New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 63
THURSDAY, SEPTEMBER 29, 2016

SECOND CIRCUIT REVIEW

Expert Analysis

The Second Circuit In the Supreme Court

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With the U.S. Supreme Court beginning its October 2016 term next month, we conduct our 32nd annual review of the performance of the U.S. Court of Appeals for the Second Circuit over the past term, and briefly discuss the court's decisions scheduled for review during the new term.

The court's 2015 term was marked by the sudden passing of Justice Antonin Scalia in February 2016. As a result, four of the court's 80 merits decisions this term were split 4-4.[1] Although one might assume that the current makeup of the court would result in a record number of 4-4 decisions, the percentage of 4-4 decisions this term was consistent with the percentage in recent history due to recusals or missing justices: 7 percent of all Rehnquist court decisions (1986-2004) and 4 percent of Roberts court decisions, prior to the death of Justice Scalia (2005-2015), resulted in a 4-4 split.[2]

Justice Scalia's death also coincided with a high number of left-leaning opinions (56 percent of decisions this term). That percentage is only slightly lower than the 2014 term, which marked the highest percentage of liberal decisions since the Warren court.[3]

Six of the Supreme Court's 80 merits decisions this term arose out of the Second Circuit. Four were affirmed, and two were reversed, resulting in a 33 percent reversal rate. This reversal rate tied the U.S. Court of Appeals for the First Circuit for the second lowest reversal rate among the circuits this term; the U.S. Court of Appeals for the Eighth Circuit had a 29 percent reversal rate.[4] The accompanying table compares the Second Circuit's performance during the 2015 term to those of its sister circuits.

We discuss below the Supreme Court's decisions this term in the five cases that reviewed written opinions by the Second Circuit. We omit discussion of the court's decision in *Torres v. Lynch*, 136 S. Ct. 1619 (2016), which, although it arose out of the Second Circuit, was an Immigration Court decision that was denied review by the Second Circuit.

Statutory Interpretation

The Supreme Court heard two cases from the Second Circuit this term involving a question of statutory interpretation.

In *Lockhart v. U.S.*, 136 S. Ct. 958 (2016), the defendant Avondale Lockhart received a 10-year sentence after pleading guilty to possessing child pornography in violation of 18 U.S.C. §2252(a)(4). Lockhart's sentence was based on application of the 10-year mandatory minimum sentence under 18 U.S.C. §2252(b)(2), which applies to someone with a prior state conviction for crimes "related to aggravated sexual abuse, sexual abuse, or abusive conduct involving a minor or ward."

Lockhart, who was previously convicted of sexual abuse of his then-53-year-old girlfriend, argued that the modifier "involving a minor or ward" applies not only to the last of the three listed crimes in the statute but to all three listed crimes and thus did not apply to his prior conviction for sexual abuse of an adult. The district court applied the "rule of the last antecedent" to find that the modifier "involving a minor or ward" applies only to the immediately preceding clause (abusive conduct involving a minor or ward) and sentenced Lockhart to 120 months in prison. The Second Circuit affirmed.

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Supreme Court October Term 2015

Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or Vacated	% Reversed or Vacated
First	3	2	1	33%
Second	6	4	2	33%
Third	3	1	2	67%
Fourth	6	3	3	50%
Fifth	9	4	5	56%
Sixth	4	1	3	75%
Seventh	0	0	0	0
Eighth	6	4	2	33%
Ninth	11	3	8	73%
Tenth	4	1	3	75%
Eleventh	3	0	3	100%
D.C.	4	2	2	50%
Federal	4	1	3	75%

SOURCE: Kedar S. Bhatia, Stat Pack for October Term 2015, SCOTUSBLOG 3-4 (June 29, 2016), http://www.scotusblog.com/wp-content/uploads/2016/06/SB_stat_pack_OT15.pdf.

