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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 2011 term next month, we conduct our 27th annual review of the performance of the U.S. Court of Appeals for the Second Circuit in the Supreme Court over the past term, and briefly discuss the Second Circuit decision scheduled for review during the new term.

During its 2010 term, the Supreme Court, joined by new Associate Justice Elena Kagan, who in August of 2010, filled the vacancy left by the retirement of Justice John Paul Stevens, issued 72 merits decisions reviewing opinions by the federal courts of appeals. The Court reversed or vacated judgments in 47 of those 72 decisions, as the performance table (See page 8: Table 1) shows.[1]

Although the Second Circuit's reversal rate was high (80 percent), its performance was roughly in line with the overall performance of the other courts of appeals, and comparable to its own performance in the 2009 term. In the 2009 term, the Supreme Court reversed six of the seven cases that it reviewed from the Second Circuit.

We describe below four of the five Second Circuit decisions reviewed in the 2010 term.[2]

Prescriber Data

In a case affecting existing and proposed legislation in numerous states regulating the sale of prescription drugs, the Supreme Court in *Sorrell v. IMS Health Inc.* addressed a circuit split on the level of scrutiny to be applied under the First Amendment to a Vermont statute restricting the sale and use of prescriber-identifying information for marketing purposes without the prescribers' consent.[3] The Court held that heightened scrutiny ought to be applied and struck down the statute.

Pharmacies collect information about the prescriptions they fill, including information identifying the prescribers. Many pharmacies sell this information to data-mining companies, which then aggregate and analyze the data to produce reports on the prescribing behavior of particular physicians. These reports are then leased to pharmaceutical manufacturers, which use them to more effectively market their products to individual prescribers.

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In 2007, Vermont enacted its Prescription Confidentiality Law, which prohibited the sale and utilization of prescriber-identifying information for marketing purposes absent individual prescribers' consent.[4] Finding that the market for prescription drugs was dominated by brand-name companies whose marketing activity (called "detailing") increases the cost of health care and insurance by unnecessarily encouraging prescription of brand-name drugs at the expense of lower cost generic alternatives, the Vermont Legislature sought to regulate the flow of prescriber-identifying information in the marketing context without affecting its use for other purposes, such as research or educational communications regarding treatment options.[5]

Sorrell involved cases brought by data-mining companies and an association of pharmaceutical manufacturers in the District of Vermont seeking declaratory and injunctive relief under the First and Fourteenth amendments. After a bench trial, the district court denied relief, holding that, although the use and sale of prescriber-identifiable information is protected by the First Amendment, Vermont's statute was subject to—and survived—intermediate scrutiny, which the court applied because the statute regulated commercial speech rather than the fully protected non-commercial speech that would justify application of strict scrutiny.[6]

The Second Circuit reversed and remanded. It agreed with the district court that the statute regulated commercial speech and thus warranted only intermediate scrutiny, and that protecting public health and containing health care costs were "substantial" state interests sufficient to justify regulation of commercial speech. However, the court held that the statute could not survive intermediate scrutiny because it did not "directly advance" these state interests and was not sufficiently tailored.[7]

The Supreme Court, in a 6-3 decision authored by Justice Anthony Kennedy, affirmed the judgment, but held that Vermont's regulation of speech warranted heightened scrutiny because it targeted particular speech and particular speakers, namely, marketing speech by pharmaceutical manufacturers, and that, regardless of whether strict or intermediate scrutiny applied, the statute could not survive.

First, the Court explained that because marketing is speech with a particular content, and the Vermont law prohibited the use of prescriber-identifiable information only for marketing purposes, the law burdened speech with a particular content. In addition, the statute specifically barred pharmaceutical companies and their marketing agents from obtaining and using that information, while others were still allowed to obtain and use the information for other purposes. Furthermore, the Court held, the statute constituted viewpoint discrimination by regulating speech in order to discourage the promotion of brand-name drugs.[8]

The statute was determined to warrant the exercise of heightened scrutiny because of its content-based regulation of speech, even though the speech regulated is economic in nature. Because the Vermont law is "directed at certain content and aimed at particular speakers," the Court stated, it is not merely part of a legislative scheme regulating economic activity that entails only "an incidental burden on public expression."

