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ALERTS

SCOTUS Cert Recap: SCOTUS Adds Eight Issues To Its Docket, Including Appellate Procedure, Religious Accommodations In Employment, Civil Forfeiture, Free Speech, And The False Claims Act

January 30, 2023

Highlights

On January 13, the Supreme Court agreed to consider the following questions:

To preserve the issue for appeal, must a party reassert, in a post-trial motion, a purely legal issue rejected at summary judgment?

Should the Court overrule its earlier decision that Title VII does not require an employer to grant a religious accommodation where doing so would impose "more than a de minimis cost" and instead adopt a standard that would require such accommodations in more circumstances?

Do the Takings and Excessive Fines clauses allow the government to forfeit property to satisfy a debt, sell the property for more than the amount of the debt, and retain the surplus?

To establish that a statement is a "true threat" unprotected by the First Amendment, must the government show the speaker subjectively knew or intended the statement to be a threat, or merely that an objectively reasonable person would perceive the

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statement as threatening?

Are a defendant's subjective beliefs about the lawfulness of its conduct relevant to whether it "knowingly" submitted a false claim under the False Claims Act?

Does a foreign plaintiff state a cognizable civil claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) when it alleges an injury to intangible property?

Does the U.S. Bankruptcy Code abrogate Indian tribal sovereign immunity?

To qualify as "an offense relating to obstruction of justice" that renders an alien subject to removal under the Immigration and Nationality Act (INA), must the offense have a nexus with a pending investigation or judicial proceeding?

On Jan. 13, the U.S. Supreme Court accepted eight new issues for consideration during the final months of its 2022-23 term. Arguments are still being scheduled but will likely occur in late April, and the Court is expected to issue its decisions on these cases by midsummer.

Those decisions will affect numerous areas of law, including employment, civil liberties, bankruptcy, immigration, and civil forfeiture. The issue with the most extensive impact concerns civil procedure, where the Court has the chance to resolve a deeply entrenched circuit split regarding what procedures a litigant must follow to preserve an issue for appellate review — a decision that will affect every civil case that goes to trial in the federal courts. The other new additions to the Court's docket will be impactful as well, and they likewise warrant close scrutiny.

Court Poised to Answer Critical Question on Preservation of Appellate Rights

The first case, *Dupree v. Younger*, raises a procedural question that will likely have the broadest significance of any on the Court's docket this term, potentially affecting every civil case that goes to trial: to preserve an issue for appeal, must a party reassert, in a post-trial motion, a purely legal issue rejected at summary judgment?

The federal courts of appeal are fractured on this question. Eight circuits — the Second, Third, Sixth, Seventh, Ninth, Tenth, D.C., and federal - have held that a party can appeal the issue without re-raising it in a post-trial motion, but three circuits — the First, Fourth and Fifth — have held that the party must re-raise the issue or else waive the right to appeal it. One circuit, the Eighth, has adopted a compromise position that allows parties to appeal an issue without re-raising it so long as it is a "preliminary" issue unrelated to the merits of the case. The eight majority circuits emphasize that requiring a party to re-raise an almost certainly futile legal argument serves no practical purpose, while the remaining circuits underscore the difficulty in distinguishing between "legal" and "factual" issues.

Although this question may seem esoteric, it can have devastating consequences. Consider a litigant who unsuccessfully moves for

summary judgment on a variety of issues (some factual, some legal), loses at trial, and then fails to re-raise the earlier legal issues (perhaps because doing so would be futile) in a post-trial motion. In some circuits, the litigant is out of luck and cannot raise the issue on appeal, while in most circuits the litigant could win reversal of the entire case based on that issue. No matter how the Court ultimately comes down on this question, a conclusive and clear answer will be invaluable to civil litigants everywhere.

