NEW ADVOCATES' SPECIAL

Attention! Advocates who may not be new shouldn't miss "Access" Issues in the Supreme Court's 1992 Term
"Access" Issues in the Supreme Court's 1992 Term

By Laurie Davison, Gill Deford, Matthew Diller, Shelley Jackson, and Brian Lawlor

The authors of this article are with the Federal Court Access Group, an ad hoc group of legal services and public interest attorneys organized by the National Senior Citizens Law Center to monitor Supreme Court developments concerning poor people's access to federal court. Matthew Diller, formerly of The Legal Aid Society of New York, is a professor at Fordham Law School; Laurie Davison is litigation director at Mid-Minnesota Legal Assistance; Gill Deford is a former National Senior Citizens Law Center staff attorney; Shelley Jackson, is a clinical law instructor at the District of Columbia School of Law; and Brian Lawlor is with Legal Services of Northern California. For more information on the Federal Court Access Group, contact Laurie Davison, Mid-Minnesota Legal Assistance, 430 First Ave. N., Suite 300, Minneapolis, MN 55401-1780, (612) 332-1441.

Attorneys new to legal services practice--as well as their more experienced counterparts--should keep abreast of Supreme Court and lower federal court decisions that affect low-income individuals' access to the federal courts. During its 1992 term, the Supreme Court issued a number of decisions in this area, including cases concerning attorney fees, standing, retroactive application of federal statutes, and other access issues. This article summarizes these decisions and gives a brief preview of the access issues that may be before the Court this term.

I. Claims for Attorney Fees

A. Social Security Cases: Shalala v. Schaefer

In the 1991 decision Melkonyan v. Sullivan, the Supreme Court addressed the timing for filing a petition for attorney fees under the Equal Access to Justice Act (EAJA) in social security appeals. The Melkonyan decision created many new questions and spawned hundreds of reported and unreported decisions in contested fee proceedings. Last term, the Supreme Court tried to untangle, in Shalala v. Schaefer, the confusion created by Melkonyan.

Since April 1989, when a federal district court remanded Mr. Schaefer's claim to the Secretary of Health and Human Services (HHS), the jurisprudence surrounding attorney fee claims in social security disability appeals has undergone startling changes. At that time, the distinction between remands under "sentence six" of the applicable Social Security Act provision (claims remanded when the claimant has new and material
evidence, and good cause for failing to submit this evidence during administrative proceedings) and "sentence four" of the statute (claims remanded for any other reason) was not recognized. /5/ In June 1990, however, the Supreme Court focused on this difference in Sullivan v. Finkelstein. /6/ Furthermore, it was also previously well settled that a social security claimant did not become a prevailing party for the purpose of attorney fees unless and until the court, or HHS on remand, determined that the claimant was eligible for social security benefits. /7/

Consequently, prior to Melkonyan, social security claimants' representatives uniformly waited until after the award of benefits to file petitions for attorney fees under EAJA. Melkonyan stated in dicta, however, that the time period for filing an EAJA fee petition began to run when the court entered a remand order under sentence four of 42 U.S.C. Sec. 405(g). /8/ This rule would have deprived Mr. Schaefer, and hundreds of other social security claimants, of attorney fees, as they had followed the accepted policy of waiting until the decision on remand before filing the fee petition.

The Melkonyan decision was clearly inequitable when applied retroactively to claimants like Mr. Schaefer who had obtained fourth-sentence remands before Melkonyan had been issued. It was also causing problems prospectively. Although several appellate courts held that a district court could retain jurisdiction following a sentence four remand, that conclusion seemed tenuous given the Supreme Court's dicta in Melkonyan. /9/ HHS added to the confusion by taking the position that a social security claimant who obtained a sentence four remand was required to file his motion for attorney fees within 30 days of the remand order becoming final and nonappealable--even though he could not yet satisfy the threshold statutory requirement of being a prevailing party. /10/

