The Impact of Foreclosure Proceedings on Residential Tenants
Supreme Court Term 1993 -- 94: Decisions Affecting Access to Federal Courts

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In terms of decisions affecting access to the federal courts, this year was relatively quiet for the U.S. Supreme Court. Unlike in recent years, in which it announced major decisions marking new bright lines or major shifts in its thinking about jurisdictional and procedural questions bearing on access to the courts, the Court moved with notable caution. As a practical matter, the most significant news this term for most legal services advocates was the extensive amendments (effective December 1, 1993) to the Federal Rules of Civil Procedure adopted by the Court. /1/

Even so, the Supreme Court announced several decisions that, although seemingly arcane, pose potential problems for federal court advocates. Kokkonen v. Guardian Life Ins. Co. of America, /2/ in particular, offers numerous reasons to pause and think hard about the effect of federal court settlement agreements or consent decrees. The Supreme Court’s dismissal of the writ of certiorari in Ticor Title Ins. Co. v. Brown, /3/ suggests potentially serious difficulties for class action plaintiffs. Legal services attorneys should also take note of a handful of other decisions announced by the Supreme Court this term that may affect their clients’ access to federal courts.

I. Jurisdiction to Enforce Settlement Agreements

Among the cases this term, Kokkonen v. Guardian Life Ins. Co. of America /4/ has perhaps the broadest implications for legal services advocates. Although the decision states an easily understood rule, its consequences can be enormous for parties who agree to dismiss a case in reliance upon a negotiated settlement agreement.

In Kokkonen, the parties reached an oral agreement to settle all claims and counterclaims. The substance of the agreement was read into the record but not memorialized as part of a court order. Later, the parties stipulated, pursuant to Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, to a voluntary dismissal with prejudice. The district court approved the stipulation and adopted the
order of dismissal. However, "[t]he Stipulation and Order did not reserve jurisdiction in the District Court to enforce the settlement agreement[,] indeed, it did not so much as refer to the settlement agreement." /5/

A month after dismissal of the case, the defendant went back to the district court to have the agreement enforced. The plaintiff opposed the motion to enforce the judgment on the ground that the court lacked subject-matter jurisdiction. Both the district court and the Ninth Circuit held that the federal court had "inherent power" to enforce the settlement agreement. /6/ Rejecting arguments based on "ancillary jurisdiction" and general "supervisory power," however, a unanimous Supreme Court concluded that "enforcement of [a] settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence, requires its own basis for jurisdiction." /7/ In essence, the Court found that an attempt to enforce the settlement is simply a claim for breach of contract and can be maintained in federal court only if there is some independent basis of jurisdiction. /8/

However, Justice Scalia, writing for the Court, left open two escape hatches through which parties can secure federal jurisdiction to enforce such a settlement. First, the district court can embody the terms of the settlement in its Rule 41(a) /9/ dismissal order, in which case the settlement presumably becomes a "consent decree," and breach of the agreement is then a violation of a court order. Second, the dismissal order can specify that the court retains jurisdiction for enforcement purposes or that the dismissal is conditional upon compliance with the settlement. /10/ The Court suggested that, for purposes of federal jurisdiction, these two alternatives are equivalent. /11/

Kokkonen produces curious effects. It places a premium on the language of a court's dismissal order, even though the relationship between the original suit and enforcement of the settlement is the same regardless of the order's wording. Moreover, if the dismissal is conditioned on compliance with the settlement, why would violation of the settlement authorize judicial enforcement, rather than simple reinstatement of the suit? Indeed, the Court mentions, but does not comment on, the split in the circuits over whether breach of a settlement provides grounds for reinstatement of a suit under Rule 60(b). /12/

Given that enforcement can be obtained by asking a court to include the necessary language in its dismissal order, the principal long-term effect of Kokkonen will be the creation of a trap for the unwary. For litigants who are aware of Kokkonen, the availability of judicial enforcement will become a chit to be bargained over. It will enable defendants to seek concessions from plaintiffs in return for language that will make the agreement enforceable. Finally, even though Justice Scalia's opinion seems to discourage nitpicking over exact wording, Kokkonen could possibly lead to a welter of litigation over which magic words are necessary in order for a dismissal order to extend jurisdiction.

