applied a five-factor test to determine whether a government employee's privacy interests outweigh the public's interest in disclosure.[24]

The Supreme Court vacated and remanded the case in light of its decision in a case on appeal from the Ninth Circuit, *National Archives and Records Administration v. Favish*.[25] In *Favish*, the Supreme Court held that where there is a privacy interest protected by Exemption 7(C) and the public interest asserted is that officials acted negligently or improperly in the performance of their duties, "the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred."[26]

2004 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 two Second Circuit decisions during its 2004 term. The Supreme Court consolidated *Swedenburg v. Kelly*[27] with *Granhom v. Michigan Beer & Wine Wholesalers Ass'n*, a Sixth Circuit case, and granted certiorari to consider whether a state regulatory scheme having different rules for in-state versus out-of-state wineries violates the dormant Commerce Clause. In *City of Sherrill v. Oneida Indian Nation*,[28] the Court granted certiorari to determine the status of alleged Indian reservation land.

Second Circuit's Performance During the October 2003 Term

Circuit	Cases	Affirmed	Reversed or Vacated	Affirmed/ Reversed in Part	% Reversed or Vacated
First	1	0	1	0	100
Second	8	0	8	0	100
Third	4	1	3	0	75
Fourth	7	3	4	0	57
Fifth	7	0	7	0	100
Sixth	7	1	6	0	86
Seventh	5	2	3	0	60
Eighth	4	1	3	0	75
Ninth	32	6	26	0	81
Tenth	3	0	3	0	100
Eleventh	6	0	6	0	100
D.C.	5	0	5	0	100
Federal	1	0	1	0	100

SOURCE: Paul, Weiss, Rifkind, Wharton & Garrison

1. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 SCt 872 (2004).
2. *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 123 F Supp 2d 738, 742 (SDNY 2000).
3. *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F3d 89, 113 (2d Cir. 2002).
4. 124 SCt 872, 883.
5. *F. Hoffman— La Roche Ltd. v. Empagran S.A., et al.*, 124 SCt 2359, 2364 (2004).
6. 124 SCt at 2366-2369.
7. 284 F.3d 384, 400 (2d Cir. 2002).
8. *Bank Austria AG v. Sniado*, 124 S.Ct. 2870 (2004).
9. *Sniado v. Bank Austria AG*, 352 F3d 73, 75-76 (2d Cir. 2003).
10. *Rumsfeld v. Padilla*, 124 SCt 2711 (2004).
11. *Padilla ex rel. Newman v. Bush*, 233 FSupp 2d 564, 569-70 (SDNY 2002).
12. Padilla v. Rumsfeld, 253 F.3d 695, 705 (2d Cir. 2003).
13. *Rumsfeld*, 124 SCt at 2727.
14. *Societe Nationale des Chemins de Fer Francais v. Abrams*, 124 SCt 2834 (2004); *Republic of Poland v. Garb*, 124 SCt 2835 (2004); *Republic of Austria v. Whiteman*, 124 SCt 2835 (2004); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F3d 173 (2d Cir. 2003); *Garb v. Republic of Poland*, 72 Fed.Appx. 840 (2d Cir. 2003).
15. *Garb v. Republic of Poland*, 207 FSupp 2d 16, 39 (EDNY 2002); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 175 F Supp 2d 423, 450 (EDNY 2001).
16. *Whiteman v. Republic of Austria*, No. 00-8006, 2002 WL 31368236, at *9 (SDNY 2002).
17. *Abrams*, 332 F3d 173, 180-85 (2d Cir. 2003) (applying *Landgraf v. USI Film Products*, 511 US 244 (1994)).
18. 124 SCt 2240 (2004).
19. 124 SCt 2902 (2004).
20. 124 SCt 2488 (2004).
21. 124 SCt 2092 (2004).
22. 321 F3d 83, 102 (2d Cir. 2003).
23. *Perlman v. Department of Justice*, 124 SCt 1874 (2004).
24. *Perlman v. United States Dept. of Justice*, 312 F3d 100, 107-08 (2d Cir. 2002).
25. 124 SCt 1874 (2004).
26. *Nat'l Archives and Records Admin. v. Favish*, 124 SCt 1570, 1581 (2004).
27. *Swedenburg v. Kelly*, 124 SCt 2391 (May 24, 2004).
28. *City of Sherrill v. Oneida Indian Nation*, 124 SCt 2904 (June 28, 2004).