The Court also rejected the conclusion of the U.S. Court of Appeals for the First Circuit, which,

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reviewing substantially similar legislation from Maine and New Hampshire, held that regulation of the sale, transfer, and use of prescriber-identifiable information constitutes regulation of a commodity rather than regulation of speech. Rather, it is the creation and dissemination of information that is the subject of Vermont's regulation, the Court held, which is in the meaning of the First Amendment because information is "the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."

Still, the Court did not explicitly decide that the Vermont statute was subject to strict scrutiny. While stating that in "ordinary case[s] it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory," the Court acknowledged the state's argument that intermediate scrutiny applies because the regulated speech is commercial in nature and went on to conduct an analysis under that standard, holding that in any event the statute could not survive intermediate scrutiny. Applying intermediate scrutiny, the Court agreed with the Second Circuit that the statute was not drawn to serve the state's asserted justifications. In denying only some speakers access to prescriber information where that information is used for a particular type of speech, the statute, the Court stated, did not serve the purpose of protecting prescribers' privacy.

In addition, while the promotion of public health and the containment of health care costs are legitimate state policy goals, the statute was held not to advance them in a permissible way. The Court rather ascribed the statute's protections to an attempt to constrain the speech of the pharmaceutical manufacturers merely because of the persuasiveness of their marketing techniques.

Justice Stephen Breyer, joined by Justices Ruth Bader Ginsburg and Elena Kagan, dissented, disagreeing with the majority's fundamental view of the Vermont statute as a broad content- and speaker-based restriction on speech. Rather, Justice Breyer argues, the restriction on the use and sale of prescriber information is "inextricably related to a lawful governmental effort to regulate a commercial enterprise." As legislation regulating economic activity, its incidental restriction on speech does not justify the application of heightened scrutiny. Applying heightened scrutiny to all such legislative provisions that burden speech "would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives" and "'retur[n us] to the bygone era of *Lochner v. New York*…in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.'"

Standing and Clean Air Act

In *American Electric Power Company v. Connecticut*, eight states, New York City, and a group of nonprofit land trusts brought federal common law actions for nuisance in the Southern District of New York against five electric power companies that are the largest emitters of carbon dioxide in the United States.[9] Plaintiffs claimed that the power companies' carbon dioxide emissions contributed to global warming and, in doing so, substantially and unreasonably interfered with public rights. The relief plaintiffs requested was a decree setting carbon dioxide emissions for each defendant at an initial cap, with annual reductions thereafter. The district court dismissed the actions as non-justiciable political questions.[10] The Second Circuit reversed, finding that the actions were not barred by the political question doctrine, that the plaintiffs had standing, and that they had adequately stated a claim under the federal common law of nuisance.[11]

The legal backdrop of this case is the Supreme Court's decision in *Massachusetts v. EPA*, decided after the *American Electric* plaintiffs filed their actions, in which the Supreme Court decided that Massachusetts had standing to sue the EPA for its refusal to regulate greenhouse gases and that the Clean Air Act authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases.[12]

Before the Supreme Court in *American Electric* were the questions of whether the plaintiffs had standing and whether the Clean Air Act displaces federal common law of nuisance with respect to pollution by greenhouse gases.