II. Opting Out of Class Actions

Do class members, in a Rule 23(b)(2) case involving claims for both injunctive relief and money damages, have a due process right to opt out of the class?
Although the Supreme Court granted certiorari on this issue in Ticor Title Ins. Co. v. Brown, the Court found, after briefing and argument, that the case did not properly present the question. Finding that certiorari had been improvidently granted, it dismissed the appeal. Three justices dissented. The majority concluded that the constitutional issue need not be reached if certification of a class seeking damages is permitted only under Rule 23(b)(3). Rule 23, by its terms, requires notice and opportunity to opt out in a Rule 23(b)(3) class action. Thus, if Rule 23(b)(2) does not permit certification of classes seeking damages, the constitutional issue is largely academic. Because the Court did not consider Ticor to pose squarely the Rule 23 question, it decided to dismiss the appeal rather than proceed to interpret the Constitution.

Even though the Court did not decide any issues, Ticor seems destined to create difficulties for class action plaintiffs. The Court stated that there is "at least a substantial possibility" that claims for damages preclude certification under Rule 23(b)(2). This statement casts doubt on the generally accepted view that "incidental" claims for damages do not foreclose the possibility of certification under Rule 23(b)(2) if the principal relief sought is injunctive.

The matter is far from trivial. If damage claims can be brought only under Rule 23(b)(3), then, at an early stage in the action, plaintiffs would have to bear the costs of individually notifying all identifiable class members of their right to opt out. The impossibility of raising many damage claims would be the practical effect of such a requirement. One way of limiting the impact of such a rule is to define "damages" very narrowly. Some courts have already held that awards of back pay and retroactive payments of public benefits are equitable remedies, not "damages," for purposes of Rule 23.

By the same token, the constitutional question that the Court declined to address could raise similar problems. A holding that due process requires class members to be given an opportunity to opt out is likely to result in an individual notice requirement. However, since Rule 23(b)(2) does not have the same rigid notice requirements as those applied to cases certified under Rule 23(b)(3), a more practicable means of providing notice could possibly pass muster.

Ticor has one immediate repercussion. It leaves intact in the Ninth Circuit -- the largest circuit in the country -- the rule that due process requires an opportunity to opt out when the damages sought in a Rule 23(b)(2) class action are "substantial."

III. Vacating Lower-Court Decisions

Should an appellate court routinely vacate a lower-court judgment at the request of the parties when a case is settled during the pendency of the appeal? This question, which has divided the circuits, remained unanswered when the Supreme Court in Kaisha v. U.S. Philips Corp. dismissed the writ of certiorari because the petitioner Izumi (Kaisha) was not a party to the action.

Justice Stevens, in a dissent joined by Justice Blackmun, agreed with the majority of the circuit courts which have held that a judgment should not be vacated unless the court concludes that the public interest would be served by vacatur. The Justice stated, "While it is appropriate to vacate a
judgment when mootness deprives the appellant of an opportunity for review . . . , that justification does not apply to mootness achieved by purchase." /27/

The Supreme Court's views on vacatur in the settlement context may have influenced the outcome of another case, Schoolcraft v. Shalala. /28/ In Schoolcraft, the parties reached a settlement on the merits while the Secretary of HHS's petition for certiorari was pending. The settlement was conditioned upon the Court vacating the Eighth Circuit's decision. The Court, however, denied the joint motion to vacate the decision below and denied the Secretary's petition for certiorari. /29/

IV. Appealability of Orders Vacating Dismissals

What happens if parties agree to a settlement providing for dismissal of the lawsuit, and the court, on that basis, dismisses the case but then later vacates the dismissal order and reinstates the case? Does a disgruntled party have the right to appeal immediately from the order vacating the court's prior order of dismissal? Applying the "collateral order doctrine," /30/ Justice Souter, writing for a unanimous Court in Digital Equip. Corp. v. Desktop Direct, Inc., /31/ firmly answered, No. A district court order that denies effect to a privately negotiated settlement agreement without otherwise resolving the underlying cause of action cannot be appealed immediately by a dissatisfied party. /32/

V. Retroactivity of the Civil Rights Act of 1991

Does the Civil Rights Act of 1991 (Act) apply retroactively to cases of employment discrimination that arose prior to its enactment? In two cases addressing different provisions of that Act, the Supreme Court held that it does not apply retroactively. In both cases, the Court adhered to the strong presumption against retroactive application of federal statutes and concluded that neither the statutory language nor the legislative history of the Act overcame that presumption. /33/ The Court came to the edge but stopped short of requiring a "clear statement" in the statutory text to rebut the presumption against retroactivity. /34/

