

## SECOND CIRCUIT REVIEW

## Expert Analysis

# The Second Circuit in the COVID-19 Era

Over the past six weeks, the coronavirus has claimed tens of thousands of American lives. More than 600,000 Americans have tested positive for COVID-19. The actual number of Americans carrying the virus is exponentially higher. More than 160 states and municipalities across the nation have imposed shelter-in-place orders and closed schools, restaurants, bars, retail shops, museums, theaters, libraries, parks, stadiums and other public venues.

The legal profession, including our courts, has not been spared. The practice of law has become “remote.” The New York State Bar Association held its first remote meeting in its 150-year history. Courts, likewise, have been forced to adapt to these unprecedented times and have adopted novel practices and procedures. We discuss this month how the pandemic has affected the Second Circuit and what to watch for as the crisis develops.

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, both specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss. HENRY R. TOPPER, a litigation law clerk at the firm, assisted in the preparation of this column.



By  
**Martin  
Flumenbaum**



And  
**Brad S.  
Karp**

### Oral Arguments Move to Teleconference Platform

On March 19, the Second Circuit announced that, effective March 23, 2020 and “until the crisis passes,” the court will hear all oral arguments using a teleconference platform. Although the court had begun to hear telephonic oral arguments on an ad hoc basis on March 12, 2020, the March 19 announcement marked the court’s move to exclusively telephonic oral arguments—a practice that has been adopted in several other circuits, including the Fourth, Seventh, Eighth, Ninth, and D.C. circuits. As the New York Law Journal has already reported, Chief Judge Katzmann described the first teleconference oral argument as a “maiden-voyage,” not without its hiccups.

Unsurprisingly, the customary and organic back-and-forth of in-person oral argument is not

possible in the teleconference format. As many of us have learned from our own teleconferencing experiences over recent weeks, the format does not lend itself to the natural flow of conversation—the lack of visual cues makes it impossible to know when someone else is trying to speak. This format will affect judges who are active questioners and change the conversational back and forth that marks many, if not most, Second Circuit arguments.

Accordingly, although the court has not issued formal procedural guidelines for telephonic oral argument, there have been reports in certain appeals that the panel’s presiding judge has allowed the appellant to begin with a short, uninterrupted presentation, followed by sequential questioning by each of the three judges, then a repeat of that procedure for the appellee’s argument and rebuttal. Each panel’s presiding judge, however, may have different preferences regarding the argument’s format and structure.

It is too early to say what impact, if any, the new teleconference oral arguments will have on the court’s decision making. Of the 23 opinions that have been issued since

the March 19, 2020 teleconference order as of April 13, only one, *Hayward v. IBI Armored Services*, 2020 WL 1647176 (2d Cir. April 3, 2020), was argued after the new rules were introduced. There is nothing unusual about the opinion. We will continue to monitor the court's activity and determine if the shift to telephonic argument has led to any noteworthy changes in the Circuit's jurisprudence, such as an increase in the number of appeals that the court disposes of by summary order, or even greater reliance on briefs as opposed to oral arguments, reflected perhaps by an increased number of cases "submitted" for decision, without oral argument

#### **Changes to Court Deadlines and Paper Copies**

Recognizing that COVID-19 has disrupted the personal and professional lives of those who practice before the court, on March 16, 2020, the court ordered a 21-day extension of time for all filings and deadlines. Absent an extraordinary circumstance, which is defined as "serious personal illness or death in counsel's immediate family," no additional extensions of time to file will be granted. Local Rule 27.1 (f) (1). Ten days later, on March 26, 2020, the court announced that papers due on or after May 18, 2020 will be due on the date specified in the order or by rule and that the court does not anticipate further extending filing dates and other deadlines.

The court has also lifted requirements for paper filings during the pandemic, although paper copies of documents must still be served

on pro se litigants and others who are not registered to file electronically. Papers that cannot be filed in ECF, such as pro se papers, petitions for review, and petitions for a writ seeking extraordinary relief, can be emailed to the court.

#### **Circuit Productivity During the COVID-19 Crisis**

As the court adapts during these unprecedented times, it would not be surprising if there was a drop in the court's productivity. To date, however, there has been no such

---

The court has adopted new, unprecedented measures to adapt to this crisis, including telephonic oral arguments and tolled filing deadlines.

decrease. During the first three weeks since formally shifting to remote proceedings, the court in fact issued more opinions than it did during the same period in 2019 (23 and 13, respectively). However, the court has also issued more summary orders during this three-week period compared to 2019 (78 and 53, respectively). During this same three-week "remote" period, there have been approximately 50 fewer notices of appeal filed than during the same period in 2019. It would not be surprising to see an uptick in summary orders at a time when the Circuit Judges and attorneys who appear before the court are all working remotely. It remains to be seen how these trends will develop in the weeks and months to follow.

The Second Circuit has continued to issue several important

opinions during the pandemic, including defining an "automatic telephone dialing system" for purposes of the Telephone Consumer Protection Act in *Duran v. La Boom Disco*, 2020 WL 1682773 (2d Cir. Apr. 7, 2020); holding that companies do not consent to general personal jurisdiction in New York by registering to do business and designating an agent for service of process in the State in *Chen v. Dunkin' Brands*, 2020 WL 1522826 (2d Cir. Mar. 31, 2020); and refusing to rehear en banc a decision barring President Trump from blocking users on Twitter in *Knights First Amendment Institute at Columbia University v. Trump*, 953 F.3d 216 (2d Cir. March 23, 2020).

#### **Conclusion**

Like other courts and like virtually every business, the Second Circuit has been profoundly impacted by the COVID-19 pandemic and the attendant shutdowns and stay-at-home orders. The court has adopted new, unprecedented measures to adapt to this crisis, including telephonic oral arguments and tolled filing deadlines. The full extent of this impact remains to be seen. Although we might expect eventually to see slight decreases in the court's productivity, coinciding with the implementation of the new rules and guidelines, the Second Circuit has continued to issue landmark decisions, of the highest quality.