In Schaefer, the Supreme Court has again altered the once accepted rules in this area. Justice Scalia, writing for the Court, reaffirmed the Melkonyan dicta: "In sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run so that the judgment is no longer appealable." /11/

Justice Scalia was forced to acknowledge, however, that there had been "some contradiction" between Melkonyan and Sullivan v. Hudson. /12/ In Hudson, the Supreme Court held that a successful social security claimant could obtain attorney fees under EAJA for the time spent in postremand administrative proceedings. /13/ It would be impossible, however, for a social security claimant to file a claim for fees, in accord with Melkonyan, itemizing the actual time expended during the "yet-to-be-held administrative proceeding." /14/ Schaefer resolved this conundrum by restricting the availability of postremand fees to cases remanded under sentence six of section 405(g)--despite the fact that, as the Court itself recognized, Hudson was a sentence four remand. /15/

Justice Scalia also had to address the "dicta" in Hudson that "a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings."
Again, he reconciled Hudson with Melkonyan by rejecting the Hudson dicta as applied to sentence four cases. Thus, despite abundant case law and legislative history to the contrary (which Schaefer ignores), the Supreme Court now holds that a social security claimant who wins a sentence four remand is thereby a prevailing party. 

This resolution would have otherwise ended the matter adversely for Mr. Schaefer, as his petition for fees was filed long after the remand order and was more than a year "late." Of course, his attorney was not aware that the remand order was a sentence four remand, that sentence four remand orders were final judgments, or that his client was a prevailing party because of that order.

The Supreme Court, apparently sensitive to the confusion and contradictions that its decisions since 1989 had occasioned, found a solution, however. It was not only Mr. Schaefer's attorney who was unaware of the consequences of the remand order; the district court was equally ignorant of the sentence four remand order as constituting a final judgment, and, consequently, it did not set forth its judgment "on a separate document" as required by Rule 58 of the Federal Rules of Civil Procedure. The Supreme Court therefore held that, since no separate document was entered, the time to appeal the remand order had never run out. Because the time to file a petition for fees under EAJA runs from the end of the period for appeal, the EAJA time limits similarly did not lapse. Thus, the award of fees to Mr. Schaefer was affirmed.

B. Defining Prevailing Party: Farrar v. Hobby

In Farrar v. Hobby, the Court reiterated that a civil rights "plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Thus, it determined that an award of nominal damages was sufficient to accord prevailing party status. Nevertheless, that there is an entitlement to a fee does not end the inquiry, and the "reasonable" fee in such circumstances may be no fee at all.

II. Standing: Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville

The Court clarified the standard that putative federal court plaintiffs must satisfy in order to have standing to sue in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville. Northeastern held that an association of nonminority contractors who claimed that they were prevented from applying for municipal contracts "reserved" for minorities under a minority business set-aside ordinance could challenge the ordinance in federal court, even without proving that association members would, but for the ordinance, have been awarded the contracts.
Citing prior decisions, the Court held that plaintiffs who allege a denial of equal access to governmental benefits satisfy the "injury in fact" prong /23/ of the standing requirement if they establish /24/ that they were denied the right to compete for the benefits on an equal basis. /25/ "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." /26/

Northeastern rejected the City of Jacksonville's assertion that recent modifications in the set-aside ordinance rendered the case moot, and reiterated established law that "voluntary cessation of a challenged practice does not deprive a federal court" of jurisdiction. /27/ Since the new ordinance was similar to the one originally challenged by plaintiffs as harmful to their attempts to gain city contracts, the Court held that, "to the extent [the new ordinance] accords preferential treatment to [minority] contractors and . . . is a 'set aside' by another means, it disadvantages [plaintiffs] in the same fundamental way." /28/

### III. Retroactive Application: Harper v. Virginia Department of Taxation

Over the last several years the Supreme Court has, with mixed success, attempted to clarify the ground rules for when a new rule of federal law should be given retroactive application. /29/ Last term's decision in Harper v. Virginia Department of Taxation adopted a comparable rule that synthesizes its prior holdings: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." /30/