In Landgraf v. USI Film Products, /35/ a case involving charges of sexual harassment and retaliation by an employer, the Court held that section 102 of the Act, which created a new statutory right to recover compensatory and punitive damages for certain violations of Title VII, does not apply to a case pending on appeal at the time the Act was enacted into law. /36/ Essentially the same result was reached in Rivers v. Roadway Express, /37/ involving claims made under Title VII and 42 U.S.C. Sec. 1981 based on charges of racially discriminatory practices against a group of black garage mechanics. The Supreme Court held that, even though section 101 of the 1991 Act broadened the definition of the phrase "to make and enforce contracts" in section 1981, the newly expanded statutory definition in section 101 does not apply retroactively to cases which arose before its enactment. /38/

VI. No Bivens Actions Against Federal Agencies
In a unanimous decision, the Supreme Court held that Bivens-style actions affording a damages remedy against individual federal agents for violation of constitutional rights are not available against federal agencies themselves. In 1971, the Supreme Court recognized an implied cause of action for monetary damages against agents or officers of the federal government who violate federal constitutional rights, in part because of the absence of a cause of action against the federal government directly. /39/ In F.D.I.C. v. Meyer, /40/ the Supreme Court reversed the Ninth Circuit by concluding that the Bivens rationale for finding an implied cause of action for damages does not support its extension to a suit against agencies of the federal government. /41/

VII. Burden of Persuasion Under the APA

Writing for a six-member majority, Justice O'Connor concluded, in Director, Office of Workers' Compensation v. Greenwich Collieries, /42/ that the term "burden of proof" in section 7(c) of the Administrative Procedure Act (APA) /43/ means that the "burden of persuasion" is on the claimant appearing before the agency. The net result in Greenwich Collieries was the reversal of administrative decisions which had awarded benefits to individuals under the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act.

The Department of Labor had ruled in the claimants' favor by applying its "true doubt" rule, which required that "when the evidence is evenly balanced, the benefits claimant wins." /44/ In effect, this approach put the burden of persuasion on the party opposing the award. The companies opposing the claims in Greenwich Collieries contended that the language, in section 7(c) of the APA, providing that "the proponent of a rule or order has the burden of proof" /45/ actually means the "burden of persuasion" is shifted to the proponent.

The Court agreed with that position, concluding that, at the time of the APA's passage (in 1946), "the ordinary meaning of burden of proof was burden of persuasion." /46/ In short, since the APA trumps the Department of Labor rule, a "tie" based on an evenly balanced evidentiary record could no longer result in an automatic ruling in favor of the claimant.

In reaching its decision, the Court discredited its "cursory conclusion" to the opposite effect ten years ago in a footnote in NLRB v. Transportation Management Corp., /47/ in which it gave a "cursory answer to an ancillary and largely unbrieved question[.]" /48/ However, Greenwich Collieries does not appear to cast doubt on the validity of administrative rules which shift the burden after some type of a prima facie showing has been made. While criticizing the characterization, in Transportation Management, of section 7(c) of the APA, the Court reaffirmed the holding in that case that the burden shifted to the employer to establish independent grounds for discharge, after an employee showed that antiunion animus contributed to the employment discharge. /49/

VIII. Appellate Review of the Qualified Immunity Defense

In yet another case from the Ninth Circuit, Elder v. Holloway, /50/ the Supreme Court considered whether questions affecting a qualified immunity defense should be reviewed on appeal as matters
of law or as "legal facts." The Court, in a unanimous decision written by Justice Ginsburg, concluded that such questions should be reviewed as questions of law, not fact.

The Ninth Circuit had determined that the plaintiffs had the burden of putting into the trial court record the so-called legal facts showing that the federal right at issue was "clearly established" at a particular time, such that a public official who allegedly violated that right enjoyed no immunity from suit. In essence, the Ninth Circuit had held that, if the plaintiffs failed to cite or the district court did not consider precedent relevant to the qualified immunity defense, then that same precedent should not be considered on appeal. /51/

Reversing, the Supreme Court held that an appellate court, in reviewing a judgment regarding a qualified immunity defense to a damages suit based on violation of federal rights, should not disregard relevant legal authority on the qualified immunity issue simply because it had not been brought to the attention of the district court. Justice Ginsburg concluded, "A court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents.'" /52/

IX. Important Cases to Be Reviewed Next Term

Legal services advocates should also be alert to several other cases of interest which the Supreme Court recently agreed to review:

In Shalala v. Guernsey Memorial Hospital, /53/ the Supreme Court will review the question of whether an HHS Medicare Providers Reimbursement Manual that resulted in substantive changes in existing regulations, but was adopted without notice and comment, constitutes a "legislative rule" subject to the rulemaking requirements of the APA.

