New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 252—NO. 59
WEDNESDAY, SEPTEMBER 24, 2014

SECOND CIRCUIT REVIEW

Expert Analysis

The Second Circuit in the Supreme Court

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With the U.S. Supreme Court beginning its 2014 term next month, we conduct our 30th annual review of the performance of the U.S. Court of Appeals for the Second Circuit over the past term, and briefly discuss the Second Circuit decisions scheduled for review during the new term.

The court ended its 2013 term with one of the highest percentages of unanimous opinions in decades. Approximately two-thirds of the court's merits cases resulted in unanimous decisions, compared to only 10 cases (roughly 15 percent of the docket) resolved by split 5-4 decisions. Many of the unanimous decisions, however, masked sharp disagreements in reasoning among the justices, leading some commentators to label the apparent agreement "illusory."[1] And the 5-4 decisions revealed a court that is still very much divided on matters such as campaign finance regulations, the role of religion in public life, and the death penalty.[2]

During the October term 2013, the Supreme Court issued 64 merits decisions reviewing opinions by federal courts of appeals, including five cases arising out of the Second Circuit. The court affirmed the Second Circuit in 60 percent of the cases it reviewed—the second-highest affirmance rate of all of the federal circuits. The accompanying performance table compares the Second Circuit's performance during the 2013 term to those of its sister circuits.[3]

We describe in this article the Second Circuit decisions reviewed during the 2013 term.

Copyright

In *American Broadcasting Companies v. Aereo*,[4] the court held that Aereo publicly performed copyrighted works, and thus violated the Transmit Clause of the Copyright Act of 1976, when it permitted its subscribers to watch television programs over the Internet at roughly the same time that the programs were broadcast over the air.

Aereo's service consists of a technologically complex system of antennas and other equipment that allows a user to select a television show and then stream it over the Internet by receiving signals on an antenna dedicated to that particular user. A group of television producers, marketers, distributors, and broadcasters who owned the copyrights to many of the programs that Aereo streamed sued Aereo for copyright infringement in the Southern District of New York. They also sought a preliminary injunction against Aereo's operations. The district court denied the injunction, and the Second Circuit affirmed.[5] In the Second Circuit's view, Aereo did not publicly perform copyrighted works in violation of the Copyright Act because it did not transmit "to the public," but instead made private transmissions to individual users.[6]

In a 6-3 decision authored by Justice Stephen Breyer, the Supreme Court reversed. The court first found that Aereo itself performed copyrighted works, and did not just supply equipment that allowed others to do so. The court reached that conclusion by looking to Congress' primary purpose in enacting the Transmit Clause, which was to overturn prior court holdings that the activities of certain early cable providers fell outside the Copyright Act's scope.[7] Because Aereo's activities were substantially similar to those of the cable companies, the court reasoned that Aereo likewise performed copyrighted works.

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The court then held that Aereo performed those works publicly because it transmitted the programs to a large number of people who were unrelated and unknown to each other. The fact that it did so by means of individually assigned antennas was irrelevant "[i]n terms of the Act's purposes," and Congress would have intended to protect copyright holders from Aereo's infringing activities just as it did from those of the early cable companies.[8]

Justice Antonin Scalia, joined by Justices Clarence Thomas and Samuel Alito, dissented, arguing that the court's opinion misconstrued the Copyright Act and disregarded settled rules for service-provider liability. In the dissenters' view, Aereo did not perform copyrighted works and cannot be held liable for direct copyright infringement because its users, rather than Aereo itself, chose the content to be streamed over Aereo's system. The dissent rejected the court's contrary reasoning as based on the "shak[y]" foundation of legislative history, and expressed concern that the majority's "improvised standard ('looks-like-cable-TV')…will sow confusion for years to come."[9]

Significant pre-decision commentary on the case had focused on how the court's ruling might affect other new technologies, including cloud computing and other means of remote digital storage. But in one of its concluding passages, the court disclaimed any broader implications of its decision, stating that "[w]e cannot now answer more precisely how…the Copyright Act will apply to technologies not before us."[10] It remains to be seen how lower courts will apply Aereo's purpose-based approach to copyright claims involving other novel technologies.