Dispute Over Postal Service Sunday Delivery May Lead to Expansion of Employees' Religious-Accommodation Rights

In *Groff v. DeJoy*, the Court will consider whether to expand employees' Title VII rights to religious accommodation in the workplace. The petitioner, Gerald Groff, is a United States Postal Service (USPS) employee and observes a Sunday Sabbath on which he abstains from work. In 2013, when USPS began delivering parcels on Sundays, it accommodated Groff's Sunday observance by switching his shifts and assigning other employees to cover for him, but it eventually began disciplining Groff whenever he did not report to work on a scheduled Sunday. Groff sued USPS under Title VII, which requires employers to accommodate employees' religious exercise unless the accommodation would cause the employer "undue hardship." Nearly half a century ago, in *Trans World Airlines, Inc. v. Hardison*, the Supreme Court defined "undue hardship" to mean "more than a de minimis cost." A divided panel of the Third Circuit held that exempting Groff from Sunday deliveries easily meets this test, concluding that the accommodation "far surpasses a de minimis burden" because it would encumber Groff's coworkers, who would have to take on extra shifts and deliver more packages in his absence.

Groff's cert. petition urged the Court to overrule *Hardison's* "de minimis" test in favor of a "substantial burden" standard. And recognizing that some justices may prefer to leave precedent undisturbed, however, Groff also offered an alternative middle ground: reject the view – held by the Third Circuit and six other circuits – that Title VII's "undue burden" test can be satisfied by burdens borne by the employee's coworkers and instead hold that the "undue burden" must be on the employer's business itself. This compromise, Groff contends, would protect employees' religious practice from their coworkers' "heckler's veto." Notably, in opposing Groff's cert. petition, the USPS (represented by the U.S. Solicitor General) argued that review was unnecessary in part because the Religious Freedom Restoration Act already guarantees federal employees greater religious-accommodation rights than Title VII – perhaps suggesting that the federal government does not intend to fight very hard for *Hardison*.

A baker's dozen of amici, including a coalition of 17 states, several members of Congress, and various religious organizations, offered their support to Groff. Given the Court's recent shift toward expanding religious liberties – Justices Samuel Alito, Clarence Thomas, and Neil Gorsuch, for example, have previously indicated their interest in reconsidering *Hardison* – the Court's decision in this case has the potential to have a significant impact on employers across the country.

Court Will Consider Constitutional Limitations on Tax-Sale Forfeitures

Tyler v. Hennepin County concerns a Minnesota county government that forfeited 93-year-old Geraldine Tyler's home to satisfy a $15,000 tax debt. The county then sold the home for $40,000 and retained the surplus rather than refunding it to Tyler. She then sued the county, arguing that the forfeiture violated the Constitution's Takings Clause, which requires "just compensation" for "private property" taken for public use, and the Excessive Fines Clause, which, as the name suggests, forbids the imposition of "excessive fines." The county responded that Minnesota law gave Tyler extensive opportunities to redeem and repurchase the property, and that Minnesota law does not recognize a property interest in surplus tax-sale proceeds; the county thus argues that there is no property interest for the Takings Clause to protect, and argues that the Excessive Fines Clause is inapplicable because retention of surplus proceeds is not punitive and thus not a "fine."

Both the district court and the Eighth Circuit agreed with the county, but at the cert. stage several interest groups filed amicus briefs supporting *Tyler*. The Court's decision will directly affect the rules governing tax sales, and – by clarifying which forfeitures constitute "fines" under the Excessive Fines Clause – could have broader ramifications as well.

Court Has Another Chance to Settle the Level of Intent Required to Prove a "True Threat" Under the First Amendment

In *Counterman v. Colorado*, the Court will consider how the First Amendment's speech protections limit the government's ability to impose criminal liability for threatening statements. The case arose out of Facebook messages petitioner Billy Raymond Counterman sent to a female musician, who found them frightening and reported them to Colorado law enforcement. Counterman was charged with violating a Colorado law prohibiting communications "that would cause a reasonable person to suffer serious emotional distress." At trial, Counterman argued the messages were a product of his mental illness and that he did not intend to threaten the musician, but he was nonetheless convicted, and state courts rejected his argument on the ground that the Colorado law did not require a showing of subjective intent. The Court has now agreed to review the case to decide whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threat, or merely that an objectively reasonable person would perceive the statement as threatening.

