
Monday, March 4, 2019

Greetings, Court Fans!

We’ve got a lot to cover this week, with five new opinions on subjects ranging from capital punishment to foreign sovereign immunity to aphrodisiacs.

Okay, aphrodisiacs may not strictly have been the subject of *Nutraceutical Corp. v. Lambert (No. 17-1094)*, but they did provide the factual background for the Court to decide a question of interest both to procedure nerds and the class action bar—whether the 14-day interlocutory-appeal deadline found in Federal Rule of Civil Procedure 23(f) can be equitably tolled. In a unanimous opinion, the Supreme Court held it cannot.

Nutraceutical Corporation is the maker of “Cobra Sexual Energy” pills, a dietary supplement targeted at men that touts its ability to prolong bedroom performance. Troy Lambert stocked up on these pills and was shocked, shocked, to find that they didn’t live up to expectations. Presumably the only Cobra customer willing to admit it, Lambert brought a putative class action lawsuit claiming that Nutraceutical made various misrepresentations in their advertisements that violated California’s consumer-protection laws. (But is it truly deceptive to sell snake oil under the name Cobra?) He initially convinced the District Court to certify a class, but the judge reversed himself on February 20, 2015, and decertified.

Federal Rule of Civil Procedure 23(f) gives litigants in class actions an opportunity to seek an immediate appeal of a class-certification decision. It says that the courts of appeals may “permit an appeal from an order granting or denying class-certification . . . if a petition for appeal is filed . . . within 14 days after” the order is entered. Lambert did not immediately petition for permission to appeal. Instead, on March 2, 2015 (10 days after the certification decision), he informed the District Court that he was going to file a motion for reconsideration, and the District Court allowed him until March 12th to file that motion. Lambert filed his motion for reconsideration on time, and it was denied on June 24, 2015. He then filed a petition for permission to appeal under Rule 23(f) 14 days later. Nutraceutical objected, saying the 23(f) petition was untimely because it was filed more than 14 days after the certification decision of February 20th. The Ninth Circuit ruled that although the petition was facially untimely, Rule 23(f)’s time limit was non-jurisdictional and therefore amenable to equitable tolling. The Ninth Circuit then went onto rule on the merits and found that the class should not have been decertified.

Writing for a unanimous court, Justice Sotomayor concluded that the Ninth Circuit should not have tolled the deadline. Though she agreed that Rule 23(f) is a “nonjurisdictional claim-processing rule,” which can be waived or forfeited by an opposing party, she noted that some claim-processing rules are mandatory and are “unalterable”
if properly raised. Justice Sotomayor explained that whether such a rule is mandatory and unalterable depends on the flexibility of its language. After looking at the interaction between Rule 23(f) and the Federal Rules of Appellate Procedure, she concluded that Rule 23(f) lacks the necessary flexibility to allow for equitable tolling. That’s because Federal Rule of Appellate Procedure 26(b) expressly states that a court of appeals “may not extend the time to file . . . a petition for permission to appeal.” Lambert argued that other language in Rule 26(b) should lead to a relaxed application, but Justice Sotomayor demurred. Though the Court might be willing to apply the rule flexibly if it were “writing on a blank slate,” it had already held twice before construed a similar procedural rule strictly. Sotomayor also rejected Lambert’s argument that certain advisory committee notes to Rule 23(f) suggested it should be subject to equitable tolling, pointing out that those notes related to the court’s decision whether to accept an interlocutory appeal, not the time for filing the petition to appeal. And she made quick work of Lambert’s final argument that courts of appeals uniformly accept Rule 23(f) petitions filed within 14 days of a decision on a motion to reconsider that is itself filed within 14 days of the original certification decision. In that scenario, Justice Sotomayor noted, the timely filed motion for reconsideration delays the date that the 14-day Rule 23(f) period begins to run. Lambert’s problem was that he delayed in filing the motion to reconsider. (At least he could delay something, amiright?)

Although Lambert whiffed at the Supreme Court, he may have some hope on remand. In a footnote, Justice Sotomayor made clear the Court that the Court was not ruling on the effect of a motion for reconsideration filed within the 14-day window for petitioning provided by Rule 23(f) or whether a petition would be considered timely if the District Court had misled Lambert in some way. Lambert had argued that his petition was timely because he had filed his motion to reconsider within the deadline set by the District Court (even if not within 14 days) and that the ruling on the motion for reconsideration should have started a new 14-day clock for his petition. The Court declined to address that argument because it hadn’t been addressed below, but it encouraged the Ninth Circuit to weigh in on remand.

