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SECOND CIRCUIT REVIEW

The Second Circuit in the Supreme Court

By Martin Flumenbaum and Brad S. Karp
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With the U.S. Supreme Court beginning its October Term 2024 in the coming weeks, we conduct our 40th annual review of the performance of the U.S. Court of Appeals for the Second Circuit in the Supreme Court during the past term.

The Supreme Court's October Term 2023 was a consequential one. Although the court maintained its recent practice of hearing around 60 cases—the fewest since the 1860s—the court issued major decisions concerning presidential immunity; federal and state abortion laws; judicial deference to administrative agencies; federal firearm statutes; interactions between government officials and social media platforms; election law; and bankruptcy. While significant cases were divided along ideological lines, including the agency-deference and election-law cases, many were not, including the cases concerning federal laws governing firearms and abortion.

MARTIN FLUMENBAUM *and* BRAD S. KARP *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the chairman of Paul Weiss* ABIGAIL VICE *and* MATTEO GODI, *litigation associates at the firm, and* ROBERT N. BOREK, *a summer associate, assisted in the preparation of this column.*

Martin Flumenbaum

Brad S. Karp

Overall, the court issued 59 opinions and decided 64 cases, seven of which arose from the Second Circuit. The court reversed in six of those cases, but the Second Circuit was not an outlier in that respect: Six other circuits had reversal rates as high or higher. Indeed, the court reversed in nearly three-fourths of the cases it decided, including in seven from the Fifth Circuit and six from the Ninth Circuit.

The table below compares the Second Circuit's performance to those of its fellow federal courts of appeals, as well as the federal district courts and the state courts. We will next discuss the court's seven decisions that arose out of the Second Circuit.

Sarbanes-Oxley Act

Murray v UBS Securities concerned whether 18 U.S.C. Section 1514A of the Sarbanes-Oxley Act,

a provision that protects against whistleblower retaliation, requires the whistleblower-employee to show that the employer acted with retaliatory intent. 601 U.S. 23 (2024). The Second Circuit held that it did. (At the Supreme Court, our law firm represented amicus curiae the Chamber of Commerce.)

The Supreme Court reversed in a unanimous decision. In an opinion by Justice Sonia Sotomayor, the court explained that an employee need only demonstrate that the protected activity was a contributing factor in the employer's adverse employment decision. The court concluded that a retaliatory intent, or "animus," requirement was not consistent with the text of Section 1514A or its burden-shifting framework.

Justice Samuel Alito Jr., joined by Justice Amy Coney Barrett, concurred to emphasize that, while the statute does not require animus, it still requires intent.

Release of Nondebtor Claims in Bankruptcy

Harrington v Purdue Pharma presented the question whether, as part of a reorganization plan under Chapter 11 of the Bankruptcy Code, potential claims against nondebtor third parties may be extinguished without the claimants' consent. 144 S. Ct. 2071. The Second Circuit said yes, approving the reorganization plan of Purdue Pharma, which involved a release of claims by opioid-crisis victims against the Sackler family.

The Supreme Court reversed in a 5-4 decision. Justice Neil Gorsuch, writing for the court, explained that the catchall provision listing permissible reorganization-plan terms is confined to the debtor. According to the majority, broader statutory context and history confirmed that Congress chose not to authorize the third-party releases here.

Court	Cases	Affirmed	Reversed or Vacated	Percent Reversed or Vacated
First Circuit	2	0	2	100%
Second Circuit	**7**	**1**	**6**	**86%**
Third Circuit	4	2	2	50%
Fourth Circuit	1	0	1	100%
Fifth Circuit	10	3	7	70%
Sixth Circuit	3	0	3	100%
Seventh Circuit	2	0	2	100%
Eighth Circuit	4	2	2	50%
Ninth Circuit	11	5	6	55%
Tenth Circuit	2	1	1	50%
Eleventh Circuit	4	3	1	25%
D.C. Circuit	3	0	3	100%
Federal Circuit	3	0	3	100%
District Courts	1	0	1	100%
State Courts	4	0	4	100%

This chart counts separately cases from different courts that were consolidated and resolved in a single opinion. It also includes per curiam opinions and summary reversals; it excludes decisions in original actions, emergency applications, and cases that were dismissed for various reasons.

Justice Brett Kavanaugh, joined by Chief Justice John Roberts and Justices Sotomayor and Elena Kagan, dissented. In their view, the court inadvisably discarded the well-developed, narrow practice of third-party releases, a practice they saw as consistent with the broad statutory language and context. Further, the dissenting justices highlighted that the settlement was likely the only path to meaningful relief for opioid-crisis victims.

Securities Liability and Pure Omissions

Macquarie Infrastructure v Moab Partners addressed whether failing to disclose information required by Item 303 of Regulation S-K gives rise to a private cause of action under Rule 10b-5(b) and Section 10(b) of the Exchange Act, even if the failure does not render any statement misleading. 601 U.S. 257 (2024). The Second Circuit concluded that it does. (Our law firm represented respondent Barclays Capital at the Second Circuit and the Supreme Court.)