The lower courts – state and federal – have long been divided on this issue. Most federal courts of appeals, as well as Colorado and 15 other states, require only objective intent, while the Ninth and Tenth Circuits, as well as seven states, require varying levels of subjective intent. The Court had an opportunity to resolve this split nearly a decade ago in *Elonis v. United States*, but it ultimately decided that case on a narrower statutory ground, leaving the lower-court split unresolved. The Court has now agreed to tackle this question, and its answer will determine what juries must find before convicting a person accused of making criminal threats.

Court to Decide Whether Subjective Intent Matters in False Claims Act Cases

Next up is another question of scienter, this one arising from two False Claims Act (FCA) cases, U.S. ex rel. *Schutte v. SuperValu Inc.* and *U.S. ex rel. Proctor v. Safeway*, which the Court has consolidated for review. The FCA imposes civil liability for "knowingly" presenting "a false or fraudulent claim for payment" to the government, and it defines "knowingly" to mean acting with: 1) actual knowledge, 2) deliberate ignorance, or 3) reckless disregard for the truth.

Whether a claim was "false" under the FCA often turns on the meaning of a federal statute or regulation, and in *SuperValu* and *Safeway* the disputed term is the "usual and customary" drug prices pharmacies must report when seeking reimbursements under Medicare and Medicaid. The pharmacy defendants in these cases are accused of overstating these prices (by ignoring discounted prices they allegedly routinely charged to customers) and thereby receiving unlawfully inflated reimbursements. The pharmacies argue that they reasonably interpreted "usual and customary" to refer only to retail prices. The Seventh Circuit, the lower court in both of these cases, concluded that interpretation was wrong but reasonable.

Nevertheless, the relators suing the pharmacies argue that even if the pharmacies' interpretation were objectively reasonable, they still "knowingly" submitted a false claim: the relators allege that pharmacy executives expressed concerns about this practice while it was ongoing, and they argue that this shows the pharmacies subjectively knew their interpretation was wrong.

The Seventh Circuit rejected this argument, concluding that in the FCA context "a defendant's subject intent is irrelevant for purposes of liability." An FCA defendant, the Seventh Circuit pointed out, "might suspect, believe, or intend to file a false claim, but it cannot know that its claim is false if the requirements for that claim are unknown." It reasoned that this result was required by the Supreme Court's decision in *Safeco Insurance Co. of America v. Burr*, which held that "evidence of subjective bad faith" cannot support a finding of "willfulness" under the Fair Credit Reporting Act where "the company's reading of the statute is objectively reasonable."

Other circuits, however, have concluded that subjective intent is relevant under the FCA, and the Court has taken up these two cases to resolve the 4-4 circuit split on this question. The Court's decision will have significant implications for the wide variety of industries that receive federal funds – particularly those, such as the health care sector, that are subject to extensive and sometimes ambiguous regulations.

RICO's Russian Doll: Court Mulls Whether a Foreign RICO Plaintiff Can Bring a Claim for Injury to Intangible Property

An international dispute between two Russian entrepreneurs has created another opportunity for the Court to consider whether and how the Racketeer Influenced and Corrupt Organizations Act (RICO) can apply outside America's borders. *Yegiazaryan v. Smagin* and *CMB Monaco v. Smagin*, which the Court has consolidated for review, involve a complex

series of legal proceedings that began when Vitaly Smagin sued Ashot Yegiazaryan in a London court and won a multimillion dollar judgment. Yegiazaryan was residing in California, so Smagin successfully domesticated the judgment in the U.S., but after learning that Yegiazaryan had transferred the majority of his assets to an account at CMB Monaco, Smagin filed RICO claims against both Yegiazaryan and CMB Monaco. The Ninth Circuit held that the claims could proceed because they targeted Yegiazarian's conduct in his residence state of California.

