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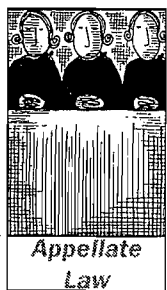
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When Private Enterprise Hits Public Agencies, Splits Arise

By Laura W. Brill,
Katharine J. Galston,
Alana B. Hoffman,
Ted M. Sichelman and
Jonathan P. Steinsapir

In February 2006, the U.S. Courts of Appeals created or deepened conflicts of authority on matters of substantial importance to the business community. Many of the month's cases focus on regulatory and contractual relations between federal agencies and private enterprise.

The range of issues includes the scope of the Clean Water Act, sexual



harassment retaliation claims, the ability of federal agencies to terminate executory contracts during bankruptcy proceedings, and the power of courts to dismiss claims against foreign corporations on

forum non conveniens grounds without first resolving contested issues of personal jurisdiction.

Environmental Law

The question of the jurisdiction of the Clean Water Act and the sites to which federal regulation extends has been the subject of much recent controversy in the federal courts. Under Sections 301 and 502 of the Clean Water Act, any discharge of dredged or fill material into "navigable waters," defined in the act as "waters of the United States," is forbidden unless authorized by a permit issued by the Army Corps of Engineers. There is much debate, however, regarding the scope of "navigable waters."

In *United States v. Johnson*, 437 F.3d 157 (2006), the 1st U.S. Circuit Court of Appeals concluded that the government's exercise of jurisdiction over wetlands that were "hydrologically connected" to a navigable river (meaning that the water from the wetlands eventually drains into the waterway), pursuant to regulations promulgated by the Environmental Protection Agency in conjunction

with the Corps to carry out the mandate of the Clean Water Act, complied with constitutional, statutory and regulatory requirements.

In addressing prior Supreme Court decisions regarding the jurisdictional reach of the act — *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (commonly referred to as *SWANCC*) — the *Johnson* court expressed its disagreement with the 5th Circuit on the proper interpretation of such precedent.

In *Riverside*, the Supreme Court held that defining "waters of the United States" to encompass wetlands that abut navigable waterways is a permissible interpretation of the Clean Water Act. In *SWANCC*, the Corps had exercised jurisdiction over property that the court described as "non-navigable, isolated, intrastate waters" and "ponds that are not adjacent to open water," based on the presence of protected migratory birds. The court held such extensions of jurisdiction were invalid.

Addressing its *Riverside* opinion, the court stated "our holding [in *Riverside*] was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the Clean Water Act to cover wetlands adjacent to navigable waters. We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States.'" *SWANCC*, quoting *Riverside* (internal citations omitted).

Johnson held that the extent to which *SWANCC*'s holding constrains *Riverside* is that jurisdiction over waters that are not "inseparably bound up with navigable-in-fact waters ... cannot find support in *Riverside*." *Johnson*, 437 F.3d at 170. It rejected the argument that *SWANCC* establishes *Riverside* as the outer limit of Clean Water Act jurisdiction over "waters of the United States" and a mere exception narrowly extending jurisdiction to wetlands adjacent to

navigable waterways.

In reaching this conclusion, the 1st Circuit expressed its disagreement with the 5th Circuit on this issue. The 5th Circuit has stated, "[i]n this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* a body of water is subject to regulation if the body of water is actually navigable or adjacent to an open body of navigable water." *Needham* (internal quotations omitted).

This term, the question of the scope of the jurisdiction of the Clean Water Act and where "navigable waters" begin is again before the Supreme Court. On Feb. 21, 2006 (the first day of hearings that included Justice Samuel Alito), the Supreme Court heard arguments in *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*, 04-1034 and 04-1384, consolidated challenges to the application of the Clean Water Act, appealed from decisions of the 6th Circuit. The 6th Circuit, like the 1st, has interpreted *SWANCC* more narrowly than the 5th Circuit — as holding only that the Clean Water Act does not reach isolated waters that have no connection to navigable water. At issue in each case is whether wetlands that drain into non-navigable tributaries that may flow into navigable bodies of water are part of the "waters of the United States" and thus within the jurisdiction of the Clean Water Act and whether the application of the act to these wetlands is a permissible exercise of congressional authority under the Commerce Clause.

Employment Law – Retaliation

In one of Alito's last published opinions before he ascended to the Supreme Court, the 3rd Circuit in *Jensen v. Potter*, 435 F.3d 444 (2006), held that "a retaliation claim predicated upon a hostile work environment is cognizable under 42 U.S.C. Section 2000e-3(a)[.]" which makes it unlawful to discriminate against an employee for making a charge or participating in an investigation or hearing under Title VII.

This conclusion placed the 3rd

Circuit on the majority side of a long-standing circuit split on this issue. Emphasizing that discrimination claims based on a hostile work environment are cognizable under another section of Title VII, 42 U.S.C. Section 2000e-2(a), because "discriminatory ridicule or abuse can so infect a workplace that it alters the terms or conditions of the plaintiff's employment," the court concluded that the same is true under Section 2000e-3(a). Only the 5th and 8th Circuits hold that Section 2000e-3(a) applies only to "ultimate employment decisions," and therefore does not cover a hostile work environment claim. See *Manning v. Metropolitan Life Insurance Co.*, 127 F.3d 686 (8th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997).

