



PREVIEW

OF UNITED STATES SUPREME COURT CASES

Issue No. 7 | Volume 38 | April 18, 2011

Previewing the Court's Entire April Calendar of Cases, including ...

Microsoft v. i4i Limited Partnership

i4i incorporated a custom XML editor into a product and began selling it more than one year before filing a patent application. Microsoft later used the XML editor in its Word program. i4i sued Microsoft for patent infringement; Microsoft claimed the patent was invalid under the "on-sale" bar. The parties now ask the Court whether the Federal Circuit's interpretation of 35 U.S.C. § 282, requiring the party challenging the validity of a patent to prove invalidity by "clear and convincing" evidence, is appropriate when the patent examiner did not consider prior art.

American Electric Power Co. v. Connecticut

Eight states, the City of New York, and three private land trusts sued five power companies and the federal Tennessee Valley Authority in federal court based on common law public nuisance for harms resulting from the defendants' greenhouse gas emissions. The defendants argue that federal courts cannot hear the case because the plaintiffs lack standing, their claims are displaced by federal law and regulations, and their claims present a nonjusticiable political question.

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U.S. SUPREME COURT April 2011 CALENDAR

MONDAY

APRIL 18

Tapia v. United States

Microsoft v. i4i Limited Partnership

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Sorrell v. IMS Health, Inc.

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APRIL 27

Nevada Commission on Ethics v. Carrigan

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WHAT'S NEW ONLINE

This month, the *PREVIEW* website (www.supremecourtpreview.org) features:

- a sign-up for our weekly e-blasts highlighting all the merits and amicus briefs submitted to the Court,
- all the merits and amicus briefs for the April cases, and
- easy-to-access downloadable versions of previous *PREVIEW*s from this term.

Will the Fifth Circuit Get to Keep Its *Oscar*? : The Fraud-on-the-Market Presumption in Certification of a Securities Fraud Class Action

CASE AT A GLANCE

The Erica P. John Fund sued Halliburton Co. in a securities fraud class action for losses stemming from alleged misleading statements. Halliburton claimed that the Fund had not satisfied the predominance requirement for class certification. The Court must now determine a plaintiff's burden of proof to support class certification based on the so-called "fraud-on-the-market" presumption.

Erica P. John Fund, Inc. v. Halliburton Co.
Docket No. 09-1403

Argument Date: April 25, 2011
From: The Fifth Circuit

by Linda S. Mullenix
University of Texas School of Law, Austin, TX

ISSUE

The issue in *Fund* focuses on whether plaintiffs seeking certification of a securities fraud class action must, in addition to invoking a rebuttable fraud-on-the-market presumption, demonstrate by a preponderance of the evidence "loss causation"—that alleged misrepresentations had an impact on a company's stock price.

FACTS

The Erica P. John Fund, Inc. (the Fund), as lead plaintiff, brought a securities fraud class action on June 3, 2002, on behalf of its shareholders against Halliburton Co. and David J. Lesar, Halliburton's former president and CEO. The lawsuit was brought in the Northern District of Texas. In 2006, the plaintiffs filed a fourth amended complaint that alleged the defendants had violated the Securities Exchange Act of 1934 and Securities Exchange Commission Rule 10-b5.

The plaintiffs alleged that Halliburton committed securities violations by deliberately falsifying information and misleading the public in three ways: (1) falsely representing Halliburton's liability for asbestos claims; (2) engaging in accounting practices that obscured Halliburton's probability of collecting revenue on fixed price construction contracts; and (3) knowingly misrepresenting and touting the benefits of Halliburton's merger with Dresser Industries, which efficiencies Halliburton knew would not be realized.

The class period extended from June 3, 1999, through December 7, 2001. The plaintiffs essentially argued that during this interval certain corrective statements and disclosures made by Halliburton after its false and misleading statements caused the company's stock to decline, resulting in losses for its shareholders. After the complaint was filed, extensive discovery occurred and the Fund received more than 600,000 pages of documents from Halliburton.

In September 2007, the plaintiffs moved for class certification. The plaintiffs did not attempt to certify a class action where they would have to prove that every class member individually relied on Halliburton's disclosures or corrective statements. Rather, the plaintiffs invoked the "fraud-on-the-market" presumption to satisfy the class certification requirement that common issues in the litigation—in this instance reliance on the false and misleading statements—predominated over individual issues.

The Fund filed an expert witness report known as an "event study" in support of the class certification motion to demonstrate that the market for Halliburton's stock was efficient—that is, the market price accounted for all available favorable and unfavorable information about the company. The purpose of establishing an efficient market during the class period was to support the plaintiffs' entitlement to rely on the fraud-on-the-market presumption. In response, Halliburton supplied its own expert report and documentary evidence showing that the stock price declines were caused by the release of unrelated negative news and other causes, not by "corrective" disclosures that revealed the falsity of prior statements. The Fund did not request any additional discovery in connection with the class certification process.

Relying on Fifth Circuit precedent in *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007), the district court denied class certification. The court held that plaintiffs who invoke the fraud-on-the-market presumption must show that the alleged false statements affected the stock's value. The court held that the plaintiffs failed to prove, by a preponderance of the evidence, that their losses were more probably caused by Halliburton's corrective statements than some other new information. This matter of proof in securities litigation has been labeled "loss causation." The court held that when a company makes mixed disclosures, plaintiffs have a heightened burden to separate actual corrective effects from the effects of new negative events.

Citing its own *Oscar* precedent, the Fifth Circuit affirmed the district court's denial of class certification. See 597 F.3d 330 (5th Cir. 2010). The Fifth Circuit first indicated that *Oscar* requires a court to assess an alleged misrepresentation's effect on market price at the class certification stage. In order to gain class certification, a plaintiff is required to prove loss causation—that is, “that the corrected truth of the former falsehoods actually caused the stock price to fall and resulted in losses.” The court held that a plaintiff must do more than simply allege a misrepresentation and show a price decline following a subsequent disclosure of negative information; a plaintiff must show that a stock's price decline “resulted directly *because* of the correction to a prior misleading statement.”

The court held that the Fund failed to show that any of Halliburton's alleged misrepresentations had distorted the market price on which investors relied. The court held, therefore, that the plaintiffs failed to establish loss causation as to Halliburton's statements regarding its asbestos liabilities, its accounting for revenue on unapproved claims, or its projections on the benefits of the merger with Dresser Industries. Consequently, the plaintiffs were not entitled to presume that the Fund and investors relied on the misrepresentations by relying on market price. Because there was no basis for assuming that investors relied on a distorted market price, the plaintiffs would have to prove reliance for each individual plaintiff, which defeated the predominance requirement for class certification.

CASE ANALYSIS

Shareholder securities fraud class actions are a specialized type of fraud litigation. When a plaintiff individually pursues an ordinary common law fraud claim, the plaintiff must prove that he or she knew of an alleged fraudulent or misleading statement and relied on that statement to his or her detriment. Pursuing fraud claims in the class action context, however, has been extremely difficult.

In order to certify a fraud class action for damages under Federal Rule of Civil Procedure 23(b)(3), plaintiffs must demonstrate that common issues of law or fact predominate over individual issues. Common law fraud claims entail inherently individual reliance issues. Therefore, almost all courts have refused to certify fraud class actions, believing that such classes simply cannot satisfy the predominance requirement.

In 1988, the Supreme Court announced a doctrine to enable class certification in securities fraud class actions by creating a rebuttable presumption that security purchasers rely on the integrity of the market price, which is presumed to incorporate all public, material misrepresentations. See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). This so-called *Basic* presumption, or the “fraud-on-the-market” presumption, enables a plaintiff in a securities fraud class action to submit proof of an efficient market of reliance in lieu of individual proof that would undermine the predominance requirement.

In order to invoke the fraud-on-the-market presumption of reliance, a plaintiff must establish that (1) the defendant made public, material misrepresentations, (2) the defendant's shares were traded in an efficient market, and (3) the plaintiff traded shares between the time the misrepresentations were made and the time the truth was revealed.

However, if a plaintiff satisfies these criteria, the Court in *Basic* also held that a defendant could then rebut the reliance presumption by showing that the misrepresentation in fact did not lead to a distortion in price. The *Basic* decision indicates that a defendant may rebut the presumption of reliance by refuting the elements of the presumption (such as market efficiency) or by making “[a]ny showing that severs the link between the alleged misrepresentation and either the price received or paid by the plaintiff, or his decision to trade at a fair market price.”

If a defendant successfully rebuts the reliance presumption, then the causal connection between the misrepresentation and the plaintiff's reliance would be broken. When a defendant successfully rebuts the presumption, then the plaintiff must respond with sufficient evidence to reestablish the presumption. If the plaintiff cannot, then he or she would have to establish reliance on a plaintiff-by-plaintiff basis. Thus, if plaintiffs cannot demonstrate that they are entitled to a presumption of reliance on the market price, or otherwise show that common issues predominate over individual issues, then a court may not certify a class action under Rule 23.

Nearly two decades after the Supreme Court's articulation of the fraud-on-the-market presumption of reliance, the Fifth Circuit, in its 2007 *Oscar* decision, clarified standards for applying the presumption. Drawing on the Supreme Court's holding in *Basic* that a defendant is entitled to rebut the presumption, the Fifth Circuit indicated that courts may not apply the presumption where the evidentiary record at class certification shows that the alleged misstatements did not affect market price.

And, one year after *Oscar*, the Second Circuit similarly concluded that a court may not certify a securities class action using the fraud-on-the-market presumption if the evidence offered by the parties demonstrates that the alleged market misrepresentations did not affect market price. *In re Salomon Analyst Metromedia Litigation*, 544 F.3d 474 (2d Cir. 2008). In *Salomon*, the Second Circuit held that “[i]f defendants attempt to make a rebuttal ... the district judge must receive enough evidence ... to be satisfied that each Rule 23 requirement has been met.”

In 2010, however, the Seventh Circuit strongly repudiated the Fifth and Second Circuits' approach, holding that a securities class action may be certified on the fraud-on-the-market presumption without considering whether alleged misrepresentations affected market price. *Schleicher v. Wendt*, 618 F.3d 679 (7th Cir. 2010). The Seventh Circuit indicated that the requirement that plaintiffs show that statements actually caused material changes in stock prices erroneously required that plaintiffs—in order to certify a class action—prove everything (except falsity) that would be required to win on the merits at trial. The Seventh Circuit held that price impact was a question related to the merits of the case, and therefore courts could not and should not consider this question at the class certification stage.

In addition to the Seventh Circuit's strong repudiation of the *Oscar* approach, several other federal district and circuit courts have disagreed with or distinguished the *Oscar* holdings. Consequently, there currently is a split among the federal courts concerning how the Supreme Court's *Basic* presumption applies at the class certification stage of proceedings.

The Fund contends that the Fifth Circuit's *Oscar* decision is wrong and is applied to defeat class certification of securities class actions. Consequently, the Court, according to the Fund, should reverse the lower courts' holdings, and repudiate *Oscar*. The Fund argues that the Fifth Circuit cannot unilaterally rewrite the Court's standards for entitlement to a presumption of reliance in securities fraud cases, and the Supreme Court did not intend, in its *Basic* decision, to authorize the lower federal courts to engraft new standards onto the simple requirements for invoking and applying the fraud-on-the-market presumption.

The Fund contends that loss causation is a separate and distinct element of a securities cause of action, and the *Basic* decision does not require that plaintiffs prove loss causation in order to use the fraud-on-the-market presumption.

The Fund argues that the Fifth Circuit's *Oscar* approach, requiring a showing of loss causation at class certification, is an additional and substantial requirement that effectively nullifies the fraud-on-the-market presumption established by the *Basic* Court. The Fund argues that proof of loss causation is a merits issue that is appropriate for trial but is not appropriate or relevant for a court's determination whether a proposed securities class action is suitable for certification.

The Fund additionally argues that the Fifth Circuit's *Oscar* requirement of proof of loss causation also violates the Supreme Court's *Eisen* rule, which prohibits a court from evaluating class certification to rule on the underlying merits of the claims. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). In the Fund's view, the Fifth Circuit's *Oscar* decision requires courts to prematurely evaluate the merits issue of loss causation. Thus, the Fund suggests that the issue before the Court is not whether a plaintiff must establish loss causation at trial but rather when the plaintiff must do so. The Fund contends that it is not proper to require plaintiffs to offer proof of loss causation at class certification, even when loss causation turns on common evidence.

Furthermore, the Fund argues that the Fifth Circuit's *Oscar* approach additionally prejudices plaintiffs by requiring proof of loss causation, at an early stage of proceedings, without sufficient merits discovery. The Fund contends that the *Oscar* decision imposes heightened class certification standards the Court did not authorize in *Basic*, imposes a higher standard at class certification than plaintiffs would have to satisfy at summary judgment, and violates the plaintiffs' Seventh Amendment right to trial by jury.

Halliburton, in response, urges the Court to uphold the Fifth Circuit's decision as an appropriate application of the *Oscar* requirements. The defendant essentially contends that a court may not certify a securities class action based on a fraud-on-the-market presumption where the evidence offered by the parties shows that no alleged misrepresentation affected the market price of a stock.

Halliburton's argument centers on its contention that the *Basic* decision supplies defendants with the opportunity to rebut the presumption of reliance, and that if the defendant does so successfully, then the burden shifts to the plaintiff to reestablish the causal link that entitles the plaintiffs to the presumption. If the plaintiff fails to do so, then the presumption fails and the plaintiff must show reliance on a

plaintiff-by-plaintiff basis, which defeats the predominance element for class certification.

Halliburton argues that plaintiffs cannot simultaneously rely on a rebuttable presumption to obtain class certification, while denying defendants the ability to defeat class certification by rebutting the presumption.

Halliburton concedes that the question of whether a misrepresentation has an effect on a stock's market price may overlap with a merits question. Nonetheless, Halliburton contends that whether a misrepresentation distorted market price is directly relevant to a plaintiff's ability to show that common issues predominate. Consequently, a court must consider this issue in evaluating class certification.

Moreover, under the often-repeated "rigorous analysis" standard for class certification, it is sometimes necessary for courts to "probe beyond the pleadings" to evaluate whether the claims, defenses, and substantive law may be tried on a classwide basis. This type of inquiry, federal courts agree, does not violate the *Eisen* prohibition against considering some merits at class certification.

The defendant argues that there is no logical reason why a defendant should not be able to rebut the plaintiff's attempts to satisfy the Rule 23 requirements at class certification. Indeed, other prerequisites to class certification—such as the existence of an efficient market—may be rebutted at class certification. If the Supreme Court repudiates the *Oscar* requirement for proof of loss causation at class certification, the defendant claims that this would result in large numbers of securities class actions being certified and would postpone defendants' ability to rebut the presumption of reliance until much later in the proceedings. Such a ruling would be wasteful, inefficient, and impose *in terrorem* settlement pressure on defendants, even in meritless cases.