In Brown v. Gardner, /54/ a case of interest to those representing veterans, the Supreme Court will consider whether a statute that provides for the payment of disability benefits to veterans who are injured by medical procedures performed at VA facilities is violated by a regulation limiting the availability of benefits to instances in which the facility was at fault for the injury.

The Court will consider, in Swint v. Chambers County, Alabama Comm'n, /55/ whether an Alabama county is shielded from section 1983 liability for its sheriff's conduct because state law does not grant law enforcement authority to counties and characterizes county sheriffs as state, not county, officials who lack final authority to establish municipal policy.

Finally, a petition for certiorari is pending in Moore v. Kennison. /56/ The Moore petition was filed by the Missouri attorney general seeking review of a $2,500 attorney fee award to a prisoner who asserted civil rights claims challenging the state's rehabilitation program for sex offenders. The petition presents questions bearing on the recovery of attorney fees under 42 U.S.C. Sec. 1988, including whether a plaintiff is a "prevailing party" when he survives a motion to dismiss but ultimately obtains no relief; whether a plaintiff is entitled to fees as a "catalyst for reform" when a nonparty is the one who took the actions which allegedly addressed plaintiff's concerns; and what a plaintiff's burden of proof should be under a "catalyst" theory for the recovery of fees. A historical
note: The last time the Missouri attorney general obtained review of a section 1988 attorney fee award, the result was the seminal holding in Hensley v. Eckerhart. /57/

Footnotes


/5/ Id. at 1675.

/6/ Id.

/7/ Id. at 1676.

/8/ Id. at 1677.


/10/ Kokkonen, 114 S. Ct. at 1677.

/11/ Id.

/12/ Id. at 1675.


/14/ Id. at 1362.

/15/ See id. at 1362 -- 64 (O'Connor, Rehnquist, and Kennedy, JJ., dissenting).

/16/ Id. at 1361.

/17/ F. R. Civ. P. 23(c)(2).

/18/ Ticor, 114 S. Ct. at 1362.

/19/ Id. at 1361.
/20/ See Jack Friedenthal et al, Civil Procedure 734 & n.61 (1993); Herbert Newberg & Alba Conte, Newberg on Class Actions Sec. 4.14, pp. 4 -- 48.


/22/ Newberg & Conte, supra note 20, Sec. 4.14, pp. 4 -- 47, 4 -- 49.

/23/ See Friedenthal et al., supra note 20, at 751 (suggesting that the notice requirements of Rule 23 applicable to Rule 23(b)(3) actions are more stringent than due process requires).

/24/ Ticor Title Ins. Co. v. Brown, 982 F.2d 386, 392 (9th Cir. 1992).


/26/ Petitioner Izumi Seimitsu Kogyo Kabushiki Kaisha is referred to as "Izumi" by the Court.

/27/ Kaisha, 114 S. Ct. at 431 (citation omitted).


/32/ Id. at 4463.


/34/ See Landgraf, 114 S. Ct. at 1522 -- 24 (Scalia, Kennedy, and Thomas, JJ., concurring in Landgraf and Rivers judgments).

/35/ Id. at 1483.

/36/ Id. at 1508.


/38/ Id. at 1519 -- 20.


41/ Id. at 1005 -- 6.


43/ 5 U.S.C. Sec. 556(d).

44/ Greenwich Collieries, 62 U.S.L.W. 4544.

45/ 5 U.S.C. Sec. 556(d).

46/ Greenwich Collieries, 62 U.S.L.W. at 4546.


49/ Id. at 4546 -- 47.


51/ See Elder, 975 F.2d 1388, 1394 (9th Cir. 1991).

52/ Elder, 114 S. Ct. at 1023 (quoting Davis v. Scherer, 468 U.S. 183, 192 n.9 (1984)) (brackets in the original).


