New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 58
WEDNESDAY, SEPTEMBER 23, 2015

Expert Analysis

Second Circuit Review

The Second Circuit in the Supreme Court

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With the U.S. Supreme Court beginning its October 2015 term next month, we conduct our 31st 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's 2014 term was fractious, with the most dissenting opinions in decades at 68 and fewer unanimous opinions (40 percent) than in many years.[1] This is in contrast to the court's 2013 term, where approximately two-thirds of the court's docket resulted in unanimous decisions.[2]

There were 19 5-4 opinions last term, with a higher-than-usual percentage of the majority opinions joined or authored by Justices who are considered to be among the more liberal on the court; Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan aligned in the majority in eight of the 5-4 decisions.[3] There were some familiar themes among the 5-4 decisions, revealing that the court is still deeply divided on issues such as gay marriage and the death penalty.[4]

The Supreme Court issued 74 merits decisions last term,[5] but only one arising out of the Second Circuit, *Gelboim v. Bank of America Corp*. This is the lowest number of Supreme Court merits decisions arising out of the Second Circuit in over a decade.[6]

Like the Second Circuit, the Third, Seventh and Eleventh Circuits all had 100 percent reversal rates this past term. The U.S. Court of Appeals for the First Circuit was the only circuit that did not have any cases reversed or vacated by the court. The accompanying table compares the Second Circuit's performance during the 2014 term to those of its sister circuits in more detail.[7]

We describe in this article the Supreme Court's decision in *Gelboim*. Further, because the court reviewed only one Second Circuit case this term, we also take this opportunity to discuss another Second Circuit case that was originally on the court's docket but which was dismissed prior to oral argument, *Public Employees' Retirement System of Mississippi v. IndyMac MBS*. Our discussion of *IndyMac* focuses on the Second Circuit's decision below and the state of the law in the Second Circuit on the primary issue in IndyMac following the court's dismissal.

Supreme Court October Term 2014 Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or Vacated	% Reversed or Vacated
First	1	1	0	0
Second	1	0	1	100
Third	3	0	3	100
Fourth	6	3	3	50
Fifth	8	2	6	75
Sixth	5	1	4	80
Seventh	3	0	3	100
Eighth	8	1	7	88
Ninth	16	6	10	63
Tenth	4	1	3	75
Eleventh	5	0	5	100
D.C.	4	1	3	75
Federal	3	1	2	67

'Gelboim'

In *Gelboim*, the court held that the district court's dismissal of a plaintiff's complaint asserting federal antitrust claims was a final appealable order even where the complaint was consolidated, for pretrial purposes, with other claims that were not similarly dismissed. Ellen Gelboim brought a class-action complaint in the U.S. District Court for the Southern District of New York, alleging that members of a putative class were entitled to damages for a group of banks' violations of federal antitrust law in connection with an alleged scheme to artificially depress the London Inter-Bank Offered Rate (LIBOR).[8] Pursuant to 28 U.S.C. §1407, Gelboim's case was consolidated for pretrial purposes with more than 60 other actions from judicial districts across the country, all asserting claims arising out of the alleged LIBOR rate-fixing scheme (the MDL).

In June 2012, defendants moved to dismiss four categories of cases in the MDL, including the antitrust action that Gelboim brought on behalf of a putative class of bond purchasers with LIBOR-linked rates. The District Court granted defendants' motion to dismiss, finding that no plaintiff could assert a cognizable antitrust injury, and denied leave to amend.

Thereafter, assuming that Gelboim was entitled to an appeal as of right under 28 U.S.C. §1291 because her suit had been dismissed in its entirety, the District Court granted a Fed. R. Civ. P. 54(b) certification authorizing Gelboim to appeal the dismissal of her antitrust claims. The Second Circuit, however, dismissed the Gelboim appeal because the "orde[r] appealed from did not dispose of all claims in the *consolidated* action."[9] Gelboim filed a petition for a writ of certiorari with the Supreme Court, challenging the Second Circuit's decision dismissing her appeal.

The Supreme Court granted certiorari and, in a unanimous decision authored by Justice Ginsburg, reversed and remanded the Second Circuit's decision. The court held that the District Court's order dismissing Gelboim's antitrust claim made the claim an immediately appealable final decision under 28 U.S.C. §1291. The court noted that cases that are consolidated for pretrial purposes pursuant to 28 U.S.C. §1407, "ordinarily retain their separate identities" and that an MDL order under §1407 merely transfers these cases to a "single district court," rather than creating a single "monolithic multidistrict" action.[10] In so concluding, the court examined the legislative history of §1407, which indicated that Congress anticipated that individual actions con-

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solidated for pretrial purposes in an MDL would be remanded to their originating district if not otherwise disposed of during pretrial proceedings in the MDL court.