Halliburton suggests that a defendant's right to rebut a presumption of reliance should not be thwarted because of a plaintiff's purported need for discovery. Halliburton notes that if additional discovery is needed on loss causation, courts may order and manage such discovery. In addition, Halliburton points out that the Fund had five years and ample discovery production prior to class certification but did not ask the court for further discovery on the loss causation issue. Finally, Halliburton suggests that the *Oscar* decision does not frustrate a plaintiff's right to trial by jury but merely may eliminate a procedural means for pursuing remediation on a classwide basis.

On the facts, Halliburton argues that the Fund failed to meet its burden after Halliburton offered evidence showing that the misrepresentations did not affect the stock's market price, hence rebutting the presumption. Halliburton contends that the Fund's evidence fell far short of showing that a later stock price decline was attributable to corrective disclosures and not to general market declines or other information unrelated to the truth of the alleged misrepresentations.

SIGNIFICANCE

In the broadest sense, the *Fund* appeal is significant because the Court will determine whether to reimpose a very liberal set of standards for certification of securities class actions, upholding the *Basic* presumption of fraud-on-the-market without any other showing, or

will affirm lower court decisions which have, in effect, tightened and enhanced those *Basic* requirements. The fight embodies a dispute between the Fifth and Seventh Circuits concerning what plaintiffs have to demonstrate at the class certification stage to permit a court to allow a securities class action to proceed.

As such, the *Fund* decision has broad implications for stock market investors seeking recovery for investment fraud. The plaintiffs and their many amici have cast this appeal as a consumer protection case, asking the Court not to turn investors away from the courthouse at the class certification stage. The United States, as amicus, has joined the plaintiffs in asking for reversal of the Fifth Circuit's decision and the *Oscar* interpretation of the *Basic* holdings.

The Court will have to determine whether federal courts may require plaintiffs to prove loss causation at the class certification stage. The plaintiffs have suggested that this requirement embodies illegitimate “heightened pleading” at the class certification stage and imposes an improper assessment of the merits of the case—before trial. The plaintiffs further suggest that this is an unfair burden to impose on plaintiffs at an early stage of litigation, when the plaintiffs may have inadequate access to information needed to satisfy the additional requirement of proving loss causation to satisfy class certification requirements. The plaintiffs view this heightened class certification requirement as a means for courts to frustrate securities class actions at the very outset of the litigation.

The defendant, on the other hand, views the role of the court at class certification as evaluating whether it makes sense to proceed with a proposed class action that could not actually be tried based on common evidence and proof. If this is not true, then the defendants suggest that proposed class actions that cannot satisfy the Rule 23 requirements ought to be dismissed at the certification stage. The defendants cite to the large economic costs entailed in prosecuting class actions and the settlement pressure on defendants to settle cases if a court certifies a class—even in the instance of meritless claims.

In recent years, the Supreme Court has evinced a trend towards supporting heightened pleading requirements for ordinary and class action complaints. In addition, several lower federal courts, including the Second and Third Circuits, also recently have issued landmark decisions clarifying and strengthening the evidentiary burdens of production and persuasion at class certification. Court watchers will now focus on whether the Court in this appeal will endorse the *Oscar* standard, in light of these recent trends in pleading and class certification.

It is of some note that the Court has changed personnel since the *Basic* decision in 1988. Only four justices joined the Court's *Basic* opinion then: Justice Blackmun, Brennan, Marshall, and Stevens. Justices Rehnquist, Scalia, and Kennedy did not participate in the *Basic* decision, and Justices White and O'Connor dissented in relevant parts. Hence, the Court now has been almost completely reconstituted since the *Basic* decision, which first articulated the fraud-on-the-market presumption.

Moreover, in opinions by now-Justice Alito when he sat on the Third Circuit, that court similarly held on motions to dismiss that a plaintiff must establish a misrepresentation's price impact in order to invoke *Basic*'s fraud-on-the-market presumption. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997); *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000). It remains to be seen whether, in consideration of this *Fund* litigation, Justice Alito will import his views into the class certification context.

It seems reasonable to suggest, however, that if the Court upholds the Fifth Circuit's decision and allows the courts to keep the *Oscar* standard, then this will impose a greater burden on plaintiffs who wish to pursue class certification in securities fraud cases. On the other hand, if the Court reverts to a liberal interpretation of the *Basic* decision and presumption, then securities class litigation will continue to be robust in federal courts.

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The Armed Career Criminal Act and Revised State Drug Sentencing: It Depends on What “Is” Means

CASE AT A GLANCE

A federal district court sentenced Clifton Terelle McNeill under the Armed Career Criminal Act (ACCA) for a firearm conviction because McNeill had three violent felony and serious drug offense convictions in North Carolina. The ACCA defines a “serious drug offense” to include a state drug offense “for which a maximum term of imprisonment of ten years or more is prescribed by law.” After McNeill was convicted of his prior drug offenses, but before he was sentenced on the federal firearm offense, North Carolina lowered the maximum sentence for McNeill’s prior drug offenses to less than ten years. McNeill argues that he should not have been sentenced under the ACCA because the ACCA defines a “serious drug offense” by the maximum sentence that “is prescribed” at the time of federal sentencing.

McNeill v. United States
Docket No. 10-5258

Argument Date: April 25, 2011
From: The Fourth Circuit

by Brooks Holland
Gonzaga University School of Law, Spokane, WA

ISSUE

Does the phrase “is prescribed by law” in the Armed Career Criminal Act, when referring to the maximum sentence for a prior state drug conviction, mean the maximum sentence applicable to the prior drug offense at the time of a defendant’s federal sentencing or at the time the defendant committed the prior drug offense?

FACTS

In 2007, a Fayetteville, North Carolina, police officer attempted to stop Clifton Terelle McNeill after he drove through a red light. McNeill evaded the officer for several miles and then stopped and fled on foot. When the officer chased and tackled McNeill, the officer discovered a .30-caliber Smith & Wesson firearm under McNeill’s body. The officer searched McNeill and found 3.1 grams of crack cocaine packaged for distribution and \$369.

A federal grand jury in North Carolina indicted McNeill for possession of cocaine base with intent to distribute, see 21 U.S.C. § 841(a)(1); possession of a firearm as a convicted felon, see 18 U.S.C. § 922(g)(1); and possession of a firearm during a federal drug-trafficking offense, see 18 U.S.C. § 924(c)(1)(A)(i). McNeill pleaded guilty to the drug offense and the felon-in-possession firearm offense. In exchange, the government moved to dismiss the count charging the § 924(c) firearm offense.

The presentence report concluded that several of McNeill’s prior convictions qualified McNeill for sentencing under the Armed Career

Criminal Act (ACCA). See 18 U.S.C. § 924(e). The ACCA provides a 15-year mandatory minimum sentence for a person convicted of a firearm offense under 18 U.S.C. § 922(g) if that person has three prior convictions for “a violent felony or serious drug offense, or both, committed on different occasions from one another.” McNeill’s prior convictions included a common-law robbery and an assault with a deadly weapon. McNeill also had four 1992 convictions for cocaine sales committed in 1991 and two 1995 convictions for possession of cocaine with the intent to manufacture, sell, or deliver, which he committed in 1992 and September 1994.

At sentencing, McNeill argued that his prior drug convictions did not count as “serious drug offenses.” The ACCA defines a serious drug offense to include a state drug offense “for which a maximum term of imprisonment of ten years or more is prescribed by law.” At the time of McNeill’s prior drug offenses, North Carolina law subjected these crimes to ten-year maximum sentences, and McNeill was sentenced to ten years on some convictions. In 1993, however, North Carolina reduced the maximum sentence for these offenses to less than ten years. This change in law applied only to offenses committed after October 1, 1994. McNeill thus argued that the district court could not sentence him under the ACCA because his prior drug offenses no longer were subject to a ten-year maximum sentence and thus did not constitute “serious drug offenses.”

The district court rejected this argument, finding that “[u]nder the ACCA, a court looks to the maximum sentences for the offenses at issue at the time of the offense.” Designating McNeill an ACCA

offender, the district court sentenced him to 300 months on the felon-in-possession firearm conviction and 240 months on the drug conviction.

On appeal, the Fourth Circuit rejected McNeill's argument that his prior drug convictions did not qualify as "serious drug offenses." See *United States v. McNeill*, 598 F.3d 161 (4th Cir. 2010). The Fourth Circuit acknowledged a circuit split on the question of whether the controlling state drug sentence under the ACCA should be the state sentence governing at the time of federal sentencing, or the state sentence that governed when the prior state drug offense was committed. Compare e.g., *United States v. Darden*, 539 F.3d 116 (2nd Cir. 2008) (sentence at time of federal sentencing); *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003) (sentence when prior offense was committed). Focusing on the fact that North Carolina made its change to drug sentences nonretroactive, the Fourth Circuit concluded: "If [McNeill] were tried and convicted today for his drug offenses committed in 1991, 1992, and September 1994, he would be subjected to the higher sentences imposed by the pre-October 1994 sentencing statutes."

McNeill petitioned the U.S. Supreme Court for a writ of certiorari on July 2, 2010. The Supreme Court granted the petition on January 7, 2011.

CASE ANALYSIS

McNeill grounds his argument on the word "is" in the ACCA, because the ACCA defines a "serious drug offense" by the maximum sentence that "is prescribed" by state law. Observing that the "ACCA's definition of a 'serious drug offense' is written in the present tense," McNeill argues that "[t]he statute's plain language thus establishes that it is a state's current penalty structure that determines seriousness." McNeill asserts that Congress meant for federal courts to defer to state judgments about the seriousness of state drug convictions in applying the ACCA. The "ACCA's underlying purpose," McNeill contends, thus "reinforces this plain reading of its statutory language."

This approach also follows Supreme Court precedent, according to McNeill. In *United States v. Rodriguez*, 553 U.S. 377 (2008), the Supreme Court held that the ACCA uses "offense" in the generic form rather than the specific form. Therefore, McNeill asserts, "[u]nder *Rodriguez* ... an ACCA analysis must look at 'an offense' as it is defined by state law, without incorporating extraneous facts that do not bear on that definition," such as the date when the defendant committed the offense.

The government agrees that the ACCA requires federal courts to rely on state law in determining the seriousness of a prior state drug conviction. But the government reads "is prescribed" in the ACCA to reference one of two sentencing events: (1) the time of the sentencing for that prior drug offense and conviction; or (2) the time of federal sentencing, informed by the maximum sentence the defendant could receive for the drug offense actually committed.

The first construction of "is prescribed" better conforms to Supreme Court precedent, the government argues, because in *Rodriguez* the Supreme Court analyzed the relevant statutes "that applied '[a]t the time of respondent's drug offenses.'" Highlighting the fact

that McNeill was sentenced to ten years on some of his prior drug convictions, the government contends that McNeill's position defeats the "rationale" of *Rodriguez*: "[McNeill's] reading would mean that the 'maximum term of imprisonment ... prescribed by law' for his prior offense was lower than the sentence that he actually could have received (and in fact did receive)."

The ACCA's other uses of the present-tense verb "is" confirms this analysis, according to the government. Indeed, the government observes, "[i]n construing the ACCA's definition of 'violent felony,' [the Supreme Court] has considered the time of the underlying felony, not the time of the federal sentencing to which the ACCA may apply." The government further notes that "[i]n the state and federal cases that appear to have addressed a similar question, courts have construed definitions in recidivist statutes that use the word 'is' ... to refer to the time of the earlier conviction rather than the second proceeding." The government thus argues that the "Congress intended only to expand the scope of the ACCA's predicate offenses," and not to "create an unusual, dynamic regime under which a prior conviction's status as a predicate offense could shift whenever the legislature changes the potential sentence for a similar offense committed at a later date."

At a minimum, the government contends, even if the maximum sentence for a prior state drug offense should be determined at the time of federal sentencing, the actual maximum sentence applicable under a nonretroactive law such as North Carolina's should govern. North Carolina, the government explains, did not extend its change in drug sentences to offenders like McNeill, who were convicted prior to this change. Therefore, if McNeill were sentenced today for any of his prior drug offenses, he still would remain subject to a ten-year maximum sentence on each conviction. In the government's view, a federal court should not attempt to divine *why* North Carolina ameliorated its maximum drug sentences when North Carolina itself determined not to apply this change retroactively to McNeill's convictions.

McNeill responds that the government's position ignores the nature of North Carolina's changes to its drug sentences. In revising drug sentences only prospectively, McNeill argues, North Carolina did not distinguish the "normative" seriousness between otherwise identical drug offenses committed before and after this change in the law. "Retroactivity involves a decision about remedy," McNeill asserts, "not a decision about harm." North Carolina applied nonretroactivity as the traditional default rule to address the state's financial and administrative concerns, as well as concerns about ex post facto and "abatement" claims if the new law did not apply only prospectively. As a "truth in sentencing" reform, McNeill adds, the new sentencing law would not materially differentiate the actual time served between pre- and post-change convictions. The change simply lowered the "artificially" high maximum sentences that applied. Indeed, McNeill emphasizes, "North Carolina makes the current law the measure of an offense's seriousness when that offense is considered for recidivist purposes."

McNeill suggests that, in contrast to his "straightforward reading" of the ACCA, the government's position will result in arbitrary and inequitable federal sentences. McNeill emphasizes that under the government's approach, federal courts will sentence defendants convicted of identical state offenses differently under the ACCA. This outcome would violate the canon that "courts should not read a law

in a way that produces arbitrary outcomes,” and may “raise serious equal protection concerns.” The government’s approach also will prove “vexing,” McNeill contends, because federal courts will struggle to interpret and apply different states’ retroactivity rules. And in some states such as Delaware, McNeill observes, courts could not apply the government’s rule because these states permit some offenders to elect “between the law in place at the time of the offense and the law in force at the time of sentencing.”

According to McNeill, these practical concerns weigh in favor of his position that “[t]he present penalty for the crime answers [the] question.” This position is supported by the National Association of Criminal Defense Lawyers and Families Against Mandatory Minimums, who elucidate these perceived practical problems in the administration of the ACCA implicated by the government’s position. At the least, McNeill argues, these concerns justify application of the rule of “lenity,” under which a defendant is entitled to narrow construction of an ambiguous criminal statute.

The government counters by identifying practical difficulties that would follow from McNeill’s position. For example, courts would need to “convert” the offense of the prior conviction into an offense that hypothetically occurred under the prevailing sentencing regime and determine the maximum sentence. The government characterizes the amici’s confidence that federal courts could resolve these issues as a “sanguine prediction” that is belied by lower court experience. McNeill’s rule could produce its own arbitrary results, the government observes, by allowing the “ACCA’s applicability to depend on the happenstance of the timing of the federal sentencing proceeding (rather than the timing of the defendant’s state and federal convictions).”

The government stresses that its position avoids these infirmities because it ensures that defendants convicted in state court can know the future effect of that prior conviction if they violate federal law, thus better fulfilling the ACCA’s deterrent function. Adding that McNeill’s proposed construction “is not in equipoise with the approach of either the district court or the court of appeals,” the government concludes by asserting that the rule of lenity does not support McNeill’s position.