Establishment of Religion

In *Town of Greece v. Galloway*,[11] the court held that the town of Greece, N.Y., did not violate the Establishment Clause by opening its town board meetings with prayers offered by local members of the clergy. The case arose from a suit filed by citizens who attended the monthly board meetings and challenged the prayers as impermissibly preferring Christianity over other religions. The town's prayer program is officially open to those of all faiths, but because nearly all of the local congregations are Christian, nearly all of the participating prayer-givers have been Christian as well.

Supreme Court October Term 2013
Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or Vacated	% Reversed or Vacated
First	4	1	3	75
Second	5	3	2	40
Third	2	0	2	100
Fourth	2	1	1	50
Fifth	7	1	6	86
Sixth	11	2	9	82
Seventh	4	3	1	25
Eighth	2	0	2	100
Ninth	12	1	11	92
Tenth	4	2	2	50
Eleventh	3	1	2	67
D.C.	4	2	2	50
Federal	6	1	5	83

SOURCE: Compiled by the authors

A district court in the Western District of New York upheld the prayer practice as consistent with the First Amendment. The Second Circuit reversed, holding that when viewed in their totality by a reasonable observer, the prayers conveyed the message that the town was endorsing Christianity.[12]

In a 5-4 vote that broke down along standard lines, the Supreme Court reversed. Justice Anthony Kennedy delivered the opinion of the court, reasoning that the town's prayer practice was consistent with the historical tradition of legislative prayer that the court had recognized and approved in *Marsh v. Chambers*.[13] The majority rejected the argument that legislative prayer must be nonsectarian in order to pass constitutional muster. Instead, prayers were permitted so long as they were not "exploited to proselytize or advance any one, or to disparage any other, faith or belief."[14] And in the majority's view, the prayers delivered in Greece did not fall outside of that tradition because the town maintained an official policy of non-discrimination, and the prayers invoked universal themes that did not denigrate anyone's faith.

Justice Elena Kagan dissented. Writing on behalf of herself and Justices Ruth Bader Ginsburg, Breyer, and Sonia Sotomayor, she argued that the town's prayer practice—which involved an almost unbroken line of Christian prayers offered every month for over a decade—violated the principles of religious pluralism and inclusion inherent in the Establishment Clause. The dissent distinguished the case from *Marsh* because the prayers in Greece were often overtly sectarian in nature, invited participation by the audience, and were addressed toward members of the public, many of whom attended the town meetings to seek redress for individual grievances.

Moreover, despite the religious diversity among citizens of the town, Greece never made any efforts to involve, accommodate, or even reach out to adherents of non-Christian faiths. Under the circumstances, the town's prayer practice divided its citizens along religious lines, thereby violating the First Amendment's "promise

that every citizen, irrespective of her religion, owns an equal share in her government."[15]

Hague Convention

In *Lozano v. Montoya Alvarez*,[16] the court held that a one-year time period for a return remedy in the Hague Convention on the Civil Aspects of International Child Abduction is not subject to equitable tolling. The Hague Convention generally requires the return of a child who has been abducted by one parent and taken to another country, provided that the other parent requests the return within one year of the abduction. After the one-year period has passed, a return remedy is still available, but can be blocked if "the child is now settled in its new environment."[17]

In a unanimous opinion, the Supreme Court affirmed the Second Circuit's holding that the one-year time period cannot be tolled, even if the abducting parent concealed the child's location from the other parent.[18] The court found that the one-year period is not a statute of limitations, and that no presumption of equitable tolling applies to treaties like the Hague Convention. Reviewing the text and purposes of the Hague Convention, the court concluded that the parties to the treaty did not intend for equitable tolling to apply. And the court declined the petitioner's invitation to "rewrite the treaty" to incorporate such tolling principles.[19]

ERISA

In *Heimeshoff v. Hartford Life & Accident Insurance*,[20] the court unanimously ruled that a limitations period in an employee benefit plan covered by the Employee Retirement Income Security Act (ERISA) is enforceable, even if the period starts to run before the internal administrative review process concludes and thus before the cause of action accrues. The court affirmed the Second Circuit's decision, reasoning that in the absence of a controlling statute of limitations to the contrary, contractual limitations periods should ordinarily be enforced as written. The court then found that the three-year limitations period in the employee benefit plan at issue was reasonable.

> In one of its concluding passages in 'Aereo', the court disclaimed any broader implications of its decision, stating that "[w]e cannot now answer more precisely how…the Copyright Act will apply to technologies not before us."