The Court divided equally on the standing question, with four justices concluding that at least some of the plaintiffs have Article III standing under *Massachusetts* (Justice Sonia Sotomayor did not participate), and conducting no further analysis.[13]

On the preemption question, hinting at the possibility that in cases like this the federal courts lack the institutional capacity to fashion appropriate equitable remedies, the Supreme Court simultaneously reaffirmed the existence of specialized federal common law after *Erie R. Co. v. Tompkins* (and, specifically, the federal common lawmaking authority of the federal courts in the area of environmental protection), and reemphasized that there exist prudential limits on the exercise of this authority.[14] The Court went on to hold unanimously that because *Massachusetts* held that emissions of carbon dioxide qualify as air pollution subject to the Clean Air Act, and because the act "speaks directly" to carbon dioxide emissions from defendants' plants, the act and any EPA actions taken pursuant to the act "displace any federal common law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants."[15]

The Court further disagreed with the Second Circuit when it held that the fact that the EPA has not yet exercised its rulemaking authority to set standards governing emissions from the defendants' plants does not prevent displacement of federal common law in the area. Congress' delegation of authority, not the regulatory exercise of that authority, is the act triggering preemption.[16]

False Claims Act and FOIA

Schindler Elevator Corp. v. United States ex rel. Kirk is a qui tam action under the False Claims Act (FCA) in which Daniel Kirk, a U.S. Army veteran who had been employed by Schindler Elevator Corp., claimed that the company had falsely certified its compliance with a federal statute governing the company's contracts with the federal government.[17] The statute—the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA)—requires contractors like Schindler to submit periodic reports to the Secretary of Labor. To support his allegations under the FCA that Schindler falsely certified compliance with the VEVRAA, Kirk used information he received pursuant to a FOIA request submitted to the Department of Labor, which he claimed showed that Schindler violated the VEVRAA by failing to file certain required reports and including false information in the reports it did file.[18]

The central question in the case was whether the Department of Labor's response to the FOIA request was a "report" within the meaning of the FCA's public disclosure bar, requiring dismissal of Kirk's action. The FCA's public disclosure bar withdraws judicial jurisdiction over actions "based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a Congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person

TABLE 1

Supreme Court October 2010 Term Performance of the Circuit Courts

Circuit	Cases	Affirmed	Reversed or Vacated	Affirmed/ Reversed in Part	% Reversed or Vacated
First	2	2	0	0	0
Second	5	1	4	0	80
Third	5	2	3	0	60
Fourth	4	2	2	0	50
Fifth	7	2	5	0	71.4
Sixth	6	1	5	0	83.3
Seventh	5	2	3	0	60
Eighth	4	1	2	1	50
Ninth	26	7	18	1	69.2
Tenth	0	0	0	0	0
Eleventh	3	1	2	0	66.6
D.C.	0	0	0	0	0
Federal	7	3	4	0	57.1

bringing the action is an original source of the information."[19] The district court for the Southern District of New York found that the response was a report within the meaning of the statute.[20]

The Second Circuit vacated and remanded, holding that an agency's response to a FOIA request is neither a report nor an investigation within the meaning of the public disclosure bar.[21] The court of appeals had applied the "noscitur a sociis" canon of statutory interpretation to determine the meaning of "report" from the term's neighboring words. The court concluded that because the words "hearing, audit, or investigation," and the phrase "criminal, civil, [and] administrative hearings" "connote the synthesis of information in an investigatory context" to "serve some end of the government," the word "report" must mean a composition issued in this regulatory context, as opposed to production of documents in response to a FOIA request.[22]

The Supreme Court reversed and remanded in a 5-3 decision written by Justice Clarence Thomas.[23] The Court first turned to the ordinary meaning of the word "report," since the statute provides no definition, and concluded that the plain meaning of "report" is "something that gives information" or a "notification."[24] Pointing to the statute's inclusion of news media as a source of public disclosure prohibiting judicial jurisdiction, and its inclusion of both "allegations" and "transactions" as subject disclosures, the Court then held that the conclusion that a FOIA response is a "report" in this sense is "consistent with the general broad scope of the FCA public disclosure bar."[25]