SIGNIFICANCE

The advocates have presented the Supreme Court with three potential constructions of “is prescribed” in the ACCA’s definition of a “serious drug offense.” One construction could favor McNeill and two would favor the government.

First, the Supreme Court may adopt McNeill’s argument that the North Carolina sentences that governed at the time of his federal sentencing should have determined the maximum sentence “prescribed by law.” This ruling could relieve McNeill of his ACCA designation. Yet, this ruling might not change McNeill’s sentence because the district court sentenced McNeill well above the ACCA’s mandatory minimum. The government’s brief notes that the district court “stated that, even if it had ‘incorrectly calculated the advisory guideline range or ha[d] erroneously departed,’ it would still ‘impose the same 300-month and 240-month sentences as variance sentences.’” The

Fourth Circuit upheld these sentences against McNeill’s claim of substantive unreasonableness.

Second, the Supreme Court may embrace the government’s first position that federal courts should look to a state’s applicable maximum sentence for a prior drug conviction at the time of the prior offense, not at the time of federal sentencing. This ruling would end McNeill’s challenge to his felon-in-possession firearm sentence. Such a ruling also could render changes to state drug sentences irrelevant to subsequent ACCA adjudications—a prior drug conviction would be deemed a “serious drug offense” by the maximum sentence applicable solely when the drug offense was committed.

Third, the Supreme Court may accept the government’s alternative position, that if the ACCA looks to the maximum applicable sentence for a prior state drug conviction at the time of federal sentencing, the federal court should determine the maximum state sentence the defendant could receive if sentenced for the offense he or she actually committed. This ruling would permit defendants to benefit from changes in state law to avoid ACCA designation if the state applies a change to its drug sentences retroactively. This ruling, therefore, equally may end McNeill’s challenge to his felon-in-possession firearm sentence, unless the Supreme Court questions whether North Carolina’s change in law did apply retroactively to McNeill.

All three of these constructions, however, significantly could affect federal criminal sentencing under the ACCA. The federal government often argues that prior state drug convictions constitute “serious drug offenses” under the ACCA. Yet, states not uncommonly revisit their internal judgment about how to punish those drug offenses. Therefore, whatever construction the Supreme Court adopts for the “is prescribed” provision, it will enlarge or narrow the ability of federal sentencing decisions to reflect current and evolving state law judgments about the seriousness of particular drug offenses.

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PREVIEW of United States Supreme Court Cases, pages 288–290.
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Can a Federal Judge Give a Convicted Defendant a Longer Prison Sentence to Promote Rehabilitation?

CASE AT A GLANCE

Alejandra Tapia is a federal prisoner serving a 51-month sentence. Tapia was sentenced at the top-end of her advisory guideline range by the district court so that she would be eligible to participate in the Bureau of Prison's 500-hour drug treatment program to promote her rehabilitation. This case requires the Supreme Court to determine whether a district court may, after determining that some term of imprisonment is appropriate, consider rehabilitation in determining the *length* of that term of imprisonment.

Tapia v. United States
Docket No. 10-5400

Argument Date: April 18, 2011
From: The Ninth Circuit

by George A. Couture and Josh Friedman
 Atlanta, GA

ISSUES

May a district court give a defendant a longer prison sentence to promote rehabilitation, as the Eighth and Ninth Circuits have held, or is such a factor prohibited, as the Second, Third, Eleventh, and D.C. Circuits have held?

Said another way, does 18 U.S.C. § 3582(a), which dictates the factors to be considered in determining a prison sentence, preclude a district court from imposing a longer sentence so a defendant might participate in a rehabilitation program while in prison?

FACTS

In this case, the United States District Court for the Southern District of California increased petitioner's sentence so that she would be eligible for a 500-hour drug abuse treatment program while in custody of the Bureau of Prisons (BOP). Notably, district courts have no authority to order the BOP to place a defendant in any given facility or rehabilitative program, but they may offer recommendations. Petitioner concedes that imposition of a longer prison sentence was consistent with prior Ninth Circuit precedent but argues that the Ninth Circuit rule conflicts with plain meaning of § 3582(2) and broader context of the Sentencing Reform Act of 1984. The government agrees and urges the Court to reject the Ninth Circuit's reasoning and vacate petitioner's sentence. By invitation of the Court, amicus curiae (respondent-amicus) defends the Ninth Circuit rule as falling within the purpose and structure of the Sentencing Reform Act.

In January 2008, petitioner Alejandra Tapia and a friend were driving from Mexico to the United States. At the border, they were questioned by an immigration official who discovered two individuals—later determined to be undocumented aliens—concealed in the car's gas tank compartment.

Initially, petitioner was indicted by a federal grand jury in the Southern District of California on two counts: (1) bringing in illegal aliens for financial gain and aiding and abetting in violation of 8 U.S.C. § 1324 (a)(2)(B)(ii) and 18 U.S.C. § 2; and (2) bringing in illegal aliens without presentation and aiding and abetting in violation of 8 U.S.C. § 1324 (a)(2)(B)(iii) and 18 U.S.C. § 2. Two days after her arrest, petitioner was released by the district court and ordered to comply with various conditions of pretrial release.

In March 2008, a bench warrant was issued for petitioner's arrest after she failed to appear in court for a motion hearing. Six months later, petitioner was apprehended in an apartment that contained methamphetamine, a shotgun, and mail belonging to other individuals. The government then filed a superseding indictment, adding a third count charging petitioner with bail jumping in violation of 18 U.S.C. § 3146. In December 2008, a jury found petitioner guilty on all three counts.

At sentencing, the district court calculated the adjusted guideline offense level for petitioner's alien smuggling conviction, which was increased because the manner in which the aliens were smuggled put them at a substantial risk of death or bodily injury. See USSG § 2L1.1(b)(6). Petitioner's offense level was increased another two levels for obstruction of justice by fleeing while on bail. See USSG § 3C1.1. The district court concluded that the petitioner's guideline sentencing range was 41–51 months.

Petitioner argued that she should be sentenced to no more than three years, the mandatory minimum. She contended that a higher sentence would be greater than sufficient to meet the congressionally mandated goals of sentencing in 18 U.S.C. § 3553(a), particularly in light of her lifelong history of sexual and physical abuse, and that she had never before even served one year in custody.

The district court acknowledged the physical and sexual abuse, stating, “I’m concerned about that and she needs help.” Reviewing the relevant sentencing factors in 18 U.S.C. § 3553(a), the district court opined four separate times that petitioner needed to take part in BOP’s 500-hour drug treatment program, commonly referred to as BOP’s Residential Drug Abuse Program (RDAP). RDAP is a voluntary, 500-hour, nine to twelve-month program of individual and group therapy for federal prisoners with substance abuse problems. BOP only offers RDAP in some of its facilities to select prisoners. RDAP is popular among inmates and there is a long waiting list. As an incentive to get prisoners to participate, federal law allows the BOP to reduce the sentences of graduates convicted of “nonviolent” offenses by up to 12 months.

First, the district court stated, “[t]he sentence has to be sufficient to provide needed correctional treatment, and here I think the needed correctional treatment is the 500 Hour Drug Program.” Next, the district court focused on the importance of the drug treatment program when determining the length of sentence:

Here I have to say that one of the factors that I am going to impose is a 51 month sentence, 46 months [for alien smuggling] plus five months for the bail jump, and one of the factors that affects this is the need to provide treatment. In other words, so she is in long enough to get the 500 Hour Drug Program, number one.

Additionally, the district court noted the importance of deterrence, given petitioner’s escalating criminal conduct, but returned to the drug treatment program a third time, stating,

I think that a sentence less than what I am imposing would not deter her and provide for sufficient time so she could begin to address these problems. And I am going to recommend that she serve her sentence at FCI Dublin where they have facilities to really help her, and I think that this is the necessary sentence for all the reasons I stated, and it’s the least sentence that can be imposed to effect all those reasons.

For a fourth and final time, the district court cited the treatment goal in its custodial housing recommendation:

The court recommends, strongly recommends, that she participate in the 500 Hour Drug Program and that she serve her sentence at FCI Dublin/Pleasanton. I recommend that institution because I think they have the appropriate tools and rehabilitation, people there to help her, to start to make a recovery here.

In addition to her custodial sentence, petitioner was sentenced to serve three years of supervised release. In doing so, the district court once again expressed concern with petitioner’s substance abuse issues, requiring her to participate in a drug abuse program and staying away from drug users and dealers.

On appeal to the Ninth Circuit, petitioner challenged the increased term for rehabilitation. More specifically, petitioner argued that the district court committed plain error by basing her 51-month

sentence on speculation about whether and when she could enter and complete BOP’s drug abuse treatment program. Petitioner principally relied upon the plain language of 18 U.S.C. § 3582(a), which states: “The court in determining whether to impose a term of imprisonment ... shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that *imprisonment is not an appropriate means of promoting correction and rehabilitation.*”

Before the Ninth Circuit, Tapia acknowledged that the Ninth Circuit, in *United States v. Duran*, 37 F.3d 557 (1994), sanctioned longer prison sentences based upon rehabilitation considerations. However, Tapia argued that *Duran* was wrongly decided in light of *In re Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009), and *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007), and inconsistent with the later decision in *United States v. Kikuyama*, 109 F.3d 536 (9th Cir. 1997).

The Ninth Circuit rejected Tapia’s argument and affirmed, citing *Duran*. *United States v. Tapia*, 376 F. App’x 707 (9th Cir. 2010).

Petitioner sought review in the Supreme Court, noting the clear circuit split. Compare *United States v. Hawk Wing*, 433 F.3d 622 (8th Cir. 2006) (allowing consideration of rehabilitation to impose longer sentence); *United States v. Duran*, 37 F.3d 557 (9th Cir. 1994) (same), with *In re Sealed Case*, 573 F.3d 844 (D.C. Cir. 2009) (holding rehabilitation is not valid reason to impose longer sentence); *United States v. Manzella*, 475 F.3d 152 (3d Cir. 2007) (same); *United States v. Harris*, 990 F.2d 594 (11th Cir. 1993) (same); *United States v. Maier*, 975 F.2d 944 (2d Cir. 1992) (same).

The solicitor general agreed with Tapia’s interpretation but argued against certiorari because (1) the issue was raised on plain error review and (2) the solicitor general was in the process of advising courts of appeals about the correct application of § 3582(a). The Supreme Court granted certiorari to determine “[w]hether 18 U.S.C. 3582(a) precludes a district court at an initial sentencing from considering a defendant’s rehabilitative needs in setting the length of a term of imprisonment.”

CASE ANALYSIS

This case presents the question of whether 18 U.S.C. § 3582(a) permits a district court to increase a term of imprisonment for the purpose of promoting a defendant’s rehabilitation. 18 U.S.C. § 3582(a) cabins the discretion of sentencing judges by instructing:

FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.

The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent they are applicable, recognizing that imprisonment is not an appropriate means of promoting rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the sentencing commission pursuant to 28 U.S.C. § 994(a)(2).

18 U.S.C. § 3582(a).

Petitioner, with support from the government, argues that § 3582(a)'s admonition "that imprisonment is not an appropriate means of promoting correction and rehabilitation" prohibits a district court from considering rehabilitation in both determining *whether* to imprison a defendant and also in determining the *length* of imprisonment. She reasons that this result is compelled by the statute's plain text and is further supported by the purpose and context of its enacting legislation, the Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 et seq., and 28 U.S.C. §§ 991-998, which stemmed from Congress's rejection of the idea that imprisonment fosters rehabilitation. Alternatively, the petitioner contends that her sentence should be reversed pursuant to the Rule of Lenity.

Respondent-amicus agrees that the Sentencing Reform Act generally repudiated rehabilitation as a proper concern in sentencing determinations but counters that the act preserved the district courts' discretion to fashion individualized sentences specifically tailored to insure defendants receive "corrective treatment." In so doing, respondent-amicus disputes petitioner's textual and contextual accounts and alternatively counters that the Rule of Lenity offers no relief in this case.

Plain Language

Petitioner and the government argue that the plain language of § 3582(a) prohibits a district court from either imposing or lengthening a term of imprisonment in order to rehabilitate a defendant. They reason that § 3582(a) cabins a sentencing courts discretion in two contexts: "determining whether to impose a term of imprisonment" and "determining the length of the term." Accordingly, petitioner and the government insist that a court engaged in either act must "recogniz[e] that imprisonment is not an appropriate means of promoting rehabilitation." They support this argument by citing to differing rules of grammar contained in numerous well-respected authorities on the art and style of writing.

In addition to the structure of § 3582(a), petitioner and the government also submit that the terms "imprisonment" and "recognizing" demonstrate the broad scope of Congress's prohibition against any considerations of rehabilitation. To this end, they emphasize that "imprisonment" is defined as both the act of imprisoning and the conditions of being imprisoned. Similarly, "recognize" is defined as "to acknowledge or treat as valid." Petitioner and the government thus reason that, taken together, a sentencing court that considers rehabilitative purposes in imposing and fashioning a term of imprisonment fails to "treat as valid" Congress's mandate that "imprisonment is not an appropriate means of promoting rehabilitation."

Respondent-amicus does not take issue with these rules of grammar or definitions. Rather, respondent-amicus counters that the "recognizing" clause of § 3582(a) does not speak to petitioner's sentence at all. This is so, respondent-amicus explains, because the text of § 3582(a) mentions "'imprisonment' per se, not targeted treatment programs in prison" like the one considered by the sentencing court in this case. Respondent-amicus emphasizes that § 3582(a) instructs courts to fashion terms of imprisonment by considering the factors enumerated in 18 U.S.C. § 3553(a). Section 3553(a)(2)(D), he explains, sets forth that one such factor is that the sentence "provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner."

Respondent-amicus suggests that, in light of this congressional instruction to consider correctional treatment programs, petitioner and the government's proffered interpretation unnecessarily "puts the two clauses of [section] 3852 at war with each other." A better reading, respondent-amicus suggests, is one that recognizes the distinction Congress drew between "imprisonment" and "correctional treatment" programs.

Statutory Context and Purpose

Petitioner and the government next argue that the context and purposes of the Sentencing Reform Act bolster their plain language argument. To this end, they emphasize the Court's statement in *Mistretta v. United States*, 488 U.S. 361, 367 (1989) that the Sentencing Reform Act categorically "rejects imprisonment as a means of promoting rehabilitation." Moreover, likely anticipating respondent-amicus's reliance on § 3553(a)(2)(D), they suggest that Congress's instruction to consider "needed ... correctional treatment" accords perfectly with § 3582(a). Specifically, 3553(a)(2)(D) "requires the court generally to consider rehabilitative purposes in fashioning a defendant's sentence, while [s]ection 3582(a) specifically prohibits the court from relying on rehabilitation as a justification for imposing or lengthening a defendant's term of imprisonment." As petitioner explains, Congress thus "carve[d] out imprisonment as the one aspect of sentencing to which rehabilitative concerns are largely inapposite."