Federal courts apply a general presumption against extraterritoriality: a federal statute applies outside the United States only if Congress expressly so provides. In keeping with that presumption, the Court stated in *RJR Nabisco v. The European Community* that a civil RICO claim requires a "domestic" injury, but it expressly declined to specify how the lower courts should determine whether an injury is "domestic" or foreign. That issue that is relatively simple when the injured property is real estate or tangible assets in a specific physical location, but it becomes particularly thorny when the injured property is an intangible asset, such as a court judgment or an arbitration award.

The three federal Courts of Appeal to address this issue have thus come up with three different approaches: the Seventh Circuit focuses on the plaintiff's physical location, while the Third and Ninth Circuits have different multi-factor balancing tests. The Court will now decide which – if any – of these tests should apply to determine when a foreign plaintiff can state a cognizable RICO civil claim for an injury to intangible property.

Notably, this case joins *Abitron Austria GmbH v. Hetronic International, Inc.*, a case about the extraterritorial application of the Lanham Act, already on the Court's docket. And like Abitron, this case will doubtless have implications for international businesses, particularly with respect to disputes arising from overseas conduct.

Court Will Determine Whether Federal Bankruptcy Code Abrogates Indian Tribal Sovereign Immunity

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, the Court will consider whether, by enacting the U.S. Bankruptcy Code, Congress abrogated Indian tribal sovereign immunity. Congressional abrogation of sovereign immunity typically requires express statutory language, and the Bankruptcy Code includes such express language with respect to specific federal, state, local, and foreign governments, as well as "other foreign or domestic government[s]." The Bankruptcy Code does not, however, specifically refer to Indian tribes.

Coughlin involves a debtor who borrowed money from a short-term lending entity wholly owned and operated by a division of the Chippewa Indian tribe. The debtor filed a Chapter 13 petition, but the tribe-owned lender kept trying to collect the debt – which, absent sovereign immunity, would ordinarily be subject to the Bankruptcy Code's automatic stay of debt-collection efforts. A divided panel of the First Circuit, following a Ninth Circuit decision, concluded that "other . . . domestic government" was sufficient to abrogate tribal sovereign immunity and thus granted the debtor's request to enforce the automatic stay.

The Sixth and Seventh Circuits had previously reached the opposite result, noting that the Supreme Court has never found tribal sovereign

immunity abrogated without some express mention of Indian tribes in the statutory text. The Court's resolution of this split case will affect how the Bankruptcy Code applies to tribes and tribe-owned businesses around the country – as well as those who may be debtors or creditors to such entities.

Court to Clarify When a State Predicate Offense Qualifies as "An Offense Relating to Obstruction of Justice" That Renders an Alien Subject to Deportation

The third and final set of consolidated cases in this group of cert. grants, *Pugin v. Garland* and *Garland v. Cordero-Garcia*, present the Court with a question of particular relevance to noncitizens who have been convicted of felonies. The Immigration and Nationality Act (INA) provides that a noncitizen convicted of an "aggravated felony" is subject to deportation and ineligible for readmission to the United States. And among many other things, the INA defines "aggravated felony" to include "an offense relating to obstruction of justice." Like the vast majority of criminal convictions in the U.S., the convictions at issue in these cases are products of state law, and determining whether such individual state convictions fit federal law's generic description is often difficult.

Indeed, the Court frequently addresses similar questions in the context of the federal Armed Career Criminal Act, which criminalizes the use of a firearm in "a crime of violence."

The thorny question in these cases concerns whether, to qualify as an "offense relating to obstruction of justice," the state conviction must have a nexus to a pending investigation or judicial proceeding. The Third and Ninth Circuits have held that it must, while the First and Fourth Circuits have held that no such nexus is required. The Court's decision in this case is certain to have profound implications for permanent resident noncitizens convicted of felonies, who may find themselves subject to deportation if the Court concludes that no nexus is required.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, Kian Hudson at 317-229-3111 or kian.hudson@btlaw.com or Lara Langeneckert at 317-231-6487 or lara.langeneckert@btlaw.com.