The Supreme Court, in a 6-2 decision, affirmed. The majority held that application of the rule of the last antecedent is appropriate where it "takes more than a little mental energy to process the individual entries in the list, making it a heavy lift to carry the modifier across them all." Although it acknowledged that the rule "is not absolute," the majority held that no other indicia of meaning exist sufficient to overcome the natural reading. Further, the majority noted that the statutory context supported this interpretation: The terms "aggravated sexual abuse," "sexual abuse" and "abusive conduct involving a minor or ward" mirror three separate headings under Chapter 109A of the Federal Criminal Code, which contains federal predicate offenses that also trigger the mandatory minimum under Section 2252(b)(2).

Justices Elena Kagan and Stephen Breyer dissented, arguing that the court should have applied the "series-qualifier canon," which provides for a modifying phrase to be applied to each preceding term of "a single, integrated list." The dissent argued that the rule of the last antecedent does not ordinarily apply where there is a "straightforward, parallel construction that involves all nouns or verbs in a sentence."

In *RJR Nabisco. v. European Community*, 136 S. Ct. 2090 (2016), the European Community and certain member states alleged that RJR Nabisco was engaged in a pattern of foreign conduct that violated RICO—involving the predicate acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud and violations of the Travel Act. The district court dismissed the claim, holding that RICO does not apply extraterritorially. The Second Circuit reversed, holding that RICO applies extraterritorially if the predicate act statutes apply extraterritorially. The Second Circuit also held, in a supplemental decision issued when it denied RJR Nabisco's motion for rehearing, that litigants need not plead a domestic injury to establish a RICO violation.

> In 'Gobeille,' the Supreme Court held that ERISA's preemption clause is meant to be read broadly, and preempts state laws that have an "impermissible 'connection with' ERISA plans," such as those that "interfere[ ] with nationally uniform plan administration."

The Supreme Court reversed in a 4-3 decision, applying the "presumption against extraterritoriality"—which assumes that statutes do not apply extraterritorially unless they explicitly provide for extraterritorial reach—to find that private litigants can only bring a suit for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) based on foreign conduct if they allege a domestic injury.[5]

The majority held that the extraterritorial conduct at issue here could violate RICO because the predicate statutes had express extraterritorial reach; however, the court found that the RICO private right of action provision did not explicitly extend the right to individuals alleging a foreign injury.

Justices Breyer, Kagan and Ruth Bader Ginsburg dissented. The dissent noted that the requirement of domestic injury does not apply to suits brought by the government, and argued that the statute's text and history do not support a reading that RICO's reach is more limited in a private civil context than when a suit is brought by the government.

Preemption

In *Gobeille v. Liberty Mutual Insurance Company*, 136 S. Ct. 936 (2016), Liberty Mutual challenged a Vermont statute requiring disclosure of certain data on health care cost and quality. Concerned that disclosure to Vermont of such data would violate its fiduciary duties, Liberty Mutual sought a declaration that the Employee Retirement Income Security Act (ERISA), which has its own reporting requirements, preempts the Vermont statute. The district court granted summary judgment to Vermont. The Second Circuit reversed, holding that the Vermont statute interfered with one of ERISA's "core functions."

In a 6-2 opinion, the Supreme Court affirmed. The court held that ERISA's preemption clause is meant to be read broadly, and preempts state laws that have an "impermissible 'connection with'

ERISA plans," such as those that "interfere[ ] with nationally uniform plan administration." The court held that "reporting, disclosure and recordkeeping" are integral aspects of ERISA and that the Vermont statute intrudes on this "central matter of plan administration." As a result, Liberty Mutual was not required to disclose the data pursuant to the Vermont statute.

Justices Ginsburg and Sonia Sotomayor dissented, arguing that because each statute has a distinct purpose and the reporting requirements differ, there is no "impermissible connection" between the statutes or interference with ERISA.