Foreign Sovereigns' Assets

Finally, in *Republic of Argentina v. NML Capital*,[21] the court held that the Foreign Sovereign Immunities Act (FSIA) does not immunize a foreign-sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets. The case involved efforts by a bondholder to obtain discovery regarding the assets of the Republic of Argentina after that country defaulted on its external debt. The Second Circuit affirmed a district court order granting the bondholder's motions to compel compliance with its subpoenas.[22]

The Supreme Court, in turn, affirmed the Second Circuit in an opinion authored by Justice Scalia. The court held that the FSIA recognizes only two types of immunity, neither of which forbids discovery of a foreign sovereign's assets in aid of execution of a judgment. A "plain statement" is required to preclude application of federal discovery rules, but far from containing such a plain statement, "the [FSIA] says not a word on the subject."[23]

The 2014 Term

While additional Second Circuit cases may be added to the docket in the upcoming months, the Supreme Court is currently scheduled to review only two Second Circuit decisions during its 2014 term. In *Public Employees' Retirement System of Mississippi v. IndyMac,*[24] the court will consider whether the filing of a putative class action is sufficient, under the rule announced in *American Pipe & Construction v. Utah*,[25] to satisfy the three-year time limitation in Section 13 of the Securities Act of 1933. In the decision under review, the Second Circuit held that the American Pipe tolling rule does not apply in that context.[26] And in *Gelboim v. Bank of America*,[27] the court will resolve a circuit split regarding whether and under what circumstances the dismissal of a suit that has been consolidated with other cases is immediately appealable.

1. Nina Totenberg, "Rare Unanimity In Supreme Court Term, With Plenty of Fireworks," NPR, July 6, 2014, available at http://www.npr.org/2014/07/06/329235293/rare-unanimity-in-supreme-court-term-with-plenty-of-fireworks; see also Adam Liptak, "Compromise at the Supreme Court Veils Its Rifts," New York Times, July 1, 2014.
2. See, e.g., *Hall v. Florida*, 134 S. Ct. 1986 (2014); *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).
3. In the interest of completeness, the table treats certain consolidated cases as separate decisions rather than one. For example, it counts the court's decision in *Riley v. California*, 134 S. Ct. 2473 (2014), as an affirmance of the First Circuit's ruling in *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013), cert. granted, 134 S. Ct. 999 (2014). Similarly, it treats the court's opinion in *Burwell v. Hobby Lobby,* 134 S. Ct. 2751 (2013), as a reversal of the Third Circuit's decision in *Conestoga Wood Specialties v. Secretary of U.S. Department of Health & Human Services*, 724 F.3d 377 (3d Cir. 2013), cert. granted, 134 S. Ct. 678 (2013).
4. 134 S. Ct. 2498 (2014).
5. *WNET, Thirteen v. Aereo*, 712 F.3d 676 (2d Cir. 2013).
6. Id. at 684-94 (construing 17 U.S.C. §101).
7. 134 S. Ct. at 2504-06 (citing *Teleprompter Corp. v. Columbia Broad. Sys.,* 415 U.S. 394 (1974); *Fortnightly v. United Artists Television*, 392 U.S. 390 (1968)).
8. Id. at 2508-09.
9. Id. at 2512-15 (Scalia, J., dissenting).
10. Id. at 2511 (opinion of the court).
11. 134 S. Ct. 1811 (2014).
12. *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012).
13. 134 S. Ct. at 1818-19 (citing *Marsh v. Chambers*, 463 U.S. 783 (1983)).
14. Id. at 1821-22 (quoting *Marsh*, 463 U.S. at 794-95).
15. Id. at 1841-42 (Kagan, J., dissenting).
16. 134 S. Ct. 1224 (2014).
17. Hague Convention, Art. 12.
18. 134 S. Ct. at 1231 (citing *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012)).
19. Id. at 1235.
20. 134 S. Ct. 604 (2013).
21. 134 S. Ct. 2250 (2014).
22. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012).
23. 134 S. Ct. at 2256-57.
24. 134 S. Ct. 1515 (2014).
25. 414 U.S. 538 (1974).
26. *Police & Fire Ret. Sys. of Detroit v. IndyMac*, 721 F.3d 95 (2d Cir. 2013).
27. 134 S. Ct. 2876 (2014).