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SECOND CIRCUIT REVIEW

Expert Analysis

The Second Circuit in the Supreme Court

With the U.S. Supreme Court beginning its October 2017 term next month, we conduct our 33rd 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 upcoming term.

The Supreme Court gained an additional justice last term, with Justice Neil Gorsuch winning Senate confirmation to fill the seat of late Justice Antonin Scalia. Notwithstanding the changed makeup of the court, the term was marked by an unusual number of unanimous decisions: 41 out of 69 opinions (59 percent) were decided 9-0, the highest number since the October 2013 Term. See Kedar S. Bhatia, "Stat Pack for October Term 2016," SCOTUSBLOG 5, 15-16 (June 28, 2017).

Five of the court's 71 merits decisions (resulting in 69 written opinions) arose out of the Second Circuit. One was affirmed and four were reversed or vacated, resulting in an 80 percent reversal rate. Yet the Second Circuit

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was far from the most-reversed circuit last term: seven circuits had reversal rates between 86 and 100 percent. The accompanying table compares the Second Circuit's performance during the 2016 Term to those of its sister circuits.

We discuss below the Supreme Court's five merits decisions that arose out of the Second Circuit last term.

Commercial Speech

In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), merchants challenged a state statute prohibiting them from applying a surcharge when a customer uses a credit card instead of cash to purchase an item, and identifying the credit card surcharge as such to the customer. The merchants alleged that the statute violated the First Amendment by regulating what they communicated to their customers. The district court sided with the merchants, but the Second Circuit vacated the judgment, finding that the statute regulated conduct rather than speech. Id. at 1148.

The Supreme Court reversed, with all justices concurring in the judgment. The majority found that the statute proscribed ways in which merchants could communicate about their prices, rather than merely regulating the amount a merchant could collect. Id. at 1150-51. The court remanded the case with instructions to consider whether the regulation is a valid disclosure requirement—defined as a requirement "reasonably related to the State's interest in preventing deception of consumers," *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)—and therefore permissible regulation of speech. *Expressions*, 137 S. Ct. at 1151.

Standing to Intervene

In *Town of Chester, N.Y. v. Laroe Estates*, 137 S. Ct. 1645 (2017), the Supreme Court considered whether a litigant seeking to intervene as of right under Federal Rule 24(a)(2) must meet the requirements of Article III standing in order to pursue relief not requested by a plaintiff in the action. Respondent Laroe Estates filed a motion to intervene as of right in a regulatory takings action by a land developer, alleging that Laroe had

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Circuit	Number	Affirmed	Number Reversed or Vacated	% Reversed or Vacated
First	1	1	0	0%
Second	5	1	4	80%
Third	2	0	2	100%
Fourth	2	1	1	50%
Fifth	4	2	2	50%
Sixth	7	1	6	86%
Seventh	2	0	2	100%
Eighth	2	0	2	100%
Ninth	8	1	7	88%
Tenth	3	0	3	100%
Eleventh	5	2	3	60%
D.C.	3	1	2	67%
Federal	7	1	6	86%

SOURCE: Kedar S. Bhatia, "Stat Pack for October Term 2016," SCOTUSBLOG at 3 (June 28, 2017).

an equitable interest in the subject property that was not adequately represented by the developer. Id. at 1648-49. The district court found that Laroe's equitable interest in the property did not confer standing, but the Second Circuit reversed, holding that an intervenor as of right was not required to meet Article III's standing requirements. Id. at 1649-50.

The Supreme Court unanimously vacated the judgment, holding that an intervenor of right must meet the requirements of Article III standing where the intervenor seeks additional relief beyond what is requested by the plaintiff. Id. at 1651-52. The court held, however, that the Second Circuit had not adequately analyzed whether the relief sought by Laroe was different from that sought by the developer, and therefore remanded with instructions to resolve that issue. Id. at 1652.

Equitable Tolling

In *California Pub. Emp.' Ret. Sys. v. ANZ Sec.*, 137 S. Ct. 2042 (2017), the Supreme Court considered whether the tolling principle announced in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974) applies to the three-year time limit for actions brought under §11 of the Securities Act of 1933. Id. at 2051. *American Pipe* held that a statute of limitations period was tolled—such that a complaint filed after the limitations period would be timely—where a class action complaint filed before the expiration of the limitations period "[n]otified the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate." Id.

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In 2008, a putative class action was filed against underwriters of an offering, alleging violations of §11. Id. at 2047-48. Petitioner was a member of the class, but brought a separate complaint more than three years after the offering. Id. Section 13 of the 1933 Act has two limitations provisions applicable to §11 claims, providing first that "[n]o action shall be maintained … unless brought within *one year* after the discovery of the untrue statement or the omission," and second that "[i]n no event shall any such action be brought … more than *three years* after the security was bona fide offered to the public." Id. at 2047 (emphasis added). The district court dismissed petitioner's claim, concluding that the three-year period was not tolled during the pendency of the class action, and the Second Circuit affirmed. Id.

