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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 2018 term next month, we conduct our 34th 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 end of the October 2017 term brought the surprising announcement of Justice Anthony Kennedy's retirement, which took effect on July 31, 2018. Justice Kennedy's retirement gives President Donald Trump his second opportunity to appoint a justice to the bench. Justice Kennedy's potential replacement—Judge Brett Kavanaugh of the U.S. Court of Appeals for the District of Columbia Circuit—is widely perceived to be a more conservative appointment than Justice Kennedy, who was nominated in 1987 by President Ronald Reagan and has long been considered a critical swing vote on the court.

During the term, the court produced a total of 63 opinions, an uncommonly small percentage (39 percent) of which were unanimously decided. This was the lowest rate of unanimous decisions since the October 2008 term. See Kedar S. Bhatia, "Stat Pack for October Term 2017," SCOTUSBLOG 15-16 (June 29, 2018). Four of the court's merits decisions arose out of the Second Circuit, two of which were affirmed and two of which were reversed, resulting in a 50 percent reversal rate. Id. at 3-4. This made the Second Circuit the least-reversed of all the Circuits aside from the Tenth, which had a reversal rate of 33 percent. Id. The remaining circuits had reversal rates between 57 and 100 percent. Id. Overall, the court reversed 74 percent of the cases before it this term, which is consistent with its reversal rates ranging from 63 percent to 79 percent over the past 10 years. See "Stat Pack Archive," SCOTUSBLOG. The accompanying table compares the Second Circuit's performance during the 2017 term to those of its sister circuits. We discuss the Supreme Court's four merits decisions that arose out of the Second Circuit last term.

Alien Tort Statute

In *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), plaintiffs alleged that they, or the persons on whose behalf they asserted claims, were injured or killed by

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Circuits	Number	Affirmed	Number Reversed or Vacated	% Reversed or Vacated
First	1	0	1	**100%**
Second	4	2	2	**50%**
Third	3	0	3	**100%**
Fourth	0	-	-	**-**
Fifth	4	1	3	**75%**
Sixth	4	0	4	**100%**
Seventh	7	3	4	**57%**
Eighth	3	1	2	**67%**
Ninth	14	2	12	**86%**
Tenth	2	2	1	**33%**
Eleventh	6	1	5	**83%**
D.C.	5	1	4	**80%**
Federal	3	1	2	**67%**

This table shows the performance of the circuits in the Supreme Court in the 56 merits decisions arising out of the circuits. The remaining merits decisions for the term arose out of state or district courts, or were original jurisdiction cases.

terrorist acts committed abroad. Id. at 1393. Petitioners filed suit under the Alien Tort Statute (ATS) against Arab Bank, a Jordanian financial institution with a New York branch, alleging that defendants knowingly assisted terrorist activities by accepting donations, maintaining bank accounts, and transferring funds on behalf of terrorist organizations through its New York branch, as well as laundering money through a Texas-based nonprofit suspected of supporting Hamas. Id. at 1393-34. The district court dismissed plaintiffs' claims, citing the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum Company*, which held that foreign corporations may not be sued under the ATS, and the Second Circuit affirmed. Id. at 1395. While the *Jesner* litigation was pending in the lower courts, the Supreme Court reviewed the *Kiobel* decision, but affirmed on narrower grounds, holding that the ATS does not cover suits against foreign corporations where, unlike in *Jesner*, all the relevant conduct took place outside the United States. Id. at 1395-96.

In a 5-4 decision, the Supreme Court affirmed, expanding on its decision in *Kiobel* and concluding that foreign corporations cannot be sued under the ATS. Id. at 1406-07. The court found that the ATS was originally drafted "to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations," and that—absent further action from Congress—separation of powers concerns weigh against the court extending private rights of action to impose liability on corporations. Id. at 1397, 1402-03.

Justices Sotomayor, Ginsburg, Breyer, and Kagan dissented. The dissent argued that the courts were well within their authority to exercise common law discretion in determining that the ATS's scope could reach corporations for "conscious-shocking behavior" and that the text, history, and purpose of the ATS, along with the long tradition of corporate liability in tort law, confirm that corporations can be held liable under the statute. Id. at 1419-20.

Prosecutorial Overreach

In *Marinello v. United States*, 138 S. Ct. 1101 (2011), defendant Carlo Marinello was charged with several counts of tax-related offenses for, among other things, failing to maintain corporate books and records, destroying records, failing to provide accurate information regarding his finances to his accountant, and hiding income. Id. at 1105. During the period 2004 to 2009, the IRS had, unbeknownst to Marinello, periodically investigated Marinello's tax practices. In 2012, Marinello was charged and

convicted under 26 U.S.C. §7212(a) for "corruptly … endeavor[ing] to obstruct or imped[e] the due administration of [the Internal Revenue Code]." Id. at 1104-05.

Marinello appealed, arguing that he was not aware of the pending IRS investigation into his tax practices and therefore could not be convicted of interfering with the "due administration" of an IRS investigation. Id. at 1105. The Second Circuit disagreed, reasoning that neither the plain language of the statute nor other cannons of statutory interpretation required proof of any "awareness of a particular [IRS] action or investigation." Id.