### IV. Direct Federal Court Challenge of Immigration Regulations: Reno v. Catholic Social Services

In Reno v. Catholic Social Services, /31/ the Court again considered whether the system of appellate review over individual claims under the Immigration Reform and Control Act of 1986 (IRCA) precludes district court jurisdiction over direct challenges to Immigration and Naturalization Service regulations promulgated to interpret IRCA. Relying on McNary v. Haitian Refugee Center, Inc., /32/ the Court held that the IRCA review scheme--a single administrative appeal for aliens denied an adjustment of their status with judicial review only if the alien faces deportation--did not preclude district court jurisdiction. /33/

The Court went on, however, to state that "the claims still must satisfy the jurisdictional and justiciability requirements that apply in the absence of a specific Congressional directive." /34/ Thus, it concluded that "the promulgation of the challenged regulations did
not itself give each . . . class member a ripe claim; a class member's claim would ripen only once he took the affirmative steps that he could take before the INS blocked his path by applying the regulation to him." /35/

The apparent implication of the ripeness analysis is that a challenge to a regulation may not be brought until the individual has applied for the benefit. /36/

V. Section 1983 Jurisprudence

A. "Heightened Pleading" Requirement Invalidated: Leatherman v. Tarrant County Narcotics Unit

Resolving a conflict among the circuits, the Court held unanimously in Leatherman v. Tarrant County Narcotics Unit that, in civil rights cases alleging municipal liability under Section 1983, a district court may not require litigants to meet a "heightened pleading standard," i.e., one more stringent than the usual "notice pleading" standard envisioned by Rule 8 of the Federal Rules. /37/

B. Sheriff Acquiescence in Self-Help Eviction Violates Fourth Amendment: Soldal v. Cook County, Illinois

Rather than wait for judgment in a pending eviction action, and in violation of Illinois state law, the manager of a trailer park gave new meaning to the term "mobile home" by seizing and, quite literally, carrying away the trailer home in which the Soldal family lived. Employees of the trailer park wrenched free the sewer and water connections, disconnected the phone, tore away the trailer's canopy and skirt, and used a tractor to haul away the trailer. In aid of these illegal acts, the manager enlisted the help of the local county sheriff, who stood by to ensure that the tenants did not interfere with the seizure of the trailer. In Soldal v. Cook County, Illinois, /38/ a unanimous Supreme Court held that the state action in this case was cognizable under Section 1983. "We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment." /39/

VI. Administrative Procedure Act Cases

A. Exhaustion Under the APA: Darby v. Cisneros

In a unanimous decision, Darby v. Cisneros interpreted section 10(c) of the Administrative Procedure Act (APA) /40/ to preclude a federal court from creating a requirement of
administrative exhaustion in cases brought under the APA. /41/ Only if required by statute or by agency rule may a court demand exhaustion in an APA case. /42/

B. Agency Action Not Subject to the APA: Lincoln v. Vigil

The APA issues in Lincoln v. Vigil /43/ derived from the decision of the Indian Health Service to redirect annual lump-sum appropriations from a local health care program to a national one. First, after reviewing various decisions involving agency discretion, the Court held that "[t]he allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion." /44/ Faced with balancing a number of complicated factors within its expertise, an agency should be free to act as it sees fit, as long as it uses the appropriation "to meet permissible statutory objectives." In that context, therefore, an agency's action is unreviewable under the APA. /45/

Second, the Court determined that termination of the program, while arguably a "rule," was not subject to the APA's notice and comment provisions because "'rules of agency organization' are exempt from [those] requirements under [5 U.S.C.] Sec. 553(b)(A)." /46/ The Court distinguished its holding in Morton v. Ruiz /47/ on the ground that, in that case, the Bureau of Indian Affairs had violated its own regulations' requirement that it publish proposed changes in the Federal Register. /48/