In response, respondent-amicus invokes the same distinction between "imprisonment" and "correctional treatment" to argue that the Sentencing Reform Act contemplates precisely the sentence that petitioner received. Respondent-amicus submits that the Sentencing Reform Act sought to institute a system of targeted sentencing that would enable judges to "facilitate treatment of certain pathologies." This outcome, respondent-amicus explains, reflected the growing awareness that "[i]ndefinite isolation through imprisonment has proven to be ineffective and arbitrary," and therefore inappropriate. Critically, respondent-amicus suggests, this rejection of "indefinite isolation" imposes no similar limitation on "determinate terms" that enable "corrective treatment." On respondent-amicus's account, these two concepts are thus analytically and practically distinct.

Any other conclusion, respondent-amicus warns, would create an "exception that would swallow the rule." Specifically, respondent-amicus reasons that because the overwhelming number of federal defendants receive terms of imprisonment, petitioner proposes a regime in which sentencing courts would be unable to consider rehabilitation for the great majority of defendants before them. Respondent-amicus contends that such a massive limitation on a sentencing court's discretion is at odds with the Sentencing Reform Act's underlying embrace of targeted sentencing.

Respondent-amicus continues that looking beyond the Sentencing Reform Act, petitioner's sentence accords with Congress's recurring endorsement of in-prison drug treatment programs. To this end, respondent-amicus emphasizes that Congress expected evolutions in "current knowledge" to shape sentencing courts' determinations about "effective" sentencing. It is thus particularly telling according to respondent-amicus that, in 1990, Congress increased federal funding for in-prison drug treatment programs.

Respondent-amicus also points out that although sentencing judges cannot guarantee that a defendant will be enrolled in an in-prison drug treatment program, neither can they guarantee such placement for individuals who violate the terms of their supervised release. Yet, because sentencing judges can consider the need for drug treatment programs in fashioning remedies for violations of supervised release, it follows they can similarly do so for initial imprisonment determinations. At the very least, respondent-amicus concludes, even if the decision whether to imprison a defendant should not be based on concerns for rehabilitation, the Sentencing Reform Act's repeated distinction between the decision to imprison and the terms of that imprisonment, especially when placed alongside Congress's consistent support for drug treatment programs, compels the conclusion that a sentencing judge can consider rehabilitation when determining the length of a prison sentence.

Finally, it bears mention that all parties point to numerous statements in the legislative history that appear to support their respective conclusions. As a result, although such statements can at times shed light on a statute's meaning, in this case, the mutually contradictory citations may limit the interpretive value of the legislative history. Similarly, both sides argue that Congress knows how to enact specific mandates into federal law. Therefore, its failure to expressly equate correctional treatment and imprisonment means to the petitioner that such consideration *cannot support* a term of imprisonment. However, to the respondent-amicus, this means that a sentencing court is *not prohibited* from factoring such consideration into the sentence determination. For obvious reasons, this argument too seems to be an ill-suited means to resolve the question presented.

Rule of Lenity

Petitioner pleads in the alternative that, to the extent the Court does not embrace her proffered interpretation of § 3582(a), she is nonetheless entitled to relief through application of the Rule of Lenity. The Rule of Lenity applies primarily to the interpretation of criminal statutes. It instructs courts to favor a more lenient interpretation of a criminal statute when, after consulting traditional canons of statutory construction, the statute remains ambiguous. Emphasizing the disagreements among the courts of appeals to interpret § 3582(a), she argues that at best the true meaning of the statute is unclear, and avers that the policy considerations underscoring application of the Rule all weigh in her favor.

Respondent-amicus, counters that even if § 3582(a) is ambiguous, the ambiguity is certainly not of the "grievous" nature to which the Court has previously applied the Rule. Respondent-amicus concludes that the Rule is inapposite to this case. Finally, the authors note that this article was written before petitioner's reply brief was filed. Although petitioner and the government anticipated respondent-amicus's arguments in their briefs, petitioner's reply may present additional arguments not included in this article.

SIGNIFICANCE

Because this case involves the interpretation of a federal judge's sentencing discretion under the Sentencing Reform Act, the Court's resolution of the circuit split will likely only affect federal defendants.

At bottom, this case involves the interpretation of a federal statute and rules of statutory construction, not constitutional analysis. Considering the large number of federal defendants who are sentenced each year in federal court, the Court's decision could potentially impact a lot of cases. According to the Sentencing Commission, some 81,000 federal inmates were sentenced in fiscal year 2009 and another 7,400 were resentenced.

If the Court rules against the petitioner, it will be overturning the Second, Third, Eleventh, and D.C. Circuits. Although the pool of potential cases impacted is large, the diversity in offender characteristics and the realities of BOP sentencing options will likely limit the actual number of cases affected. First, there are only a limited number of BOP rehabilitative programs available and demand already exceeds supply. Second, and more importantly, district judges are well aware that they have no authority to place prisoners in the custody of the BOP into particular facilities or programs. As a result, district courts may view the possibility of rehabilitation as too speculative to warrant lengthening a defendant's sentence.

If the Court rules in favor of petitioner, her case will likely be remanded for resentencing, provided she can meet the other requirements of plain error review. A decision in favor of petitioner would also abrogate the law of the Eighth and Ninth Circuits. Ironically, if petitioner is resentenced, the district court will not be able to lengthen her sentence to promote rehabilitation purposes but will be able to consider her post-sentencing rehabilitation to shorten her sentence under *Pepper v. United States*, 131 S. Ct. 1229 (2011) (holding district courts may consider post-sentencing rehabilitation at resentencing).

Of course, we cannot predict how the Court will decide *Tapia*. And it is always difficult to speculate about where the Supreme Court may be going with respect to its sentencing jurisprudence. But since *United States v. Booker*, 543 U.S. 220 (2005) (holding Sentencing Guidelines must be treated as advisory), the Court has trended toward interpreting federal sentencing law to give district courts greater sentencing discretion. See, e.g., *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Pepper v. United States*.

Indeed, even before *Booker*, in *Koon v. United States*, 518 U.S. 81 (1996), the Court recognized the centrality of individualized sentencing: "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." The Court quoted and reaffirmed this principle just last month in *Pepper*, explaining "the punishment should fit the offender and not merely the crime." Regardless of the outcome of *Tapia*, the fact the Court granted certiorari signifies a continued interest in tweaking federal sentencing law.

Finally, despite who wins in the Supreme Court, the decision is likely to spawn a number of federal prisoner initiated post-conviction motions to vacate sentences pursuant to 28 U.S. C. § 2255 by inmates who can show it made a difference in the length of their term of imprisonment.

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PREVIEW of United States Supreme Court Cases, pages 291–295.
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ATTORNEY-CLIENT PRIVILEGE

Does the Fiduciary Exception to Attorney-Client Privilege Apply to Communications Between the U.S. Government and an Indian Tribe?

CASE AT A GLANCE

As a fiduciary, the secretary of the interior and his staff holds, in trust, certain funds of the Jicarilla Apache Nation, which are derived from natural resources mined from tribal land. The tribe sued the United States to compel an accounting of the fund. The issue is whether the tribe can invoke the fiduciary exception to the attorney-client privilege, under which a fiduciary may not shield from trust fund beneficiaries communication with its attorneys on fiduciary matters, in order to compel the production of documents about Indian trust funds managed by the secretary of the interior.

United States v. Jicarilla Apache Nation Docket No. 10-382

Argument Date: April 20, 2011
From: The Federal Circuit

by Jayne Zanglein and Kristi House
Western Carolina University, Cullowhee, NC

ISSUE

When the United States acts as a fiduciary to an Indian tribal trust fund, is the “real client,” for purposes of invoking the attorney-client privilege, the government or the Indian tribe?

FACTS

The Jicarilla Apache Nation (the tribe) owns a 900,000-acre plot of land in New Mexico; the land contains timber, gravel, and oil and gas resources. The secretary of the interior and his designees hold revenues derived from the land in trust for the tribe and, in a fiduciary capacity, manage the trust fund.

The tribe sought an accounting of the trust fund because it believed that the government had mismanaged the funds and had breached its fiduciary duty to the tribe. The tribe alleged that the United States did not maximize returns on the funds, failed to pool assets with other funds, and invested too deeply in short-term maturities.

From December 2002 through June 2008, the parties engaged in alternative dispute resolution. During this time, the government gave the tribe thousands of documents; however, the government withheld 226 documents, claiming that the documents contained privileged information under the attorney work product doctrine, attorney-client privilege, or the deliberative process privilege. This included documents exchanged among the U.S. Department of the Interior, the Office of the Solicitor, and various agencies including the Bureau of Indian Affairs. The tribe asked the court to place the case on its active case calendar and filed a motion to produce the documents. The government filed its response as well as a privilege log. In addition, the government produced 71 of the 226 documents after withdrawing claims of the deliberative process privilege.

The U.S. Court of Federal Claims held that the government could not withhold documents under the attorney-client privilege because, as the beneficiary of a trust fund managed by the U.S. government, the tribe fell within the fiduciary exception to the attorney-client privilege. This exception allows a trust beneficiary to gain access to attorney-client communications that relate to fiduciary matters.

The court classified the documents into five categories. The first included documents from personnel in various Interior agencies requesting legal advice from the Interior’s Office of the Solicitor; these documents directly or indirectly related to the tribal accounts. This category included 20 documents, six of which were exact duplicates of documents already produced. The court held that the fiduciary exception applied to all of the documents in this category, except the duplicates, because they related to the administration of tribal trusts and the tribe’s investments.

The second group of documents included legal advice provided by the Solicitor’s Office or other government offices over a 75-year span. This was the largest group of requested documents and included 83 pages. Most of this information was related to the legality or appropriateness of investment strategies. The court ordered the production of these documents under the fiduciary exception.

The third set of documents included contracts between accounting firm Arthur Andersen, Inc., and the Interior. Eighteen documents were classified in this category, all of which the government sought to withhold under the work product doctrine. The court agreed that the work product doctrine protected these records.

The fourth category of documents contained information on anticipated or pending litigation with other tribes prepared by the Interior or Solicitor's Office. This category included 25 documents. Twenty-one of these documents were prepared in anticipation of litigation with other tribes and, therefore, according to the court, were protected under the work product doctrine.

The fifth and final group was a hodge-podge of nine documents that do not readily fit into the other four categories. Two of these documents were emails discussing the request for legal advice, another two related directly to fund management, three documents were merely cover sheets, and the final documents were duplicates of previously produced documents. The court ordered the production of the cover sheets because they were not protected either by the attorney-client privilege or the work product doctrine. The court also ordered production of documents that related to the tribe's investments because these documents fell under the fiduciary exception.

The United States appealed, seeking a writ of mandamus from the Court of Appeals for the Federal Circuit on the grounds that the "fiduciary exception does not apply to [the government] because its relationship to the tribe is different than a traditional fiduciary relationship." *Jicarilla v. United States*, 590 F.3d 1305 (Fed. Cir. 2009). Noting that this is a case of first impression, the Federal Circuit denied mandamus and upheld the lower court's opinion. The court held that a tribal trust was sufficiently analogous to a private trust so as to justify the application of fiduciary exception. In fact, the court asserted, the Supreme Court has analogized the relationship of the federal government to Indian tribes as a "ward to his guardian." Because the government was consulting with attorneys for the ultimate benefit of the beneficiaries, the beneficiaries were the real clients. The court held that, "the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." The court dodged the question of whether the fiduciary exception applies to work product documents.

The court relied on the *Restatement (Third) of Trusts* to hold that the United States, as a trustee for the tribal fund, has a general fiduciary duty to disclose "information related to trust management to the beneficiary Indian tribes, including legal advice on how to manage trust funds."

The government filed a petition for rehearing, but in the meantime the Court of Federal Claims issued a protective order that preserved the government's privilege and prevented disclosure to third parties. With these protections in place, the government produced the requested documents and filed a petition for certiorari to determine whether the privilege applies.

CASE ANALYSIS

The attorney-client privilege allows clients to keep private confidential information discussed during consultation with lawyers. The privilege allows open dialogue between an attorney and his or her client so that the client is comfortable disclosing all relevant information and the attorney can provide accurate legal advice based on this information.

Such communications can only be revealed if the client waives the attorney-client privilege.

In cases involving a trust fund, the issue is who is the client: the fiduciary or the beneficiary? An exception to the attorney-client privilege exists in the context of fiduciary relationships due to this concern. The fiduciary exception is premised on the belief that the beneficiary is the ultimate client; therefore, the exception grants the beneficiary access to attorney-client communications between the fiduciary and an attorney when the communications relate to plan administration.

Both parties argue that they are the "real client." The tribe contends that because the purpose of the attorney-client communication was to discuss the interests of the beneficiaries (i.e., the tribe), the tribe should be granted access to the communications. In contrast, the government argues that because it was acting in its capacity as a sovereign entity, the government lawyers are not representing the tribe, but are acting on behalf of the U.S. government.

The government bolsters its argument by pointing out that the government attorneys are paid by the government, not by the trust fund. Additionally, the government contends that the trust fund records belong to the government, not the tribe. The government, therefore, concludes that only the government can assert a privilege with respect to the records.

The government's position is further reinforced by a 1979 letter from Attorney General Bell to the Department of the Interior. The attorney general clarified that government attorneys represent the government, not the tribes: "[T]he Attorney General is attorney for the United States in these cases, not a particular tribe or individual Indian. Thus, in a case involving property held in trust for a tribe, the Attorney General is attorney for the United States as 'trustee,' not the 'beneficiary.' He is not obliged to adopt any position favored by a tribe in a particular case."

The government contends that the Federal Circuit erred by abrogating the attorney-client privilege in relation to tribal property. The government analogizes the attorney-client privilege to the Freedom of Information Act Exemption 5, which exempts from mandatory disclosure the production of "inter-agency or intra-agency memorandums or letters, which would not be available by law to a party other than an agency in litigation with the agency." Courts have held that such memoranda issued by government agencies are protected under attorney-client privilege.

The government argues that the Federal Circuit's ruling presents ethical dilemmas for government lawyers who may have a conflict between tribal and governmental interests. For example, the government attorney's advice to the tribe may be directly adverse to its advice to another agency, such as an environmental control agency. Private attorneys may face similar quandaries, but unlike the government, private fiduciaries have the option to hire independent counsel to avoid such conflicts. The government, therefore, contends that the fiduciary exception to attorney-client privilege is inapplicable to the government because government lawyers represent clients with competing interests.

The tribe explains that the attorney-client privilege was crafted to assure open and honest communication between the attorney and his

or her client to ensure frank communications so that the attorney can provide informed legal advice. The tribe contends that the attorney-client privilege is inappropriate in the context of government officials communicating with government attorneys about the management of tribal funds because, unlike a private attorney, a government attorney's loyalties do not lie solely with the client-agency, but with the public interest.

The tribe states that the "fiduciary exception rests on two foundations. First, the fiduciary acts as a proxy for the beneficiary who is the 'real client' for whose benefit the advice was sought. Second, the fiduciary has a duty to disclose all information related to trust management to the beneficiary." The duty to disclose, argues the tribe, is a duty imposed on all fiduciaries of trust funds in order to allow a beneficiary to detect a possible fiduciary breach. The tribe emphasizes that "the attorney-client privilege should not be used as a shield to prevent disclosure of information relevant to an alleged breach of fiduciary duty." (citing *Bland v. Fiatallis N. America, Inc.*, 401 F.3d 779 (7th Cir. 2005).)