The Supreme Court, in a 7-2 decision, reversed and remanded, rejecting the Government's interpretation of the statute. The majority relied in part on the court's prior precedent in *U.S. v. Aguilar*, 515 U.S. 593 (1995), which found that a "similarly worded statute" criminalizing obstruction of the "due administration of justice" required the Government to prove a "nexus" between the defendant's actions and the judicial proceedings with which he was accused of interfering. *Marinello*, 138 S. Ct. at 1105-09. In *Aguilar*, the court reasoned that, particularly in the criminal context, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." Id. at 1106. Here too, the court reasoned, the Government should be required to prove a "nexus," by demonstrating that a pending proceeding was known to, or at least reasonably foreseeable by, the defendant. Id. at 1106-11.

Justice Clarence Thomas, joined by Justice Samuel Alito, dissented. The dissent argued that the plain language of the statute contains no requirement that the defendant be aware of any IRS proceeding. Id. at 1111-15. The dissent further argued that the *Aguilar* nexus requirement was based on the specific legislative history of that statute. Id. at 1115-16.

> At this point, the Supreme Court has granted certiorari for two cases arising out of the Second Circuit for next term.

Interpreting Foreign Law

In *Animal Science Products v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865 (2018), Vitamin C producers in the United States brought a class action lawsuit against a Chinese pharmaceutical manufacturer and its holding company for engaging in illegal price-fixing in violation of the Sherman Act. Id. at 1870. Defendants moved to dismiss, arguing that Chinese law requires Hebei and similarly situated companies to coordinate prices and establish supply shortages. Id. The Chinese government filed an *amicus curiae* brief in support of defendants' motion. Id. at 1870-71. Plaintiffs argued in response that defendants' price-fixing was voluntary and not required by Chinese law. Id. at 1871.

The district court rejected Hebei's argument that its price-fixing activities were required by Chinese law. The district court found that it was not bound to defer to the Chinese government's statement, but rather that it could consider any relevant evidence on issues of foreign law under Federal Rule of Civil Procedure 44.1. Id. at 1871.

On appeal, the Second Circuit reversed. Id. Relying on the Supreme Court's decision in *United States v. Pink* and other Second Circuit precedent, the Second Circuit held that U.S. courts are bound to defer to reasonable interpretations of foreign law when such interpretations come from the foreign government. Id. at 1871, 1874.

In a unanimous decision authored by Justice Ruth Bader Ginsberg, the Supreme Court reversed and remanded. The court held that "[a] federal court should accord respectful

consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements." Id. at 1869. The court noted that Federal Rule of Civil Procedure 44.1, which post-dated certain of the cases relied upon by the Second Circuit, including *United States v. Pink*, "fundamentally changed the mode of determining foreign law in federal courts" and permits court to consider any relevant evidence, including inadmissible sources, when determining questions of foreign law. Id. at 1873.

Anti-Steering Provisions

In *Ohio v. American Express Company*, 138 S. Ct. 2274 (2018), the Department of Justice and 17 state attorneys general filed suit challenging American Express's anti-steering rules. Id. at 2283. American Express employs a policy that discourages merchants who accept American Express credit cards from "steering" customers—through discounts or other incentives—toward using other types of credit cards that charge merchants lower commercial fees. Id. at 2282-83. Plaintiffs brought suit claiming that these policies violate Section 1 of the Sherman Act because, absent the anti-steering provisions, merchants would entice customers to use less expensive cards, credit card companies would compete to reduce their fees, and customers would benefit by paying lower retail prices. Id. at 2277.

After a bench trial, the district court found that there were two relevant markets—the merchant market and the cardholder market—and found defendants liable because there was an anticompetitive effect on the merchant side of the market in the form of higher merchant fees. Id. at 2283. On appeal, the Second Circuit disagreed, holding that the credit card market should be evaluated as a whole, rather than as two separate markets for merchants and cardholders, and that the provisions were, therefore, not anticompetitive. Id.

In a 5-4 decision, the Supreme Court affirmed. The majority determined that so called "two-sided platforms" like the credit card market require special antitrust scrutiny and that the particular nature of credit-card transactions justify what might otherwise be considered anticompetitive conduct. Id. at 2287-90. Since credit card networks deal with both merchants and consumers, the court reasoned that challenging these policies as anticompetitive requires proving anticompetitive effects on both sets of market participants. Id. at 2285-86. As to the effect on consumers, the court found that American Express's higher fees were actually procompetitive because they support rewards programs that attract affluent customers. Id. at 2289.

The 2018 Term

At this point, the Supreme Court has granted certiorari for two cases arising out of the Second Circuit for next term. In *Gundy v. United States*, the court will consider whether the Sex Offender Registration and Notification Act (SORNA) improperly delegates authority to the U.S. Attorney General to decide whether the statute's registration requirements should apply to sex offenders who were convicted before its passage. In *Republic of Sudan v. Harrison*, the court will consider the Second Circuit's decision to allow plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act to serve the foreign state by mail addressed and sent to the foreign state's head of foreign affairs "via" or in "care of" the foreign state's diplomatic mission to the United States.