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SECOND CIRCUIT REVIEW

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The Second Circuit in the U.S. Supreme Court

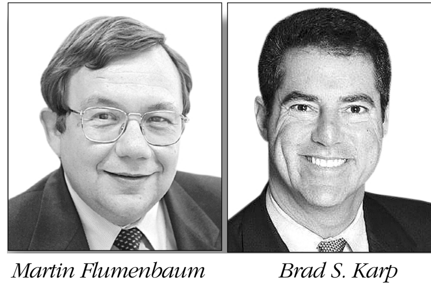
WITH THE U.S. Supreme Court beginning its 2003 term in two weeks, we conduct our 19th annual review of the U.S. Court of Appeals for the Second Circuit's performance in the Supreme Court during its past term and also briefly summarize the Second Circuit decision that the Court has scheduled for review during its 2003 term.

During its 2002 term, the Supreme Court denied 348 petitions for certiorari to the Second Circuit and granted three. The Court reversed two of the three decisions it reviewed, and vacated and remanded the third for further consideration in light of its affirmation this term of an Eleventh Circuit decision.

The accompanying table (below) compares the Second Circuit's performance during the October 2002 term to that of the other circuits.

Megan's Law

In *Connecticut Department of Public Safety v. John Doe*,[1] the Supreme Court reversed the judgment of the Second Circuit and upheld Connecticut's version of "Megan's law," which requires convicted sex offenders to register with the state upon their release into the community and provides that the Department of Public Safety will post a publicly available sex offender registry containing registrants' names, addresses, photographs and descriptions.[2] In a unanimous decision, the Court held that Fourteenth Amendment "procedural" due process does not entitle sex offenders to a hearing to determine whether they are currently dangerous before their inclusion in the registry.



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A convicted sex offender filed a 42 USC §1983 action in the District of Connecticut on behalf of himself and similarly situated sex offenders, alleging that the Connecticut law violates his Fourteenth Amendment right to procedural due process because it deprives him of a liberty interest without notice or a meaningful opportunity to be heard. The plaintiff claimed that his inclusion in the public registry gave the public the false impression that he is "currently dangerous" and that before his name was included on the registry he was entitled to a hearing to determine whether in fact he is presently dangerous.

The district court granted summary judgment for the plaintiff on the due process claim,[3] applying the "stigma plus" test derived from the Supreme Court's decision in *Paul v. Davis*,[4] which held that a plaintiff claiming defamation as a deprivation of a liberty interest in violation of his due process rights under 42 USC §1983 must show that the government has stigmatized him by making a statement about him which he claims is false, that is capable of being proven true or false and that is sufficiently derogatory to injure his or her reputation. In addition, the plaintiff must show a "plus" factor, that the government has imposed a tangible and material burden on the plaintiff that alters his or her legal status, that only the government could impose.[5] The plus factor requirement is intended to prevent garden-variety defamation claims from being cast as deprivation of a constitutionally protected liberty interest under §1983.

The Second Circuit affirmed the district court's decision upon a de novo review, finding that the sex offender had satisfied the *Paul* test. The Second Circuit agreed with the plaintiff and the district court that the Connecticut law stigmatized the plaintiff as a "currently dangerous" sex offender. Even though the registry contained a disclaimer stating that the state "made no determination that any individual included in the Registry is currently dangerous," the Second Circuit found that this clearly implied that some registrants may be so, and because the list is undifferentiated as

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to those who may and may not be so, the registry creates the implication "that each person on the list is more likely than the average person to be currently dangerous."[6] The Second Circuit further found that the registry requirements altered the plaintiff's legal status, and therefore constituted the necessary "plus" factor required under *Paul*.