VII. Other Access Cases

A. Eleventh Amendment Rulings: Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.

In a case that has important tactical and procedural implications whenever a party could arguably invoke Eleventh Amendment immunity, the Court held in Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc. that states and "state entities" that claim to be "arms of the state" may take advantage of the collateral order doctrine /49/ to appeal a district court order denying a claim of immunity based on the Eleventh Amendment. /50/

B. In Forma Pauperis Status: Rowland v. California Men's Colony

The holding in Rowland v. California Men's Colony was triggered by a Section 1983 civil rights action brought by an association of inmates at a California state prison that moved to proceed in forma pauperis. /51/ Resolving a conflict between the Fifth and Ninth Circuits, the Supreme Court held in a 5-4 decision that the word "person" in the federal in forma pauperis statute, 28 U.S.C. Sec. 1915, applies only to natural persons and not to artificial entities, such as associations or corporations.
VIII. Cases to Watch in the 1993 Term

A. Schoolcraft v. Sullivan

The Secretary of HHS and state Disability Determination Services officials filed petitions for certiorari seeking review of the Eighth Circuit's decision in Schoolcraft v. Sullivan, a class action challenging the standards used by the state agency to evaluate claims of disability based on alcoholism or another drug dependency. The petitioners argue that waiver of exhaustion of administrative remedies was improper and that the plaintiffs could not sue the state agency officials under 42 U.S.C. Sec. 1983. At writing, the Clinton administration is considering whether to go forward with its appeal and is exploring the possibility of settling the merits.

B. Landgraf and Rivers

The Court has granted certiorari in two cases concerning the retroactivity of provisions of the Civil Rights Act of 1991. Landgraf v. USI Film Products is a sex discrimination case concerning the retroactive application of the Act's provisions for punitive damages and the availability of jury trials. Rivers v. Roadway Express, Inc. is a race discrimination case addressing whether the Act's interpretation of the right to be free from discrimination in the "making and enforcing" of contracts is subject to retroactive application.

footnotes


/2/ 28 U.S.C. Sec. 2412.


/5/ 42 U.S.C. Sec. 405(g).


/7/ See Sullivan v. Hudson, 490 U.S. 877 (1989); Paulson v. Bowen, 836 F.2d 249 (9th Cir. 1988); Gamber v. Bowen, 823 F.2d 242 (8th Cir. 1987); Brown v. HHS, 747 F.2d

/8/ Melkonyan, 111 S. Ct. at 2165.

/9/ See Gray v. Secretary of HHS, 983 F.2d 954 (9th Cir. 1993); Labrie v. Secretary of HHS, 976 F.2d 779 (1st Cir. 1992); Gutierrez v. Sullivan, 953 F.2d 579 (10th Cir. 1992), cert. denied, 61 U.S.L.W. 3869 (U.S. June 29, 1993); Welter v. Sullivan, 941 F.2d 674 (8th Cir. 1991).

/10/ Justice Stevens described the government's proposal that all recipients of sentence four remands file protective EAJA petitions and then update them if they were successful on remand, or withdraw them if they were unsuccessful, as "rather bizarre." Schaefer, 61 U.S.L.W. at 4726 (Stevens, J., concurring in the judgment).


/12/ Id. at 4725, n.4.

/13/ Hudson, 490 U.S. at 892.

/14/ Schaefer, 61 U.S.L.W. at 4724.

/15/ Id. Cases that have (mistakenly) followed the "retained jurisdiction" approach, whether explicitly or not, may be characterized as "hybrids," like Hudson, and therefore may warrant fees for the postremand administrative work as well. Id. at 4724. This is the apparent result in Schaefer itself, where the Court affirmed the full award of fees, even though some of the work must have taken place during the remand. It may also be relevant that, in Gutierrez, 61 U.S.L.W. at 3869, also a retained jurisdiction case, the Supreme Court denied certiorari rather than vacating and remanding in light of Schaefer.