Historically, Indian tribes have been subject to paternalistic governmental oversight and the government has placed their assets and earnings under trust, exercising "pervasive control" over tribal funds. Over time, tribal communities have become increasingly reliant on the government to exercise its fiduciary duties in good faith. The tribe argues that the government's fiduciary duties do not disappear simply because it is also a sovereign. In this case, according to the tribe, there are no competing interests to be advanced by the government in its capacity as a sovereign: the government is merely executing traditional trustee functions by managing the tribal trust funds.

SIGNIFICANCE

Although it is easy to conclude that this case is only applicable to discovery issues relating to tribal funds held in trust by the U.S. government, the case has broader implications, especially in the area of employee benefits and shareholder actions. This will be the Court's first opportunity to address the fiduciary exception to the attorney-client privilege and it can easily have an impact beyond tribal funds.

The fiduciary exception to the attorney-client rule is frequently invoked in employee benefit cases where the trustee's real clients are the beneficiaries of the trust. Oftentimes, beneficiaries of employee benefit plans do not have ready access to documents relating to the management of the fund. The privilege is also summoned in derivative litigation, where the directors sue the corporation for breach of fiduciary duty. Shareholders simply do not have access to information about corporate mismanagement. The fiduciary exception, along with the corresponding duty to disclose, gives these beneficiaries the authority to demand documentation of communications between the fiduciary and his or her attorney in cases where a breach of fiduciary is alleged. Without the fiduciary exception, fiduciaries of trust funds and directors of corporations could hide any evidence of their own wrongdoing from the ultimate beneficiary.

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PREVIEW of United States Supreme Court Cases, pages 296–298.
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What Is the Appropriate Standard of Proof in Patent Invalidity Cases When the Patent Examiner Fails to Consider Prior Art?

CASE AT A GLANCE

i4i incorporated a custom XML editor into a product and began selling it more than one year before filing a patent application. Microsoft later used the XML editor in its Word program. i4i sued Microsoft for patent infringement; Microsoft claimed the patent was invalid under the “on-sale” bar. The parties now ask the Court whether the Federal Circuit’s interpretation of 35 U.S.C. § 282, requiring the party challenging the validity of a patent to prove invalidity by “clear and convincing” evidence, is appropriate when the patent examiner did not consider prior art.

Microsoft v. i4i Limited Partnership
Docket No. 10-290

Argument Date: April 18, 2011
From: The Federal Circuit

by Jayne Zanglein and Romie Patel
Western Carolina University, Cullowhee, NC

ISSUE

Must a party who claims that a patent is invalid prove invalidity by “clear and convincing” evidence even though the patent examiner did not consider prior art before issuing the patent?

FACTS

i4i Limited Partnership and Infrastructures for Information, Inc. (collectively i4i), sued Microsoft Corporation (Microsoft) for patent infringement. i4i is a software consulting company that develops and maintains customized software. In June 1994, i4i applied for a patent with the U.S. Patent and Trademark Office (USPTO) for an XML editor. i4i incorporated the editor into a product called S4 and began selling it before a patent was issued. Four years later, the USPTO issued U.S. Patent No. 5,787,449 (‘449 patent), without considering prior art. (Prior art is the entire body of public knowledge up until the date of application. If an invention is based on prior art, it is unpatentable).

The ‘449 patent concerned a method for processing and storing information about the structure of electronic documents. A “document” in a computer program has two distinct parts: the content, which is the actual text the user creates, and the structure, which is the metadata or encoding that allows the creator to define how the content will look. The creator can mark up certain text using tags that remain invisible to the reader. For example, in HyperText Markup Language (HTML), which is used to tag web pages, the creator inputs a “” to make text bold. All text will be bold until the creator turns off the bold with the “” tag. “Metacodes” such as and are HTML tags that determine how the computer displays the content on the page.

This case involves a form of markup language called Extensible Markup Language (XML). XML is markup language similar to HTML but instead of having predefined markup language such as , it allows the creator to define his own tags. In other words, in XML the creator can use to define a function other than bold.

The invention “claimed by the ‘449 patent is an allegedly improved method for editing a document containing markup codes by storing the document’s content separately from its metacodes.” i4i created this method of processing and storing content and metacodes distinctly by using a “metacode map.” A metacode map allows a computer to manipulate the structure of a document without referencing the content.

Microsoft developed a word processing and editing software called Microsoft Word (Word). A new version was introduced in 2003, which had custom XML editing capabilities and the functionality of those capabilities continued in Microsoft’s 2007 version of Word. i4i sued Microsoft for patent infringement, claiming that “Word users infringe the ‘449 Patent when they use Word to open files that contain custom XML” because “when used in this manner, Word separates the custom XML metacodes from content and stores them in the manner claimed by the ‘449 Patent.” Microsoft argued that it had a valid defense to the suit in that the ‘449 patent was invalid in the first place because i4i had sold the product for four years prior to receiving the ‘449 patent.

At trial, Microsoft requested jury instructions indicating that the “burden of proof with regard to its defense of invalidity based on prior art that the examiner did not review during the prosecution of the patent-in-suit is by preponderance of the evidence.” The trial court

refused this request and instead instructed the jury that Microsoft had the burden to prove the patent invalidity by “clear and convincing” evidence. The jury concluded that Microsoft had infringed the ‘449 patent and failed to prove by clear and convincing evidence that the patent was invalid. The jury awarded \$200 million in damages to i4i.

Microsoft moved for a new trial to challenge the jury instruction on “clear and convincing” evidence. The district court denied Microsoft’s motion and awarded an additional \$90 million in damages. The court enjoined Microsoft from selling any Word products that were capable of opening certain files containing the custom XML language. Microsoft appealed.

The Federal Circuit held that the district court did not err in issuing the jury instructions on the standard of proof. The court rejected Microsoft’s contention that in *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), the Supreme Court lessened the burden of proof in patent invalidity cases where the patent examiner did not consider all relevant factors.

The Supreme Court granted Microsoft’s petition for certiorari to determine the appropriate standard of proof.

CASE ANALYSIS

The Patent Act provides that “[a] patent shall be presumed valid” and that “[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.” 35 U.S.C. § 282. The Patent Act does not specify the appropriate burden of proof when challenging patents; however, before § 282 was enacted in 1952, the Supreme Court had held that in patent cases, “there is a presumption of validity, a presumption not to be overthrown except by clear and cogent evidence.” *Radio Corp. of Am. (RCA) v. Radio Eng’g Labs., Inc.*, 293 U.S. 1 (1934). i4i relies on *RCA* to argue that the proper burden of proof in any patent invalidity case is by clear and convincing evidence. In contrast, Microsoft cites to dicta in *KSR*, which it believes supports the view that a heightened standard is inappropriate. Relying on *KSR*, Microsoft contends that where an invalidity defense rests on evidence that the USPTO did not consider, the presumption that the agency considered the claim is “much diminished.”

Microsoft argues that 35 U.S.C. § 282 does not impose a heightened standard for proving patent invalidity. Instead, § 282 simply places the burden of proving invalidity on the accused infringer without specifying the burden of proof. Microsoft claims that because patent rights are treated as property under 35 U.S.C. § 261, the standard of proof should be the same as for all other property rights, i.e., by the preponderance of evidence. Microsoft argues that a heightened burden of proof is unjustified because the resolution of validity issues in patent litigation does not “threaten the individual[s] involved with ‘a significant deprivation of liberty’ or ‘stigma’” of the sort that courts have found it necessary to justify a heightened standard. *Santosky v. Kramer*, 455 U.S. 745 (1982). Microsoft claims that if Congress wanted to establish a higher standard of proof, it could have done so by incorporating a standard of proof into the statute. In support, Microsoft cites legislative history, which indicates that an earlier draft of § 282 had provided that “the burden of establishing invalidity by convincing proof shall rest on any person asserting invalidity of the patent.” H.R. Comm. on the Judiciary, 81st Cong., Proposed Revision and

Amendment of the Patent Laws: Preliminary Draft with Notes 68 (Comm. Print 1950). However, this language was not included in the final draft, thereby indicating to Microsoft Congress’s desire to not incorporate such a higher standard of proof.

Microsoft notes that since the enactment of the Patent Act of 1952, two circuits have rejected the clear and convincing evidence standard. The Sixth Circuit holds that “a preponderance of evidence is sufficient to establish invalidity” in the “usual” patent case. *Dickstein v. Seventy Corp.*, 522 F.2d 1294 (6th Cir. 1975). The Second Circuit reached the same conclusion. *Rains v. Niaqua, Inc.*, 406 F.2d 275 (2d Cir. 1969). The remaining circuits agree with this preponderance standard, at least where the prior art evidence was never considered. Microsoft also points to *Manufacturing Research Corp. v. Graybar Electric Co.*, 679 F.2d 1355 (11th Cir. 1982), in which the Eleventh Circuit held that the district court “erred in instructing the jury to apply a clear and convincing evidence standard to the defense of invalidity” in circumstances where prior art should have been considered. The Eleventh Circuit further held that, “when pertinent prior art was not considered by the Patent Office, [the defendant] need only introduce a preponderance of the evidence to invalidate a patent.”

Microsoft next contends that the USPTO’s decision is not subject to agency deference where the USPTO did not exercise its expertise. According to Microsoft, such an absence of expertise occurs when the USPTO does not consider “all relevant factors” such as prior art or the on-sale bar. Microsoft argues that the court cannot defer to an agency decision if the agency has not decided a factual issue. Microsoft thus argues that the Federal Court erred in applying a clear and convincing burden of proof when reviewing the USPTO decision because the USPTO failed to look at important evidence when investigating the patent.

First, the USPTO ignored the “on-sale bar” of 35 U.S.C. § 102(b), which states that a “person shall be entitled to a patent unless— ... the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.” Microsoft alleges that the ‘449 patent was based on an XML editor that was created and sold in i4i’s S4 system more than a year before the patent application was filed with the USPTO. At trial, Microsoft provided evidence that the S4 user guide showed that the XML editor was the same as the system described and claimed in the ‘449 patent: “a system for creating, opening, editing, and storing documents containing metacodes, [which] allowed the metacodes to be manipulated separately from the content.” Microsoft claims that it was unable to meet its standard of proof, in part, because i4i allegedly “discarded” the S4 source code before commencing litigation against Microsoft.

Second, Microsoft contends that because the USPTO failed to consider prior art (i.e., the inclusion of the XML editor in S4), the USPTO decision should not be given any deference and the preponderance of the evidence standard should apply in determining the validity of the patent. Prior to the passage of the Patent Act of 1952 (which added § 282), most circuits had held that, “[t]he issuance of a patent creates no presumption of validity sufficient to overcome a pertinent prior art reference which has not been considered in the patent office.” *O’Leary v. Liggett Drug Co.*, 150 F.2d 656 (6th Cir. 1945). A higher

standard of proof would only apply to patents that are valid and have not been prior art. One year before Congress enacted 35 U.S.C. § 282, the Ninth Circuit held that “[e]ven one prior art reference, which has not been considered by the Patent Office, may overthrow the presumption of validity.” *Jacuzzi Bros., Inc. v. Berkeley Pump Co.*, 191 F.2d 632 (9th Cir. 1951).

i4i counters that for over 150 years, courts have consistently held that the presumption of patent validity imposes a heightened standard to prove invalidity. i4i points to the legislative history of the Patent Act of 1952, which indicated that the act was passed in order to codify existing law. i4i concedes that the act made some substantive changes to existing patent laws, but that no change was made to § 282.

i4i claims that the S4 system is not prior art because at the time that S4 was released, i4i had not yet conceived of the XML editor so it could not possibly be considered prior art. i4i also claims that the S4 source code had been discarded nine years earlier during the normal course of business before this litigation began.

i4i counters Microsoft’s argument that prior art should “weaken” the presumption of validity and the standard of proof. i4i emphasizes that 11 out of the 12 cases cited by Microsoft were decided after Congress’s 1965 reenactment of the first paragraph of § 282. Regional circuits were then in agreement that where the USPTO ignores prior art, courts will impose a heightened standard of proof. So even though Congress never actually codified the “clear and convincing” burden of proof, i4i claims that Congress ratified the circuits’ uniform adoption of that standard.

i4i rejects Microsoft’s contention that congressional silence on the burden of proof makes the default standard of preponderance applicable. Section 282 does not mention *any* standard. i4i emphasizes that more than 125 statutes describe a preponderance standard and claims that this undermines Microsoft’s argument that preponderance is an automatic default standard. Moreover, i4i claims that Congress was not silent; in 1995, Congress amended § 282 and authorized reexamination of a patent by the examiner under a preponderance standard. In contrast, Microsoft claims that this amendment supports its argument that the standard should be by a preponderance of the evidence when the patent office does not consider all factors during the initial prosecution and is asked to reexamine the patent application.

i4i opposes Microsoft’s claim that a higher standard is only applicable in cases that involve liberty interests. i4i relies on an 1887 Supreme Court case, which held that a heightened burden of proof is demanded in patent cases because of the “respect due to a patent, the presumptions that all the preceding steps required by the law had been observed before its issue, [and] the immense importance and necessity of the stability of titles dependent upon these official instruments.” *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325 (1887). i4i concludes that the “clear-and-convincing standard promotes durable, stable patent rights, thereby furthering ‘the policy of stimulating innovation that underlies the entire patent system.’” (citing *Dawson Chemical Co. v. Rohm & Hass Co.*, 448 U.S. 176 (1980).)

SIGNIFICANCE

Microsoft could have wide-reaching implications for patent holders, inventors, and a number of companies engaged in research and

development. Google, Verizon, MasterCard, *New York Times*, Wal-Mart, and others wrote a joint amici brief in support of Microsoft. According to amici, adoption of the clear and convincing standard would tilt “the playing field even further in favor of patent holders.” Google points to research indicating that about one-third of jurors will defer to the patent examiner’s decision in this incredibly complex area of law. Juries are “twice as likely as judges to find patents valid.” But, according to amici, the USPTO is overworked and there are not enough patent examiners to properly review each application properly and in a timely manner. As a consequence, the clear majority of patents that the USPTO reexamines are determined to be invalid. When jurors unwittingly rely on the decisions of patent examiners, who issue a substantial number of invalid patents, and the court applies a heightened standard of review, the patent holder is likely to win even if the patent is invalid, asserts Google.