Addressing the statute's legislative history, in which Congress repealed a broader predecessor statute, the Court stated that the current provision was meant to "strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits."[26] The Court characterized Kirk's action as "a classic example of the 'opportunistic' litigation the public disclosure bar is designed to discourage" because Kirk used FOIA to substantiate otherwise inadequate allegations and "reap a windfall."[27]

Justice Ginsburg, joined by Justices Breyer and Sotomayor, warned that the Court's decision "weakens the force of the FCA" by "severely limit[ing] whistleblowers' ability to substantiate their allegations before commencing suit."[28] The dissent took issue with the majority's rejection of the Second Circuit's interpretation of the statute. That court's application of the noscitur a sociis canon, to the dissent, did not give common meaning to terms that do not share such, but rather utilized the context within which the term "report" appears to determine which, among the many common understandings of the term, is the one most likely intended by Congress.[29]

In exhorting Congress to consider overturning the Court's decision in this case, the dissenters note the gap existing between the majority's and the dissent's (and Second Circuit's) view of the important facts. Rather than being an example of the opportunistic or parasitic litigation the public disclosure bar is intended to prevent, the dissent argued that this case illustrates how an individual with first-hand "'independent but partial knowledge'" of fraud could be barred from court merely by confirming or supplementing his knowledge by obtaining additional information from the government.[30]

ERISA

In *CIGNA Corp. v. Amara*, the Court granted certiorari on the question of whether employees could recover under ERISA by proving only "likely harm" would result from the company's violations of ERISA's notice provisions governing changes to pension plans.[31] However, the district court for the District of Connecticut, which had applied this standard and was summarily affirmed by the Second Circuit, issued a remedy under ERISA §502(a)(1)(B) that reformed the terms of CIGNA's plan.[32]

The Supreme Court held, 8-0, that §502(a)(1)(B) did not authorize reformation of the terms of the plan but rather only authorized relief enforcing the terms of the existing plan.[33] Nevertheless, the Court held that §502(a)(3), which authorizes "other appropriate equitable relief" for violations of ERISA, would authorize reformation of the terms of the plan, and remanded to the Second Circuit to determine what kind of equitable relief was sought, which would be necessary to determine the applicable standard of harm. Giving some guidance regarding this question, the Court acknowledged that some showing of actual harm would be required, rejecting CIGNA's argument that employees must always show detrimental reliance to obtain relief.[34]

The 2011 Term

While additional Second Circuit cases likely will be added to the docket in the upcoming months, the Supreme Court is currently scheduled to review only one Second Circuit decision during its 2011 term. In *FCC v. Fox Television Stations Inc.*, the Court will consider whether the Federal Communications Commission's approach to determining indecency in television broadcasts—namely, its policy banning "fleeting expletives"—is unconstitutionally vague.[35] The Second Circuit invalidated the policy.[36]

1. Where the Supreme Court issued one decision disposing of multiple cases from multiple circuits, Table 1 counts that decision as one case for each affected circuit. In *Abbott v. United States*, 131 S. Ct. 18 (2010), the Court consolidated cases from the U.S. Court of Appeals for the Third and Fifth circuits, and in *PLIVA Inc. v. Mensing*, 131 S. Ct. 2657 (2011), the Court reviewed decisions from the Fifth and Eighth circuits. Table 1 therefore shows a total of 74 cases reviewed from the circuit courts of appeals, and the Supreme Court disposed of these with 72 merits decisions.

2. We do not address *Madison County v. Oneida Indian Nation of New York*, 131 S. Ct. 704 (2011) (per curiam), which was vacated and remanded prior to oral argument. At issue was the Second Circuit's decision that the Oneida Indian Nation's (OIN) tribal sovereign immunity protected it from suit for foreclosure for nonpayment of county taxes. *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149, 160 (2d Cir. 2010). After the Supreme Court granted certiorari but prior to oral argument, the OIN passed a tribal declaration and ordinance waiving its sovereign immunity with respect to "enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States." Oneida Indian Nation, Ordinance No. O-10-1 (2010). Given this factual development, the Supreme Court vacated the decision of the Second Circuit and remanded, urging the court to revisit its ruling on sovereign immunity. *Madison Cnty.*, 131 S. Ct. at 704. The parties have briefed the case on remand, but as of the time of this writing, oral argument has not yet been scheduled.