Separation of Powers

In *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), the court considered a challenge to a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S. C. §8772, which Congress enacted in response to efforts by over 1,000 victims of Iran-sponsored terrorism and their surviving family members (the "victims") to satisfy judgments they had obtained against Iran in 16 different actions under the Foreign Sovereign Immunities Act. Specifically, in 2008, the victims sought $1.75 billion in bond assets held in a New York bank account to satisfy their judgments. Whether the assets actually belonged to Bank Markazi, the Central Bank of Iran, however, was disputed. In response, Congress enacted legislation that made the assets available to satisfy the claims of the victims in these litigations if the district court made certain findings, including "whether Iran holds equitable title to, or the beneficial interest in, the assets…." Applying the new standard, the district court found that the victims were entitled to the assets. On appeal, Bank of Markazi argued that the decision violated Article III, as Congress, rather than the judiciary, determined the case's outcome. The Second Circuit affirmed.

In a 6-2 decision, the Supreme Court affirmed. "[A] statute does not impinge on judicial power," the majority held, simply because it "directs courts to apply a new legal standard to undisputed facts." The court also rejected the contention that legislation must be generally applicable, citing a litany of decisions upholding laws affecting a small number of individuals, or even one, specific entity.

Chief Justice John Roberts and Justice Sotomayor dissented, arguing that Congress cannot both create a rule that will resolve a matter in favor of one party and make that rule applicable to the specific dispute alone. Roberts conceded that "it can sometimes be difficult to draw the line between legislative and judicial power," but argued that the "entire constitutional enterprise depends on there being such a line."

Copyright Act

In *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979 (2016), the Supreme Court revisited a matter it first heard in 2013, when it ruled that Supap Kirtsaeng did not violate the Copyright Act when he sold English language textbooks purchased in his home country of Thailand at a profit to students in the United States. Kirtsaeng subsequently returned to the district court and sought attorney fees from Wiley under Section 505, which gives a court discretion to award fees to the prevailing party. Grounding its decision in Second Circuit precedent, the district court denied Kirtsaeng's application because Wiley's position in the litigation was objectively reasonable. The Second Circuit affirmed.

In a unanimous decision, the court vacated the Second Circuit's decision and remanded the case, holding that a court should give substantial weight to whether the losing party's argument was "objectively reasonable" when evaluating whether to award attorney fees to the prevailing party under Section 505 of the Copyright Act, and that a finding of objective reasonableness does not create a presumption that attorney fees will not be awarded.

The court noted that the Second Circuit "at times suggests that a finding of reasonableness raises a presumption against granting fees, [ ] and that goes too far in cabining how a district court must structure its analysis and what it may conclude from its review of relevant factors." Additional relevant factors include frivolousness, motivation and "the need in particular circumstances to advance considerations of compensation and deterrence." The court remanded with instructions that objective reasonableness be given "substantial weight," but also that other factors be considered in the analysis.

The 2016 Term

Thus far, the Supreme Court has only granted one cert petition from the Second Circuit for the 2016 term. In *Lynch v. Morales-Santa*, 136 S. Ct. 2545 (2016), the court will consider the constitutionality of treating, for purposes of U.S. citizenship under 8 U.S.C. §§1401-09, foreign-born children with a U.S. citizen mother different from foreign-born children with a U.S. citizen father.

1. These figures treat decisions in consolidated matters as one merits decision.

2. Mark Fahey, "With Scalia Missing, the Supreme Court Still Hates Ties," CNBC (June 28, 2016), http://www.cnbc.com/2016/06/28/with-scalia-missing-the-supreme-court-still-hates-ties.html.

3. Alicia Parlapiano, "When the Eight-Member Supreme Court Avoids Deadlocks, It Leans Left," THE N.Y. TIMES (June 27, 2016) http://www.nytimes.com/interactive/2016/06/27/us/eight-member-supreme-court.html?_r=0.

4. The reversal rates referenced in this column treat 4-4 decisions as affirming the appellate court decision.

5. Justice Sotomayor recused herself from the case.