Amici writing in favor of i4i include Genentech, a drug manufacturer, that emphasizes the value of patents and the need to rely on their validity. According to Genentech, “[t]o obtain a patent is to enter into a bargain with the public: in exchange for disclosing its invention and demonstrating to the Patent Office that the invention is a new, useful and non-obvious advancement over the prior art, the patent applicant receives the right to exclude others from practicing that invention in the United States for a limited time.” The patent holder must be able to reasonably rely on the right to exclude others from practicing its invention when patent holders sometimes invest millions of dollars to create or improve a patented product. The application process “provides patentees with the necessary level of certainty to support their decisions on whether to invest in new ideas.” Without a heightened standard, the USPTO’s issuance of a patent would become “scarcely more than an advisory opinion of a patentee’s rights on which reliance would be perilous.” According to Genentech, investors understandably would be reluctant to invest in new innovation for fear that the patent behind it may not be as secure as it is presumed to be.

A ruling against i4i may leave companies reluctant to devote the vast resources necessary to innovate. For example, the cost to develop a new drug is about \$1.2 billion and there is no guarantee that the product will eventually reach the market. Companies such as Genentech take this enormous risk only because courts apply a presumption of validity to the patents they obtain for these drugs; for these companies, the benefits they obtain from the patent outweigh the risks because the patent can only be negated if a party challenging the patent satisfies a high burden.

However, as amici in support of Microsoft point out, there are substantial financial concerns at play for those accused of infringing on patents. The cost of defending a patent suit is between \$1.5 and \$4 million per defendant. The Securities Industry and Financial Markets Association (SIFMA) notes that with the “costs of litigation skyrocketing, more financial services companies will be forced into expensive settlements with holders of questionable patents rather than taking the risk of lengthy, unsuccessful litigation or potential injunctive relief that could cripple the markets.”

As amici Tessera, an electronic technology developer, asserts, patent licensing is “essential to the health of the innovation economy because innovators rely on their innovations’ licensing revenues to finance research and development.” In 2009, the U.S. had a net

balance of \$64.6 billion in international licensing and royalties, and it anticipates a growth rate of fifteen percent per year. Tessera argues that “while innovation is currently America’s leading international trade surplus, this strategic advantage will not necessarily continue” if the United States does not maintain a heightened burden of proof at the same time that its international trading partners are strengthening their own patent systems.

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PREVIEW of United States Supreme Court Cases, pages 299–303.
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SEPARATION OF POWERS

Can States and Private Plaintiffs Sue Energy Companies in Federal Court for Common Law Public Nuisance?

CASE AT A GLANCE

Eight states, the City of New York, and three private land trusts sued five power companies and the federal Tennessee Valley Authority in federal court based on common law public nuisance for harms resulting from the defendants' greenhouse gas emissions. The defendants argue that federal courts cannot hear the case because the plaintiffs lack standing, their claims are displaced by federal law and regulations, and their claims present a nonjusticiable political question.

American Electric Power Co. v. Connecticut Docket No. 10-174

Argument Date: April 19, 2011
From: The Second Circuit

by Steven D. Schwinn
The John Marshall Law School, Chicago, IL

ISSUES

Did the plaintiffs allege a sufficiently concrete and particularized injury, traceable to the defendants' greenhouse gas emissions, and redressable by injunctive relief to satisfy both constitutional and prudential standing requirements?

Is the plaintiffs' federal common law public nuisance claim displaced by the federal Clean Air Act and implementing regulations?

Does the plaintiffs' federal common law public nuisance claim raise a political question, better resolved by the political branches of government?

INTRODUCTION

Separation of powers principles limit the kinds of cases that can go before the federal courts. Thus, plaintiffs must have "standing" to sue, their common law claims cannot run up against federal law or administrative regulation, and their claims cannot present issues better resolved by the political branches. This case tests these three principles.

FACTS

In 2004, eight states and the City of New York sued five power companies, including American Electric Power Company, Inc. (AEP), and the federal Tennessee Valley Authority (TVA) in federal court, alleging that emissions from the defendants' power plants contribute to global warming and resulting threats to themselves and, as *parens patriae*, to their citizens. Three private land trusts filed a parallel suit against the same defendants for threats to their property. The court heard the cases together.

The plaintiffs brought their claims under the common law of public nuisance—a court-created claim, not based on a specific statutory cause of action, in which a defendant allegedly interferes unreasonably with a "right common to the general public," for example, public health, public safety, and public comfort. See Restatement (Second) of Torts § 821B (1979). They alleged that the defendants' emissions contribute to a "risk of an abrupt change in climate due to global warming," higher surface temperatures, and greater threats, and that reduced emissions would decrease these threats. In particular, the plaintiffs alleged that emissions and resulting global warming would cause increased smog and heat-related mortality in Los Angeles and New York City; shrinking mountain snowpack, reducing the amount of drinking water in California; rising sea levels, affecting low-lying property in New York City; reduced crop and livestock yields in Iowa; lower water levels in the Great Lakes, harming commercial shipping and hydropower production in New York; and the destruction of several species of hardwood trees.

The plaintiffs alleged that the defendants were contributing to and exacerbating these threats by emitting 650 million tons of carbon dioxide each year, 10 percent of the entire country's annual emissions. They further alleged that the defendants had feasible, cost-effective alternatives for generating power with lower emissions. The plaintiffs sought injunctive relief to reduce the defendants' carbon-dioxide emissions, but they did not seek damages.

The district court dismissed on the ground that the case raised a nonjusticiable political question more appropriate for the legislative and executive branches. A two-judge panel of the Second Circuit reversed. (The third judge on the panel, then-Judge Sonia Sotomayor, was elevated to the Supreme Court during the pendency of the appeal. Because the two judges agreed, they decided the case without a

replacement for Justice Sotomayor.) The panel ruled that the plaintiffs' claims did not involve a political question because it could decide them based on well-settled principles of public nuisance law and not public policy. It also ruled that the plaintiffs had standing and that the federal Clean Air Act did not displace the plaintiffs' claims.

CASE ANALYSIS

This case is about the separation of powers. In particular, it is about the powers of the federal courts—the power to hear certain kinds of disputes, and the power to craft certain claims—and the point at which these powers run up against the powers of the other branches.

In order to protect this kind of intrusion by the judiciary, the Supreme Court has developed several doctrines. One is “standing,” the requirement that federal court plaintiffs allege (and ultimately establish) that they suffered a concrete and particularized injury, traceable to the defendant’s conduct, that can be redressed by their federal lawsuit. Standing rules thus both limit the kinds of cases that come before the federal courts and ensure that those cases are appropriate for judicial resolution. In addition to this “constitutional” standing, the Supreme Court has also created “prudential” standing rules—rules that are based on practical considerations of judicial administration and judicial economy.

A second doctrine that protects separation of powers relates to the federal courts’ powers to craft common law (or judge-made law). This doctrine says that federal courts cannot craft common law or rule on federal common law cases when Congress has legislated, or when the executive has regulated, on the matter. When this happens, the Court has ruled that the federal laws or regulations have “displaced” the federal lawsuit.

A third doctrine that protects separation of powers is the political question doctrine. The political question doctrine says that the courts cannot hear certain kinds of cases that, based on the relative institutional characters, are more appropriate for the political branches.

This case involves all three doctrines: standing (both constitutional and prudential); displacement; and political question.

The Defendants’ Arguments

The private power companies and the TVA filed separate briefs. Their arguments differ primarily in emphasis but not in content (with two significant exceptions, both dealing with the standing arguments, and noted below). Therefore, the private power companies and the TVA are referred to together as the “defendants.”

The defendants argue that the plaintiffs lack standing, that federal law and regulations displace their claims, and that their case presents a nonjusticiable political question.

Standing

The defendants proffer two principal arguments on standing. First, the defendants argue that the plaintiffs lack standing because they cannot satisfy the core constitutional standing requirements that an “injury in fact” be “fairly traceable” to the defendants’ actions, and that the “injury in fact” be “likely redressable by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). They claim

that the plaintiffs’ alleged chain of causation between their injuries and the emissions—that the emissions cause climate change *generally*, and that climate change contributes *generally* to increased risks of injuries—is simply too attenuated to satisfy the “fairly traceable” requirement. They claim further that outside actors—“billions of independent sources around the world over the course of centuries,” not parties to this case—also contributed to climate change. In light of these outside contributions, the plaintiffs’ harms are not sufficiently “fairly traceable” to these defendants’ emissions. Finally, the defendants contend that the plaintiffs’ alleged harms will not be redressed by the requested relief: there is no basis to claim that a court order reducing emissions for these defendants would lead to any reduction or slowing in global warming. According to the defendants, the Supreme Court’s ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), is not to the contrary: the plaintiff’s case there was based on a statutory cause of action, including congressionally defined injuries and causation, not a common law claim with far less determinate and judicially defined injuries and causation.

Second, the defendants argue that “prudential” standing principles also bar the plaintiffs’ claims. The defendants contend that the plaintiffs’ claims are more in the nature of a “generalized grievance” that requires policy determinations more appropriate for the political branches. The defendants argue that this is even more true here, where the plaintiffs’ claims are based on judicially created common law, and where the legislature has yet to weigh in.

The TVA’s arguments on standing diverge in two significant ways. First, the TVA presses the prudential standing argument hardest and contends that the Court can and should resolve the case on that point alone. (The TVA argues that the principle of constitutional avoidance counsels in favor of this result.) Next, the TVA argues that if the Court reaches the constitutional standing issue, it could rule that the coastal state plaintiffs have constitutional standing because their claims are materially similar to the state of Massachusetts’s claims in *Massachusetts v. EPA* (holding that Massachusetts had standing to petition for judicial review of the EPA’s decision under the Clean Air Act not to regulate greenhouse gases emitted by motor vehicles). The TVA contends that if the coastal states have standing both constitutional standing and prudential standing, then the Court should assess whether the act displaces their claims.

Displacement

The defendants similarly proffer two principal arguments on displacement. First, the defendants argue that there is no federal common law nuisance cause of action. They claim that the federal courts’ authority to create common law causes of action is quite narrow and based upon constitutional necessity (i.e., the need for the courts to create a remedy because Congress cannot). And none of the limited and uniquely federal concerns that have justified the creation of federal common law—concerns about the rights and obligations of the United States, admiralty, conflicting rights of states, or our foreign relations in interstate and international disputes—applies here. In particular, the defendants say that this case raises no constitutional necessity, no claim of states’ rights, and no interstate dispute. The defendants conclude that these issues are simply too complex for a common law remedy, and that such a remedy could undermine federal interests in coordination of air emission regulation.

Second, the defendants contend that the comprehensive federal statutory and regulatory schemes under the Clean Air Act displace any common law remedy available to the plaintiffs. They point to the language of the act, its legislative history, and the regulations under the act to show that the act is comprehensive and already includes avenues for states and others to seek to limit emissions. (The defendants argue that the act resembles the Clean Water Act, which displaced the federal common law water pollution claims in *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).) Finally, the defendants argue that the EPA issued comprehensive regulations since the plaintiffs' filed their suit and claim that these regulations also displace the suit.

Political Question

The defendants argue that a common law nuisance claim is a non-justiciable political question because it lacks any judicially manageable standards. In particular, they say that the nature of the plaintiffs' claims—which involve a complicated causal chain with many actors that are not parties to this suit, and a balancing of the gravity of the harm against the utility of the emissions in order to judge the defendants' reasonableness—would necessarily require a court to make *ad hoc* policy determinations and complicated policy judgments based on complex data. These determinations are best left to the political branches, not the courts.

The Plaintiffs' Arguments

Like the defendants, the plaintiffs also argue standing, displacement, and political question.

Standing

The plaintiffs proffer two principal arguments in support of standing. First, the plaintiffs argue that they satisfy the requirements of constitutional standing. They argue that all parties agree that they alleged sufficiently concrete injuries. They further contend that they alleged that the defendants' emissions made a "meaningful contribution" to their injuries—all that is required at the pleading stage under *Massachusetts v. EPA* and under substantive tort law. The plaintiffs claim that they sufficiently alleged that a ruling in their favor would redress their injuries, because an injunction against the defendants would *slow* or *reduce* global warming, even if it would not *reverse* it. And finally they argue that their standing here is even more firmly established than the state of Massachusetts's standing in *Massachusetts v. EPA*, because *Massachusetts* was decided on summary judgment (where the standard is higher than on a motion to dismiss, as here), *Massachusetts* involved alleged harm that flowed from a third party (and not directly from the defendants, as here), and *Massachusetts* involved statutory claims (which involve concerns about separation of powers that ultimately drive the standing doctrine that are not present in a pure common law suit, as here).

Second, the plaintiffs argue that there are no prudential concerns that bar standing. They contend that the rule barring generalized grievances is a requirement of constitutional standing, not prudential standing, and that the TVA is muddling standing doctrine by arguing otherwise. They argue in any event that their claims are not generalized grievances, because their alleged harms involve concrete, particularized injuries to themselves and, as *parens patriae*, to their citizens.

Displacement

The plaintiffs proffer two principal arguments in support of their claim that neither the act nor the EPA regulations displace their common law case. First, they argue that there is a federal common law of public nuisance and that states can invoke it in the absence of congressional or agency action. They point to a line of Supreme Court cases recognizing and applying that law. They argue that it is one of the few areas of *specialized* federal common law (and thus dodges the famous language in *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 78 (1938) that "[t]here is no federal *general* common law" (emphasis added)). And they say that nothing has transpired that would undermine the continued vitality of the federal common law of public nuisance. Finally, the plaintiffs argue that public nuisance is not limited to cases between states or to cases involving a localized problem traceable to a discrete source, as the defendants claim, and that allowing their case to move forward will neither open the floodgates to federal public nuisance litigation nor increase the likelihood of inconsistent judicial remedies.

Second, the plaintiffs argue that neither the act nor EPA regulations displace their case because neither imposes any limitations on existing power plants' carbon-dioxide emissions—the basis for the plaintiffs' claims here. The plaintiffs contend that the EPA's mere authority under the act (or its future plans or its incremental approach) to regulate these emissions are not enough to displace this case; the act or the regulations would have to impose actual limitations on greenhouse gas emissions from existing power plants before they could displace the case. Even the EPA's most recent regulations do not do this.

Political Question

The plaintiffs proffer two arguments on the political question doctrine. First, they argue that the political question doctrine applies only to cases implicating constitutional separation-of-powers concerns or foreign affairs and not to domestic common law tort claims, as here. They contend moreover that the courts' exercise of authority over common law cases presents no conflict between the branches of government because Congress or the EPA could pass legislation or enact regulations to displace common lawsuits and thus prevent the development of a parallel regulatory system created through the common law in the courts.

Next, the plaintiffs argue that the factors in *Baker v. Carr*, 369 U.S. 186 (1962), the seminal case on the political question doctrine, do not bar adjudication of their claims. They claim that public nuisance law is a settled part of the common law—a doctrine that the courts recognize and rule on—so its standards are necessarily discovered by the courts and any required policy determinations are necessarily appropriate for the judiciary. They argue that the courts have already established manageable standards for public nuisance claims and that the Court has never found a political question merely because a case involves a broad standard such as reasonableness or a complex causal chain. In fact, they argue, federal courts regularly deal with these kinds of cases, and they now have well-established principles to guide them in fashioning equitable relief in common law public nuisance claims. They also contend that the case's complexity does not change it into a political question: federal courts regularly rule on cases of similar or even greater complexity without turning them

into a political question. At bottom, they say, the defendants err by confusing the political debate about climate change with the political question doctrine and thus wrongly turning the former into the latter.