The Supreme Court disagreed. Chief Justice William Rehnquist, writing for the Court, found that the State of Connecticut "has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness. Indeed the public registry explicitly states that officials have not determined that any registrant is currently dangerous."[7] Because Fourteenth Amendment procedural due process "does not require the opportunity to prove a fact that is not material to the State's statutory scheme," the Court held that the respondent is not entitled to a hearing to establish that he is not presently dangerous and reversed the Second Circuit's affirmation of the district court's decision.[8]

The Court explained that even if respondent could prove that he is not currently dangerous, the state had decided that all sex offenders, whether dangerous or not, must be publicly disclosed. Therefore, the Court concluded, "[u]nless respondent can show that the substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise." The Court noted that respondent's claim may actually be a substantive challenge to the registry statute, erroneously framed as a procedural due process claim, but because respondent had not brought a substantive claim, the Court expressed no opinion on whether the law violated substantive due process principles.[9]

U.S. Supreme Court October 2002 Term Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or Vacated	Affirmed Reversed in Part	% Reversed or Vacated
First	1	1	0	0	0
Second	3	0	2	1	100
Third	0	0	0	0	0
Fourth	3	0	3	0	100
Fifth	3	0	3	0	100
Sixth	9	2	6	1	70
Seventh	4	1	3	0	75
Eighth	1	0	1	0	100
Ninth	23	7	16	0	62
Tenth	1	0	1	0	100
Eleventh	4	2	2	0	50
D.C.	5	3	2	0	40
Federal	2	1	1	0	50

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All Writs Act

In a per curiam decision, an equally divided Court affirmed in part and vacated and remanded in part the Second Circuit's decision in *Dow Chemical v. Stephenson*.[10] The plaintiffs in *Dow Chemical* are two Vietnam War veterans who claimed injury as a result of exposure to Agent Orange. Plaintiff Stephenson's suit, originally filed in 1999 in the U.S. District Court for the Western District of Louisiana, was subsequently transferred by the multi-district litigation (MDL) panel to the U.S. District Court for the Eastern District of New York (EDNY).

Plaintiff Isaacson filed suit in 1998 in New Jersey state court, asserting only claims under state law. Defendants removed the case to federal court, where it was subsequently transferred by the MDL panel to the EDNY, to be consolidated with the massive class action litigation *In re "Agent Orange" Prod. Liab. Litig.* (*Agent Orange*) dating back to the 1970s.[11] The district court based removal jurisdiction of the otherwise nonremovable action on the All Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[12]

On appeal to the Second Circuit, the *Isaacson* plaintiffs challenged the removal of Isaacson's suit under the All Writs Act, arguing that the district court should have remanded the case to the New Jersey state court. The Second Circuit affirmed the district court's removal and transfer of Isaacson's suit, holding that the case presented exceptional circumstances justifying the district court's use of the All Writs Act to remove an otherwise nonremovable case "in order to 'effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained.' "[13] The Second Circuit found the removal and transfer appropriate because the EDNY was the court best situated to determine the preclusive effect of the settlement in *Agent Orange*.[14]

The Supreme Court vacated and remanded the case as to the Isaacson plaintiffs, for consideration of the All Writs Act issue in light of its decision this term in a case on appeal from the Eleventh Circuit, *Syngenta Crop Protection, Inc. v. Henson*.[15] In *Syngenta*, the Court settled a circuit split on whether the All Writs Act can be used to remove cases from state court to prevent frustration of federal court orders. In a unanimous ruling, the Court affirmed the Eleventh Circuit's decision and held that the All Writs Act cannot be invoked

either by itself or in combination with the doctrine of ancillary enforcement jurisdiction, to remove from state court a suit over which the federal court has no original jurisdiction.[16]

Citing the controlling authority of *Pennsylvania Bureau of Correction v. U.S. Marshals Service*,[17] the Court stated that where a statute specifically addresses a particular issue, it is the statute and not the All Writs Act that is controlling. The Court noted that removal under 29 USC §1441 "is entirely a creature of statute" permitted only when the federal court has original jurisdiction over the subject matter of the state court suit. The Court emphasized that the All Writs Act may be narrowly used by a federal court to issue process "in aid of" its existing statutory jurisdiction; the Act does not enlarge that jurisdiction. Therefore, it "cannot confer the original jurisdiction required to support removal pursuant to §1441."[18]

Ineffective Aid of Counsel

In *Massaro v. United States*,[19] the Supreme Court reversed the Second Circuit's decision affirming the district court's denial of an ineffective assistance of counsel claim in a habeas corpus petition under 28 USC §2255 as procedurally defaulted because the claim was not brought on direct appeal.