Employment – Federal Procedure

Federal law requires a federal employee claiming discrimination to exhaust administrative remedies before filing suit in federal court. Once the employee's agency renders a final decision, the employee may appeal to the Equal Employment Opportunity Commission or to a federal district court. If an employee pursues relief in the EEOC, and the EEOC does not act within 180 days, the employee may file a complaint in federal court. At issue in *Brown v. Snow*, (11th Cir.), was whether the filing of a complaint 35 days before the end of the 180-day period constituted a failure to exhaust administrative remedies that deprived the 11th Circuit of jurisdiction to hear his case.

Brown cited the opinion of the 2nd Circuit in *Boos v. Runyon*, 201 F.3d 178 (2000), which held that the provision is not jurisdictional in nature but merely a waivable timing requirement. The 11th Circuit, however, reaffirmed its position that the 180-day requirement was jurisdictional in nature. Nonetheless, because *Brown* cooperated in good faith with the EEOC and did not ask the EEOC to terminate its investigation, which continued throughout the 180 days, the 11th Circuit held that *Brown* had

exhausted his administrative remedies and jurisdiction was proper.

Bankruptcy Law

The 5th Circuit, in *In re Mirant*, 440 F.3d 238 (2006), weighed in on a circuit split regarding the ability to terminate executory contracts during bankruptcy. This court held that the Bonneville Power Administration, a federal agency, could not unilaterally terminate an executory contract pursuant to the contract's "ipso facto clause" (which provided that default by the institution of bankruptcy proceedings triggered a right to terminate) during the automatic stay triggered by the filing of a Chapter 11 petition.

The Bonneville Power Administration argued that while the Bankruptcy Code generally bars the enforcement of ipso facto clauses, its exception for where "applicable law [such as, according to Bonneville Power, the federal Anti-Assignment Act, which prevents assignments of contracts to which the United States is a party] excuses a party, other than the debtor, to such a contract or lease from accepting performance or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties" applied and thus permitted termination. 11 U.S.C. Section 365(e)(2)(A).

Bonneville Power Administration asked the 5th Circuit to join other courts, including the 3rd, 4th, 9th and 11th Circuits, that have held that this section creates a "hypothetical" test. Under this "hypothetical" approach, a court asks whether the non-debtor (here, Bonneville Power Administration) could refuse to accept performance from any hypothetical assignee; it is irrelevant whether the debtor did actually assign, intend to assign, or attempt to assign the contract.

The 5th Circuit declined, instead siding with the 1st Circuit and adopting the "actual" test. "The actual test requires on a case-by-case basis a showing that the non-debtor party's contract will actually be assigned or that the non-debtor party will in fact be asked to accept performance from or render performance to a party-including the trustee-other than the party with whom it originally contracted." *Mirant*. Therefore, in a case where there is no actual or intended assignment, Section 365(e)(2)(A)'s exception is not available to the non-debtor party.

Federal Courts

In *Malaysia International Shipping Corp. v. Sinochem International Co. Ltd.*, 436 F.3d 349 (2006), the 3rd Circuit deepened an existing circuit split as to whether a district court is empowered to dismiss an action on forum non conveniens grounds without first resolving contested issues of personal jurisdiction.

The case involved a contract to have Malaysia International ship goods to Sinochem, a Chinese corporation in China. A dispute arose between Sinochem and Malaysia International as to the shipping of the goods, and Sinochem applied to a Chinese court to have a Malaysia International vessel arrested in China.

Malaysia International then sued Sinochem in the Eastern District of Pennsylvania for fraud and wrongful arrest of its vessel. Shortly thereafter, Sinochem sued Malaysia International in China, and moved to dismiss the action in Pennsylvania for lack of subject matter jurisdiction, lack of personal jurisdiction and forum non conveniens.

The district court held that it had subject matter jurisdiction, but that on the record before it there was no personal jurisdiction. It noted that Malaysia International might be able to show personal jurisdiction after being afforded an opportunity to take jurisdictional discovery. The court went on to deny the request for additional discovery, however, because it found that the forum non conveniens doctrine applied. The district court accordingly dismissed the case, and Malaysia International appealed. The 3rd Circuit affirmed the district court's finding of subject matter jurisdiction, but remanded for a determination of personal jurisdiction holding that a district court may not dismiss a case on forum non conveniens grounds without first deciding whether it has personal jurisdiction over the defendant.

In so doing, the 3rd Circuit joined the 5th, 7th and 9th Circuits and split with the 2nd and D.C. Circuits in holding that a district court may not dismiss a case on forum non conveniens grounds without first deciding whether it has personal jurisdiction over the defendant. Compare *Malaysia International*; *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005); *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), affirmed in part, cert. dismissed in part, 538 U.S. 468 (2003); *Kamel v. Hill-Rom Co.*, 108 F.3d 799

(7th Cir. 1997); with *In re Arbitration Between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002); *In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998) (superseded by statute on other grounds).

Laura W. Brill, a partner at Irell & Manella in Los Angeles, is a member of the firm's litigation and appellate practice groups. **Ted M. Sichelman**, **Katharine J. Galston**, **Alana B. Hoffman** and **Jonathan P. Steinsapir** are associates in the same office.