SIGNIFICANCE

On its surface, this case is important for two reasons. First, it is important for its practical effect. The defendants and their amici warn that allowing this case to move forward would lead to increased abusive litigation against the business community based on abstract harms, only remotely connected to the defendants' behavior—harms such as global warming, or anything else that might be considered a public nuisance. This litigation will cost time and money and result in another layer of regulation (above and beyond federal law and regulations already on the books)—a layer that could be arbitrary and unpredictable, based on the myriad ways that federal courts might analyze concepts such as reasonableness or causation in these very complex cases.

On the other hand, the plaintiffs and their amici argue that this litigation is essential for states and others to redress their very real harms against actors who have created a public nuisance. In the absence of federal law or regulation on point, they argue that the federal common law offers them their only means of relief for their individualized injuries at the hands of the defendants.

The case thus pits the business community's economic interests against plaintiffs' interests in remedies for harms caused by public nuisances. Because the case comes to the Court on the pleadings and a motion to dismiss, only one of these weighty interests will prevail. (Amicus Tort Law Professors, writing in support of the plaintiffs, however, argue that tort law itself guards against some of the evils envisioned by the defendants. If they are right, this suggests that victory for the plaintiffs may not lead to increased abusive litigation and other harms.)

Second, the case is important for its doctrinal effect. Standing and the political question doctrine are notoriously squishy areas of constitutional law, and the case presents an interesting and hard question on displacement. Thus this case gives the Court a limited chance to clarify some points on standing and the political question doctrine and to rule on displacement where the government has not yet regulated in the specific area at issue but seems to be moving in that direction.

But it is hard to imagine that this second point is not just cover for the first, and that both points are not just cover for the underlying dispute. In other words, this case is probably really about global warming and its causes and effects. This is underscored by the lineup of amici on both sides of the case, with business groups arguing for the defendants, and environmental groups arguing for the plaintiffs. And the deep divisions on the underlying issue of responsibility for global warming are only underscored by the facts that different groups of law professors, different groups of scientists and experts, and different states have weighed in as amici on both sides of the case.

If this case is really a proxy battle on global warming and responsibility for its effects, any ruling will necessarily disappoint, at least in the short run. A ruling for the defendants will merely shift the debate back to the EPA, and a ruling for the plaintiffs will only allow the suit

to move beyond the pleadings (after which plaintiffs likely face other significant hurdles in winning their case). But worse, if this case is really a proxy battle, any ruling on standing, the political question doctrine, or even displacement could only further muddy the doctrinal waters in those areas and lend more evidence to the criticism that these doctrines, especially standing and political question, merely provide doctrinal cover for judges to impose their political will in the underlying dispute.

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PREVIEW of United States Supreme Court Cases, pages 304–308.
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FIRST AMENDMENT

What Level of Scrutiny Applies to the Nevada Ethics in Government Law, Which Was Used to Censure a City Council Member for Voting on a Matter Because His Volunteer Campaign Manager Lobbied the City Council on That Matter?

CASE AT A GLANCE

The Nevada Ethics Commission censured Sparks City Council Member Michael Carrigan for voting on a development project after the commission learned that his campaign manager lobbied on behalf of the project developer. Carrigan sued the commission, claiming that its censure under the Nevada Ethics in Government Law violated the First Amendment. The Nevada Supreme Court applied “strict scrutiny,” the most rigorous test known to constitutional law, and struck the law down as violating the First Amendment.

Nevada Commission on Ethics v. Carrigan Docket No. 10-568

Argument Date: April 27, 2011
From: Supreme Court of Nevada

by Steven D. Schwinn
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ISSUE

Did the Nevada Supreme Court err when it applied strict scrutiny to a city council member’s free speech claim against the Nevada Ethics Commission for censuring him under the Nevada Ethics in Government Law for voting on a development project for which his volunteer campaign manager also advised, and lobbied on behalf of, the developer?

FACTS

Michael A. Carrigan was first elected to the Sparks City Council (the council) in 1999. Carrigan’s close personal friend Carlos Vasquez volunteered on that campaign and his next two campaigns. Carrigan called Vasquez his “campaign manager.”

In early 2006, about six months before the primary election in Carrigan’s third campaign, Vasquez also started work as a public relations consultant for the Red Hawk Land Company. Red Hawk previously submitted an application to the council for required master plan and zoning changes for a hotel and casino project known as the “Lazy 8.” The company hired Vasquez to “manage the misinformation” surrounding the project. Among other activities, Vasquez met with each of the council members, including Carrigan, to try to get the project approved.

The project came before the council in August 2006, just one week after Vasquez helped Carrigan win his primary election. Carrigan, seeing that his relationship with Vasquez raised potential conflict-of-interest concerns under the Nevada Ethics in Government Law (the Ethics Law), consulted the Sparks city attorney. The city attorney advised Carrigan that the Ethics Law required Carrigan only to publicly

disclose the relationship before voting on the Lazy 8 matter. Carrigan did so before voting for the project.

Soon after the vote, the Nevada Commission on Ethics (the commission) opened an investigation into the matter. In October 2007, the commission concluded that Carrigan violated the Ethics Law by voting on the project. In particular, the commission found that Carrigan violated a provision that requires that

a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by ... [his] commitment in a private capacity to the interests of others.

Nev. Rev. Stat. 281A.420(2)(c). Another provision of the Ethics Law defines “commitment in a private capacity to the interests of others” as a commitment to a person

(a) Who is a member of his household; (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (c) Who employs him or a member of his household; (d) With whom he has a substantial and continuing business relationship; or (e) *Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.*

Nev. Rev. Stat. 281A.420(8) (emphasis added). The commission found that Carrigan’s relationship with Vasquez fit the definition in subsection (e), the catch-all provision, and that he therefore improperly

voted on the Lazy 8 project. The commission issued a written decision censuring Carrigan for violating the Ethics Law.

Carrigan filed a petition in a Nevada district court challenging the Ethics Law, in particular the catch-all provision, under the First Amendment Speech Clause. (There is some disagreement as to whether Carrigan filed an as-applied challenge or a facial challenge, although Carrigan argues that he brought both. An as-applied challenge means that Carrigan claims that the catch-all provision violates the First Amendment in his case only; a facial challenge means that Carrigan claims that the catch-all provision is categorically unconstitutional, in every possible application of the law. Carrigan's as-applied challenge is much easier to prove because he has to show only that the catch-all provision violated his own free speech rights and not that it violates the First Amendment in every possible case.) The district court denied the petition, ruling that the government's interest in an ethical government outweighed Carrigan's free speech right to vote. The court rejected Carrigan's claims that the Ethics Law was unconstitutionally overbroad and vague.

Carrigan appealed to the Nevada Supreme Court, which reversed. It applied "strict scrutiny," the most rigorous test known to constitutional law, and ruled that the catch-all provision of the Ethics Law is unconstitutionally overbroad in violation of the First Amendment.

CASE ANALYSIS

The First Amendment protects against government intrusion on speech and association. But under the First Amendment, courts apply different rules to government intrusions, depending on both the degree and type of the intrusion. For example, courts apply "strict scrutiny" when the government imposes a severe burden on protected speech. They also apply strict scrutiny to speech restrictions in a "public forum" (a space traditionally open to free speech, such as public sidewalks) when the restriction discriminates in its treatment of different speech based on the content or viewpoint of the speech. Strict scrutiny means that the government restriction must be narrowly tailored to serve a compelling government interest.

In contrast, the court will uphold a government restriction on speech in a "nonpublic forum" (a space not open to free speech but rather open only to that speech that serves the purpose of the forum, such as a military base) if the restriction is merely reasonable and not based on the viewpoint of the speaker.

Courts apply a different standard to government restrictions on conduct that has an expressive element. In those cases, the government restriction must further an important or substantial governmental interest, the interest must be unrelated to the suppression of free speech, and any incidental restriction on speech must be no greater than necessary to further the interest. *United States v. O'Brien*, 391 U.S. 367 (1968).

Courts apply yet a different standard to government restrictions on a government employee's speech. In those cases, courts balance the government's interest in promoting the efficiency of the public services it performs through its employees against the employee's interest in commenting on matters of public concern. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

In addition to these various rules, courts also apply the "overbreadth doctrine" and the "vagueness doctrine" to First Amendment cases. The overbreadth doctrine says that a government restriction on speech is unconstitutional when it sweeps substantially overbroad in relation to its legitimate sweep—that is, when it proscribes too much protected speech (in addition to unprotected speech). The vagueness doctrine says that a government restriction must give fair warning to a person of common intelligence what conduct is illegal under the statute.

This case asks which test or tests apply to a government restriction on a city council member's vote—in particular, the catch-all provision in the Nevada Ethics in Government Law. The parties seem to agree that the *Pickering* test does not apply. But beyond that, they disagree on everything from *whether* the First Amendment Speech Clause covers a vote to what test or tests apply.

The commission proffers three principal arguments. First, the commission claims that Carrigan's vote is not speech and that the First Amendment does not apply. It contends that legislative recusal rules have been "mainstays of this country's legislatures since the Founding," and that they have always enjoyed widespread acceptance, suggesting that they present no First Amendment problems. Moreover, the commission says that legislative voting is fundamentally different than speech: legislative voting is "a public trust ... held for the sole benefit of the people," not speech. By this reckoning, recusal rules are really no different than those well-accepted rules that prevent lawmakers from using public resources—telephones, offices, and the like—for private gain, or those rules restricting lawmakers from having potentially conflicting outside business interests. It claims that legislative voting has no "communicative element," and, even if it does, recusal rules are a far less intrusive violation than other content-based restrictions on actual legislative speech (such as rules restricting indecent language in legislative debate). The commission argues further that invalidating recusal rules would interfere with the states' power to structure their political systems. Finally, the commission claims that lower court cases upholding government retaliation against lawmakers for their votes do not give rise to a general free speech right to vote, as the Nevada Supreme Court ruled here.

Second, the commission argues that even if Carrigan's vote was protected by the First Amendment, the catch-all provision is subject only to rational basis review (and not strict scrutiny, as the Nevada Supreme Court ruled). The commission claims that the provision is content-neutral and nondiscriminatory—that it applies to *any* vote on *any* issue, and is designed to promote state interests that have nothing to do with the suppression of ideas. The commission says that strict scrutiny is inappropriate because the catch-all provision sweeps narrowly and results in no severe restriction on speech—not Carrigan's speech outside the Council, nor his constituents' speech within the Council. The commission further claims that the logic of applying strict scrutiny to the catch-all provision would also extend to other recusal provisions and thus severely burden governments, because they would have to defend their recusal rules against a deluge of challenges at this higher level of scrutiny. Because the catch-all provision is content-neutral and nondiscriminatory, and because strict scrutiny is inappropriate, the commission claims that the catch-all provision is subject only to rational basis review. (The commission argues that First Amendment forum analysis gets to the

same conclusion: municipal council voting is a nonpublic forum, and under the First Amendment the government can restrict access for legitimate, viewpoint-neutral reasons, as it has here.)

Third, the commission argues that the Nevada Supreme Court erred in ruling that the Ethics Law was unconstitutionally overbroad. It claims that neither the text nor experience with the catch-all provision supports the conclusion that it sweeps too broadly—indeed, that the Nevada Supreme Court failed to identify even “a single instance” where the catch-all provision wrongly punished protected activity. The commission also claims that the catch-all provision is sufficiently tethered to the four statutory categories explicitly set out in the Ethics Law, and in any event, Nevada public officials may seek guidance from the commission if they have any questions as to the provision’s applicability. The commission argues that any alternative rule—for example, a rule requiring disclosure alone—would not sufficiently protect against conflicts of interest and biased voting. The commission says that without a recusal requirement, officials could continue to vote on issues in which they have a conflict, with no meaningful check. Finally, the commission claims that it is no answer to say that Carrigan lodged a case only against the catch-all provision (and not recusal rules more generally): “such line-drawing decisions have long been a matter of ‘legislative discretion’”; and the catch-all provision only lends further credence to the commission’s position that its recusal rules are nondiscriminatory.

In response, Carrigan proffers three principal arguments of his own. First, Carrigan claims that the catch-all provision is unique, even unprecedented. While nearly every other state has conflict-of-interest rules for legislators, Carrigan says that Nevada is the only state with a catch-all provision. Carrigan claims moreover that “no state has *ever* disqualified an elected official from voting based on a political relationship of any sort,” including the type at issue here, and that even the Nevada Ethics Commission has not interpreted a disqualification provision to reach a political relationship. Because of the unique nature of the catch-all provision, Carrigan argues that a ruling in his favor could be written so as to avoid the wide-sweeping effects on other recusal rules that the commission fears. (Carrigan also reminds the Court that his challenge is a limited, as-applied challenge to the catch-all provision. But he claims that he should win whether his case is labeled “as applied” or “facial.”)

Second, Carrigan argues that the catch-all provision burdens at least two First Amendment rights and therefore should be subject to strict scrutiny. Carrigan claims that the provision burdens his right to vote—a free speech right, because his vote represented his “ultimate and definitive . . . expression” of his views on the Lazy 8 project. He argues that his position—that his vote is protected speech—is supported by precedent, particularly the Court’s decision in *John Doe No. 1 v. Reed*, 130 S. Ct. 2811 (2010) (holding that the First Amendment applies to a citizen-legislator’s decision to sign a petition to put a piece of legislation up for public vote). Carrigan also claims that the provision burdens the First Amendment right to associate—both his own, and his campaign worker’s. Moreover, he says that the burdened association is a political relationship, an association that enjoys especial protection because it “harkens back to the foundation of our democracy and exemplifies, even today, the very essence of democracy.”

Carrigan argues that the burdens on these First Amendment rights mean that strict scrutiny should apply. He claims that the catch-all provision requires him to choose between associating with volunteers who are “especially politically active” (like Vasquez) and voting on issues of public importance, thus burdening both rights. He contends further that lower levels of scrutiny should not apply because the catch-all provision “severely” burdens these rights. (He says that a lower level of scrutiny, intermediate review, would be more appropriate if the statute did not contain the catch-all provision, and that such a statute would survive any level of scrutiny.)

Third, Carrigan argues that the catch-all provision fails any level of scrutiny. He claims that the provision is unconstitutionally vague regardless of the level of scrutiny because its plain terms do not give fair warning that it applies to a relationship like the one he had with Vasquez. He says that even the most intelligent layperson could not have known that this political relationship was “substantially similar” to a business relationship, especially when the city attorney advised him otherwise. He further contends that even the commissioners’ views were “disparate and tentative” on the question, thus underscoring the vagueness of the provision. And he claims that the commission’s arguments that he should have known what the provision meant—that the legislative history of the provision suggested that it would apply in a like situation, and that Carrigan could have sought guidance from the commission—are unavailing: the legislative history was based only on a bare statement by the governor’s representative; and a request for guidance was unreasonable “in the heat of a legislative battle,” especially because the commission had 45 days to respond. Carrigan argues that in any event the most important burden imposed by the provision occurs long before any vote, when a candidate and campaign volunteer decide to work together in the first place.