Petitioner Mr. Massaro was indicted on federal racketeering charges in connection with a murder. The day before trial, prosecutors learned of a bullet allegedly recovered from the automobile in which the victim's body was found, but did not notify defense counsel until the trial was underway. Defense counsel declined the trial court's offer of a continuance so that the bullet could be examined. Mr. Massaro was convicted and sentenced to life imprisonment.

On direct appeal to the Second Circuit, Mr. Massaro's new counsel argued that the district court had erred in admitting the bullet in evidence. No claim of ineffective assistance of counsel was raised. The Second Circuit affirmed the conviction, and the Supreme Court denied certiorari. Mr. Massaro then petitioned the district court to vacate his conviction under 28 USC §2255, claiming that he had received ineffective assistance from his trial counsel because counsel failed to accept the trial court's offer of a continuance. The district court held that his claim was procedurally foreclosed because he could have raised it on appeal.

The Second Circuit affirmed, adhering to its holding in *Billy-Eko v. United States*,[20] that when the defendant is represented by new counsel on appeal and a claim of ineffective assistance of counsel is based solely on the trial record, it must be raised on direct appeal. Otherwise, the Second Circuit held, the claim is procedurally defaulted unless the petitioner can demonstrate cause and prejudice.[21]

The Supreme Court reversed, holding that a claim of ineffective assistance of counsel may be brought under 28 USC §2255, regardless of whether the petitioner could have it on direct appeal. The Court resolved a split among the circuits, with the U.S. Court of Appeals for the Seventh Circuit joining the Second Circuit, while the 10 other circuits held that failure to raise ineffective assistance of counsel did not procedurally default the claim in a collateral proceeding. Justice Anthony Kennedy, writing for a unanimous Court, found that the largely administrative objectives of the cause-and-prejudice standard for claims not brought on direct appeal did not apply to claims for ineffective assistance of counsel. The Court explained that applying a procedural default rule would "creat[e] the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim."[22] In addition, the Court reasoned that an appellate court was ill-equipped to handle and decide the fact-heavy issues of ineffective assistance of counsel claims.

The 2003 Term

While additional Second Circuit cases undoubtedly will be added to its docket during the upcoming months, the Supreme Court is currently scheduled to review at least one Second Circuit decision during its 2003 term. In *Verizon Communications v. Law Offices of Curtis Trinko*,[23] the Court granted certiorari to consider whether a regulatory statute with procompetition provisions such as the Telecommunications Act of 1996 provides the regulated industry with implicit immunity from suit under antitrust laws.

(1) 123 SCt 1160 (2003).
(2) Conn. Gen. Stat. §§54-250 to 54-261 (1999).
(3) The district court granted summary judgment to the defendant on plaintiff's claim that the law created an unconstitutional ex post facto punishment for the offense. *Doe v. Dept. of Public Safety*, 271 F3d 38, 61 (2d Cir. 2001).
(4) 424 US 693 (1976).
(5) 424 US at 701-02, 710-11.
(6) 271 F3d at 49.
(7) 123 SCt at 1163.
(8) Id.
(9) Id. at 1165.
(10) 123 SCt 2161 (2003); *Stephenson v. Dow Chemical Co.*, 273 F3d 249 (2d Cir. 2001).
(11) 597 FSupp 597 FSupp 740 (EDNY 1984).
(12) 28 USC §1651(a).
(13) 273 F3d 249, 256 (quoting *Ivy v. Diamond Shamrock Chems Co.*, 996 F2d 1425 (2d Cir. 1993).
(14) An equally divided Supreme Court affirmed the Second Circuit's decision that the plaintiffs were not adequately represented by the class in *Agent Orange*. 123 SCt 2161 (2003).
(15) 537 US 28 (2002).
(16) Id. at 34.
(17) 474 US 34 (1985).
(18) 537 US at 33.
(19) 123 SCt 1690 (2003).
(20) 8 F3d 111 (2d Cir. 1993).
(21) 27 Fed.Appx.26 (2d Cir. 2001).
(22) 123 SCt at 1693.
(23) 123 SCt 1480 (2003).

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