In a 5-4 decision, the Supreme Court affirmed, holding that §13's three-year limit is a statute of repose. Id. at 2049-54. Writing for the majority, Justice Anthony Kennedy reasoned that the two-limitations-period structure of §13 lent toward the conclusion that the one-year period is a statute of limitations, whereas the three-year period is a fixed limit reflecting a legislative intent that a defendant not be subject to protracted liability. Id. at 2051. The dissenting justices would have held that the statute of repose was tolled by the filing of the class action where the pension fund was a member of the class. Id. at 2056-58 (Ginsberg, J., dissenting).

Implied Causes of Action Against Federal Officers

In *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the Supreme Court considered whether an implied cause of action against federal officers existed under the precedent of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) for alleged violations of the respondents' Fourth, Fifth and Eighth amendment rights in the wake of the Sept. 11, 2001 terrorist attacks. Respondents, six illegal immigrants of Arab or South Asian descent living in New York on September 11, were

identified and detained by federal officers as part of their investigation of the terrorist attacks. Id. at 1852-53. Respondents sued in district court, alleging that their treatment during detention violated the Fourth and Fifth Amendments and 42 U.S.C. §1985(3), which prohibits conspiracies to violate equal protection rights. Id. at 1853-54. The district court and Second Circuit held that an implied cause of action existed for respondents' constitutional claims against certain of the defendants. Id. at 1854.

The Supreme Court reversed, finding that the differences between the instant case and prior *Bivens* cases were "meaningful enough" to make this a "new *Bivens* context." Id. at 1856-60. A new *Bivens* context, the court explained, requires courts to carefully consider whether Congress has intentionally declined to create the cause of action. Id. Under this analysis, the court held that several factors counseled against finding an implied cause of action, including that adjudication of the claims would require broad inquiry into issues of national security. Id. at 1860-61. With respect to respondents' claims under §1985(3), the court held that the federal officers had qualified immunity because it is an open question whether agents of the same principal can form a conspiracy as a matter of law; therefore, a reasonable officer would not have been on notice that his conduct was unlawful. Id. at 1868.

Citizenship of Children Of Unwed U.S. Citizens

In *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), the Supreme Court considered whether a statutory scheme violated the equal protection component of the Fifth Amendment where it granted citizenship to children of unwed U.S. citizen mothers if the mother resided in the United States for one year prior to the child's birth, but required unwed U.S. citizen fathers to live in the United States for 10 years (with at least five of those years after attaining the age of 14). Morales-Santana, whose father failed to satisfy the requirements set forth in the statute because Morales-Santana was born 20 days before his father's 19th birthday, alleged that the statutory scheme inappropriately discriminated against unwed fathers based on their gender. Id. at 1686-88.

Analyzing the issue under the framework applicable to gender discrimination equal protection claims, the Supreme Court affirmed the judgment of the Second Circuit, finding that the government failed to provide an "exceedingly persuasive justification" for the unequal treatment. Id. at 1689-90. The court reasoned that the scheme was based on antiquated notions that unwed fathers would "care little about, and have scant contact with, their nonmarital children." Id. at 1692. The court held that even if the government intended to "ensur[e] a connection between the foreign-born nonmarital child and the United States, the gender-based means scarcely serve the posited end" because an unwed U.S. citizen mother who lived in the United States for one year before the birth of her child could pass on citizenship, whereas an unwed U.S. citizen father who raised his children in the United States could not. Id. at 1696.

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With respect to relief, however, the court declined to apply the one-year unwed mothers' rule to Morales-Santana. Id. at 1698-1701. Finding that the one-year rule was an exception that Congress carved out for unwed mothers only, the court held that it would be inappropriate to extend the exception to additional categories of individuals where it was clear that congressional intent was to apply stricter requirements of physical presence to all other parents. Id. The court left it to the legislature to resolve the impermissible distinction. Id.

The 2017 Term

So far, the Supreme Court has granted certiorari for three cases arising out of the Second Circuit for next term. In *Jesner v. Arab Bank*, the court will consider whether the Alien Tort Statute allows for corporate liability. In *Leidos v. Indiana Pub. Ret. Sys.*, the court will consider whether failure to disclose information under Item 303 of SEC Regulation S-K violates §10(b) of the Securities Exchange Act of 1934 and rules thereunder. Finally, in *Marinello v. U.S.*, the court will consider whether 26 U.S.C. §7212(a) should be construed to require proof that the defendant had knowledge of a pending IRS action in order to be convicted of attempted obstruction of administration of the tax laws.