Carrigan also argues that the catch-all provision serves no legitimate state interest, much less a compelling one. Carrigan claims that standard recusal rules—those based on the first four categories in the Ethics Law—are designed to maintain lawmakers’ integrity and to prevent the misuse of office for private ends, both compelling state interests. But he says that this case has nothing to do with those interests; instead, this case is about his *political* relationship and his *political* interests. And, argues Carrigan, political relationships and interests are not susceptible to the same kind of abuse; in fact, they are merely the stuff of everyday politics. Moreover, neither the commission nor any opponent of the Lazy 8 development has anything like a due process right in “a legislator purged of political loyalty.”

Finally, Carrigan argues that the catch-all provision is not sufficiently tailored to satisfy strict scrutiny. Carrigan contends that the provision is overbroad, because the Nevada Legislature, in its brief, seems to define the catch-all provision in a way that “sweeps in droves of constitutionally protected relationships with even less influence than a campaign manager.” He claims that it is underinclusive, because the commission in practice seems to single out only some kinds of political relationships for special burdens (such as his relationship with Vasquez) and ignores others (such as independent campaign spenders, endorsers, get-out-the-vote drivers, and the like). Carrigan says that the recusal rule sweeps far more broadly than necessary to further any state interests and that a disclosure rule would suffice.

SIGNIFICANCE

The question for the Court is quite narrow: What level of scrutiny applies to Carrigan’s censure by the commission, under the catch-all provision, for his vote on the Lazy 8 project? But while this question is narrow, it is also very important, because the level of scrutiny may well dictate the ultimate outcome of the case. If strict scrutiny applies, the catch-all provision is almost surely unconstitutional, as the Nevada Supreme Court ruled. But if a lower level of scrutiny applies—and especially if mere rational basis review applies—the catch-all provision may well stay on the books. (If the Court rules that voting is not speech under the First Amendment, then quite clearly the law will remain on the books.)

Because the issue is quite narrow, a similarly narrow ruling will likely directly affect only the Nevada catch-all provision. After all, no other state seems to have a similar catch-all provision. But the commission and fourteen states (as amicus) argue that applying strict scrutiny here will encourage vexatious litigation, costing time and money, and jeopardize other recusal and conflict-of-interest statutes.

This kind of prediction may be premature: the case is still at an early stage. The parties have framed the issue around the level of scrutiny (and not around the application of the level of scrutiny). A corresponding ruling will thus go only to the level of scrutiny (and not the application in this case). Such a ruling could represent just the first phase of the litigation—the next coming when the courts apply the standard.

Still, the parties have argued the application, and the Court could rule on both the level of scrutiny and its application (especially if it rules, like the Nevada Supreme Court, that strict scrutiny applies). If so, the case may have a broader impact, because this kind of ruling could suggest how the case might apply to other recusal rules that do not have a catch-all provision.

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PREVIEW of United States Supreme Court Cases, pages 309–312.
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FIRST AMENDMENT

Prescription Data Collection: The Intersection of the First Amendment and Medical Confidentiality

CASE AT A GLANCE

A Vermont law allows physicians to consent or withhold consent before their prescription information can be sold by pharmacies or used for marketing purposes. This law was passed in response to the practice of “data collectors” who collect and sell this information for marketing purposes. The Court must now determine whether the First Amendment trumps the statute.

Sorrell v. IMS Health, Inc.
Docket No. 10-779

Argument Date: April 26, 2011
From: The Second Circuit

by Elliott B. Pollack
Pullman & Comley, LLC, Hartford, CT

ISSUE

Does the First Amendment trump a statute which restricts access to nonpublic prescription drug records and allows physicians the right to refuse to allow their identifying information to be sold or used for marketing purposes?

FACTS

Probably around the turn of the last century, Vermont pharmacies began selling information from their prescription drug records to data collection companies. The companies resell this data to pharmaceutical manufacturers for marketing purposes in order to promote their brand name drug sales. “Data collection” or “data mining” describes the sale of accumulated data in bulk for secondary use.

Hitherto thought to be a completely confidential triparty transaction between the physician issuing the prescription, the patient receiving it, and the pharmacy to which the prescription is delivered for filling, this ceased being true. The information does not come to rest in the pharmacy. Instead, the new end users are the pharmaceutical companies who manufactured the drug in the first place. Patients’ names are not disclosed; however, the names of the prescribing doctors and their prescribing practices are the “gold” that the pharmaceutical manufacturers seek to extract from the work of these data companies.

The reach of the data collectors’ activities is extensive. Using pharmacy-sold data, prescriptions and doctors apparently can be correlated to individual patients. The companies can “track (a) (doctor) over time and determine behaviors” such as changes in prescribing patterns. While patients’ names are encrypted, the collector is nevertheless able to match individual prescription records to patient surveys taken by another marketing company. This enables the pharmaceutical

manufacturer to learn “what was and was not discussed, during the doctor appointment....”

Doctors’ names and prescribing habits then “travel from pharmacy records to the computers of pharmaceutical sales representatives,” or detailers. “Detailing” describes the efforts of sales representatives, “detail men” or “detail women,” to meet with physicians (prescribers) for the purpose of encouraging them to prescribe a particular manufacturer’s brand products. The marketing edge that the sales persons acquire by virtue of access to these data is impressive. For example, sales representatives can learn whether doctors are “under performing,” i.e., switching patients to other drugs. The detailers can then use this information to target doctors “to push the physician’s behavior toward their product.”

In response, the Vermont Legislature adopted a prescription confidentiality law in 2007. The law grants physicians the ability to consent or to withhold consent before their brand prescription information can be sold by pharmacies or used for marketing these drugs. The law does not limit a pharmacy’s ability to sell data if it does not identify the physician-prescriber or the patient. In addition, the ability of manufacturers and marketers to use the data is significantly limited to reasonably health-related concerns such as safety notices and recalls. By restricting the information available to “detailers,” the Vermont Legislature seemed to be encouraging the use of generic drugs as opposed to manufacturers’ brand name products.

The atmosphere surrounding the adoption of the legislation can probably be best summarized by a physician who testified before the Vermont legislative committee considering the proposed legislation: “like the majority of physicians, I don’t want my prescribing habits monitored so that organizations and corporations can profit by selling them and/or using that information for the goal of trying to subvert what I do.”

While the legislation was designed to restrict usage by the pharmacy industry, other entities are free to use the data in their marketing efforts. For example, a variety of governmental and private bodies may continue to use the prescriber-identifiable data (PI data) for law enforcement, research, safety notices, claims management, formulary compliance, and to encourage the prescription of generic drugs.

Three data collection companies and PhRMA, a pharmaceutical industry association, challenged the constitutionality of the legislation in the United States District Court for the District of Vermont. *IMS Health, Inc. et al vs. William H. Sorrell et al*, 631 F.Supp. 2d 434 (2008–2009). The district court upheld the law as being within constitutionally permissible bounds for the regulation of commercial speech and denied injunctive relief.

The Second Circuit Court of Appeals reversed. 630 F.3d 263 (2010). Applying the *intermediate scrutiny* test relevant to regulation of commercial speech, the court of appeals found that there was no cognizable state interest in public health and in reducing pharmaceutical costs. The 2-1 decision by Judge Koeltl concluded that the Vermont legislation improperly restricted commercial speech in “that (it) does not directly advance the substantial interest asserted by Vermont, and is not narrowly tailored to serve those interests....”

At the outset, it is interesting to note how the litigants attempted to position themselves on the sunny and cloudy sides, respectively, of the First Amendment. IMS Health and its corporate co-litigants chose to describe themselves as information “publishers” in order, as Judge Koeltl put it, “to further their First Amendment [a]rgument.” The district court and Vermont preferred to characterize these opponents as “data miners.” Observing that parties’ “rights depend on what they do rather than what they are called,” Judge Koeltl elected to use the “data miner” nomenclature employed by the district court, but to no great advantage to Vermont.

In a comment which perhaps best characterizes the Second Circuit’s ruling, Judge Koeltl characterized the law’s exemption for those engaged in law enforcement, research, safety notices, claims management, and the encouragement of generic drug use as the “state’s attempt to correct what it sees as an unbalanced marketplace of ideas that undermines the state’s interest in promoting public health, protecting prescriber privacy, and reducing health care costs.” The “idea market place” concept is at the center of its decision.

The option for Vermont doctors to release their data for marketing purposes did not save the statute, Judge Koeltl ruled, because their absolute veto right extended even to drug information which could be beneficial.

A vigorous dissent was filed by Circuit Judge Deborah A. Livingston; its reasoning will be discussed below.

CASE ANALYSIS

The district court denied relief to the data miners but it did conclude that the Vermont law restricted their commercial speech and was not merely a regulation directed towards their conduct. Ironically, while agreeing with that characterization of miners’ actions as commercial speech, the Second Circuit reversed the district court’s ruling relying

on *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

Central Hudson promulgated a four-part test to determine the constitutionality of government regulations of commercial speech. Under *Central Hudson*, the government must demonstrate a substantial interest in the goal of the prohibition; the restriction must directly advance the state’s interest; and if a more limited restriction on commercial speech would suffice, excessive restrictions must be stricken. (The reference in *Central Hudson* to a fourth test relating to misleading or unlawful activity is not relevant here). Vermont argues that its law satisfies *Central Hudson*, while IMS, the other data collectors, and PhRMA (collectively, the respondents) agree with the Second Circuit’s holding that the law blocked “speech beyond what the state’s evidence purportedly address[ed].”

What is the substantial interest asserted by the state of Vermont? Vermont asserts a number of interests and argues that each are advanced by the law. Vermont argues that restricting pharmacies from selling PI data is acknowledged to offer important assistance in keeping down drug expenditures, promoting low cost but equally effective generics, and reducing the influence of high-powered detailing practices. Another such interest put forth by Vermont is that the physicians should be able “to control the use of their non-public information.” Thus, argues Vermont, the law serves the First Amendment’s recognition of individuals’ rights to remain silent about any topic and to be left alone. In upholding the private nature of physicians’ treatment decisions for their patients, exclusive of the disclosure necessary to the pharmacist to fill a prescription, Vermont asserts it was acting in a manner consistent with the privacy rights extended over health care data.

Vermont argues (and Judge Livingston pointed out in her dissent) that the only way Vermont pharmacies obtain physicians’ prescription information in the first place is because physicians are legally required to furnish it to them. Once acquired, however, what constitutional right, Vermont asks, do pharmacies have to resell these data at a profit for reasons totally unrelated to the health care of their customers—the physicians’ patients? Essentially, Vermont argues that having compelled physicians to “speak” to pharmacies, it is entitled to limit the further dissemination of that speech to others consistent with the scope of the First Amendment. *Seattle Times Company v. Rhinehart*, 467 U.S. 20 (1984) stands for the proposition, Vermont asserts, that “[T]he First Amendment does not mandate unrestricted access to and use of information by others” that government regulation has demanded in the first place. The data in possession of the pharmacy, a nongovernmental actor, urges Vermont, is in actuality no different than the information held by the police department in *City of Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). There, the Court upheld a California statute restricting access to arrest records in light of a facial challenge by a company that published and sold this information. According to Vermont, *United Reporting* clearly permits the government to restrict access to information that it has directed businesses, here the pharmacies, to collect.

Vermont next argues that if the pharmacies sought to sell patients’ prescription information *with* identifying data in place, there would be no dispute that such conduct would not amount to protected

commercial speech and that government could prevent it in the interest of patient confidentiality. In Vermont's view, redacting patient identifying information does not resuscitate the data miners' First Amendment rights. In this regard, Vermont turns to the District of Columbia Circuit Court of Appeals' ruling in *FEC v. International Funding Institution, Inc.*, 969 F2d 1110 (1992), where the court refused to strike down a law that made campaign donor lists available to the public but restricted the use of these data for solicitation or commercial purposes. The court there held that those seeking these data "have no claim of right to the benefit of the compelled disclosure apart from the measure in which the concomitant use restriction is found." Why, Vermont asks, can the state not protect physicians who do not wish to "surrender the details of their treatment decisions to data vendors and pharmaceutical manufacturers"?

In *Lorillard Tobacco Company v. Reilly*, 533 U.S. 525 (2001), the Supreme Court appears to have anticipated at least a portion of the data miners' contention that the Vermont legislation reduces the effectiveness of their ability to market brand name drugs. The operative question according to Vermont, based on *Lorillard*, is whether "a speech regulation ... unduly impinges on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about the products." There is no undue impingement by its legislation, Vermont maintains, because pharmaceutical companies are able to contact doctors without restriction. The legislation simply prevents the manufacturers from turning the doctors' data into unwanted marketing tools.

The respondents' arguments extend from their initial claim: the Vermont law restricts their commercial speech in violation of their First Amendment rights. Accordingly, the respondents claim that the law simply does not satisfy the *Central Hudson* requirements in that it furthers no legitimate state goals, and even if it did, its scope is far too broad. As the Second Circuit pointed out, under the law, neither brand name drugs, which are clearly more expensive, nor their generic counterparts may be marked under the law using PI data.

In response to the state's claim deriving from the legal requirement that pharmacies keep records of the prescriptions they fill, the respondents note that "prescription-history information" is disclosed to many parties within our complex health care and reimbursement system. They insist that the central issue implicated by the Vermont legislation is that doctors could become too heavily influenced in encounters with pharmacy representatives by the detailer's use of data they have generated. Their First Amendment challenge should not be rebuffed, they contend, on the basis that doctors could be influenced to prescribe unnecessary medications and, as noted in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the "fear that people would make bad decisions if given truthful information."

SIGNIFICANCE

The physician-patient relationship is highly confidential and is based on the utmost trust by the patient in her physician's actions and recommendations. Vermont argues that its law prohibiting the data generated by physicians, against their wishes, from influencing their future prescribing conduct with the resultant cost burdens on the health care system is reasonable. The respondents, on the other hand, claim the law's scope is far too sweeping to advance these goals—assuming it does so at all.

The three *Central Hudson* factors (leaving out the element not applicable here) do not appear to have been analyzed in this health care information context prior to this litigation. Consequently, *Sorrell* raises some important questions for the Court to consider. Do states have the right to seek to protect patients against dissemination of their regulated confidential data? Do states have the ability to keep pharmacies from disclosing data that they must legally retain? Is it a reasonable state interest to encourage generic drug use over more expensive brand name equivalents? Are "exorbitant health care costs and threats to patient safety" real concerns which, by restricting access to these data, "reduces the pressures on doctors to prescribe more expensive, less proven drugs?"

Sorrell raises issues which go to the core of our modern health care system, including whether, in a so significantly regulated area, health care, the Supreme Court should defer to a state's decision as to an additional regulatory regime designed to achieve legitimate and substantial state interests. Pharmaceutical companies can engage in unlimited commercial speech; it is their access to prescription data in the hands of pharmacists via the data miners that lies at the heart of this important case.

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