1998

Section 8: Also This Term

Institute of Bill of Rights Law at the William & Mary Law School

96-1570 ***NYNEX CORP.* v. *DISCON INC.***

Ruling below (CA 2, 93 F.3d 1055):

Allegation that regional telephone company conspired to pay higher price to its former subsidiary for telephone removal services (part of which it allegedly recouped via secret rebate scheme) in order to disadvantage former subsidiary's direct competitor in supplying of removal services states claim under Section 1 of Sherman Act, at least under rule of reason and possibly under per se rule applied to group boycotts in which restraint of trade has no purpose except stifling competition; allegation that regional telephone company and its purchasing agent conspired with former subsidiary to assist latter in its monopolization of market for removal services in order to suppress other suppliers who would bypass purchasing agent and deal with phone company directly states claim for conspiracy to monopolize under Section 2 of Sherman Act, even though phone company and purchasing agent do not compete in removal services market.

Questions presented: (1) When purchaser agrees to buy from supplier A rather than supplier B, and there is no issue of any horizontal restraints or vertical price restraints, may agreement between purchaser and supplier A be characterized as group boycott in violation of Section 1 of Sherman Act? (2) Assuming same facts, may agreement between purchaser and supplier A be characterized as conspiracy to monopolize in violation of Section 2 of Sherman Act?

97-53 ***ROBERTS* v. *GALEN OF VIRGINIA INC.***

Ruling below (CA 6, 111 F.3d 405):

Absent evidence that doctors who discharged patient before she was stabilized acted on basis of improper motive, hospital is not liable under Emergency Medical Treatment and Active Labor Act as construed in Cleland v. Bronson Health Care Group Inc., 917 F.2d 266 (CA6 1990), even if improper motive, such as patient's indigency, influenced hospital's social worker who, under pressure from hospital administrators, arranged for indigent patient's transfer to long-term care facility upon her discharge; under applicable Kentucky law, hospital that clearly attempted to alert public that physicians on its premises were not its employees or agents is not liable for surgical residents' negligence in discharging patient prematurely.

Question presented: Does claim under EMTALA require proof of improper motive on part of hospital, its staff, or physicians as prerequisite for recovery?

97-303 ***HUMANA INC. v. FORSYTH***

Ruling below (CA 9, 114 F.3d 1467):

Although Racketeer Influenced and Corrupt Organizations Act prohibits acts that are also prohibited under applicable Nevada insurance law, complaint alleging RICO violation by insurer that secretly negotiated discount with health care provider for its portion of charges incurred by co-paying beneficiaries does not 'invalidate, impair, or otherwise supersede' Nevada law, which, unlike RICO, does not provide private cause of action, and thus complaint is not barred by McCarran-Ferguson Act.

Question presented: Would application of RICO to business of insurance 'invalidate, impair or supersede' state law regulating same conduct in contravention of McCarran-Ferguson Act when state and federal statutory prohibitions are parallel, but remedies provided are materially different?

97-475 ***EL AL ISRAEL AIRLINES LTD.*** **v.** ***TSENG***

Ruling below (CA 2, 65 LW 2817):

Intrusive security search of airline passenger who is suspected of presenting possible risk of terrorism but is later cleared is not 'accident' within meaning of Article 17 of Warsaw Convention; state law claims to recover for injuries sustained during international air travel are not precluded by Warsaw Convention when event or occurrence giving rise to injury is found to be outside convention.

Question presented: Does Warsaw Convention, which is U.S. treaty, exclusively govern and preclude any recovery for passenger's injuries sustained in course of 'international transportation' if injuries were not caused by 'accident' within meaning of Article 17 of Convention?

97-1056 ***MARQUEZ*** **v.** ***SCREEN ACTORS GUILD INC.***

Ruling below (CA 9, 124 F.3d 1034, 156 LRRM 2129):

Union did not breach its duty of fair representation by negotiating collective bargaining agreement that requires every actor employed by producer of television series to be union member, even though decisional law limits requirement of union 'membership' to requirement that employee pay union initiation fees and dues covering 'financial core' of services provided to all employees; actor's challenge to CBA provision requiring union membership and payment of periodic dues and initiation fees by any actor who, when hired by producer, had previously worked more than 30 days in motion picture industry is preempted by National Labor Relations Board jurisdiction.

Questions presented: (1) Does union breach its duty of fair representation when it negotiates and maintains compulsory unionism provision that, on its face, requires--misleadingly--that employee be 'a member of the Union' and pay periodic dues and initiation fee 'uniformly required as a condition of acquiring membership,' even though those requirements cannot lawfully be enforced literally as condition

of employment? (2) Does NLRB have exclusive jurisdiction over performer's claim that union breached its duty of fair representation by negotiating and maintaining compulsory unionism provision that misleadingly requires payment of dues as condition of employment after 30 days of 'employment as a performer in the motion picture industry'? (3) If NLRB does not have exclusive jurisdiction over this claim, did union breach its duty of fair representation by negotiating and maintaining that provision? (4) Is employer indispensable party to suit for breach of duty of fair representation when employee seeks reformation or expungement of CBA provision alleged to be facially invalid?