The court further explained that a finding to the contrary would leave the question regarding accrual of the right to appeal in this circumstance impermissibly unclear. As the court noted, at the conclusion of pretrial consolidation, "[t]here may be no occasion for the entry of any judgment. Orders may issue returning cases to their originating courts, but an order of that genre would not qualify as the dispositive ruling Gelboim [ ] seek[s] to overturn on appeal. And surely would-be appellants need not await final disposition of all cases in their originating districts [to appeal.]"[11]

Instead, the court held that a "sensible solution to the appeal-clock trigger is evident: When the transferee court overseeing pretrial proceedings in multidistrict litigation grants a defendant's dispositive motion 'on all issues in some transferred cases, [those cases] become immediately appealable…while cases where other issues remain would not be appealable at that time.'"[12]

Although *Gelboim* answers the question of whether a plaintiff whose complaint is dismissed in its entirety with prejudice has an immediate right to appeal under §1291 when it was consolidated with other pending actions for pretrial purposes, the decision leaves open the question of whether an action consolidated with others for all purposes would be immediately appealable under §1291 under similar circumstances.

Although the court "express[ed] no opinion" on this question,[13] it seems as though the court's reasoning—which relied heavily on the legislative history suggesting that Congress expected cases consolidated under §1407 to be remanded to their original districts if not otherwise resolved during pretrial proceedings—could not be easily applied to reach a similar outcome in cases consolidated for all purposes. Plaintiffs whose complaints are dismissed with prejudice after being consolidated for all purposes with other pending actions may need to await a final judgment in the consolidated action for their appeal as of right to accrue under §1291.

'IndyMac'

As discussed above, although originally on its docket,[14] the Supreme Court did not review the merits of the Second Circuit's decision in *Police and Fire Retirement System of City of Detroit v. IndyMac MBS*, 721 F.3d 95 (2d Cir. 2013). On Sept. 29, 2014, prior to oral argument, the court dismissed the writ of certiorari as "improvidently granted."[15]

The primary issue before the Second Circuit was whether the class action tolling rule articulated in *American Pipe & Construction Co. v. Utah*, 414 U.S. 539 (1974)—which "suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action" at "the commencement of a class action"—applies equally to statutes of repose.[16] The IndyMac litigation involved a consolidated class action alleging violations of Sections 11, 12(a) and 15 of the Securities Act in connection with numerous offerings of mortgage pass-through certificates made by IndyMac from 2005 to 2007.

After the District Court dismissed for lack of standing certain claims relating to securities that the lead plaintiffs had not purchased, and after Section 13's three-year statute of repose expired, putative plaintiffs, who were purchasers of the securities underlying the dismissed claims, sought to intervene in the action to revive the dismissed claims. The District Court denied the motions to intervene, reasoning that the putative plaintiffs' claims were untimely because the statute of repose had expired.

On appeal, the Second Circuit rejected the putative plaintiffs' argument that Section 13's statute of repose should be tolled under *American Pipe*. In so holding, the Second Circuit emphasized the difference between statutes of limitation and statutes of repose, stating that the statutes of limitation limit the availability of remedies whereas the statutes of repose cut off a plaintiff's substantive right to sue (and provide defendant with a substantive right not to be sued after a certain time). The court explained that a court can equitably toll a limitation on remedies, but that a statute of repose cannot be tolled in equity because, after it expires, the plaintiff has no substantive, legal right to sue the defendant.

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The court recognized, however, that a circuit split exists as to whether the tolling principle outlined in *American Pipe* is an equitable or legal one. But the Second Circuit declined to weigh in on the circuit split in its decision in *IndyMac*, finding that, even if American Pipe tolling is legal, the Rules Enabling Act (REA) prohibits tolling in this context. Specifically, the court found that the REA, which provides the Supreme Court with "the power to prescribe general rules of practice and procedure," including the Federal Rules of Civil Procedure, forbids the promulgation of a rule "abridg[ing], enlarg[ing] or modify[ing] any substantive right."[17] The court therefore reasoned that interpreting the filing of a class action under Fed. R. Civ. P. 23 to extend the substantive right to sue by tolling the statute of repose would impermissibly enlarge or modify a substantive right.