The Supreme Court vacated the Second Circuit's judgment in a unanimous decision. In an

opinion by Sotomayor, the court concluded that a "pure omission" liability theory does not give rise to a cause of action under Rule 10b-5(b). Rule 10b-5(b) proscribes only actual misstatements—falsehoods and misleading half-truth statements. And looking to context, the court explained, the rule lacks the language of other provisions that provide pure-omissions liability based on undisclosed information that was "required to be stated."

Federal Arbitration Act

Bissonnette v LePage Bakeries Park St presented the question whether the exemption from Section

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1 of the Federal Arbitration Act for «workers engaged in foreign or interstate commerce» is limited to workers in the transportation industry. 601 U.S. 246 (2024). The Second Circuit held that it was.

The Supreme Court vacated in a unanimous decision. In an opinion written by Roberts, the court reasoned that an industry-based limitation was inconsistent with the statutory language because the phrase "workers engaged in foreign or interstate commerce" focuses on the nature of employee's responsibilities, not the nature of the employer's business. The court remanded for further proceedings, twice noting the possibility that, even without an industry-based limitation, petitioners may not qualify for the exemption as transportation workers because their work does not cross state lines.

Criminal Procedure and Forfeiture

In *McIntosh v United States*, the Supreme Court considered whether a district court may order criminal forfeiture at sentencing without having entered the preliminary forfeiture order required by Federal Rule of Criminal Procedure 32.2(b)(2)(B). 601 U.S. 330 (2024). The Second Circuit held that it can.

The Supreme Court affirmed in a unanimous decision. In an opinion by Sotomayor, the court determined that Rule 32.2(b)(2)(B) is "best understood as a time-related directive," violation of which does not limit a court's authority. The court relied on the plain language of Rule 32.2(b)(2)(B), which contains other terms indicating flexibility on timing and does not specify a consequence for noncompliance. Additionally, the court highlighted that the Rule governs the conduct of district courts, like other time-related directives that govern a public official's conduct, and unlike mandatory claim-processing rules that ordinarily govern litigant conduct.

Banking Law Preemption

Cantero v Bank of America posed the question whether a New York law, requiring mortgage lenders to pay interest on funds held in escrow accounts, is preempted for national banks. 602 U.S. 205 (2024). The Second Circuit concluded that it was.

The Supreme Court vacated in a unanimous decision. Kavanaugh, writing for the court, explained that the Dodd-Frank Act provides precise instructions for courts to follow when determining whether a state banking law is preempted. In prior cases, the court took a case-specific, fact-based approach to determine whether the state law "significantly interfere[s] with the exercise of a national bank power." The court explained that the statute requires a nuanced, "practical assessment of the nature and degree of the interference caused by a state

law," that does not and cannot provide a "clear line" test. The court remanded the case to the Second Circuit to undertake the proper analysis in the first instance.

First Amendment

National Rifle Association of America v Vullo concerned whether a government official—here, Maria Vullo, the former superintendent of the New York Department of Financial Services—had violated the First Amendment by pressuring regulated entities to cut ties with the NRA. 602 U.S. 175 (2024). The Second Circuit held that the alleged conduct constituted permissible government speech and legitimate law enforcement. (At the Supreme Court, our law firm represented a coalition of amici curiae scholars.)

The Supreme Court disagreed, vacating and remanding in a unanimous decision. Sotomayor, writing for the court, explained that the NRA's complaint stated a First Amendment claim based on government coercion because, against the backdrop of Vullo's direct regulatory and enforcement authority, her alleged communications—offering leniency on technical, unrelated infractions in exchange for declining to insure gun groups; entering consent decrees in which regulated entities stipulated to legal violations, reduced business with the NRA, and substantial fines; and encouraging entities through guidance to manage "reputational risks" by disassociating with NRA-related business—could be plausibly understood as threats or inducements for the purpose of punishing or suppressing NRA's advocacy. The court remanded for reconsideration of qualified immunity.

Gorsuch concurred, cautioning against applying multi-factor tests by focusing on the factors informing the legal standard and losing sight of the standard itself. Justice Ketanji Brown Jackson also concurred, highlighting that coercion alone does not violate the First Amendment; rather, the complaint must further demonstrate censorship or retaliation.

The 2024 Term

As of Sept. 23, 2024, the Supreme Court has agreed to review two cases arising out of the Second Circuit for the October Term 2024 *Medical Marijuana v Horn* presents the question whether, for purposes of civil actions under the Racketeer Influenced and Corrupt Organizations Act, economic harms resulting from personal injuries are injuries to «business or property by reason of» a defendant›s acts *Delligatti* v *United States* presents the question whether crimes requiring proof of bodily injury or death that can be committed by failing to take action have as an element the use, attempted use, or threatened use of physical force.