97-1130 ***PFAFF*** **v.** ***WELLS ELECTRONICS INC.***

Ruling below (CA FC, 124 F.3d 1429, 43 USPQ2d 1928):

Claims of patent directed to sockets for testing leadless chip carriers are invalid under 35 USC 102(b), on ground that invention of claims was on sale more than one year prior to application date, even though invention had not been reduced to practice in physical embodiment at time of sale; evidence establishes that inventor was confident that invention would work for its intended purpose at time of sale and that invention was substantially complete at least by time of pre-critical date offer to sell and receipt of purchase order, circumstances clearly indicate that more than mere concept was on sale, and, although invention was not fatigue tested until after critical date, durability is not claimed or inherent aspect of invention, making demonstration of durability unnecessary for substantial completion of invention.

Question presented: In view of longstanding statutory definition that one- year grace period to 'on sale' bar can start to run only after invention is fully completed, should patent have been held invalid under 35 USC 102(b) when invention was admittedly not 'fully completed' more than one year before patent application was filed?

97-1139 ***U.S.*** **v.** ***RODRIGUEZ-MORENO***

Ruling below (U.S. v. Palma-Ruedas, CA 3, 121 F.3d 841, 61 CrL 1420):

Proper venue for trying charge of using or carrying firearm in crime of violence, in violation of 19 USC 924(c), is place where firearm was actually used or carried, regardless of whether venue for predicate crime could properly lie in another jurisdiction.

Question presented: Is venue in prosecution for using or carrying firearm during and in relation to crime of violence, under Section 924(c)(1), proper in any district in which defendant committed underlying crime of violence, even if defendant did not use or carry firearm in that district?

97-1184 ***NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1309*** **v.** ***DEPT.***

OF INTERIOR

Ruling below (Dept. of Interior v. FLRA, CA 4, 66 LW 1285):

Federal Services Labor-Management Relations Act bars Federal Labor Relations Authority from requiring federal agency to bargain collectively over whether to engage, under next contract, in midterm bargaining over union-initiated proposals.

Questions presented: (1) Does Federal Services Labor-Management Relations Act obligate agency to bargain over union-initiated midterm proposals, when subject matter of proposals is not covered by term agreement, and union has not waived its right to bargain? (2) Does statute require agency to bargain over contract provision that would obligate it to engage in negotiations, during term of agreement, over union-initiated proposals?

97-1230 ***WEST COVINA, CALIF.*** **v.** ***PERKINS***

Ruling below (CA 9, 113 F.3d 1004):

Notice provided to owner of property seized outside scope of search warrant, which stated that home had been searched and gave date of search warrant, name of issuing judge and court, date of search, list of property seized, and names and telephone numbers of police officers to contact for 'more information' was 'skeletal,' and, like notice given in Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), was insufficient to satisfy demands of due process; application of interest-balancing test set out in Mathews v. Eldridge, 424 U.S. 319 (1976), leads to conclusion that in cases in which property is taken under California law, notice must inform owner of procedure for contesting seizure or retention of property along with any additional information required for initiating that procedure in appropriate court; notice must also include warrant number or, if it is not available and record is sealed, means of identifying court file, and must explain need for written motion or request to court stating why property should be returned; district court is instructed to enter summary judgment in favor of plaintiff on his due process claims.

Questions presented: (1) Does procedural component of Fourteenth Amendment's Due Process Clause require police department to provide legal advice and guidance concerning how to pursue post-deprivation judicial remedies for return of property seized during execution of search warrant? (2) Should balancing test set forth in Mathews v. Eldridge be used by federal courts to expand procedural rights in context of post-deprivation remedies?

97-1235 ***MONTEREY, CALIF.*** **v.** ***DEL MONTE DUNES AT MONTEREY LTD.***

Ruling below (CA 9, 95 F.3d 1422):

Landowner's 42 USC 1983 inverse condemnation action against city arising out of city's denial of application for residential development of 37.6 ocean- front acres is in nature of action at law triable to jury; issues of whether landowner has been deprived of all economically viable use of property by regulatory denial and whether city's actions substantially advanced legitimate public purpose, though presenting mixed questions of law and fact, are essentially fact-bound issues that may be presented to jury; city produced insufficient evidence of adverse environmental impacts and inadequacy of public access to property to warrant judgment notwithstanding jury verdict in favor of landowner.