/16/ Schaefer, 61 U.S.L.W. at 4725 (quoting Hudson, 490 U.S. at 887).

/17/ Id.

/18/ Id.

/19/ Id. at 4726. Justice Stevens, joined by Justice Blackmun, concurred in the judgment but would have repudiated the dicta in Melkonyan and reaffirmed the availability of postremand attorney fees in sentence four as well as sentence six remand cases. Id. at 4726 (Stevens, J., concurring).

The several Farrar opinions provide a useful summary of recent Supreme Court jurisprudence in the fee area.


The Supreme Court has ruled that plaintiffs have "injury in fact" if they demonstrate "an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Id. at 2302 (citing Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992)). Parties alleging standing must also demonstrate a "causal relationship between the injury and the challenged conduct" and a "likelihood that the injury will be redressed by a favorable decision." Id. (citations omitted).

Given Northeastern's procedural posture, the Court assumed that the plaintiffs' allegations were true. Id. at 2304.

Id. at 2302-3 (citing Turner v. Fouche, 396 U.S. 346 (1970); Quinn v. Millsap, 491 U.S. 95 (1989); Clements v. Fashing, 457 U.S. 957 (1982); and Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)). The Court distinguished Northeastern from Warth v. Seldin, 422 U.S. 490 (1975), which held that putative plaintiff-intervenor contractors lacked standing to assert that a municipal ordinance effectively prevented low- and moderate-income individuals from moving into town. The two cases were distinguishable, the Court held, because putative plaintiffs in Warth did not allege that they were prevented from applying for government benefits--variances and building permits--on an equal basis. Northeastern, 113 S. Ct. at 2304. In addition, the injury suffered by the Warth plaintiffs was not immediate enough to "warrant judicial intervention." Id. at 2307 (citing Warth, 422 U.S. at 490).

Id. at 2303 (citing Turner, 396 U.S. at 346 (1970)).

Id. at 2303 (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982)).

See, e.g., James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) (once a new rule of law is announced and applied to parties in that civil case, it must be given retroactive application by all courts); Griffith v. Kentucky, 479 U.S. 314 (1987) (law must be applied retroactively to all criminal cases pending on direct review). As noted, the Court will continue to grapple with this issue in its 1993 term, when it hears two cases concerning the retroactivity of the Civil Rights Act of 1991.


Reno, 61 U.S.L.W. at 4655-56. In light of its holding in Reno, the Court vacated and remanded Ayuda, Inc. v. Thornburgh, 948 F.2d 742 (D.C. Cir. 1991), in which the lower court had held that the review scheme precluded district court jurisdiction. Id. at 4667.

Id. at 4656.

Id. at 4657 (footnote omitted).

See id. at 4659-61 (O'Connor, J., concurring in the judgment).


Id. at 543. The Court overruled the appellate court, which acknowledged that the facts constituted a "'seizure' in the literal sense of the word," but held that because the self-help eviction "was not made in the course of law enforcement and did not invade the Soldals' privacy, it was not a seizure as contemplated by the Fourth Amendment." Id. at 542 (citing Soldal, 942 F.2d 1073, 1076 (7th Cir. 1991) (en banc)).

5 U.S.C. Sec. 704.


Id. at 4682, 4684.


Id. at 2031-32.

5 U.S.C. Sec. 701(a)(2).

Lincoln, 113 S. Ct. at 2034.


Lincoln, 113 S. Ct. at 2045.

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) held that judgments that are not "complete and final" within the meaning of 28 U.S.C. Sec. 1291
may nevertheless be appealed if they "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred."


/52/ Schoolcraft v. Sullivan, 971 F.2d 81 (8th Cir. 1991), petitions for cert. filed, Nos. 92-1392, 92-1395 (Clearinghouse No. 45,479).