The timing of appeals was also at issue in Garza v. Idaho (No. 17-1026) (at least enough to warrant this transition). The case addressed the obligations of criminal defense attorneys whose clients want to appeal, notwithstanding having waived the right to appeal in their plea agreements. In Garza, a divided Court held that the failure of a defense attorney to file a notice of appeal upon request amounts to ineffective assistance of counsel, even when the right to appeal was waived in the client’s plea agreement.

Writing for a six-Justice majority (including the Chief and Kavanaugh, along with the other liberals), Justice Sotomayor covered the basics: Under the Strickland standard, a defendant who claims ineffective assistance of counsel in a postconviction proceeding must show: (1) counsel’s performance fell below an objective standard of reasonableness; and (2) that this deficiency was prejudicial. But in Roe v. Flores-Ortega (2000), the Court held that prejudice is presumed “when counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.” The question in Garza was whether this presumption applies even when the defendant has signed an appeal waiver. Sotomayor answered that question with a resounding “yes.”

As the majority saw it, this case was properly resolved based on three things: (1) an understanding of the scope of “appeal waivers”; (2) what it means for trial counsel to file a “notice of appeal”; and (3) the Court’s prior decision in Flores-Ortega. As for the first item, Justice Sotomayor said that the term “appeal waiver” is itself misleading, because no appeal waiver ever serves as an absolute bar to appellate claims. The language of plea agreements vary widely, and “some waiver clauses leave many types of claims unwaived.” What’s more, “even a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver.” And all jurisdictions treat at least some claims as unwaiveable as a matter of law; for example, “courts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable.” Turning, then, to the second item: Justice Sotomayor noted that filing a notice of appeal is a “purely ministerial task.” Moreover, the decision to file an appeal belongs squarely to the defendant (even though the choice of what specific arguments to make on appeal belongs to counsel). At bottom, filing a notice of appeal is “a simple, nonsubstantive act that is within the defendant’s prerogative.” With that context in mind, Sotomayor turned to her third point: Flores-Ortega resolves this case. Under Flores-Ortega, “to succeed [with regard to prejudice] in an ineffective-assistance claim . . . , a defendant need make only one showing: that, but for counsel’s deficient failure to consult with him about an appeal, he would have timely appealed.” Because Garza was deprived altogether an appeal that he wanted, he “made out a successful ineffective assistance of counsel claim entitling him to an appeal, with no need for a further showing of his claims’ merit.”

The dissenters—Alito, Gorsuch, and Thomas—were unimpressed. In an opinion written by Justice Thomas, the dissenters agreed with their colleagues that the decision to appeal belongs to the defendant. But, they contended, the defendant already made the decision to forgo an appeal when he entered the plea agreements. Garza’s attorney’s decision not to file an appeal was “reasonable” because “his client had waived this right” and “filing an appeal would potentially jeopardize his plea bargain.” The dissenters would have adopted a test (similar to the one proposed by the United States Government in an amicus brief) under which “a defendant who executed an appeal waiver cannot show prejudice arising from his counsel’s decision not to appeal unless he (1)
identifies claims he would have pursued that were outside the appeal waiver; (2) shows that the plea was involuntary or unknown; or (3) establishes that the government breached the plea agreement.”

But Thomas’ didn’t stop there. In a lengthy final section joined by Gorsuch (but not by Alito), Justice Thomas questioned the Supreme Court’s entire IAC jurisprudence. The Sixth Amendment “as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel.” Thomas, therefore, took issue with the Court’s conclusion that the Sixth Amendment requires a right to effective counsel at taxpayers’ expense. What’s more, “the Constitution . . . does not mandate any particular remedy for violations of its own provisions” and “Strickland does not explain how the Constitution requires a new trial for violations of any right to counsel.” Given these considerations, Thomas cautioned that “the Court should tread carefully before extending our precedents in this area.”

By a similar margin (albeit with Kavanaugh on the sidelines), the Supreme Court decided in Madison v. Alabama (No. 17-7505) that death-row inmate Vernon Madison should get another chance to persuade a state court judge that he cannot be executed because, as a result of a series of strokes leaving him with “vascular dementia,” he cannot recall his crime and is thus unable to understand why the State wishes to execute him. This will be the third time Madison’s case has been before the same Alabama judge, who has twice before ruled him competent to be executed.