Questions presented: (1) In regulatory taking action challenging local land use decision, does 42 USC 1983 require that all liability issues be determined by court rather than by jury? (2) Can liability for regulatory taking be based upon standard that allows jury or court to reweigh evidence concerning reasonableness of public agency's land use decision? (3) Can reasonable proportionality standard established by Dolan v. City of Tigard, 512 U.S. 374, 62 LW 4576 (1994), in context of property exactions properly be applied to inverse condemnation claim based upon regulatory denial?

97-1243 ***FEDERAL LABOR RELATIONS AUTHORITY*** **v.** ***DEPT. OF INTERIOR***

Ruling below (CA 4, 132 F.3d 157, 66 LW 1285):

Federal Services Labor-Management Relations Act bars Federal Labor Relations Authority from requiring federal agency to bargain collectively over whether to engage, under next contract, in midterm bargaining over union-initiated proposals.

Question presented: Does duty to bargain over matters that are not inconsistent with federal law or government-wide regulation require agency employer to bargain over proposal that would create contractual obligation to negotiate over union-initiated proposals offered during term of collective bargaining agreement?

97-1287 ***HUGHES AIRCRAFT CO.*** **v.** ***JACOBSON***

Ruling below (CA 9, 105 F.3d 1288, 65 LW 2498, 20 EBC 2393):

Retirees' allegations that employer used pension plan surplus assets created in part by employee contributions for its own benefit and for benefit of employees who were never participants in such plan to establish new non-contributory retirement plan state cognizable claims under anti-inurement, fiduciary duty, and non-forfeiture provisions of Employee Retirement Income Security Act; holding in Lockheed Corp. v. Spink, 517 U.S. 882, 64 LW 4430 (1996), that amending existing pension plan to use surplus assets to fund early retirement program for participants of plan does not violate ERISA, so long as other ERISA provisions are not violated, is distinguishable, in part on basis that surplus in Lockheed was

attributable solely to employer contributions and that early retirement program in Lockheed benefited only those employees who were already participants in existing plan; only after discovery can district court properly determine whether employer's conduct in freezing enrollment in existing, contributory plan when it created new, non-contributory plan for new employees without equitably distributing surplus attributable to employee contributions amounted to constructive termination of contributory plan under common law of trusts.

Questions presented: (1) Did Ninth Circuit err by refusing to follow holding in Lockheed Corp. v. Spink that 'the act of amending a pension plan does not trigger ERISA's fiduciary provisions'? (2) Did Ninth Circuit err by limiting Spink to plans funded only by employer contributions, even though that limitation is never mentioned in Spink opinion, has no basis in law or logic, and has been rejected by other circuits? (3) Did Ninth Circuit err by concluding, contrary to three other circuits, that participants in defined benefit plan have legally cognizable property interest not only in their defined benefits but also in assets held by plan? (4) Did Ninth Circuit err by holding, contrary to three other circuits, that ERISA plan may be forcibly terminated (and its assets distributed) by means not specified in ERISA's exclusive termination provisions?

97-1337 ***MINNESOTA* v. *MILLE LACS BAND OF CHIPPEWA INDIANS***

Ruling below (CA 8, 124 F.3d 904):

1850 executive order that (i) explicitly revoked rights conferred on Indian bands by 1837 treaty to hunt and fish 'during the pleasure of the President' on land ceded by Indians to United States and (ii) required removal of Indians remaining on ceded lands was ineffectual to revoke rights to hunt and fish because order's removal provision, from which provision revoking rights to hunt and fish is not severable, did not comply with congressional requirements and was thus unauthorized; nor were 1837 treaty rights to hunt and fish revoked by 1855 treaty that established reservation within land ceded by 1837 treaty and, without mentioning hunting and fishing rights, conveyed to United States 'all right, title, and interest . . . in and to any other lands,' because neither Indians nor United States intended to revoke such rights in 1855 treaty; different ruling is not mandated by Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), in which hunting and fishing rights were exclusive, on-reservation rights that were held to be extinguished on that part of reservation that was relinquished by later treaty; equal footing doctrine, which requires that all states admitted to union after original 13 states be admitted with same rights and sovereignty as original states, does not require conclusion that Indians' 1837 treaty rights to hunt and fish were extinguished by congressional silence regarding such rights upon Minnesota's admission in 1858.

Questions presented: (1) Does treaty provision that gives Indian bands right to hunt and fish 'during the pleasure of the President' create only temporary rights that are extinguished when state is admitted to Union on equal footing with original 13 states? (2) Does treaty ceding to United States 'all right, title and interest of whatsoever nature' in previously ceded territory constitute express abrogation of hunting

and fishing rights reserved in previous treaty under this court's holding in Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe? (3) Did president act within scope of his congressional authority when he revoked Indians' right to hunt and fish under treaty that guaranteed only those rights 'during the pleasure of the President of the United States'?