The putative plaintiffs sought review by the Supreme Court and, on March 10, 2014, the court granted the petition. On Sept. 22, 2014, however, IndyMac plaintiffs and certain defendants filed a Notice of Agreement of Settlement in the District Court.[18] Thereafter, the Supreme Court issued an order directing the parties to file letter briefs explaining whether the proposed settlement affected the question presented to the court.[19] Although the parties argued in their briefs that the court should hear the case because certain defendants did not participate in the settlement, on Sept. 29, 2014, the court dismissed the writ of certiorari as "improvidently granted."[20]

Following this dismissal by the Supreme Court, statutes of repose defining a substantive right cannot be equitably or legally tolled by the filing of a class action under Fed. R. Civ. P. 23 in the Second Circuit.

The 2015 Term

Thus far, the Supreme Court has granted three cert petitions from the Second Circuit for the 2015 term. In *Gobeille v. Liberty Mutual*, the court will consider an ERISA (Employee Retirement Income Security Act) preemption question relating to Vermont's reporting requirements for health insurance plans.[21] In *Torres v. Lynch*, the court will address whether a state law arson conviction constitutes an "aggravated felony" under federal law that would support a finding of inadmissibility by the Immigration and Naturalization Service.[22] In *Lockhart v. United States*, the court will consider a circuit split over the correct interpretation of the language in 18 U.S.C. §2252(b)(2), which provides for a 10-year mandatory minimum sentence if a defendant was previously convicted "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward."[23]

1. Kedar S. Bhatia, Stat Pack for October Term 2014, SCOTUSBLOG 8–9, 19 (June 30, 2015), http://sblog.s3.amazonaws.com/wpcontent/uploads/2015/07/SB_Stat_Pack_OT14.pdf (hereinafter "SCOTUSBLOG 2014 Stat Pack").
2. Martin Flumenbaum and Brad S. Karp, Second Circuit Review: "The Second Circuit in the Supreme Court," N.Y.L.J. (Online), Sept. 24, 2014.
3. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *U.S. v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015); *City of L.A. v. Patel*, 135 S. Ct. 2443 (2015); *Tex. Dep't of Hous. & Cmty. Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015).
4. See, e.g., *Obergefell*, 135 S. Ct. 2584 (2015); *Glossip v. Gross*, 135 S. Ct. 2726 (2015).
5. This figure does not include *Public Emps. Ret. Sys. of Miss. v. IndyMac MBS* or *Chen v. Baltimore*, which were dismissed before oral argument, and treats *U.S. v. Kwai Fun Wong* and *United States v. June* as one merits decision.
6. See generally Tom Goldstein, Stat Pack Archive, SCOTUSBLOG (Sept. 8, 2014 4:53 pm), http://www.scotusblog.com/reference/stat-pack/.
7. SCOTUSBLOG 2014 Stat Pack at 3–4.
8. *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 903 (2015).
9. Id. at 904 (emphasis added).
10. Id. at 905.
11. Id. at 905–06.
12. Id. at 906 (alterations in original).
13. Id. at 904 n. 4.
14. On petition to the Supreme Court, the case was captioned as *Pub. Emps. Ret. Sys. of Miss.v. IndyMac MBS.*
15. Order Dismissing Writ of Certiorari, *Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS*, 135 S. Ct. 42 (2014).
16. *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS*, 721 F.3d 95, 100 (2d Cir. 2013).
17. Id. at 109.
18. *In re IndyMac Mortgage-Backed Sec. Litig.*, 09 Civ. 04583 (LAK) (S.D.N.Y. Sept. 22, 2014), Dkt. #539.
19. Kevin M. LaCroix, "Supreme Court Will Not Consider Securities Act Statute of Repose Issue in *IndyMac* After All," THE D&O DIARY (Sept. 30, 2014), http://www.dandodiary.com/2014/09/articles/securities-litigation/supreme-court-will-not-consider-the-securities-act-statute-of-repose-issue-in-the-indy-mac-case-after-all/.
20. Id.; see also Order Dismissing Writ of Certiorari, *Pub. Emps. Ret. Sys. of Miss. v. IndyMac MBS*, 135 S.Ct. 42 (2014).
21. 746 F.3d 497 (2d Cir. 2014).
22. 764 F.3d 152 (2d Cir. 2014).
23. 749 F.3d 148 (2d Cir. 2014).