Writing for a majority including the liberal Justices and the Chief, Justice Kagan noted that, in Panetti v. Quarterman (2007), the Court held that the Eighth Amendment prohibits executing a prisoner whose mental illness makes him unable to “reach a rational understanding of the reason for [his] execution.” The two questions presented in this case were whether Panetti prohibits executing a prisoner merely because he cannot remember committing his crime, and whether it draws a distinction to mental problems caused by dementia, as opposed to psychotic delusions. But these questions, too, have already been answered, according to Kagan: It’s okay to execute people who do not remember their crimes, but it may not be okay to execute people who suffer from dementia. That’s because what matters is whether a person has the “rational understanding” Panetti requires—not whether he has any particular memory (or not), or any particular mental illness. Memory loss, in and of itself, is not determinative. It’s only when someone’s memory loss “combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend why the State is exacting death as punishment,” that the Eighth Amendment kicks in. Similarly, it doesn’t matter what disorder a person has what matters is the effect that disorder has on the person’s ability to comprehend why he’s being executed. “Psychosis or dementia, delusions or overall cognitive decline are all the same under Panetti, so long as they produce the requisite lack of comprehension.” Ultimately, an execution “offends morality” when “a mentally ill prisoner cannot understand the societal judgment underlying his sentence.” A judge must look beyond diagnosis to the consequence—and to the particular circumstances of a person's mental condition.

So what does this mean for Madison? Well, the Court couldn’t quite figure out whether the state court did, in fact, look beyond diagnosis to consequence; i.e., whether it understood “insanity” to encompass only a disorder based on delusions (incorrect), rather than any mental state that would prevent someone from comprehending the rationale for his punishment (correct). The state judge, in his second decision, stated only that Madison “did not provide a substantial threshold showing of insanity[ ] sufficient to convince this Court to stay the execution.” Given the ambiguity in that one-sentence ruling, the majority remanded the case to the state court to ensure that the proper inquiry is conducted.

In dissent, Justice Alito—joined by Thomas and Gorsuch—pulled no punches: “What the Court has done in this case makes a mockery of our Rules.” Explaining that the question for which the Court granted cert was not, in fact, the question the majority answered, Alito demanded that the majority “own up to what it is doing.” Madison's counsel, he wrote, only asked the court whether the Eighth Amendment prohibits the execution of a murderer who cannot recall committing the murder for which the death sentence was imposed. Realizing that answer was likely "yes," he then switched tacks and tried to reargue competency standards, wrt large. Alito wasn't having it. Not only was it improper for the Court to answer that (unasked) question, but there was no legal error to correct in the first place, as "there was no way that the state court erroneously believed that dementia cannot provide a basis for a Ford/Panetti claim." Thus, what the majority was really doing was what it claimed it wasn't—expressing an opinion on Madison's competency and hoping that, back in Alabama, the third time's the charm.

Next up, in Jam v. International Finance Corp. (No. 17-1011), the Court addressed a philosophical question of statutory interpretation: If Congress says that X has the “same” rights as Y, are X’s rights dynamic or static—that is, do they evolve along with Y’s rights, or remain the same as when the matching statute was first enacted? In a 7-1 decision (with Kavanaugh sitting out), the Court held that, at least in the context of international organizations’ immunity from suit, the dynamic approach applies.

The International Organizations Immunities Act of 1945 (“IOIA”) grants international organizations (like the World Bank) the “same immunity from suit . . . as is enjoyed by foreign governments.” 22 U.S.C. § 288a(b). In 1945, foreign governments were almost entirely immune from suit in U.S. courts. That changed in 1952, when the State
Department adopted the so-called restrictive theory of foreign sovereign immunity, under which foreign

governments are generally immune for their “sovereign” acts but not immune for “commercial” ones. A few
decades later, Congress codified the restrictive theory with the Foreign Sovereign Immunities Act (“FSIA”). It
likewise provided that foreign states are presumptively immune from suit in the United States but created
several exceptions, the most important being that foreign governments can be sued for commercial activities
that have a “nexus” with the United States.

The International Finance Corporation (“IFC”) is an international organization covered by the IOIA, with its
headquarters in Washington. Its mission is to aid economic development by making loans for private-sector
projects in developing countries. In 2008, the IFC loaned $450 million to an Indian company to help finance the
construction of a power plant. But the company building the plant failed to take steps (required by the IFC as part
of the loan) to minimize environmental damage to surrounding areas. In 2015, a group of Indian farmers and
fishermen sued the IFC in U.S. District Court for the District of Columbia, alleging that the IFC was liable for
environmental damage because it had negligently supervised the loan. But the District Court dismissed based on
D.C. Circuit precedent establishing that the IOIA gives international organizations the same immunity foreign
governments enjoyed in 1945, i.e., near absolute immunity. The D.C. Circuit affirmed, while questioning whether its
precedent was correctly decided (and noting that another circuit, the Third, had rejected the static approach).