97-1396 ***LOPEZ* v. *MONTEREY COUNTY, CALIF.***

Ruling below (DC NCalif, 12/19/97):

Although county whose ordinances merging several inferior court district into single, countywide municipal court district served by judges elected by county residents at large is jurisdiction subject to preclearance requirements of Section 5 of Voting Rights Act with respect to changes in its electoral practices, subsequent changes in laws of state, which is not covered jurisdiction, that converted county's judicial election scheme into state plan render Section 5 inapplicable.

Question presented: May Section 5-covered jurisdiction implement voting changes without preclearance--when changes were initially created by county ordinances that this court already has determined to be subject to Section 5--simply because state, uncovered jurisdiction, subsequently enacts legislation that incorporates county's prior changes?

97-1418 ***BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N* v. *203 NORTH LASALLE STREET PARTNERSHIP***

Ruling below (CA 7, 126 F.3d 955, 66 LW 1238):

In codifying absolute priority rule upon enactment of Bankruptcy Code, 11 USC 1129(b)(2)(B)(ii), Congress did not abandon rule's longstanding, judicially created, 'new value' corollary, which permits junior claim holder, including equity interest holder, to retain equity interest in property over objection of senior impaired creditor class in exchange for contributing new capital to restructured enterprise.

Question presented: Does Bankruptcy Code authorize judge to confirm Chapter 11 plan of reorganization that grants pre-bankruptcy equity owners of debtor exclusive opportunity to retain or purchase ownership interest in reorganized debtor, but does not provide for full payment to senior, objecting class of unsecured creditors?

97-1472 ***HADDLE* v. *GARRISON***

Ruling below (CA 11, 12/5/97):

Court affirms district court decision that, because former at-will employee had no constitutionally protected interest in continued employment, his allegation that he was discharged in attempt to deter his participation as witness in federal criminal trial did not state claim under 42 USC 1985(2), which creates private cause of action for injuries when two or more persons conspire to deter any party or witness from appearing in court or testifying, or conspire to injure anyone who has appeared or testified.

Question presented: Is loss of 'at will' employment compensable in damages under 42 USC 1985(2)?

97-1489 ***YOUR HOME VISITING NURSE SERVICES INC.*** **v.** ***SHALALA***

Ruling below (CA 6, 132 F.3d 1135):

Provision of Department of Health and Human Services' Provider Reimbursement Manual that bars appeal to Provider Reimbursement Review Board of fiscal intermediary's decision not to reopen Medicare provider's cost reports is not foreclosed by plain language of Medicare statute, is reasonable interpretation of statute, and is thus entitled to deference.

Questions presented: (1) Is there jurisdiction for review of refusal to reopen Medicare provider's cost report under 42 USC 1395oo, 28 USC 1331, 28 USC 1361, and 5 USC 706? (2) Is 42 CFR 405.1885(c) based on permissible construction of Medicare statute?

97-1536 ***ARIZ. DEPT. OF REVENUE*** **v.** ***BLAZE CONSTRUCTION CO.***

Ruling below (Ariz CtApp Div1, 190 Ariz. 262, 947 P.2d 836):

Arizona's assessment of transaction privilege (contracting) taxes against construction company's gross proceeds from building federally funded roads for U.S. Bureau of Indian Affairs on Indian reservations within Arizona, which provided no regulatory or other services related to improving, maintaining, or using any such reservation roads, interferes with on-reservation road building and improvement activities that are governed by comprehensive federal regulations and is thus impliedly preempted by federal law, notwithstanding state's contention that Indian law preemption analysis does not apply because contracts were let by BIA rather than by tribes and because Congress has neither expressly nor impliedly indicated intent to preempt state taxation of federal contractors on Indian reservations.

Question presented: Is state tax on contractor doing business with United States on Indian reservation preempted when Congress has not expressly provided for such preemption and there is no infringement on tribal sovereignty because no tribal funds are used and no tribe is party to contract?

97-7213 ***MOSLEY*** **v.** ***U.S.***

Ruling below (CA 3, 126 F.3d 200, 62 CrL 1018):

Crime of bank larceny, as defined in 18 USC 2113(b), includes element of 'intent to steal or purloin' that is omitted from definition of 'bank robbery' in 18 USC 2113(a), in which robber's subjective intent to steal, i.e., to permanently deprive rightful owner of property, is irrelevant to crime of resort to force and violence or intimidation in presence of another to accomplish robber's purposes, and thus district court properly denied defendant's request for instruction that bank larceny is lesser included offense of bank robbery.

Question presented: Is bank larceny, in violation of 18 USC 2113(b), lesser included offense of bank robbery in violation of 18 USC 2113(a), as matter of law, pursuant to textual 'elements' adopted by U.S. Supreme Court in Schmuck v. U.S., 489 U.S. 705 (1989)?