3. 131 S. Ct. 2653 (2011). The First Circuit reviewed substantially similar legislation passed in Maine and New Hampshire in *IMS Health Inc. v. Mills*, 616 F.3d 7 (1st Cir. 2010), vacated and remanded, No. 10-984, 2011 WL 318578, at *1 (June 28, 2011) (citing *Sorrell*, 131 S. Ct. 2653), and *IMS Health Inc. v. Ayotte*, 550 F.3d 42 (1st Cir. 2008), cert. denied, 129 S. Ct. 2864 (2009). The First Circuit had held that the statutes regulated economic activity rather than speech and thus did not warrant First Amendment scrutiny. The Second Circuit, as discussed in more detail below, held that the Vermont statute at issue burdened commercial speech protected by the First Amendment, warranting the application of intermediate scrutiny.

4. Vt. Stat. Ann. tit. 18 §4631(d).

5. *Sorrell*, 131 S. Ct. at 2660-61.

6. 631 F.Supp.2d 434 (D. Vt. 2009)

7. 630 F.3d 263, 274, 276-77 (2d Cir. 2010).

8. *Sorrell*, 131 S. Ct. at 2663-64.

9. 131 S. Ct. 2527, 2534 (2011).

10. 406 F.Supp.2d 265, 267 (S.D.N.Y. 2005).

11. 582 F.3d 309, 315 (2d Cir. 2009).

12. 549 U.S. 497, 526, 528 (2007).

13. *Am. Elec. Power Co.*, 131 S. Ct. at 2535.

14. Id. at 2535-37.

15. Id. at 2537. Justice Samuel Alito, joined by Justice Thomas, noted briefly in concurring in the judgment that he agreed with the Court's displacement analysis only "on the assumption…that the interpretation of the Clean Air Act adopted by the majority in Massachusetts is correct," given that no party challenged this interpretation before the Court. Id. at 2540-41 (Alito, J., concurring) (citations omitted).

16. Id. at 2538.

17. 131 S. Ct. 1885, 1890 (2011).

18. Id.

19. 31 U.S.C. §3730(e)(4)(A).

20. 606 F.Supp.2d 448, 461 (S.D.N.Y. 2009).

21. 601 F.3d 94, 111 (2d Cir. 2010).

22. Id. & 111.

23. Justice Kagan took no part in the consideration or decision of the case.

24. *Kirk*, 131 S. Ct. at 1891.

25. Id.

26. Id. at 1894.

27. The Court left open a question on which the circuit courts of appeals are split: namely, whether actions are foreclosed under the bar where the information has been disclosed pursuant to FOIA but where the relator came upon that information from another source, and therefore his action is not "based upon" the FOIA disclosure. Id. at 1895 & n.8.

28. Id. at 1898 (Ginsburg, J., dissenting).

29. Id. at 1897 (Ginsburg, J., dissenting).

30. Id. at 1898 (Ginsburg, J., dissenting) (quoting Kirk, 601 F.3d at 110).

31. 131 S. Ct. 1866, 1871 (2011).

32. 348 F. App'x 627 (2d Cir. 2009); 559 F.Supp.2d 192 (D. Conn. 2008); 534 F.Supp.2d 288 (D. Conn. 2008).

33. *CIGNA*, 131 S. Ct. at 1876-77. Justice Sotomayor did not take part in the consideration or decision of the case.

34. Id. at 1879-81.

35. See No. 10-1293, 2011 WL 1527312, at *1 (June 27, 2011) (Mem.).

36. 613 F.3d 317 (2d Cir. 2010).

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