Writing for the Court, Chief Justice Roberts agreed with the plaintiffs that the IOIA’s immunity provision
created dynamic parity between international organizations and foreign sovereigns, not static parity based on
the law as it existed in 1945. That result was consistent with how the Court has generally interpreted other
statutes using the similar “same . . . as” language. And it is consistent with a canon of statutory interpretation
known as the “reference” canon. Under that canon, when a statute gives a person or entity the same rights or
liabilities as someone else in general terms, the statute should generally be interpreted to evolve as the referent
evolves. In contrast, when a statute refers to the rights or liabilities created by a specific statute, the second
statute is essentially copied and pasted into the first as it read when the first was enacted, without incorporating
any subsequent amendments to the second statute. Since this canon was well established by 1945, the Court
presumed Congress intended to follow it with the IOIA.

This interpretation does not, the Chief was quick to point out, open the floodgates to suits against international
organizations, and it does not even necessarily mean that the IFC is not immune from the plaintiffs’ suit. Many
international organizations’ charters (including, for example, the U.N.’s), provide complete immunity from suit.
Second, even under the restrictive theory of sovereign immunity, a foreign sovereign can only be sued for
“commercial” activities, and only when those activities have a “nexus” with the United States, a requirement that
will rarely be satisfied when the plaintiff’s suit concerns tortious activity committed abroad. Without deciding
these issues, the Court questioned whether the plaintiffs’ suit against the IFC would satisfy either of these
requirements. Those questions—as well as any other disputes about whether the IFC would be immune under the
standards of the FSIA—will now be resolved by the lower courts on remand.

All that was enough to satisfy most of the Justices, but one dissented and, no, it wasn’t Justice Thomas. In a
dissent that can only be described as “very Breyer,” the Active Liberty author argued that “purpose-based”
approaches to statutory interpretation can lead to sounder and more coherent results than strictly textual ones.
He criticized the Court’s textual analysis as too simplistic: Plenty of statutes using somewhat similarly worded
references have been interpreted as establishing static, rather than dynamic rights, and the specific language of
the IOIA was consistent with either approach. Whether a reference is dynamic or static, then, can only be decided
based on the purpose of the statute at issue. Turning to the IOIA itself, Justice Breyer noted that Congress’s
purpose in 1945 was to foster the creation and success of the new crop of international organizations
established in the aftermath of World War II. Subjecting these newly created organizations to suits of any type
might well have killed them in the cradle. Further, Congress wanted as many as possible of these organizations to
be located in the United States so that the United States could have an outsized role in their leadership and
activities. Subjecting the organizations to suit in U.S. court would make their founders hesitant to set up shop in
Washington. Given these purposes, Justice Breyer concluded, Congress intended international organizations to
enjoy complete immunity, just as foreign nations did at the time. The Court, he argued, should continue to honor
that purpose even though the immunity rights of sovereign nations have since evolved.

Finally, in Yovino v. Rizo (No. 18-272), the Court answered the age-old question: “May a federal court count
the vote of a judge who dies before the decision is issued?” The judge in this instance was Ninth Circuit liberal lion
Stephen Reinhardt, who died on March 29, 2018. Eleven days later, the Ninth Circuit released an en banc decision
in an equal-pay case in which Judge Reinhardt’s vote made a difference. The court treated his opinion as the
majority opinion (meaning that it constitutes binding precedent in the Circuit), but without his vote, the opinion
attributed to him would have been approved of only five of the ten judges on the en banc panel. In an per curiam
opinion (with the Chief’s fingerprints on it), the Supreme Court said, that’s not allowed.

It is generally understood, the Court noted, that a judge may change his or her position up to the very moment
When a decision is released. That understanding was been endorsed by the Supreme Court in a 1960 case in which a judge on the Second Circuit took senior status before an en banc decision was released. That holding, the Court reasoned, “applies with equal if not greater force here.” By the time the Ninth Circuit issued its opinion, “Judge Reinhardt was neither an active judge nor a senior judge. For that reason, by statute he was without power to participate in the en banc court’s decision at the time it was rendered.” Because Judge Reinhardt was no longer a judge at the time the en banc decision was filed, the Ninth Circuit erred in counting him. As the Court noted, “federal judges are appointed for life, not for eternity.”

That sentiment was joined by 8 Justices, but interestingly, Justice Sotomayor concurred only in the judgment, without opinion. Perhaps she agrees that federal judges are not appointed for eternity, or even life plus eleven days, but wants to allow a little wiggle room for the judge who dies just hours before an opinion is filed.

That’s all we’ve got by way of opinions, but the Court did also add one more case to its docket for next term. In *Rotkiske v. Klemm (No. 18-328)*, the Court will decide whether the “discovery rule” applies to toll the one-year statute of limitations under the Fair Debt Collection Practice Act.

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